

THE CORONERS' SERVICE

It has just been brought to our attention that the Justice Select Committee is taking evidence on how well the coroner system operates and if enough progress has been made since government reforms in 2009.

We apologise for the late submission of this letter which we would ask to be admitted to the Committee's considerations on this important issue.

We are the Victims Commissioner for England and Wales, Dame Vera Baird QC and Right Reverend Sir James Jones, formerly Bishop of Liverpool who led the Hillsborough Independent Panel and is the author of the report 'The patronising disposition of unaccountable power' setting out the experiences of how the authorities treated the victims and families of the Hillsborough Disaster. Together we are working to devise and promote a system to assure non-means tested legal advice and representation, where it is required by the families of deceased people who are the subject of an Inquest in which a public authority is an interested party.

We have read your call for evidence and believe that the need to assure public funded advice and representation in these cases falls within the remit of the following issues under consideration within your review:

- The Coroners Service's capacity to deal properly with multiple deaths in public disasters
- Improvements in services for the bereaved
- Fairness in the Coroners system

As Victims' Commissioner for England and Wales, Dame Vera Baird QC has statutory duties which require her to "promote the interests of victims and witnesses" and "take such steps as she considers appropriate with a view to encouraging good practice in the treatment of victims and witnesses". Whilst the attention of the Victims Commissioner is therefore required to this issue due to those duties, there is clearly an argument, by analogy, to anyone whose close family member has died whilst in the custody or care of public authorities, or where a public authority is involved in the circumstances of the death. In some of these cases it may not be known whether criminality is involved or, as with Hillsborough, not known for many years. There may be a criminal element with perhaps a potential for civil liability on a public authority for exacerbating or failing to alleviate risk. The death may have taken place in a mental health setting, in police or immigration custody or in prison. In other circumstances the death may have taken place where the role or responsibilities of public authorities are relevant to exploring how the death happened. The authorities may be interested persons in the inquest. The Victims' Commissioner thus supports Bishop James in seeking public-funded legal advice and representation for all families.

We make clear at the start that we are aware that the Government has conducted a Review of Legal Aid for Inquests and, in its final report in February 2019 said:

'We have decided that we will not be introducing non-means tested legal aid for inquests where the state is represented. However, going forward, we will be looking into further options for the funding of legal support at Inquests where the state has state funded representation. To do this we will work closely with other government departments'

We have to accept the decision not to introduce legal aid as set out above but we intend to argue for another fair system for the provision of public-funded legal advice and representation for bereaved families. We are unaware of the progress of the government's investigation of 'further options', although 18 months has passed since the report. We would

invite the Committee in course of this inquiry to seek to ascertain what has happened to that intention

Arguments for the right to free representation

Although inquests are intended to be inquisitorial not adversarial in concept, they become an arena where the accountability of the public body in question is tested. State bodies instruct legal teams and are unrestricted in the rates and quantum of funding and the level of representation. This is important as it is manifestly unfair that in current coronial proceedings, a bereaved family is reduced to mere bystanders, beholden to the coroner to ask questions they wish asked on their behalf, should the coroner agree to do so. By giving families the status of interested party, it is recognising them as participants, not merely onlookers.

There is no disrespect in our purpose to the role of coroner, but, however skilled and committed, it is not possible for a Coroner to enter into the in depth understanding of the facts and concerns of a family in the way that a lawyer may do, whose sole interest is to represent that family.

Reiterating that these are not adversarial proceedings and the coroner may ask questions on behalf of the family, a reason often offered to justify this position, is to isolate those who have suffered most, uniquely from the ability to be equipped to find out to their satisfaction and with their input what happened on their loved one and have their questions answered.

Families do not have automatic access to legal aid or other legal funding. Some "Article 2" inquests are more likely to be subject to legal aid funding for families either via a grant of 'legal help' which allows for pre-hearing advice or via exceptional case funding, for advice and representation before and at the Inquest Hearing. However, legal aid is not granted in every A2 inquest and many Inquests involve public bodies and the deaths are a significant cause of concern and of questions, yet those closest to the victim and who have suffered life-changing loss will not be legally aided and will not be able to afford to be represented.

As taxpayers, these families are likely to be contributing to funding the public bodies who may be responsible for their loved ones' death, yet they are being denied public funding for representation for themselves.

The Victims Commissioner is committed to ensuring that, in particular, victims of crime are given every assistance to: 'Cope and Recover' from what has happened to them. This is the overarching aim to which governments over many years have committed funding for victims' support services and which they have set out in the statutory Victims Code of Practice, the Victims Strategy and which is expected to be a central tenet of the proposed Victims' Law. In order to 'cope and recover' from the death of a loved one, it is well established that the bereaved need to know and to understand how their loved one met their death and to have all their questions answered and their doubts met.

By recognising families as 'interested parties' as the law does, there is a clear intention to allow them to participate. It is well-evidenced, not least of all by a paper from the Victims' Commissioner: "What Works for Victims" that procedural justice, involving being treated with decency and concern, apprised of all relevant developments, furnished with information, given skilled and professional support and allowing the fullest engagement possible in proceedings is a key part of the restoration process required for the cope and recovery of a victim of crime.

In their public paper in February 2019, the charity INQUEST lists the official reports since Lord Macpherson's in 1999 which have called for review or changes to the position for

families. Although the debate is often framed in terms of legal aid, the recommendations of these reports are essentially for non means tested public funding for legal representation at an inquest.

For example, the report of the Independent Review of Deaths and Serious Incidents in Police Custody by Dame Elish Angiolini concludes that there should be access for the immediate family to public-funded, non means tested legal advice, assistance and representation immediately following the death and throughout the inquest hearing. Sir Simon Wessely 's Final Report of the Independent Review of the Mental Health Act recommended that funding should be available for the families of those who have died unnaturally, violently or by suicide whilst detained.

Our approach

These circumstances give rise to two separate but related demands. One is that the state whose agencies are involved in the inquest should supply funding to provide for families to be represented where they wish to be. The second is that families should have access to legal funding on a similar scale to that of the relevant state authority. It is inimical for the state to furnish, via the relevant public agency's budgets substantial funding in a bid to safeguard public authority reputation and or liability yet provide no funding at all for those who have lost a loved one. There is a need for this imbalance to be address and ' a level playing field "to be provided and the human rights concept of "equality of arms" to be made available.

Bishop James' Report on the experience of the Hillsborough bereaved families included two points of learning covering this issue. One was that publicly funded legal representation should be made available to bereaved families at inquests at which a public authority is to be legally represented. The other was that the Government should identify a means by which public bodies can be reasonably and proportionately represented but are not free to use public money without restriction.

We also believe that public authorities should be told to moderate the cost of their legal advice and representation, which, particularly in cases where a number of authorities are involved, can be a massive cost of the public purse. In his report, Bishop James called on the government to identify a means by which public bodies can be reasonably and proportionately represented but are not free to treat public money as if it were limitless.

Working with the charity INQUEST and others, we intend to explore all options for funding legal advice and representation and how it might be administered. We are not re-opening the legal aid argument. We propose the establishment of a separate and specific fund, undoubtedly with its own criteria. It might possibly be retained and administered by the Ministry of Justice. Considerations that we currently have in hand include, following the fund's establishment, to require contributions to it from public authorities who choose to be represented at Inquests so that they will, at the same time, contribute to the fairness of the proceedings by sharing the cost of ensuring advice and representation and supporting the cope and recovery of families. This is a question of ensuring fairness for the proceedings and to those who they, as public servants exist to serve, not a question of making those at fault pay. We would therefore envisage that in an inquest where several public authorities are represented they will all contribute and that any contribution would be proportionate but not linked to any finding of fault implicit or express in the inquests conclusions. We emphasise that this is work in progress and the simple establishment of a specific fund without this element of 'clawback' may as accurately fit the need

We will continue to explore options to offer to government for restricting the amount spent by public authorities in protecting their interests and reputations and we will also examine

possible mechanism for requiring a levy on public authorities in this position to fund legal representation for bereaved families at the same level and quality as their own. By approaching them matter in that dual way, we would hope to minimise the extra cost of Inquest funding or families from the exchequer.

On timing, the Government is fully committed to responding to Bishop James' Report once the remaining Hillsborough trials are completed. They are expected sometime in the New Year. There is good reason accordingly to take forward the work across departments suggested in the Ministry of Justice's Final Report so that it can inform the Government's response to Bishop James' Report.

We seek the Committee's support that departments should be convened, initially at official level, to explore the proposal and to commission the work on costs/ departmental funding of the Scheme/ rates and logistics. Ministers should clearly be consulted.

We would be pleased to discuss this further with the committee and would welcome the Committee's views on this matter

Dame Vera Baird QC

Victims' Commissioner – England and Wales

Right Reverend Sir James Jones

Author: Patronising Disposition of Unaccountable Power

OUTLINE OF POSSIBLE PROPOSAL FOR CONSIDERATION ACROSS GOVERNMENT DEPARTMENTS

A possible way forward is to consider a ' Legal Funding Transfer Payment Scheme. Such a scheme could draw upon some elements of the Hillsborough Families Legal Representation Scheme (see attached background note). It could for example allow, where necessary, for funding for pathology or other expert evidence to be available, as recommended by Bishop James. But it need not follow all aspects of the Hillsborough Scheme. It could incorporate legal aid rates, and:

- would guarantee legal funding for bereaved families immediately following a death where a state authority is involved (as described above). The legal funding would carry through the inquest where the inquest is contested by the relevant public body;
- would be non means tested;
- the cost of the Scheme would be met by the relevant department. For example, the Hillsborough Scheme was funded by the Home Office, DHSC (as it now is) and the MoJ. These departments would be relevant to the proposed Scheme because the cases would include deaths in police custody, mental health trusts and prisons. But the range of Departments might be wider. For example, Bishop James referenced the Ministry of Defence;
- the Legal Aid Agency might provide professional advice (as with the Hillsborough Scheme); and
- A mechanism might be arranged to levy public authorities who are represented at inquests where families require advice and representation to contribute to the fund.

SUMMARY OF THE HILLSBOROUGH FAMILIES LEGAL REPRESENTATION SCHEME

Theresa May, when Home Secretary, met the Hillsborough families after the Hillsborough Independent Panel concluded in September 2012, but before the Attorney General's successful application to the High Court in December to quash the original inquests. She made a commitment to the families that the government would fund the families' legal representation at any fresh inquests, that this would be proper representation and not means-tested. After the High Court Hearing, the Home Office set up a Hillsborough Families Legal Representation Scheme, 'the Scheme'. The Department for Transport had established a dedicated scheme for the seven bereaved families of the 2002 Potters Bar rail disaster, the inquest was held in 2010.

The then Justice Secretary agreed that the Legal Aid Agency (LAA) would provide the Home Office with professional advice. Whilst the Home Office was the largest funder, the Ministry of Justice, plus the Department of Health and the Department of Culture Media and Sport also contributed, given their respective responsibilities for inquests, health services and sports grounds. The inquests were projected to last between 6 and 9 months, on opening the coroner projected a year, in fact they lasted 25 months.

There were 96 deceased at the Hillsborough disaster, allowing for split families just over 100 families were granted interested persons status and legally represented. The vast majority of families were represented by two firms of solicitors, although the scheme embraced six firms in total. Under the terms of the Scheme, all firms were required to work together and to avoid unnecessary duplication ensuring cost effective use of public resources. To reflect irreconcilable historic differences between families they were represented by two teams of counsel at the inquests. Again, the two counsel teams were required to cooperate, avoid unnecessary duplication and make cost effective use of public resources. The Scheme

ensured proper and comprehensive legal representation covering all aspects of proceedings. This included funded family experts, principally pathologists. It required that all families shared the same experts. The Scheme was a dedicated scheme and not a legal aid scheme. Each firm of solicitors was required to submit costed proposals and those of instructed counsel by way of detailed costed case plans in a set format. Proposals were carefully considered by the Home Office and the LAA. Case plans were reviewed on a regular basis and adjusted to reflect the status of the inquests and outstanding work. Spending peaked during the early stages of the inquests, reducing as phases were completed.

Lawyers submitted a separate, costed experts schedule. Family experts played a vital role in the inquests. The coroner's experts vigorously maintained the position set out by pathologists at the original inquests, i.e. upholding the 3:15pm cut-off that nothing could have been done to save the deceased supporters following that cut-off. Family experts equally vigorously argued the position put forward by the Hillsborough Independent Panel, i.e. had there been a more effective response by the police and ambulance service, a number of the 96 could have been saved. The coroner directed that the jury should not have to decide between his and the family experts and that they should therefore agree. During these discussions, the Scheme continued to fund the family experts. It would have been easy not to have done so. As a result, the family position was agreed and put to the jury.

This had a significant impact on the final conclusions.