

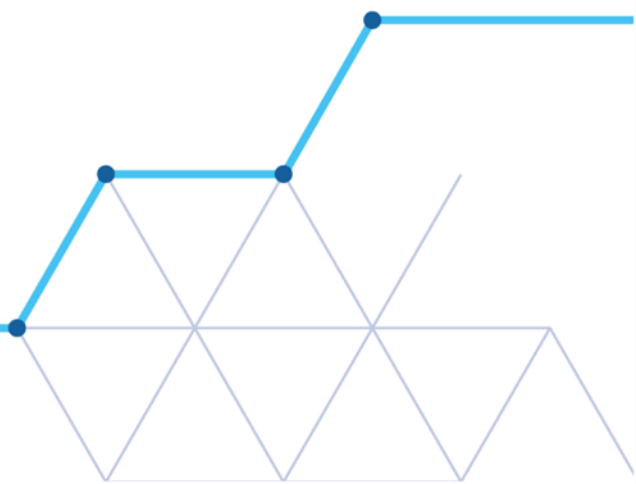


Ministry  
of Justice

# Review of legal aid for inquests

This call for evidence begins on 19 July 2018  
This call for evidence ends on 31 August 2018

Protecting and advancing the principles of justice







Ministry  
of Justice

## **Review of legal aid for inquests**

**A call for evidence produced by the Ministry of Justice. It is also available at <https://consult.justice.gov.uk/>**

## About this call for evidence

- To:** All interested stakeholders, particularly those who have been involved in or affected by an inquest.
- Duration:** From 19/07/18 to 31/08/18
- Enquiries (including requests for the paper in an alternative format) to:** Civil Legal Aid Team  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  
Email: [inquestreviewmoj@justice.gov.uk](mailto:inquestreviewmoj@justice.gov.uk)
- How to respond:** Please send your response by 31<sup>st</sup> August 2018 to:  
Access to Justice Analytical Services  
Ministry of Justice  
102 Petty France  
London SW1H 9AJ  
Email: [inquestreviewmoj@justice.gov.uk](mailto:inquestreviewmoj@justice.gov.uk)
- Response paper:** A response to this call for evidence exercise is due to be published by the end of 2018 at: <https://consult.justice.gov.uk/>

A Welsh language summary is provided on the call for evidence page.

### Equalities

In accordance with our duties under the Equality Act 2010 we will pay due regard to the need to eliminate unlawful conduct, advance equality of opportunity and foster good relations during the development of any policy proposals that might result from this call for evidence.

We have identified Legal Aid Agency (LAA) data on clients collected through provider billing (LAA Client Data) as the most relevant information on potential equalities impacts. We have asked a specific equalities question to understand more about potential equalities impacts.

We will be undertaking an Equality Statement to identify the likely impacts once the policy issues are being considered in light of the responses to this paper.

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## Foreword

Our legal aid system is a fundamental pillar of access to justice. The Government is committed to providing legal aid in cases where it is most needed. Indeed, more than a fifth of the Ministry of Justice's budget is spent on legal aid in England and Wales.

It is important that people have confidence in every part of their justice system. The legal aid scheme is designed to make sure that those who are most vulnerable, and who have no other means of funding support, are provided with assistance. Those principles are fair ones.

The current arrangements for legal aid for inquests are intended to reflect this. The inquest is a distinct judicial process. It is a public hearing held to determine who the deceased was, and how, when and where they died. For bereaved families hearing how their loved ones died can be traumatic and the search for answer can be challenging.

However, that search to find out what happened is important in helping the bereaved to understand and make sense of their loss as well as ensuring that there is proper accountability. As such, legal aid is available for families seeking early legal advice in the lead up to the inquest hearing.

The Government recognises that in some circumstances legal representation may be necessary for the inquest proceedings. That is why we have made sure funding for representation is available, where it is necessary, through the Exceptional Case Funding scheme.

Recently, criticisms have been levelled against the current availability of legal aid for inquests. In light of this, it is time to review the current system and seek views on people's experiences of the system. We want to ensure that bereaved families are properly supported and able to participate in the inquest process.

I am therefore pleased to launch this review of the provision of legal aid for inquests. I look forward to the views of all of those who read this. I hope that this will provide an opportunity for those who have been involved in the inquest process to have a say it might be improved.

**Lucy Frazer MP**

Parliamentary Under-Secretary of State for Justice

## Executive summary

1. Coroners investigate violent or non-natural deaths, deaths of unknown cause, and deaths in custody or other state detention. An inquest is a public court hearing heard by a coroner (an independent judicial office holder) to establish who the deceased was, and how, when and where they died in such cases. It is, first and foremost, an inquisitorial process that aims to establish the key facts and circumstances.
2. Inquests should be conducted in a way that families are able to feel confident that they can:
  - a. Understand the timeline and scope of proceedings;
  - b. Participate in the proceedings;
  - c. Have access to legal advice and legal representation if required; and
  - d. Feel properly supported throughout the process.
3. 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.
4. While most inquests will be conducted in such a way that bereaved families will not require legal representation, we understand that there are certain types of inquests where families may require representation.
5. This paper outlines the current position and seeks to identify potential areas for improvement or where more might be done. Part of this includes looking at the provision of legal aid for legal help and legal representation of bereaved families at inquests.
6. Respondents are asked whether more needs to be done to ensure that bereaved families can properly participate in these cases. We want to ensure that families have access to legal help and legal representation at inquests where there is a clear need.
7. More specifically, this paper aims to better understand the circumstances in which families may require legal representation to allow for a fair inquest process, and whether changes need to be made to current eligibility criteria.
8. Responses gathered from this exercise will be used to widen our existing evidence base and ensure that we have robust information on the types of inquest cases that families might need additional support.
9. They will be used to establish whether there is a need for families to have advice and representation at specific types of inquests to enable proper participation and understanding during proceedings. They will also be used more broadly to ensure that all bereaved people are sufficiently supported throughout the inquest process.



10. Once we have secured more evidence, we will then consider possible changes to our existing policies. Any prospective changes to policy will be subsequently presented in a public consultation, in which members of the public will be invited to respond to any proposals.

## Introduction

### Coroner's investigation and inquest

1. The coroner's investigation is the process by which it is established who has died, and how, when, and where they died. The coroner may decide as part of that investigation to hold a public hearing known as an inquest.
2. There may be preparatory hearings which take place before the action inquest itself. If the death may have involved a breach of the deceased's 'right to life' under Article 2 of the European Convention of Human Rights (ECHR), the coroner will additionally establish in what circumstance the deceased came by his or her death.
3. An inquest hearing is different from other types of court hearing. There is no prosecution or defence, and the coroner (or a jury if there is one) cannot find a person or organisation criminally responsible or liable in a civil context. However, evidence can be passed to the police or Crown Prosecution Service (CPS) if the facts established in the inquest suggest there may need to be a criminal prosecution.
4. There are also no parties in an inquest. There are only 'interested persons' such as the families and those persons or organisations who may have been involved in the death who are entitled to examine the witnesses. The process is fact finding – inquisitorial – rather than one side arguing against the other in an adversarial way.
5. Most inquests are held without a jury but there are particular circumstances when the law states that a jury must be called including where the death occurred in prison, police custody or state detention (including immigration removal centres and mental health units) *and* the death was not from natural causes, or if the death resulted from an accident at work. Where there is a jury it will be the jury, rather than the coroner, who decides who died, and how, when and where they died (and in what circumstances where appropriate).
6. There were 229,746 deaths reports to coroners in 2017. This is about half of all deaths in England and Wales. 31,519 inquests were opened in 2017. The majority of inquest hearings are conducted in such a way that the bereaved can understand and engage in proceedings without the need for legal representation. A small minority of inquests are, however, conducted in such a way that the bereaved might require legal representation to understand and participate.
7. Where Article 2 of the ECHR may have been breached, the state has a duty to investigate to determine whether it failed in its duty to protect that person's life. The coroner's inquest meets this responsibility by investigating all deaths that occur in state detention or where a state agency, such as a health or social service is adjudged to have held a duty of care to the person who died.
8. We would like to find out more about these types of inquests, and this call for evidence aims to improve our understanding of these cases.

9. There may also be deaths that occur in circumstances that have a 'wider public interest' element. The inquests into the deaths at Hillsborough in April 1989 and at Sousse, Tunisia in June 2015 are examples of this. We would also like to widen our evidence base in this area and we will consider these cases in greater detail in this paper.
10. The following section will set out what is meant by these terms.

### Current legislative framework

11. The current legislative framework that governs the provision of legal aid for inquests has not been substantively altered in recent years. Under the previous legislative framework – the Access to Justice Act 1999 – the granting of legal aid for representation at an inquest was treated procedurally in much the same way as under the current Exceptional Case Funding Scheme (ECF). Funding was granted at the discretion of the Lord Chancellor.
12. This has broadly remained the case for provision under the current statutory framework that was introduced over five years ago, through the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).
13. We will now set out the current availability of legal aid for inquests.

### Legal help

14. For all types of deaths, legal help – funding for the initial advice and assistance level of legal aid - is available to members of the deceased's family in the run-up to an inquest hearing. It can fund the preparatory work for the inquest hearing, such as preparing submissions to the coroner setting out the issues the family wishes the coroner's investigation to cover. It can also provide funding for lawyers to help families prepare written questions they would like to ask during the inquest hearing.
15. Legal help can also fund someone to attend the inquest hearing as a 'Mackenzie Friend', to offer informal advice in Court, provided that the coroner gives permission. A Mackenzie Friend can provide assistance and support to the bereaved in the context of an inquest and need not to be legally qualified.
16. Funding for legal help is subject to applicants passing the merits ('sufficient benefit') test and the means test, subject to the discretion to waive eligibility or contributions.
17. **Merits test:** The Director of Legal Aid Casework ("the Director") will decide whether it is justified to provide, or to continue to provide, public funds in an individual case. The factors to be considered are similar to those that would influence a privately paying client of moderate means when considering whether to become involved in proceedings.
18. **Means test:** When considering whether to grant legal aid for early legal advice (legal help) the legal aid provider will look at the applicant's financial circumstances, to determine whether the applicant has passed the means test. If the applicant has not satisfied the means test, the provider can refer the application to the Director with a request to waive the eligibility limits. The Director will consult the Lord Chancellor's Exceptional Funding Guidance for Inquest when making any decision.

## Legal representation

19. Funding for legal representation is not generally available in the majority of inquests. An inquest is not a trial. There are no defendants, only interested persons, and witnesses are not expected to present legal arguments. An inquest cannot determine civil rights or obligations, or criminal liability.
20. However, the Government recognises that there are certain types of inquests where bereaved people may require representation. In these cases, legal aid for representation may be available through the Exceptional Case Funding (ECF) Scheme.
21. Funding in these cases can be used to fund lawyers to represent the family before the inquest hearing, during the inquest hearing, and during any pre-inquest review hearing if required. For the purposes of this paper, we will use the term 'legal representation' to describe these legal services.
22. Exceptional case funding for inquests may be provided in two types of cases:
  - a. where the failure to provide such representation would be likely to amount to a breach of Article 2 of the ECHR; or
  - b. for legal representation where there is a significant wider public interest in the applicant being represented at an inquest.
23. When considering whether or not to grant ECF funding, the Director decides whether the state has an obligation to conduct an investigation into the death under Article 2, and also whether funding for legal services is required to meet this obligation.
24. Examples of these cases may include:
  - a. Deaths whilst the deceased was being arrested or taken into detention. It includes deaths of people who have been arrested or have been detained by police under the Mental Health Act 1983. The death may have taken place on police, private or medical premises, in a public place, or in a police or other vehicle;
  - b. Deaths during or following police custody where injuries that contributed to the death were sustained during the period of detention;
  - c. Deaths in or on the way to hospital (or other medical premises) following or during transfer from scene of arrest or police custody;
  - d. Deaths from injuries or other medical problems that are identified or that develop while a person is in custody; or
  - e. Deaths whilst the deceased was detained under Section 136 of the Mental Health Act 1983 or other legislation.

25. The Director will also consider the following when making a funding decision:
- a. The nature and seriousness of the allegations against the state (e.g. whether there are allegations of gross negligence, systemic failures or criminal conduct);
  - b. Any previous investigations into the death (e.g. whilst in some cases an investigation into the circumstances of a death might have been conducted by the CPS, an NHS trust, Prisons and Probation Ombudsman, or other such bodies, in others the coroner's inquest will be the only investigation by the state in which the family may be involved);
  - c. The particular circumstances of the family.
26. This list is not exhaustive. In cases where the above points are not realised, it is unlikely that exceptional funding can be obtained for deaths from "natural causes" in state detention or for deaths in hospital.
27. Wider public interest: The Director can also grant funding if in the particular circumstances of a case legal representation is likely to produce significant benefits for a class of person, other than the applicant and members of the applicant's family. This will depend on:
- a. The benefits of granting publicly funded representation
  - b. Whether the benefits are more or less tangible
  - c. Whether the benefits will definitely flow to other people or whether this is merely a possibility
  - d. The numbers of people who stand to benefit from the provision of legal aid funding.
28. In these cases, there will also be consideration of suggestions of large-scale systemic failures; whether the coroner would be assisted in uncovering systemic failings by the bereaved family being represented; and whether there are likely to be improvements to systems as a result of the inquest.
29. **Merits test**: The merits criterion for legal representation at an inquest is a test of reasonableness: that is whether it is reasonable, in the circumstances of the case, for the individual to be provided with legal aid.
30. **Means test**: When considering whether to grant exceptional case funding for legal representation, the Director will consider the applicant's financial circumstances.
31. For both legal help and legal representation, the means test includes an assessment of the applicant's gross monthly income, their monthly disposable income, and their disposable capital income.
32. In general, applicants must satisfy the means test eligibility criterion. Some applicants may be required to pay a contribution to the costs of funding their representation. This will depend on their income.

33. As with legal help, the financial eligibility limits can be disregarded for representation at inquests applications if, in all the circumstances, it would not be reasonable to expect the applicant to bear the full costs of legal assistance at the inquest. These circumstances are outlined in the Lord Chancellor's Exceptional Funding Guidance for Inquests.
34. This means that funding may be granted even where family members would not normally be financially eligible for legal aid. The Director can also disregard financial contributions that might ordinarily be made by the family.
35. A number of amendments have recently been made to the Lord Chancellor's Exceptional Funding Guidance on Inquests, which were aimed at providing greater clarity on the circumstances that should be considered when deciding whether legal aid should be awarded, and expanding the factors that the Director should consider when deciding whether or not the means test should be waived; and whose means should be assessed when any application is made. These changes should alleviate some of the distress and anxiety felt by families involved in the application process.

#### **The case for review**

36. While the majority of inquests do not require any form of representation, in a small minority of cases bereaved people may require legal representation in the interests of fairness.
37. A number of cases over the last few years have brought the current provision of support for bereaved families to the fore. Specific inquests have made it clear that the system needs to be reviewed.
38. Dame Elish Angiolini's considered these cases in her independent review of deaths and serious incidents in police custody, published on 31 October 2017. She recommended that access to free non-means tested legal advice, assistance and representation should be available for the immediate family throughout the process for inquests into deaths in custody.<sup>1</sup>
39. Bishop James Jones' report of his review of the experience of the Hillsborough families, published on 1 November 2017, asked for "proper participation" of bereaved families and proportionate legal funding at inquests. To this end, he called for bereaved families to have non-means tested publicly funded legal representation at inquests where public bodies are represented.<sup>2</sup>
40. The Chief Coroner's Third Annual Report to the Lord Chancellor: 2016-17, published in November 2017, also suggested that exceptional funding for legal representation for the family might be awarded where the state has agreed to provide separate representation for one or more interested persons.<sup>3</sup>

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<sup>1</sup> Rt. Hon. Dame Elish Angiolini DBE QC, Report of the Independent Review of Deaths and Serious Incidents in Police Custody, Jan., 2017

<sup>2</sup> Rt. Rv. James Jones KBE, 'The patronising disposition of unaccountable power': A report to ensure the pain and suffering of the Hillsborough families is not repeated, Nov., 2017

<sup>3</sup> Chief Coroner's Annual Report 2016 to 2017, Nov., 2017

41. Lord Bach's final report of his Commission on Access to Justice, published in September 2017, suggested that, 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.<sup>4</sup>
42. An Early Day Motion in the House of Commons secured by Ellie Reeves, Labour MP for Lewisham West and Penge, published on 2 November 2017, referred to these publications, calling on the Government to provide legal aid at all inquests whenever the state is funding one or more of the other parties.<sup>5</sup>
43. There have been two Westminster Hall debates on legal aid at inquests. Tim Loughton, Conservative MP for East Worthing and Shoreham, secured a debate on 9 January 2018, asking for the bereaved families of the victims of the Shoreham Airshow incident to receive legal aid through the ECF scheme for their representation at the inquests.<sup>6</sup> On 27 March 2018, Richard Burden, Labour MP for Birmingham Northfield, secured a debate on the topic of 'legal aid for families of the victims of the Birmingham pub bombings.'<sup>7</sup> Both debates saw Members of Parliament raise concerns about the existing system and equality of arms for families where public bodies have received legal representation.
44. At the centre of these arguments for some form of change is the premise that the existing system does not provide families with the necessary legal representation and support needed for them to understand and participate in inquests proceedings.
45. While it is our understanding that bereaved family members of someone who has died in custody or state detention will be likely to receive publicly funded legal representation, we would like further information on the other types of cases where Article 2 may be engaged.
46. We are also keen to broaden our understanding of inquests in other settings that involve state agents in some way such as disasters involving the major loss of life such as Hillsborough.
47. We would like to widen our evidence base of inquests where there is a wider public interest in the bereaved being legally represented.

### **Review of the provision of legal aid at inquests**

48. In the wake of the above reports and specific cases, the Ministry of Justice committed to conducting a review into legal aid at inquests.
49. This call for evidence forms part of the work that is currently being undertaken as part of this review.
50. The review aims to establish what is needed to ensure that bereaved people can understand and properly participate in inquest proceedings.

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<sup>4</sup> Fabian Policy Report, The Right to Justice: The final report of the Bach Commission, Sept., 2017

<sup>5</sup> Early day motion 498, Legal Aid for Inquests, 2 Nov., 2017

<sup>6</sup> Westminster Hall Debate, Shoreham Air Show Crash: Access to Justice, 9 Jan., 2018

<sup>7</sup> Westminster Hall Debate, Legal Aid: Birmingham Pub Bombings, 27 Mar., 2018

51. It will include an assessment of the current provision of legal aid for both legal help and legal representation at the inquest hearing. However, the review will also consider how best to support bereaved people more broadly.
52. As such, we are looking at the following areas:
  - a. The legal aid application process and eligibility tests;
  - b. The provision of legal help;
  - c. the provision and style of legal representation; and
  - d. Support available to bereaved people.

**Progress:**

53. The evidence gathering process of this review is currently underway.
54. **Official-led meetings:** We have held a number of official-led meetings with key stakeholder groups that are actively involved in the inquest process and we are in regular contact with the charity INQUEST.
55. **Surveys:** We have conducted a survey of senior coroners who were asked to provide observations based on their experiences about the types of inquests in which publicly funded legal representation may assist the administration of justice.
56. Questions also centred on how families could be better supported throughout the process, in order to understand and participate properly.
57. The response period has now closed, and we are currently collating the responses. Over 50 per cent (48 out of the 89 coroner areas in England and Wales) responded to the survey.
58. We have also conducted a survey of all volunteers working for the Coroners' Courts Support Service (CCSS). The CCSS is a charity whose trained volunteers offer emotional support and practical help to bereaved families, witnesses and others attending inquests in a number of coroner's courts.
59. **Site visits:** In order to better understand the inquest process to inform our review, we have attended a number of different proceedings as follows:
  - a. Pre-inquest Reviews (PIR)
  - b. Inquests where Article 2 is engaged
  - c. Inquests where Article 2 is not engaged
  - d. Inquests where there is some form of state involvement, and the state has legal representation



60. We are also looking at what can be done, beyond the provision of legal aid, to make inquests more sensitive to the needs of bereaved families including:
  - a. how we might control the number and actions of lawyers through the use of joint representatives and, greater use of position statements and apologies;
  - b. training for coroners on managing the courtroom and training for lawyers who act in inquests to help support an inquisitorial approach;
  - c. extending support services to every coroners' court in England and Wales;  
and
  - d. improving written guidance for bereaved families.
61. **Cross-government work:** We are currently working with colleagues in other government bodies to discuss other funding systems in place at inquests where the state is involved.
62. We are in discussion with officials from the Home Office regarding the funding of legal representation for police forces and security services.
63. We are also working with officials from NHS Resolution, to establish how legal representation for NHS Trust representatives and employees is funded. We are interested in the overall amount spent on representation at inquests, how many inquests are held where the NHS Trust or employee has representation, and the average cost of representation for each inquest.

#### **Wider Government action**

64. The MoJ is currently developing other policies which are aimed at providing better support to bereaved families, and are relevant to the review of legal aid at inquests.
65. Independent Public Advocate: The Queen's Speech on 21 June 2017 announced the Government's intention to introduce an Independent Public Advocate (IPA) who "will act for bereaved families after a public disaster and support them at public inquests". The Ministry of Justice will publish a public consultation seeking views on a range of issues pertaining to this important new role, including the support the IPA should provide, to whom it should be provided, and the disasters that should qualify for the IPA's support.
66. There remain concerns about how far the voices of the bereaved are heard following events involving loss of life on a large scale and how the bereaved can be supported to fully understand the investigatory processes that follow and to effectively participate in them. Having the IPA will address those concerns.
67. Post Implementation Review: The Ministry of Justice is also currently reviewing the changes made to legal aid by LASPO as part of a post-implementation review of LASPO. This will include the changes made to the scope of early legal advice and legal representation. Changes to the scope of legal aid for inquests were not made under LASPO and as such will not be assessed as part of the PIR process. The results of the PIR will be published later this year.

**Call for evidence**

68. This call for evidence asks for your views on the provision of legal aid for representation at inquests.
69. It aims to capture the views of anyone who will not be reached by the surveys or official-led meetings. We are interested in hearing from you if you have been involved in the inquest process.
70. We are particularly interested in hearing from members of the legal profession who have experience in this field.
71. A Welsh summary of this paper is provided on the call for evidence webpage.
72. Responses are welcomed from anyone with an interest in or views on the matters consulted upon.

## The proposals

1. The questions are based on our observations from our initial engagement with stakeholders, as well as from the reports on the subject.
2. Chapter One asks questions on the legal aid application process.
3. Chapter Two asks questions on the inquest hearing itself. Questions address the various types of inquests. There is a specific focus Article 2 cases, inquests where there is state involvement, and inquests where there is a wider public interest element.
4. Chapter Three asks more general questions on support provided to bereaved people, and how inquests can be more bereaved friendly. In particular, it asks about the style of questioning from lawyers, and the information and advice that is currently available.
5. Some of the questions will not apply to everyone responding to this call for evidence. Please only answer the questions that are relevant to your interest and experience.

## Chapter One: Legal aid applications

1. This section only applies to inquests where it is felt that the bereaved family might benefit from legal help and legal representation.

### Financial means assessment

2. Bereaved people seeking public funding for legal help and / or legal representation at an inquest are required to complete a financial means assessment.
3. Applicants may be required to provide evidence of the following:
  - a. Evidence of income for a three-month period;
  - b. Bank statements for three months for all accounts held;
  - c. Evidence of any other income and capital;
  - d. Valuations of property and mortgages outstanding; and
  - e. Mortgage and rent accounts.
4. We are committed to making this process as streamlined as possible. We understand that there are some concerns regarding the existing system.
5. Concerns have been raised about the number of family members required to provide financial details. Applicants for legal aid have been expected to include financial information for the next of kin to the deceased. This meant that each family member was required to provide financial information and proof of financial details in order for the applicant to satisfy the financial means assessment.
6. As discussed in the introduction, the guidance has since been changed. Additional family members are no longer involved in the financial application process. This means that only the family member who is seeking to have their representation funded through legal aid will have their financial means assessed.
7. The case has also been made for greater clarity on the legal aid application process. Our conversations with stakeholder groups have highlighted claims that completion of the financial eligibility process can sometimes require legal specialist knowledge that most families do not have access to.
8. We would like to know if there is anything that we can make to the current financial means assessment to make it as accessible and user-friendly as possible.

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

### **Backdating the legal help waiver**

9. Solicitors providing early legal advice may carry out the following roles which may be covered by legal help:
  - a. be in regular contact with the coroner;
  - b. obtain the medical records of the deceased and police reports if available;
  - c. take statements from the family, and any other key witnesses;
  - d. consider the use of an expert;
  - e. arrange representation at the inquest itself;
  - f. and advise the family on what the conclusion means.
10. As set out in the introduction, the Director has a discretion to waive the financial eligibility criteria in relation to the assessment of the applicant for the purpose of granting funding for both legal help and legal representation funding. This discretion is often referred to as the 'legal help waiver' or 'legal representation waiver'.
11. The Director has a discretion to backdate funding for legal representation to the date that an application for legal representation is made.
12. However, applications for the legal help waiver cannot be backdated.<sup>8</sup> Instead, funding takes effect from the date of the determination by the Director.
13. Key stakeholder groups we met told us that there should also be a discretion to backdate applications for legal help so that they have legal aid funding for the initial attendance with their solicitor.
14. For cases where there has been a death in custody or state detention, this means that families may have to pay privately to enable legal representatives to carry out work pending disclosure of material which will assist in determining whether there has been a breach of Article 2.

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

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<sup>8</sup> An exception to this is for cases being funded under an individual case contract. For more details see: <http://www.legislation.gov.uk/uksi/2017/53/regulation/2/made>

## Chapter Two: Types of inquests

### Article 2 inquests

1. In cases where the state may have been involved in the death the inquest may engage 'Article 2' of the ECHR.
2. In deaths where Article 2 is engaged, the question of 'how' the death has occurred is treated more broadly. In practice, this means that the coroner might spend more time asking questions relating to the circumstances in which the death took place.
3. In complex cases, including where Article 2 is engaged, the coroner is likely to hold one or more hearings before the inquest, known as pre-inquest review hearings (PIR). These are hearings with the interested persons where practical arrangements are agreed and preliminary legal matters are raised, such as the scope of the inquest and list of witnesses.
4. If the coroner decides that the death may engage Article 2 they are likely to announce this at a PIR. For the purposes of legal aid, this decision is necessary to demonstrate that the case meets the Article 2 part of the ECF case. Applicants are required to show that the state may need to hold an investigation into the death in order to see whether the state may have failed to protect the life of the deceased.
5. It has been suggested that without legal representation families might be unable to make a case that Article 2 is engaged.
6. This has implications for the conduct of the subsequent inquest hearing, as well as the result of any legal aid application for publicly funded representation.

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

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

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

7. Families can access publicly funded legal representation for all inquests where Article 2 is engaged, if they pass the merits and means criteria. Given the discretion to waive the financial means assessment, we are not aware of applications being refused for cases where an Article 2 inquest is being conducted.

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

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

8. In exceptional cases where applications for legal representation might not be granted, it is important that the applicant understands why their application has been refused.

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

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

9. Dame Elish Angiolini's review called for automatic, non-means tested legal representation for bereaved families where a death in custody has occurred.
10. Some stakeholders have suggested to us that families should not have to complete a financial means assessment in cases where it is likely the Director will waive the results of the assessment (inquests where Article 2 is engaged and wider public interest cases).
11. They argue that the need to complete the means test in cases where it is likely to be disregarded places unnecessary stress on the family to provide financial details when the test is not even taken into account as part of the application.
12. Currently, the Director will consider the following criteria when deciding whether the results of the financial means test should be applied:
  - a. The *nature of the proceedings* and the potentially serious effect on the individual concerned, in comparison to the proceedings for which exceptions and waivers are already in place; and
  - b. The potential *practical* difficulties for the individual to satisfy the means test (in terms of gathering evidence) and financial consequences should an exception not be made.

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

### **Wider public interest cases**

13. As well as deaths that engage Article 2, publicly funded legal representation can also be awarded where there is a wider public interest.
14. As set out in the introduction, ‘wider public interest’ for the purposes of legal aid does not mean that there is wider public interest in the inquest itself. We are concerned that this distinction might not be widely understood.

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

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

### **Inquests where the state has legal representation**

15. In addition to death in custody or state detention inquests, there are other types of cases in which the state may be involved in the inquest proceedings.
16. Examples include deaths that have occurred in an NHS hospital or after a disaster, or a terrorist attack in which multiple deaths have occurred.
17. In these type of inquests, the state body or agent involved as interested persons in the investigation and inquest is likely to have legal representation at the inquest.
18. For example, an inquest into a death in an NHS hospital is likely to involve legal representation for the NHS Trust as well, possibly, as for the individual employee. This may be funded from the NHS Resolution budget (provided by the Department of Health and Social Care), or funded by the individual’s union, or privately funded.
19. Bishop James Jones’ report on his review of the experiences of the Hillsborough disaster recommended that bereaved families needed to have non-means tested publicly funded legal representation at inquests where public bodies are represented, in order to properly participate in the proceedings.
20. We would like to find out more about the experience of families involved in inquests where public or state bodies are represented.
21. The following questions should be answered with reference to inquests where the state have had legal representation, but the inquest has not been an Article-2 inquest.

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



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

22. We would also like to know more about the need for non-means tested legal representation for inquests where the state has legal representation.

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

**State representation**

23. Bereaved families have told us that they can sometimes be intimidated and feel disadvantaged by the number of lawyers the state may field at an inquest. We have also heard concerns that they do not always feel that they have access to the same legal expertise as the state, and this has impacted upon their ability to understand and participate in the inquest proceedings.
24. Bishop James Jones' report called for:
- a. an end to public bodies spending unlimited sums on legal representation that exceeds that available to families; and
  - b. a change to how public bodies approach inquests, so that they treat them not as a reputational threat, but as an opportunity to learn and as part of their obligations to those who have died and to their family.
25. Our conversations with other government bodies regarding funding arrangements for legal representation indicates that efforts are made, where possible, to share legal representation. For example, NHS Resolution has confirmed that unless there is a conflict of interest between a representative of a NHS Trust and an individual NHS employee, it is likely that both the representative and employee will share the same lawyer.
26. However, where there are different or conflicting interests, it may not be possible for one single lawyer to properly represent and put forward to the coroner all the interests.

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

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

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

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

## Chapter Three: other support for bereaved families

1. This chapter looks at how bereaved families are currently supported and whether inquest proceedings could be more ‘family friendly’.

### Style of questioning

2. Inquests are an inquisitorial legal process. They are intended to be conducted in a different way to other court proceedings.
3. We are, however, concerned that the advocacy style and approach adopted by legal representatives in inquests is not always appropriate.
4. We would therefore like to know what you think about the style of questioning adopted by legal representatives – both those representing the state, as well as those representing the bereaved family.

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

### Information and advice literature

5. We want to make sure that when there is a coroner investigation into their loved one’s death, the information a family receives is appropriate so that they can understand the process and feel confident about what is expected of them at each stage.
6. The Ministry of Justice’s *Guide to Coroner Services* (“the Guide”) explains the investigation and inquest, and the role of the family in this process. sets out what an inquest is, what is involved in the inquest process. It also outlines the availability of legal aid for legal help, and for legal representation in certain cases. It is distributed to all coroner’s offices.
7. The *Guide* was published in February 2014 after we introduced a suite of coroner reforms in July 2013. We are currently revising the *Guide* to bring it up to date and make sure that it is as helpful as possible, focusing on the needs of bereaved families. The current version is available here:  
<https://www.gov.uk/government/publications/guide-to-coroner-services-and-coroner-investigations-a-short-guide>
8. As part of the work programme of Ministerial Board on Deaths in Custody, the Home Office has been developing a leaflet for families bereaved by a death in police custody.
9. A number of charities and law firms also produce their own information guides.

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

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

10. Finally, we would like to know if there are any other areas for improvement.

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

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

## Questionnaire

We would welcome responses to the following questions set out in this call for evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Thank you for participating in this call for evidence exercise.**

## About you

Please use this section to tell us about yourself

<b>Full name</b>	
<b>Job title</b> or capacity in which you are responding to this call for evidence exercise (e.g. member of the public etc.)	
<b>Date</b>	
<b>Company name/organisation</b> (if applicable):	
<b>Address</b>	
<b>Postcode</b>	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent.

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## Contact details/How to respond

Please send your response by 31<sup>st</sup> August 2018 to:

**Lucy Atkinson**  
**Ministry of Justice**  
**102 Petty France**  
**London SW1H 9AJ**

**Email:** [inquestreviewmoj@justice.gov.uk](mailto:inquestreviewmoj@justice.gov.uk)

### Complaints or comments

If you have any complaints or comments about the process you should contact the Ministry of Justice at the above address.

### Extra copies

Further paper copies of this call for evidence can be obtained from this address and it is also available on-line at <https://consult.justice.gov.uk/>.

Alternative format versions of this publication can be requested by emailing [inquestreviewmoj@justice.gov.uk](mailto:inquestreviewmoj@justice.gov.uk)

### Publication of response

A paper summarising the responses to this call for evidence will be published later this year. The response paper will be available on-line at <https://consult.justice.gov.uk/>.

### Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

### Confidentiality

Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulations (GDPR), and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information



we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the GDPR.







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