Ministry of Justice

Call for evidence: review of legal aid for inquests

A response by the Association of Personal Injury Lawyers

August 2018

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation with a history of over 25 years of working to help injured people gain access to justice they need and deserve. We have over 3,500 members committed to supporting the association's aims and all of which sign up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives and academics.

APIL has a long history of liaison with other stakeholders, consumer representatives, governments and devolved assemblies across the UK with a view to achieving the association's aims, which are:

- To promote full and just compensation for all types of personal injury;
- To promote and develop expertise in the practice of personal injury law;
- To promote wider redress for personal injury in the legal system;
- To campaign for improvements in personal injury law;
- To promote safety and alert the public to hazards wherever they arise;
- To provide a communication network for members.

Any enquiries in respect of this response should be addressed, in the first instance, to:

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Introduction

APIL welcomes the opportunity to respond to the MoJ's call for evidence on legal aid for inquests. All bereaved families should have access to non means tested legal aid for representation at inquests. Representation is vital to ensure that there is a level playing field between the parties involved. Families must be able to feel part of, and be at the forefront of, the investigation process.

Q1) 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.

The financial means assessment process should be abolished. It has been a long standing concern of APIL members that more bereaved families should have access to legal aid for representation at inquests. There should be a level playing field and bereaved families should have access to legal advice before an inquest and representation during the hearing. Bereaved families cannot be put at the forefront of the process if they are left to fend for themselves when all other interested parties are represented, often at the expense of the state.

If the financial means assessment process is not abolished, it must be improved. At present, families are required to gather evidence to demonstrate their finances – back dated payslips, mortgage statements etc – items that may take time and effort to compile. Once submitted to the Legal Aid Agency, the Agency has discretion to waive the financial eligibility requirements if, for example, being denied legal aid would lead to the family having to sell their house to fund the case. By the time this decision is made, however, the family have already had to compile lots of evidence at a time that is already extremely stressful for them. It would be far simpler and fairer on the bereaved family if the Legal Aid Agency (LAA) could take a view on whether to waive the financial eligibility requirements before requiring the family to provide evidence

Once a decision has been taken as to whether financial eligibility requirements are to be waived, the LAA then considers whether the family should pay a contribution towards costs. This decision can be extremely inconsistent. There is no clarity in why some clients are asked to make a contribution and others are not, even if families have similar financial circumstances. In practitioners' experience, the decisions do not appear to be linked to the means assessment – there is not a clear cut point where if the family has a certain amount of disposable income and capital, they will be asked for a contribution. The decisions seem to be arbitrary. There is no real explanation provided by the LAA to explain how these decisions are arrived at, and no guidance for those applying on what the likely outcome would be.

Families do not understand why they are subject to a complex and unclear financial assessment process, while the NHS Trust gets state funded representation automatically:

Comments from client on legal aid funding

"I cannot stress enough how important the benefit of Legal Aid has been to our family and no doubt is to others. Without this assistance there is simply no way we would have been able to afford the level of legal assistance that we received for Baby P's inquest. That being said it is a huge kick in the teeth to know that NHS Trusts are supported with no expense spared, whereas families have to jump through a number of what appear to feel like burning hoops and in a number of cases the family are expected to contribute towards their legal costs. This seems exceptionally perverse in the context of what we know about how NHS Trusts are being funded. The whole process of an inquest is extremely daunting and there is simply no way the average member of the public would be able to deal with the level and complexity of the evidence and information required in order to represent themselves, especially when you consider the emotional turmoil an inquest inevitably brings to a family. I would also stress that it is by no means a simple exercise to obtain public funding. The applications are particularly complex and require a significant amount of information to be provided. I say this from the point of view of someone who works in legal costs (and indeed has a small knowledge of Legal Aid)."

Some practitioners report that they try whenever possible to fund inquest representation through a conditional fee agreement. The legal aid application is complex for those who do not often use it, and there is no clear explanation of the likely level of contribution the family will have to make, or the criteria they will need to meet for there not to be a contribution. Due to this uncertainty, practitioners do not want to risk applying, for the family then to be told that they need to make a contribution anyway, so practitioners decide that the best option for their clients is a CFA.

CFA funding is not always a viable option, however, and will likely become impossible if fixed recoverable fees are to be introduced as proposed in 2019. Some families do not wish to pursue a claim in negligence, or perhaps the claim has already settled before the inquest, or liability is admitted before the inquest takes place. In some cases, a clinical negligence action will simply not be economical to run. In all of those scenarios, CFA funding will not be available and the families will need to seek legal aid to pay for representation. In order to ensure that bereaved families are not left in a situation where they are unable to secure funding for legal representation at an inquest, legal aid should not be means tested. At the very least, there must be clarity around the financial eligibility criteria and the decision making around contributions.

Q2) 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.

There is a lot of work involved in applying for an Exceptional Case Funding application, and the legal help waiver is important as it can help to fund this work.

The LAA's position is that they do not have any authority to back date the legal help waiver. Lawyers are being required to provide evidence in writing that the LAA had agreed to back date the waiver, or are else made to apply under a compensation scheme to cover the cost of the work carried out before the waiver is granted. There is again an issue with a lack of guidance and explanation from the LAA. Practitioners report that they have not received any assistance from the LAA in relation to how to obtain a waiver. One practitioner contacted the LAA for assistance the first time she applied for a waiver, and received no help at all.

As above, there should not be financial means testing for legal aid for inquests, but if there is, there must be much clearer guidance on how to get a waiver at an early stage. Because

the process of applying for a waiver is so uncertain, many practitioners do not use it, and do not apply for legal aid. There is a real difference between how legal practitioners who regularly use the Exceptional Case Funding scheme for inquests, and those who usually fund this work through a CFA and make infrequent claims for legal aid, are handled by the LAA. This unacceptable difference is highlighted in relation to waiver requests. Those who regularly apply for legal aid know that in order to get a waiver quickly, the email sent must specify in the subject line that it is a request for a waiver. Because of the lack of guidance and help from the LAA, those who do not regularly apply for legal aid do not know this, and as such find it much more difficult to obtain waivers and to obtain them quickly. There must be much better information as to how the process works and what is required to apply for and obtain a waiver, and how decisions on whether to grant a waiver are arrived at.

Q3) 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?

A lawyer's assistance is vital in relation to decisions to trigger Article 2, especially if the case is not considered to be an "automatic" Article 2 case, such as those involving community mental health deaths. In these circumstances, there is uncertainty as to whether Article 2 will apply, and cases with similar facts will be decided differently. Practitioners report that the families who obtain an early determination from the coroner are those who have managed to get legal representation. The process of persuading the coroner that Article 2 applies involves legal submissions and it is not appropriate for a bereaved family to do this without legal representation.

Many families do not even appreciate that there is an Article 2 aspect to their case, or the difference that this will make to the inquest, until they attend the first Pre-Inquest Review. Families cannot be expected to know the fundamental difference that it may make in relation to the conclusions the coroner draws. Lawyers are vital to ensure that Article 2 arguments are raised where appropriate, and inquests are as effective as they can be.

Legal representation in applying for Article 2 will be even more important after the decision in *R (Parkinson) v. HM Senior Coroner for Kent and Others*[1], as the decision in this case means it will be even more difficult to get a finding of a breach of Article 2 in clinical negligence cases. Article 2 will not be engaged where there is "mere negligence", only where there is a failure which results from a "dysfunction in the hospital's services that is a structural issue linked to deficiencies in the regulatory framework".

The task of seeking funding for an inquest where Article 2 is engaged is also onerous and families should not be expected to do this without legal help. Counsel's submissions and the coroner's agreement that Article 2 applies, have to be sent before the Legal Aid Agency will provide funding.

Additionally, if the coroner decides that Article 2 is not triggered, lawyers are able to challenge this decision via judicial review, ensuring that ultimately the correct decision is made. The below case illustrates the importance of legal representation in Article 2 cases.

[1] [2018] EWHC 1501 (Admin)

Case study 1 - CM

The coroner investigating the death of CM initially decided at the Pre-Inquest Review that he would look at her death solely as a road traffic accident, without exploring wider failings in care. Fortunately, CM's family had legal representation, and they were able to threaten judicial review proceedings. As a consequence, the coroner changed his mind. If the family had not had legal representation, they would have been unaware of how to even begin challenging the coroner's decision.

Q4 & 5)

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?

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?

As above, post *Parkinson,* it will be much more difficult in the future to establish that Article 2 has been triggered in clinical negligence cases.

Q6) 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?

Practitioners report cases where a coroner has found that Article 2 has been triggered, and the initial application for legal aid has still been refused. These tend to be cases where Article 2 does not "automatically" apply. In these cases, it has been necessary to appeal the LAA's decision or threaten judicial review in order to obtain funding. In the inquest into the death of baby PM, the family was initially refused legal aid for representation where Article 2 had been triggered. This decision was reversed, but only through a formal appeal with counsel submissions.

Q7) In your experience, is Art 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.

As above, practitioners have experience of cases where Article 2 has been triggered in cases of death in community living facilities, and deaths in A and E.

Q8) Where applications for legal help and/or legal representation have been refused, does the LAA give clear reasons for this decision?

In our members' experience, the LAA does not give clear reasons for refusing funding for legal help and/or representation. In the case of CM, the letter sent from the LAA refusing funding in the first instance was clearly produced through "cut and paste", with the wrong name and wrong circumstances of death included in the middle of the letter.

Poor decision making is shown by ample evidence of copying and pasting, and clear reasons are not given for the decisions made. There must be more transparency and consistency in the decision making.

Q9) Are there any ways in which the LAA can provide greater clarity regarding their decision making?

Each decision must be carefully considered – there should not be copying and pasting of decisions, and there should be clear reasons given for why a particular decision has been made. As above, there generally needs to be greater guidance and more transparency in the decisions that the LAA makes, not just on applications, but also on contributions, and waivers for legal help.

Q10) 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.

We believe that there should be no means testing for legal aid for bereaved families at inquests. The financial means testing for legal aid for inquests should be abolished.

Q11 & 12)

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?

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.

The current definition of "wider public interest" is not easy to understand. Inquests have a public function anyway so it is not entirely clear how much wider the public interest needs to be than in a standard inquest. Our view is that the wider public interest test is illusory.

One practitioner recalled that all of their applications for wider public interest grounds have been refused, except one. But it is still not clear why that particular case was successful and others were not. The rejections are also poorly reasoned. In one example, the solicitors attempted to get a wider public interest grant of funding in a case involving a child dying due to aerosols being sprayed in small spaces and the toxicity of butane and propane. The solicitors in this case produced lots of evidence to show it was a wider problem, and that there should be funding for them to represent the family at the inquest. The LAA maintained that this was a single death, and that the duty of the coroner under paragraph 7 of schedule 5, and regulation 28 of the The Coroners (Investigations) Regulations 2013 to produce a report on the prevention of future deaths, would be sufficient to address the wider impact.

Q13) 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.

Many people approach a solicitor for legal assistance after an inquest. In cases where the family has not had representation at the inquest, it is common for the process simply to have been a "white wash", with no real investigation into what happened. It is vital that bereaved families have access to legal representation to ensure that they can fully engage with the process and obtain the answers that they need about their loved one's death. Without representation, the family will not be knowledgeable about the Coroner's Act, and the numerous rules and regulations that apply to the process. It is unjust for the bereaved and

most vulnerable people at the inquest to have to go through the process without proper legal assistance.

In most inquests, all parties, other than the family of the deceased, will have legal representation funded by the public purse. Even in cases where the state does not officially have representation, they are likely to have assistance to help them, either through in-house legal professionals or specialist inquest officers. At the very least, the witnesses called by the state to assist their case will be experienced professional witnesses such as doctors, who will have been provided with advice from the Trust's legal team prior to the inquest, and during it. Coroners add weight to the submissions made by these professionals. If the family is not represented, there is a serious inequality of arms, and the family is not able to fully engage with the proceedings and may not even understand what is going on. It is not just to expect them to engage with and respond to the legal submissions made by the other parties.

It is also extremely important to remember that the family is bereaved. They should not be expected to cope with the inquest alone, on top of the traumatic experience of losing a loved one. A family should not be expected to directly question those involved in their relative's death.

There is also evidence that while the coronial process is supposed to be inquisitorial (and this is used as a justification for families not requiring legal representation), coroners can take an aggressive line and shut down questioning. An extreme example of this behaviour was seen in the case of CM, where the coroner's combative, sarcastic and terse tone caused the bereaved family serious distress, and undermined their faith in the coroner's ability to perform his judicial role. Fortunately, in this case, the family had legal representation, and were able to get the coroner replaced by threatening judicial review. If they had not been represented, they would have been unable to do this, and would have been bullied into accepting the outcome that the coroner presented in the first instance – which did not consider the wider circumstances of their daughter's death.

The following cases demonstrate the importance of legal representation at inquests:

Case study 2 - L

- **Family was not represented at pre-inquest review. As a result, the appropriate witnesses were not called.**
- **Inquest was a "white wash"**

In this case, the client had an uneventful pregnancy and had chosen to try vaginal birth after a previous caesarean section. Having not progressed to spontaneous labour by 41 weeks, induction of labour commenced on 11 November 2013 at 13.50. Syntocinon was commenced in the early hours of 12 November 2013, and continued until 17.38. Unfortunately, the labour did not progress as hoped, and was not properly or adequately monitored.

Baby L was caused respiratory distress due to meconium staining and prolonged use of syntocinon, and she died 70 minutes after she was born. The mother had no representation at the pre inquest review, meaning that oral evidence was not heard from relevant midwifery experts. The internal investigation indicated systemic failures, but the author of the investigation reprot was not called by the coroner. The inquest was a "whitewash" and a finding of natural causes was returned. Earlier representation would have meant that the client would have been represented at the PIR, and the appropriate wintesses would have been called. This would have likely altered the coroner's finding. Solicitors were instructed following the inquest, and two years after the inquest, it was conceded that Baby L's death was avoidable.

Case study 3

- **Mother of deceased in ongoing case is deaf. There are a large amount of documents to review, containing information that is distressing to the family.**
- **All other interested parties will be represented.**
- **Legal Aid Agency is currently refusing to provide funding for legal representation for the family.**

Solicitors were contacted by the family of a 16 year old boy who had died in incredibly tragic circumstances. The inquest is yet to be heard. The mother of the deceased is deaf. She does not use sign language but lip reads. She represened herself at the first Pre Inquest Review, with considerable difficulty. Solicitors were instructed just before the second Pre Inquest Review and agreed to attend, despite funding not being in place. This proved to be an incredibly difficult hearing not only for the mother of the deceased but also for the fee earner representing her. There are numerous agencies involved in this inquest, all of whom are represented by Counsel. Three separate counsel attended the Pre Inquest Review. The deceased's mother was not able to hear all that was being said and had to be frequently directed to face the person that was speaking at any given time so that she could read their lips. Whilst a hearing device had been provided, this was not without its own problems and did not work consistently throughout the hearing.

The inquest is to last for two days with the determination to be given the following week. At present, the Legal Aid Agency are refusing to provide exceptional funding. Not only will a large number of witnesses be called to give evidence but there are a considerable number of documents to review in this matter. The information is incredibly distressing and very sensitive to the deceased's family. They have no means by which to fund legal representation. The family is unable, physically and emotionally, to represent themselves. Failure to provide funding in this case will enable a significant inequality of arms given that the other agencies are all represented by Counsel.

Case study 4

- **Family of deceased is not eligible for legal aid, and relying on solicitors to support them pro bono.**
- **The sister of deceased, acting as the spokesperson for the family, is incredibly distressed, and clearly does not understand the coronial process.**

Solicitors have been contacted by the sister of the deceased. The deceased had died quite suddenly and the sister had numerous questions that needed answering but she did not know who to put those questions to or how they might be answered. An inquest is to be opened but the sister of the deceased does not know what this means, does not know the process involved, who she should be contact or what to do. The sister does not fully understand the post mortem report and so does not know how to put questions to the coroner having read that. She is incredibly distressed at having lost her sister in quite tragic circumstances. She appears to be the spokesperson for her family yet doesn't really know how to deal with this herself. She will not be eligible for Legal Aid and does not have the means to pay for private representation.

The solicitors anticipate that the issues will be fairly narrow and they have agreed to assist in considering any documents that might be received from the Coroner and in drafting any questions that the family may wish to put to the Coroner. Without that guidance and willingness of the solicitors, the family would have to represent themselves, which they are clearly not able to do.

The below comments from a client illustrate the importance of legal representation at the inquest for the bereaved family:

Comments from client

"Having experienced an Inquest at Coroners court I would suggest that it is mandatory for the bereaved party to have legal representation at these meetings. My son was let down by the NHS and sadly lost his life the Trust had admitted liability, however this did not stop them from attending the inquest with a legal team who were keen to cloud the judgement of the Coroner, I could not understand a large part of the discussion as it was in medical terms, but my legal team were able to keep me informed, also when people were withholding information under interview my legal team were able to extract this and through extensive research before the case could argue for and against on my behalf.

The emotions of being a bereaved parent is enough without the trauma of having to defend his short life on my own I simply would not have coped without the help of [my solicitor] and I am sure that even though liability had already been admitted the correct verdict at the court would not have been reached."

Q 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?

One way to ensure value for the bereaved families would be to require that only those who hold legal aid certificates, or who belong to a recognised accreditation scheme are able to conduct legally aided inquest cases, or have a faster pathway to being granted legal aid. To introduce an accreditation system solely for those who conduct inquests would be impractical. There are a wide range of lawyers in different specialist areas who may be required to represent a family at an inquest, and to deny them the opportunity to represent a family because they do not, for example, have sufficient experience of Article 2 inquests to be accredited as an "inquest lawyer", would be wrong. The most important aspect of representing a family at an inquest is to know the area of law that you are representing the family in – to be a good lawyer in a clinical negligence inquest, one must be a good clinical negligence lawyer, for example. Therefore the requirements to be granted legal aid funding should either be that the firm holds a legal aid franchise for perhaps clinical negligence work, public law work or claims against public authorities, or the lawyer is accredited as a personal injury or clinical negligence lawyer, through APIL or the Law Society for example.

Q15) In your opinion, do inquests where the state has legal representation meet the criteria used to determine the need for a financial means test?

The financial means assessment for inquests should be removed.

We do not believe that "state representation" should be the factor through which it is decided whether a family can obtain legal aid for inquest representation. As above, even if the state does not formally have representation, they may be assisted by an in-house legal team and/or inquest officers. Even if this is not the case, there will still be an inequality of arms because the family will be up against professional witnesses such as doctors, and the coroner is likely to add more weight to their submissions. Whenever there is an inquest into

an unnatural death of a person in the care of the state, the bereaved family should have access to non means tested legal aid for representation at the inquest.

Q16) 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.

Legal representation provides the family with the necessary support and advice to ensure that they are able to understand the inquest process and engage properly in the investigation into their loved one's death. The case study below demonstrates the necessary help and support that having legal representation provides to the family.

Case study 5

- **Family had legal representation in inquest where other "interested parties" were also represented. Without legal representation, the inquest would have been extremely difficult for the family.**

Solicitors represented the family of a woman who died as a result of failings in relation to psychiatric care. Legal Aid was granted, and the solicitor was able to assist the family with preparations for the inquest, including obtaining and reviewing records and obtaining from the Coroner the witness statements and preparing the daughter for giving evidence at the inquest herself. Counsel was instructed to represent the family at the inquest. The circumstances leading to the death were distressing, as the client found her mother floating in a reservoir and watched unsuccessful attempts for her to be rescued and resuscitated. The client was suffering post-traumatic stress disorder as a result.

There were a number of other "interested parties" including the Healthcare Trust responsible for the psychiatric unit, the Trust responsible for the Community Psychiatric Nurses and Social Services. Each of the other interested parties had legal representation. Ultimately, the coroner gave a narrative verdict, identifying numerous criticisms in relation to the care and making recommendations to prevent future deaths.

The inquest would have been incredibly difficult for the family without legal representation. They had no knowledge prior to this of the inquest process, or the role of the coroner. It would have been intimidating for them with all other parties having legal representation and the representation that was provided was likely to have been instrumental in the coroner's criticisms and these criticisms certainly played a part in the Trust subsequently agreeing to compensate the family in connection with a clinical negligence claim.

Q17) For cases where the bereaved family has legal representation, do you feel their lawyer(s) are effective in representing the family's interests? Please give examples where possible.

The case studies above highlight the effectiveness of lawyers in representing the family's interests.

There does not seem to be full recognition, within the questions in this call for evidence, of how difficult inquests are for the family. Practitioners representing families report that there can be tensions between the family and the legal teams representing the trust. There can be sloppy use of language and tendencies towards "patient blaming". There needs to be a full recognition of the experience of the inquest for those involved. Even for the most seasoned practitioners, inquests can be an extremely difficult experience.

Q18) In your experience, what impact does the number of lawyers representing the state have on the experience of the bereaved family?

Bereaved families often feel outnumbered against the state. Even those families that believe they are prepared will find the inquest process daunting. As well as legal representatives, there will be the corporate client, paralegals, and trainees. It can often feel oppressive, even where the family has representation.

In cases where the family is unrepresented, counsel for the state will typically try and do their best with the family who are unrepresented, sometimes putting submissions to the coroner on behalf of the family. This does have a tendency to muddy the waters however, as they are present at the inquest to represent the trust. Counsel are often in a very difficult position where the family is unrepresented.

One issue can be where the family is fractured, the state representatives may only talk to one side of the family and not the other, causing friction. The inquest is already a highly emotional and charged situation. Everything possible should be done to remove sources of friction and other issues and to make the process as non-stressful for the family as possible. This includes ensuring that the family has access to legal representation.

Q19) 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.

We believe it would be helpful for families to receive information about the role each person in the inquest plays, not limited to the lawyers representing the state. This will help them to understand and engage with the process further. Even where families are represented and have legal representatives guiding them through the process, there can be huge confusion for them about who those taking part in the inquest are, and the role that they play.

Q20) 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?

As above, there can be a tendency for coroners and the legal representatives of the state to use language which blames the patient, or the family. There have been cases where people with mental illnesses have been described as “belligerent”. In one case, a sectioned patient with substance abuse issues was referred to as a “drug addict” – there was no reference to the deceased being a patient. Aside from the problematic patient blaming stance, it is clear that there is very little consideration for how difficult and upsetting it is for the family to hear their loved one being described in this way.

One practitioner reports a case where counsel for the NHS Trust accused the family of having legal representation at the inquest solely because they were seeking compensation. This is obviously unacceptable behaviour. Civil claims and inquests are separate processes, and a family engages in an inquest to find answers as to how their loved one died. We recognise that representation at inquests can form part of a clinical negligence claim, and as such can be funded through a conditional fee agreement. Families often, however, do not care about compensation, and are not interested in bringing a claim for negligence. They simply want to know the truth and for someone to be accountable for what has happened,

and to have what they consider to be the correct cause of death on the certificate, or failings identified in the narrative conclusion

Q21) Do you consider that the MoJ guide meets the needs of bereaved people? If not, what do you suggest?

APIL understands that *The Guide to Coroner Services* is not routinely distributed or referred to by coroners. The main issue with the guide is that the overarching tone is to dissuade families from seeking legal advice and representation. At paragraph 8.12 for example, the guide states that "in most cases, you will not need to instruct a solicitor to represent you at an inquest, although you may do so if you wish". Paragraph 8.5 sets out "who can attend an inquest" and nowhere within this section is a legal representative for the family mentioned. The guide is premised on the idea that the inquest process is inquisitorial, but as stated above, this is not the case. Bereaved families need legal representation, and the guide must go further, stating clearly that if families have any concerns about the circumstances of their loved one's death, they should not hesitate to seek advice and assistance from a lawyer. It should also be stressed that the earlier they do this, the better. Often, families try to seek legal advice when it is too late, as they were previously led to believe that they did not need a solicitor.

Q22) Have you found any other information useful? If so, please can you give details.

There is a need to review all of the information available to bereaved people, not just the MoJ's guide. A new leaflet has been published, which is a guide for bereaved families. Within this guide, there is a section on what the family should do if they think there has been negligent treatment, stating that the family has three years within which to bring a claim for negligence. There is no mention of human rights claims, and the shorter limitation period for these cases, which is misleading. If families are not fully informed, they may (and do) attempt to seek advice about their loved one's death when it is too late.

Q23) What else do you think could be done to support bereaved families better throughout the inquest process?

There must be consistency in the approach of coroners, and the quality of support offered to families throughout the country. Often it is very difficult for families to access support. The local authority funded system is also problematic. The variability and accountability of coroners tends to differ vastly across the country.

There is often also confusion for families because coronial teams tend to consist of volunteer staff and coroners officers, some of whom are seconded from the police and have police email addresses, and some who have local authority email addresses. For bereaved families whose loved one died in the care of the local authority, it is distressing to receive an email from a person within that local authority in relation to the investigation into the death. This may be a small point, but must be borne in mind. It would be preferable for there to be a national system, with all emails from the coroner's office having a dedicated coroner's office address.

There is also no right of appeal from a coroner's decision. One of the only routes open to a family wishing to challenge the coroner's position is judicial review. This is extremely problematic for those families who are unrepresented, who will likely not understand that this

would be their route forward if they are unhappy with the decision made by the coroner. Even if the family has representation, that judicial review is one of the only routes open to challenge the coroner's decision is onerous, and may discourage some solicitors, as they are simply not experienced in this type of work.

The only other alternative way to challenge a coroner's decision is to request that the Attorney General exercises the power known as a "fiat" to overturn the decision and to refer the matter to the High Court to order a new inquest. This is another extremely onerous process. One practitioner described an inquest into an ITU death, where the family did not have representation, which was completed without the family or coroner seeing the medical records. The hospital had refused to release the records without probate, and the inquest was completed prior to the grant being obtained. Four years later, having completed a costly and onerous application to the Attorney General, they are awaiting a response. A member of the family provided the following quote, describing the deeply unsatisfactory process, which could have been avoided had they had legal representation at the initial inquest:

Comments from client currently applying for a "fiat"

"Where will it all end? There has been so much paperwork printed and duplicated , medical records and documents sent to so many people, MP's, foundations, professors, pharmaceutical companies, specialists, forensic people, hospital trusts, consultants and legal teams, solicitors, coroner's office, Attorney General's office over 2 years, NVMA twice, the Parliamentary Ombudsman three times over 18 months, Patient Liaison Service, information rights, the CQC, complaints departments, appeals, telephone enquiries and emails, hundreds of research hours for all concerned, staff kept from doing their jobs to attend meetings or to go through paperwork. And still 6 years later, it continues to drain time, money and resources and likely will for many years to come, all for the sake of a few hours of costs for a legal representative at an inquest. I am no mathematical genius, but even I know that it has not been cost effective"

Q24) Is there anything else you would like us to consider?

The process is not inquisitorial

The inquest process is not inquisitorial, and there is ample evidence from defendant firms to illustrate their involvement in representing the state in inquests. Articles found on several defendant law firm websites provide information on how to avoid a prevention of future deaths report by obtaining legal advice. While some coroners refuse to hear submissions about what the trust is now doing following the death as part of the inquest, others are happy to, and prevention of future deaths reports can be avoided. These tactics demonstrate that while the coronial process is meant to be inquisitorial, with the coroner investigating the facts of the case directly, when legal representatives are involved, this becomes much less straight forward, and the process will naturally become more adversarial.

In the NHS Litigation Authority's 2014/2015 annual report, there is detail on the NHSLA's inquest service, which funded legal support for its members in approximately 300 inquests during 2014/2015. This included providing support to make early apologies, explanations

and early admissions of liability. If the process was truly inquisitorial, there would be no need for this service to exist.

Difference in way people are being treated by LAA

As set out above, there is a clear difference between the way in which practitioners who largely do legally aided inquest work, and those who mainly do work on conditional fee agreements who decide to apply for legal aid in particular cases, are being treated by the Legal Aid Agency. Frequent applicants tend to be treated more favourably, and know that certain methods will enable their application to be dealt with more quickly. This is wrong – legal aid should be accessible to all bereaved families and the process of application should be clear and transparent, with no requirement for "inside knowledge" or reliance on the fact that the person applying is familiar with the process.

Inquests for stillbirths

The Government announced in November 2017 that it was looking into enabling coroners to investigate stillbirths. The inequality of the separation between still birth and neo natal death is unacceptable. In most cases, the problem is not a single incident, but is rather a systemic failure. We urge the Government to enable coroners to investigate stillbirths. NHSR recognises birth injury as by far the largest factor in clinical negligence damages, and inquests into stillbirths would provide a valuable learning opportunity.

Representation in inquests into stillbirths would be key, to assist all parties to learn lessons from these deaths. The medical aspects will be complicated and the inquest will obviously be very emotional for the family.