Response to “Proposals for the Reform of Legal Aid in England and Wales” (CP12/10)

February 2011
Introduction

1. INQUEST is the only organisation in England and Wales that provides a free, specialist, comprehensive advice service on contentious deaths and their investigation to bereaved people, lawyers, other advice and support agencies, the media, parliamentarians and the wider public. INQUEST is an independent charity and we receive no funding from the state or the Legal Services Commission. Our casework service provides both a general telephone advice, support and information service to any bereaved person facing an inquest and a free, in-depth complex casework service on deaths in state detention or involving state agents and works on other cases that also engage Article 2 of the ECHR and/or raise wider issues of state and corporate accountability. The complex casework service supports approximately 150 bereaved families in any given year (which equates to roughly 45% of INQUEST’s total caseload).

2. Our casework service gives INQUEST a unique perspective on how the whole coronial system operates. It enables us to identify systemic and policy issues arising from avoidable deaths and the way they are investigated. Drawing on this, INQUEST undertakes research and publishes reports such as How the Inquest System Fails Bereaved People (2002) and Unlocking the Truth – Families’ Experience of the Investigation of Deaths in Custody (2007): both included in-depth surveys which sought bereaved families’ views and experiences of obtaining funding for legal representation at inquests. Other INQUEST publications include: The Inquest Handbook: a guide for bereaved families, friends and their advisors; briefings on individual cases and on thematic issues arising; Inquest Law, the journal of the INQUEST Lawyers Group; and a regular e-newsletter. INQUEST is represented on the Ministerial Council on Deaths in Custody and the Ministry of Justice Coroner Service Stakeholder Forum.

3. INQUEST also works in partnership with members of the INQUEST Lawyers’ Group, a national network of nearly 200 solicitors and barristers who provide preparation and legal representation for bereaved people and which promotes and develops knowledge and expertise in the law and practice of inquests.

4. This response draws directly on INQUEST and the INQUEST Lawyers’ Group collective experiences over the last thirty years. Our answers to questions in the green paper reflect the core concerns of bereaved families: to have equal access to specialist legal representation and to ensure that the coroner is assisted to make best use of the inquest as a mechanism to prevent similar deaths occurring in the future. Our overall view remains that families bereaved by deaths in any form of detention should have access to non means tested public funding for preparation and representation at the inquest.

5. Our view is not exceptional and has been echoed by parliamentary bodies, independent reviewers and government sponsored advisory boards including:

   a. the Luce Review of the coroners service¹;
   b. a parliamentary inquiry into deaths in custody concluded with the Joint Committee on Human Rights² recommending that “participation of the next-of-

kin in the investigation into a death in custody is an essential ingredient of Article 2 compliance. ...[1]n all cases of deaths in custody, funding of legal assistance should be provided to the next-of-kin.”

c. the Forum on Deaths in Custody;
d. the Corston Report on women in the criminal justice system recommended: “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.”

6. At the heart of every death in custody case lies the inescapable reality that the bereaved family are involved in the inquest hearing through no choice of their own. One member of the ILG puts it this way: ‘the family haven’t asked for this death to have occurred, it’s not something that they are willingly embracing or deciding to gamble to get compensation for a broken leg or something…it’s descended on them in the most horrendous way’. The state is obliged to hold the enquiry and it is usually the only public forum for the family to find out how the death of their relative was caused and whether any public authority was in any way responsible. Article 2 case law recognises that one of the purposes of the enquiry is to give the family answers to their questions about the circumstances of their relative’s death. The notion that this could or should lead to significant, possibly even severe, financial consequences to the bereaved family is manifestly unfair.

7. Whilst the inquest process is inquisitorial it is not simple and informal and, in INQUEST’s experience, no family bereaved by a death that engages Article 2 would want to represent themselves. Rather these deaths raise complex and important questions about the state’s obligation to protect life and there should be no argument about the benefits of ensuring all involved have equal access to public funding for legal representation.

Article 2 ECHR and funding for bereaved families

8. Before answering specific questions about funding for inquests, we make a number of points in relation to Article 2 ECHR.

9. The state’s obligations following a death that engages Article 2 were recognised in Jordan v UK\(^4\): the investigation must be independent, effective, prompt, open to public scrutiny and enable the participation of the next of kin. In addition, the European Court of Human Rights has held that ECHR rights have to be effective, not illusory. In Airey v Ireland\(^5\), a case about breaches of Article 8 in the context of domestic violence, the European Court of Human Rights stated that in civil proceedings, public funding will be required if the assistance of a lawyer is indispensable for effective access to court, either

---

\(^4\) (2001) 37 EHRR 52
\(^5\) (1979) 2 EHRR 305

---
because legal representation is compulsory or because of the complexity of the procedure or of the case.

10. For reasons that we set out below (see paras 18-21 below), INQUEST believes that an inquest that raises Article 2 ECHR issues - a death in custody or otherwise in state detention or on active military service - is almost inevitably so complex that professional legal assistance is necessary. It is for that reason that the police, Prison Service, Ministry of Defence and other public bodies instruct teams of specialist lawyers funded by the taxpayer.

11. An inquest can not be Article 2 compliant if the family of the deceased does not have the opportunity to play an effective part in it. The argument put forward previously by the Legal Services Commission that only exceptional cases require the family to be represented to comply with Article 2 on the basis that the coroner can, ‘…in the overwhelming majority of cases…’ conduct an effective inquiry himself, without the need for family representation are increasingly difficult to sustain in relation to death in custody inquests. Particularly in light of the Court of Appeal judgment in R(Humberstone) v Legal Services Commission where the court also held that the requirement to provide funding in Article 2 cases was not just confined to exceptional cases, but should be where funding was required to likely to be necessary to enable the next of kin to play an effective part in proceedings. While we do not suggest that coroners are incapable in principle of giving effect to the family’s right to participate sufficiently, there is plenty of evidence of coroners refusing to allow questions from family members, or to allow witnesses to answer if questions are put.

12. Families do not have the same advocacy and/or witness-handling skills as counsel, or the confidence to make submissions to the coroner as to why their questions should be allowed. The inquest may also involve legal submissions as to appropriate verdict and/or rule 43 recommendations. Both of these are processes in which the legitimate interests of the next-of-kin are engaged, yet there can be little doubt that an unrepresented family is at a significant disadvantage in terms of their ability to participate compared to trained and experienced counsel – including those representing state bodies and state agents.

13. In R (Amin) v Secretary of State for the Home Department, Lord Bingham suggested that the purposes of the additional Article 2 procedural obligations on the investigation and the inquest were as follows:

... to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.

---

6 Current Legal Services Commission guidance looks to the case of R(Khan) v Secretary of State for Health [2003] EWCA Civ 1129.
7 [2010] EWCA Civ 1479
8 Unlocking the Truth op cit
9 [2003] UKHL 51
14. In INQUEST’s experience, for these objectives to be met and for families of the deceased to participate effectively in the investigation and inquest process following a death in custody they increasingly need specialist legal representation. The current reality is that where families are unrepresented, or insufficiently represented, the circumstances of the death may not receive the scrutiny which they otherwise would, with the danger that any acts or omissions which contributed to the death could happen again in the future. Our concern is that the proposals set out in the green paper would exacerbate this situation and that the lack of funding for families’ representation at inquests will lead to clear breaches of Article 2.

**Question 3: Do you agree with the proposals to exclude the types of case and proceedings listed in paragraphs 4.148 to 4.245 from the scope of the civil and family legal aid scheme? Please give reasons.**

15. We do not agree with the proposal that advocacy services in death in custody inquests should be outside the scope of legal aid.

16. Currently, the issue of funding legal representation for inquests falls to be considered under exceptional funding. INQUEST welcomed the enactment of section 51 of the Coroners and Justice Act 2009 which will bring representation at inquests into deaths in custody and deaths on active military service into the ordinary scope of civil legal aid. This provision was implemented, just over a year ago, following concerns expressed about the current situation by members of both the Houses of Commons and Lords. Parliament acted following numerous calls from parliamentary reports, independent reviews and advisory bodies to amend the current, inequitable situation. That the green paper proposes to ignore this clear indication from Parliament is not only deeply regrettable but incoherent.

17. In particular it is difficult to understand the logic in the green paper that argues that Legal Help should be in scope (as “an important means of allowing families to engage with the process successfully” para 4.121) but not representation at the inquest itself.

**Legal representation enabling families to challenge alleged violations of human rights**

18. Ultimately, inquests into deaths in custody hold the state to account where appropriate. Excluding inquests into deaths in state custody from the scope of the civil legal aid scheme seems illogical in light of other, sound commitments to the importance of individuals challenging poor state practice contained in the green paper. This is especially so when it is one of the most important human rights - the right to life - that may have been compromised by a death in custody. For example the green paper states: “we consider that cases where state agents are alleged to have abused their position of power, significantly breached human rights, or are alleged to have been responsible for negligent acts or omissions falling very far below the require standard of care have an importance beyond a simple money claim. We consider that these cases are an important means to hold public authorities to account and to ensure that state power is not misused... We therefore propose that legal aid is retained for these claims against public authorities” (para 4.53). Exactly the same reasoning can and should be applied to funding of representation at an inquest following a death in custody.
19. The inquest system not only has a crucial role to play in addressing issues of negligence and poor practice on the part of state bodies. It should also perform a vital preventative function. INQUEST Lawyers Group members have been at the forefront of developing legal practice in relation to representing families at inquests with a particular focus on deaths in detention. In pushing at the boundaries of the inquest system lawyers instructed by families have helped to expose systemic and practice problems that have contributed to deaths. Many of the changes to training and guidance, changes to the law in relation to inquests, increases in information entering the public domain about deaths in custody and other contentious deaths, and increased public awareness of the issues, have been a direct consequence of the deceased’s family’s participation in the inquest proceedings. Skilled advocacy for the family aids the inquisitorial process and can contribute to the making of coroner reports for the prevention of future deaths.

“Inquests are inquisitorial not adversarial”

20. The government’s underlying rationale for not bringing all funding for inquests into the scope of civil legal aid appears to be:“legal aid is not generally available for Legal Representation for the coroners’ courts, where the inquisitorial nature of inquests means that it is not required in most circumstances” (para 4.10).

21. However, INQUEST Lawyers Group members are increasingly reporting situations where wide representation of state bodies and their employees who may all be seeking to avoid imputations of blame or wrongdoing (such as the Chief Constable/Metropolitan Police Commissioner, Prison Service, trades unions and professional associations, Primary Care Trusts,) is secured at inquests. This can often have the effect of creating a substantial appearance of - and actual - inequality between the family's representation and that of the other interested persons. No family would question the model of the inquisitorial regime established for the coroner's court. But an investigation that throws up Article 2 issues - a death in custody or otherwise in state detention or a death on military service overseas – all too frequently is met with what appears to families to be a concerted offensive by the authorities to engage in damage limitation, restrict the public inquiry and defend the status quo. Home Office research on the subject has also noted the reality that many inquests, while putatively inquisitorial, often explore issues of culpability in which the interests of various interested parties are in tension.

22. In these circumstances, the need for careful, experienced representation of the family’s interests is crucial. INQUEST believes it is unrealistic to expect lay people to navigate their way through the complex system following a death in custody without having a legal representative to rely on the basis that, as set out in the green paper, “we do not consider that, in general, those participating in an inquest are likely to be particularly vulnerable” (para 4.151). An inquest invariably follows a death that was sudden or unnatural, and in relation to a death in custody, in traumatising circumstances. INQUEST has documented the particular vulnerability of bereaved people in this position: Chapter 5 “The impact of an inquest and sudden death” in How the Inquest System Fails Bereaved People (2002) and Chapter 6 “After the inquest” in Unlocking the Truth – Families’ Experience of the Investigation of Deaths in Custody (2007). It is INQUEST’s experience that many bereaved people dealing with the aftermath of a death in custody, including those who are highly articulate professionals, have found the

---

10 Experiencing Inquests, Davies et al, 2002, Home Office
prospect of representing their families’ interests at inquest hearings too stressful at a time when they are grieving and trying to come to terms with their relative’s death.

23. Unless families are able to find the money to secure the services of a lawyer or to find pro bono representation they are left without representation at the hearing. In practical terms, there is a good deal of anecdotal evidence that not all relevant issues may be aired or explored as thoroughly where a family are left to represent themselves. It is INQUEST’s experience that there are custodial deaths that have not been properly scrutinised because families did not have information and the resources to be legally represented.11 This is not an acceptable situation – either for the bereaved family or the wider public interest.

Complexity of law and procedures

24. One of the other factors informing the assessment in the green paper that funding for representation at inquests should not be in scope relates to the complexity of law and procedures involved: “we have also looked at whether the nature of case itself is likely to be particularly complex. We recognise that the law can seem complex, but we have considered whether the type of case, by its very nature, may be routinely of such exceptional complexity that a litigant would be able to represent themselves effectively. This may be, for example, because of the complexity of the subject matter, the particular complexity of the law in the area, or the complexity of the evidence.” (para 4.24). INQUEST believes that in relation to deaths in custody, the complexity of the law and procedures is such that funding for representation at these inquests should be in scope.

25. The House of Lords case of R (Middleton) v Secretary of State for the Home Department12 marked a fundamental change in the conduct of inquests into deaths of those who had been in the custody of the state. The use of narrative verdicts in particular has enhanced the participation of the jury in the analysis of systemic failure, and as such is a crucial tool for achieving accountability and preventing unnecessary future deaths. Middleton broadened the scope and required thoroughness of the hearing and the way verdicts were returned. We have written extensively about these changes and their impact alongside the problems faced by bereaved families in our book Unlocking the Truth: Families Experiences of the Investigation of Deaths in Custody (INQUEST 2007). One of the consequences has been a significant increase in the length of such inquests. Where prior to 2004 it was unusual for an inquest hearing to take longer than a week, and in the majority of cases they were concluded within a matter of days, the average inquest into a death in prison now lasts between two and three weeks, although in some cases it can last much longer. Although this has been a very positive development and ensures that there is greater scrutiny of the deaths, alongside changes in pre inquest disclosure, it has meant that there is a much greater need for families to have proper specialist advice and representation.

26. Many coroners have welcomed the contribution and assistance that families’ lawyers bring to these inquests. Our experience is that good quality, experienced legal representation can have a significant positive impact on the quality and outcome of the inquest. A legally qualified representative can develop a constructive relationship with

11 Ibid., p.90
12 [2004] 2 AC 182
the coroner more easily than a family that may be struggling with the law and its arcane vocabulary. An awareness of the procedures, such as which witnesses to call, what documentation to obtain, the reasons and effect of adjournments, etc, both speed the process and ensure that the family’s interests are properly considered during the investigation and other pre-inquest hearings, thus assisting the hearing itself. In addition, whilst other legal representatives can ‘cherry pick’ the parts of the evidence that they are required to deal with at the inquest (a hospital’s or an individual state agent’s failings) the representative of the family must marshal and deal with the entire range of the evidence leading to the death. This places a far greater burden and responsibility on the families’ representative.

27. The green paper argues that “legal help is currently available at inquests, and can be used to assist bereaved families in making written submissions to the coroner (for example, a list of questions they wish him or her to ask other witnesses)” (para 4.119). However, even where the applicant is legally assisted in the run-up to the hearing, it is still not always possible to predict that evidence that will be given and the issues which will emerge, even where pre-inquest disclosure has been provided (which is often difficult to secure in itself). For example, in a recent, 2011 inquest into a death in police custody, it emerged under cross examination from counsel that, on legal advice, police officers had all altered their original statements about the death. This would not have come out had the family not had skilled legal representation at the hearing. The inquest has been adjourned.

28. Finally, the assertion in the green paper that “participants do not have to present legal arguments, and can ask coroners to question witnesses on their behalf.” (para 4.119) is misguided in the context of deaths in custody. The limits to a coroner’s ability to conduct an Article 2 compliant investigation without the family being legally represented have, in the past, been pointed out by the Bar Council:

It is argued that, in the case of bereaved families, the Coroner can represent the position and look after their interests. However, the Coroner has a duty to maintain the independence of the tribunal which could give rise to a conflict of interest if he (or she) was obliged to "descend into the arena". In addition, the Coroner has duties regarding disclosures, which may involve deciding whether to give disclosure to bereaved families. Clearly if the Coroner is expected to represent the interests of bereaved families, an unacceptable conflict of interest will arise.  

Inequality of arms
29. Families without experienced legal representation have found themselves alone facing barristers representing the detaining institution and other organisations, and on many occasion also barristers representing individual officers or others staff members funded through union or professional association resources.

---

14 Nurses, doctors, social workers, civilian officers etc
30. As Sir Tom Luce, Chair of the 2003 Fundamental Review of Coroners Services pointed out, "if a police authority or a health authority is involved in an inquest, its legal costs will be met by its budget, which is a publicly tax-financed budget." To our knowledge, lawyers representing public authorities are provided with funding which appears not to be restricted or constrained (as is the situation for bereaved families) and does not appear to be assessed and/or have its merits examined in the manner prescribed within the statutory framework. INQUEST is not aware of a single inquest into a death in custody where the state has not had lawyers in attendance.

31. For example at the inquest in 2009 into the death of Moyra Stockill who died in police custody there were 11 legal representatives at the inquest looking after the interest of the Chief Constable, individual police officers and two custody officers, the NHS Trust, the relevant Hospital Consultant, individual nursing and outreach staff and the Care Quality Commission. At the 2008 inquest of Mark Camm, who died following police contact, there were 13 legal representatives present.

32. Recent parliamentary questions have touched on the inequality of arms that currently operates:
   
   (a) the total amount of the money spent on exceptional legal aid (ie for all cases covered by the existing scheme not just representation for bereaved families at inquests as the Government asserts the figures can not be disaggregated) was £1.5 million in 2008/09 and £1.6 million in 2009/10;
   
   (b) in contrast, in relation to deaths of prisoners in custody for the public bodies that the Ministry of Justice has responsibility for, the costs for legal advice and representation from the Treasury Solicitor’s Department and Counsel at inquests came to £2.2 million in 2008/09 and £2.7 million in 2009/10. This does not include the public funds spent by the Department of Health or NHS bodies on representation at the same inquests. The Home Office has been unable to provide comparable figures in relation to legal representation following deaths in police custody.

33. This leads to imbalance in legal representation and reduces the chances of having an independent, fair and balanced investigation. It is our experience that detaining authorities’ representatives are concerned to protect their interests and this often takes the form of seeking to constrict the scope of the investigation and inquest. It requires legal skills to make the case to the coroner for context and corporate issues to be considered.

34. The Forum for Preventing Deaths in Custody looked at whether or not the current regime disadvantaged families in terms of their ability to explore all relevant issues in inquests and said

---

16 Ruth Bundey “Inquest into the death of Moyra Stockill reveals gross failures by hospital and police” INQUEST Law Issue 19, INQUEST
17 Parliamentary Question from Jeremy Corbyn MP to the Parliamentary Under-Secretary of State for Justice, Hansard, 18 January 2011 http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110118/text/110118w0001.htm#11011867003416
18 http://www.publications.parliament.uk/pa/cm201011/cmhansrd/cm110124/text/110124w0002.htm#11012427001296
...the question for the Forum was whether or not this state of affairs might inhibit learning which could prevent future deaths. Almost every Forum member who expressed a view on this issue felt that, potentially, it could. The objective of exploring all relevant issues was felt to be most easily achieved where all the interested parties have the same access to legal representation by representatives who have sufficient experience and expertise. Making the family wholly or partly financially responsible for their own legal representation risked either dissuading them from being represented at all, or else being insufficiently represented. Many Forum members felt that could have a knock-on effect on the ability of the inquest to identify learning opportunities.19

35. The Bar Council commented

...if the Coroners’ system is to achieve the objectives of delivering justice for all interested parties should be entitled to legal aid in all cases. However, the Bar Council understands that the legal aid pot is finite and that difficult decisions have to be made vis-a-vis funding. As a matter of principle, all interested parties should be represented where the state has obtained representation funded via the taxpayer. The Bar believes that to deny representation to other parties where it is provided by the state (or indeed, inquests that do not involve the state but where one party has access to representation) is a violation of the equality of arms principle that underpins our system of justice.20

Costs

36. Currently, families who wish to obtain both legal advice in the run-up to the inquest and advocacy services at the inquest itself must go through two different application processes. Bringing inquests for deaths in custody in scope would allow the LSC to abolish the two separate processes for Legal Help and Advocacy Services (this would improve bereaved families’ experiences of the process and should also save the LSC money).

37. INQUEST considers the costs that would be saved by the government in keeping these inquests out of scope is more than outweighed by the damage that this will do to public confidence. In addition, the question as to the application of Article 2 of the Human Rights Act is extremely complex, and we believe that the approach to funding for bereaved families set out in the green paper will inevitably lead to legal challenges and costly litigation.

Question 4: Do you agree with the Government’s proposals to introduce a new scheme for funding individual cases excluded from the proposed scope, which will only generally provide funding where the provision of some level of legal aid is necessary to meet domestic and international legal obligations (including

19 The Forum for Preventing Deaths in Custody Annual Report 2007/8
20 The Bar Council, op cit, para 10
those under the ECHR) or where there is a significant wider public interest in funding Legal Representation for inquest cases? Please give reasons.

38. In relation to inquests we reassert our point made in response to question 3 that deaths in custody should come within the scope for funding (as per section 51 CJA). If the government decides not to revise the proposals in the green paper then we consider that this type of inquest be treated as a particular category within the exceptional funding bracket which are ordinarily deemed to comply with the requirement for significant wider public interest. We are concerned that there is no specific mention of deaths in custody as being a matter of particular public concern. It is important that this type of inquest is explicitly included. To leave decisions of the funding of these types of inquests to the discretion of the individual decision makers is not satisfactory as illustrated by problems faced by families applying for legal aid under the current system.

39. However, until the Government publishes clearer and better details of its scope, it is difficult to comment properly on the scheme proposed to replace exceptional funding. INQUEST suggests that once detailed criteria have been published there should be a further consultation on these proposals.

Problems of applying for funding under the current system

40. Although funding for representation is available in "exceptional" cases those representing families have to make lengthy, complicated, intrusive and time consuming applications to the Legal Services Commission, subjecting those who are already experiencing the trauma of bereavement to additional anxiety. Questions may be asked as part of the application process which ‘...are often intensely personal, embarrassing and experienced as intrusive...’

41. Currently, applicants who wish to obtain both Legal Help in the run-up to the inquest and advocacy services at the inquest itself must go through two different processes. The process causes some families to withdraw from the process altogether while others report family conflict because of intrusive questioning of their financial circumstances irrespective of whether individual family members had any relationship with the deceased. Many families are excluded from such support simply by virtue of the fact that they own their own home, even if this does not mean in real terms that they have substantial disposable income to be spent on legal fees. Even where families get funding this does not cover their travel and subsistence, the costs of which can be significant. Families who are denied representation by simple cost are crucially disadvantaged, not only with regard to their own interests but also with regard to the preventive role of the inquest.

42. While Legal Aid may be provided in "exceptional" circumstances, experience would suggest that the exception is already too narrowly drawn, that decisions are subject to demoralising delay, and that bereaved families resent being means-tested for what in all conscience should be their right to effective representation.

43. In the case of deaths in custody, some funding has been generally forthcoming so far to meet Article 2 obligations at inquests. However, the means-testing of the funding means

complex and intrusive investigations into family circumstances, lengthy delays and has given rise to inconsistent decisions as demonstrated below:

(a) The Legal Services Commission denied exceptional funding for the family of a man who died in hospital a few days after a struggle with a police officer on the grounds that the death fell outside their definition of “in custody” and raised no matters of wider public interest.

(b) The Legal Services Commission required earnings details of the extended family of a man found dead in prison. They were subsistence farmers living in Ghana.

(c) The inquest into the death of a woman in prison was adjourned in November 2006 to permit the representation of the family. Her retired parents were initially asked for a contribution of £8,500 by the LSC in February 2007. After an appeal the LSC announced in March 2008 a reduction of the requirement to £3,000.

(d) A man died in prison in 2007 and his inquest took place in April 2009. He had a number of siblings, but only one of them, his sister, wanted to be an interested person at the inquest. His sister had continued working until shortly before the inquest, but when she received the report from the Prison and Probation Ombudsman and read the extent of the apparent failings, she became ill and was signed off work by her doctor. As she was in employment she was required to make a monthly contribution to her legal funding as well as a contribution to representation at the inquest itself. As a single parent with two small children, she found the financial burden extremely difficult to manage. After six months sick leave her employer reduced her pay by half, but she had to continue to pay the legal contributions. She has since left her former employment and is now working part time. Whilst given her recent change in circumstances, she could be reassessed in relation to her legal contributions, she is now so distressed by the inquest process and the impact it has had on her career that she feels unable to deal with the necessary form filling which would be required.

44. INQUEST has worked with a number of families who have not been eligible for legal aid who have had to make a decision as to whether they are willing to use their savings or other capital to pay to be represented at the inquest. Examples include:

(a) The retired parents of man who died in prison were required to use the money set aside for their retirement to contribute to representation.

(b) The high-earning family of man who died in custody is funding all of their legal representation, anticipated to cost tens of thousands of pounds. The sympathetic solicitor offered his service at a reduced cost and the family is undertaking many of the tasks usually undertaken by a solicitor themselves in order to save money.
The daughter of a woman who died in police custody was required to contribute from the inheritance she received from her mother who is the subject of the inquest. The Legal Services Commission initially questioned whether there was significant wider public interest, which is unnecessary given that the death engages Article 2 as it occurred in custody and refused funding, twice. Some funding was granted on appeal but a contribution of £4,000 was required. The family member concerned is a single mother of a three year old.

45. Because there is a different process for obtaining Legal Help and for obtaining Advocacy Services, it is not inconceivable that a family member can obtain advice and assistance with preparation up until the point of the inquest, but is then left unrepresented for the hearing itself. Indeed, this has happened in death in custody inquests in the past. Bereaved families must then choose between footing a hefty legal bill or attempting to represent themselves alongside experienced counsel for the other interested persons. Aside from the obvious anxiety which this will cause and the resulting inequality of arms, this is simply irrational: how can it be right in principle for a person to be given legal assistance to prepare for the inquest, but then left without assistance for the inquest itself?

46. These problems matter. Aside from arguments about basic fairness, in legal terms, Article 2 requires next-of-kin to be able to participate in proceedings ‘...to the extent necessary to safeguard his or her legitimate interests’ (Jordan v UK). INQUEST argues this requirement might not be met in circumstances in which the family initially wished to participate, but were then dissuaded by an anxious, time-consuming and intrusive funding application process which carried no ultimate guarantee of success.

Question 7: Do you agree that the Community Legal Advice helpline should be established as the single gateway to access civil legal aid advice? Please give reasons.

Question 8: Do you agreed that specialist advice should be offered through the Community Legal Advice helpline in all categories of law and that, in some categories, the majority of civil Legal Help clients and cases can be dealt with through this channel? Please give reasons.

47. INQUEST believes that in the context of death in custody cases this is a misguided – and deeply inappropriate – proposal. INQUEST’s experience of complex casework have informed our view that specialist, sensitive handling of a case is of paramount importance and that channelling all inquiries through a single, general telephone line will not help bereaved families get the legal support they need.

The importance of specialist legal representation

48. Representing families at inquests, particularly in custody death cases, is a highly-specialised practice area, and one in which only a small number of legal practitioners have significant experience. INQUEST has collated extensive evidence that,
unfortunately, the LSC either do not understand or do not accept this. For example, an INQUEST caseworker recalls that ‘... the LSC wanted the family to instruct a solicitor who was located geographically nearest to them – but this solicitor had no experience of conducting a death in detention inquest case – another example of the failure to understand the specialism required for a family to have effective representation’.

49. The way in which INQUEST’s casework service works with bereaved families illustrates how complex the considerations involved are. INQUEST runs both a general telephone advice service for any family facing an inquest and a complex, in-depth casework service for deaths in custody. When a family contacts INQUEST’s casework team and requests legal assistance, the caseworker will explain to the family that based on their initial assessment they will discuss the case with a number of specialist solicitors, usually from the INQUEST Lawyers Group and make a decision about which solicitor to suggest that the family contact. This is based on the following considerations:

a. geographical location – proximity of the solicitor to the family/proximity to the place of death and therefore inquest (in prison deaths this is frequently different);
b. ability and willingness of the solicitor to take on new cases/cases where client is not eligible for public funding and has limited means;
c. number of INQUEST cases where the solicitor is already instructed – the aim is to spread the work as much of it is frequently underfunded;
d. the particular areas of experience and interest – solicitor members of the ILG may have particular expertise and experience relevant in both prison deaths and clinical negligence, others in police shootings or in restraint deaths, others in child and young persons deaths in detention, others in immigration law, others where drug or other medical treatment may be relevant. Where there is already expertise/knowledge this not only ensures that the family are provided with the best possible representation but reduces the amount of preparation time needed;
e. whether more than one area of legal expertise is required for example experience of restraint and experience of clinical negligence.
f. the particular needs of the bereaved family.

50. The list above is not in order of priority and there are often very specific reasons why a specific solicitor, not simply a specific firm, is approached first to take on a particular case. The overall aim is to try to ensure the family are best matched to a specific solicitor so that the family receive the best available and most efficient service from the lawyers they instruct. There is a relatively small group of solicitors and barristers with specialist knowledge and experience of dealing with deaths in custody, the majority of who are based in London, or small pockets around the country. We are often faced with the difficulty of having to go to a number of different solicitors firms before we are able to get a solicitor with capacity to take on a case.

51. INQUEST has been contacted by families who have instructed their local high street solicitor only to find just before the inquest that they need more specialist help and that the solicitor has done no advance preparation and the family have not been involved in

---

the legal process. In some cases we have been contacted after the inquest by unhappy families who have spent life savings on very poor legal representation and these cases have sometimes led to judicial review of the inquest at great public expense and at great emotional cost to the bereaved family. We also have experience of families instructing the deceased’s criminal solicitor, where this is subsequently revealed as a conflict of interest.

52. Given that some LSC decision-makers are not familiar with the nature of representing bereaved families at inquests, and the experience and specialism required for lawyers to do so effectively, it seems highly unlikely that the general telephone advice line proposed in the green paper will be better able to meet the needs of bereaved families.

Financial Eligibility: Questions 12-23 inclusive

53. Many bereaved families applying for funding for representation at inquests are currently excluded from such support simply by virtue of the fact that they own their own home, even if this does not mean in real terms that they have substantial disposable income to be spent on legal fees. As a result, we have previously argued that the government should remove the value of an applicant’s home from the assessment of their assets for Legal Help purposes. INQUEST’s experience is that even the current income and capital thresholds, which exclude almost everyone aside from those on benefits whose immediate relatives are also on benefits, mean that many families do not qualify for legal representation at inquests. We have set out the consequences of the impact of the current regime in this consultation response.

54. INQUEST believes that the proposals on financial eligibility in the green paper will make the current situation dramatically worse. We have real concerns that, taken together with the proposal not to bring funding for representation into scope, it will become even more difficult for bereaved families to participate effectively in inquests following a death in custody. This gives rise to significant concerns that the government will not meet its obligations under Article 2. By their very nature, these deaths give rise complex and important questions about the state’s obligation to protect life and there should be no argument about the benefits of ensuring all involved have equal access to public funding for legal representation at inquests following deaths in custody. We urge the government to reconsider.

INQUEST
February 2011