



APIL briefing: Judicial Review and Courts Bill – House of Lords report stage – March 2022

Amendment to clause 39 – appeal process

Clause 39 will broaden the circumstances in which a coroner can discontinue an investigation if the cause of death becomes clear. Currently, a coroner can only base the decision on a post-mortem, but this will allow an investigation to be discontinued if the cause of death becomes clear through other evidence.

It is important to recognise that a family may have a legitimate reason not to agree with the decision to discontinue an investigation. Currently, if a family disagrees with a decision made by a coroner, they must seek a judicial review. This can, however, be complex and financially prohibitive for families. Instead, there should be an easily accessible appeal process for families who want an investigation to continue.

We urge peers, therefore, to support the amendment to clause 39 tabled by Baroness Chapman of Darlington. This amendment provides that the Lord Chancellor should establish an appeal process for families who disagree with the decision to discontinue an investigation.

The experience of the family of Mrs Noreen Clements demonstrates why an appeal process could be so important for bereaved families.

Mrs Clements suffered a fractured pelvis after falling in hospital and died two weeks later. Despite her family's belief that the fall contributed to her death, it was not recorded by the doctors who completed the medical cause of death. Mrs Clements' family were fortunate that the coroner listened to their concerns and instructed an independent expert who eventually agreed with the family. This resulted in changes being made to the hospital's procedures. Under the Government's proposals, another coroner may have been satisfied with the medical cause of death. The investigation may have been discontinued before an inquest could be held, leaving the family without the answers they need, and missing a learning opportunity for the hospital. An appeal process could help ensure this does not happen.

New clauses on legal aid

A serious inequality of arms can exist at inquests. Often, families will face hospitals, local authorities or other public bodies which have legal representation funded by the public purse. Even in cases where these bodies do not officially have representation, they are likely to have assistance, either through in-house legal professionals or specialist inquest officers. At the very least, their witnesses will be experienced professionals such as doctors, who will have been provided with advice from a legal team prior to the inquest. Yet a family suffering a bereavement is likely to be refused the same publicly-funded legal aid. We urge peers to vote in favour of new clauses which will correct this inequality of arms.

At House of Lords committee stage, justice minister Lord Wolfson of Tredegar told peers *“there is a risk that having additional lawyers at an inquest will not provide an overall improvement for the bereaved and could have the unintended consequence of turning an inquisitorial event into a significantly more complex defensive case, which could, in the majority of cases, prolong the distress of a bereaved family”*¹.

This completely misses the point. Without legal representation, families will be on their own. In some cases, they will have to review reams of documents which could include distressing information about their loved one’s death. It cannot be right that any bereaved family is left to deal with these painful documents on their own, or is expected to know what is vital evidence and what should be challenged. Legal representation ensures families ask the right questions and call the appropriate witnesses at the inquest. If families are unable to do this, they might be left without the answers they need, or the closure which can come from an inquest.

The coronial process is designed to be inquisitorial, but coroners can take an aggressive line and shut down questioning. An example of this behaviour was seen in a case reported by one of our members, where the coroner’s combative, sarcastic and terse tone caused the bereaved family serious distress, and undermined their faith in the coroner’s ability. Fortunately, in this case, the family had legal representation, and the coroner was replaced under threat of judicial review. If they had not been represented, they may have been unable to do that, and may have accepted the outcome that the coroner presented in the first instance, which did not consider the wider circumstances of their daughter’s death.

¹ <https://hansard.parliament.uk/lords/2022-02-24/debates/A25BEE64-C0F3-4880-812B-2F25DCF4DDB7/JudicialReviewAndCourtsBill#contribution-CC9B5608-D2F6-4B72-9D2A-38DA00B23953>

Families can apply for legal aid, but it will be granted only in limited circumstances. Legal aid will be granted under the Government's exceptional funding scheme if it is considered there is a wider public interest in the inquest, or if it is an Article 2 inquest. An Article 2 inquest is held when there is a death in state custody, or if it can be argued that the State failed to protect someone's right to life.

We welcome the Government's recent decision to remove the financial means test in applications for exceptional case funding (ECF) but it does not go far enough. It is the experience of our members that even before the financial situation of families is considered, it is rare for applications for ECF to be successful, especially in healthcare-related inquiries. The removal of the financial means test alone is unlikely to be of benefit to many families. The Government must go further and ensure legal aid or other public funding for legal representation is available for bereaved people in inquests where public authorities are legally represented.

In the absence of legal aid, some lawyers help bereaved families by funding representation through a conditional fee agreement (CFA - otherwise known as 'no-win, no-fee') but this funding arrangement has to be linked with a separate civil claim for compensation. If a CFA is not possible, legal representation is either provided free of charge by a lawyer, which can be unsustainable for law firms, or a family has to fund its own representation. This is simply unaffordable for many families. Legal aid provides families with the certainty that there will be equality of arms at the inquest, and they will not be alone during the most difficult period of their lives.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has campaigned for the rights of people injured through no fault of their own for more than 30 years. Our vision is of a society without needless injury but, when people are injured, a society which offers the justice they need to rebuild their lives.

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