

Judicial Review & Courts Bill: Joint Briefing for House of Lords Second Reading *INQUEST, JUSTICE and INQUEST Lawyers Group Steering Group*

04 February 2022

Introduction

1. INQUEST is the only charity providing expertise on state related deaths and their investigation. For four decades, INQUEST has provided expertise to bereaved people, lawyers, advice and support agencies, the media and parliamentarians. Our specialist casework includes deaths in prison and police custody, immigration detention, mental health settings and deaths involving multi-agency failings or where wider issues of state and corporate accountability are in question.
2. The INQUEST Lawyers' Group is a national network of several hundred lawyers who provide legal advice and representation to bereaved families – often acting pro bono where funding is unavailable – as well as promoting and developing knowledge and expertise in the law and practice of inquests.
3. In the last 10 years alone, INQUEST has actively worked on over 2,000 cases as they pass through inquest and investigation processes. Currently, we are supporting families on 472 cases. This briefing is informed by the experiences of these families and others we have supported over our 40 years of work. We recently gathered the views and experiences of the inquest system from over 50 bereaved families to inform our recommendations for change.¹
4. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.²
5. In 2019, JUSTICE established a working party, chaired by Sir Robert Owen with a diverse and highly experienced membership, to consider the weaknesses in the current arrangements for inquests and public inquiries. The working party gave particular attention to the experiences of bereaved people, who, instead of finding answers through the inquest process, are often left feeling confused, betrayed, and re-traumatised.³
6. The Judicial Review and Courts Bill Part 2 Chapter 4 proposes a series of reforms to coroners' courts to improve their efficiency in light of backlogs due to the COVID-19 pandemic. In this briefing, we outline key issues with this Bill ahead of its Second Reading in the House of Lords on 7 February 2022:

¹ INQUEST, Family Evidence Submission to the Justice Committee Inquiry on the Coroner Service, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=41a24ded-3add-4099-979a-ad8adf080789>, September 2020

² JUSTICE's previous briefings on the Judicial Review and Courts Bill for Committee Stage and Second Reading are available here: <https://justice.org.uk/judicial-review-and-courts-bill/>

³ JUSTICE, 'When Things Go Wrong: The response of the justice system', <https://files.justice.org.uk/wp-content/uploads/2020/08/06165913/When-Things-Go-Wrong.pdf>, August 2020

KEY ISSUES

- **End the inequality of arms for bereaved people at inquests.** The Judicial Review and Courts Bill misses the opportunity to put bereaved people at the heart of the inquest system by providing automatic, non-means tested public funding for bereaved people at inquests.
- **Clauses 38 and 39 risk increasing coroner’s discretion to discontinue inquests and investigations.** These provisions could result in important evidence not being tested and complex cases not being publicly scrutinised. It is essential that safeguards be added to these clauses to ensure proper investigation and scrutiny is permitted where necessary and the wishes of bereaved people are given weight.
- **Plans for remote inquest hearings and juries in clause 40 poses multiple issues.** We are concerned about the traumatic impact of remote inquest hearings on bereaved families and on the principles of accessibility, transparency, participation and open justice. Our view is that the Government is pushing ahead with plans for remote hearings in the absence of sufficient evidence on their possible impact on the system.

End the inequality of arms for bereaved people at inquests

7. The Judicial Review and Courts Bill does nothing to address the fundamental inequality of arms at the heart of the inquest process. The current funding scheme allows state bodies unlimited access to public funding for the best legal teams and experts while families often face complex and demanding funding application processes. Many are forced to pay large sums towards legal costs or represent themselves. Others must resort to crowdfunding.⁴
8. The case for public funding for bereaved people at inquests has been supported by Dame Elish Angiolini, Bishop James Jones, Lord Bach, two Chief Coroners, Baroness Corston, Lord Harris, the Justice Committee, the Joint Committee on Human Rights, the Independent Review of the Mental Health Act, the Westminster Commission on Legal Aid and from agencies including the Independent Advisory Panel On Deaths In Custody and the Independent Office for Police Conduct.⁵
9. This Bill presents a timely opportunity to positively shape the inquest system for bereaved people by establishing in law the principle of equality of arms between families and public authority Interested Persons (IPs).

⁴ See INQUEST’s detailed briefing on the need for an amendment to the Judicial Review and Courts Bill to introduce automatic non-means tested public funding for bereaved families at inquests, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=fb58abc4-3f60-4782-8e14-a88095a9f2f6>, November 2021. See also a letter from INQUEST and over 20 organisations to the Judicial Review and Courts Bill Committee to stress the importance of levelling the playing field at inquests and introducing an amendment on public funding, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=1befc9aa-6b75-4238-b86b-fa304d62b85c>, November 2021

⁵ See the timeline of official support for public funding at inquests here: <https://www.inquest.org.uk/legal-aid-for-inquests-timeline>

10. The Government's recent changes to the means test for inquests that qualify for Exceptional Case Funding are welcome but are limited and do not go far enough.⁶ Legal representation at inquests will continue to remain out of reach for many bereaved people, regardless of whether the conduct of state bodies is to be interrogated. Examples of these circumstances include healthcare-related deaths in detention, self-inflicted deaths of voluntary patients in mental health settings or under the direct care of a mental health trust in the community, deaths in supported accommodation or in care settings where the person has been placed by a public body or local authority.
11. Further, we refute the Government's suggestion made at Committee Stage in the Commons that wider funding entitlements for the bereaved would undermine the 'inquisitorial nature' of inquests. As Andy Slaughter stated at Committee Stage, it is 'simply a myth' to claim it is lawyers acting on behalf of families who make the inquest process less inquisitorial.⁷ In fact, we would draw the Government's attention to comments made by Sir Bob Neill, Chair of the Justice Select Committee, on the issue:

"The truth is ... it is not the purely old-fashioned inquisitorial system any more. The reality is that an adversarial and defensive nature has inevitably been brought into the legal proceedings by the legal representatives —acting on the instructions, of course, of the public bodies concerned."⁸

INQUEST and JUSTICE fully agree with this statement and have repeatedly evidenced it to be the case for bereaved families.⁹

12. INQUEST and JUSTICE are supporting three amendments to the Judicial Review and Courts Bill that together would make funding available for cases that would or may sit outside Exceptional Case Funding criteria but where actions of state bodies require scrutiny.

PROPOSED AMENDMENTS

INQUEST and JUSTICE support the introduction of the following amendments to this Bill:

Publicly funded legal representation for bereaved people at inquests

(1) Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows.

(2) In subsection (1), after "(4)" insert "or (7)." (3) After subsection (6), insert—

⁶ Government response to the Justice Committee report on The Coroner Service,

<https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/675/67502.htm>, September 2021

⁷ Judicial Review and Courts Bill, Committee Stage (compilation of sittings as of 18 November), page 357,

https://publications.parliament.uk/pa/bills/cbill/58-02/0152/PBC152_JudicialReview_1st-11th_Compilation_23_11_2021_REV.pdf, November 2021

⁸ Westminster Hall debate on The Coroner Service, October 2021,

<https://hansard.parliament.uk/Commons/2021-10-28/debates/F483FD31-8745-4031-90E7-AFFDBB421A48/TheCoronerService>, October 2021

⁹ See INQUEST's briefing on the Judicial Review and Courts Bill for Committee Stage,

<https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=fb58abc4-3f60-4782-8e14-a88095a9f2f6>, November 2021

“(7) This subsection is satisfied where—

(a) The services consist of advocacy at an inquest where the individual is an Interested Person pursuant to section 47(2)(a), (b), or (m) of the Coroners and Justice Act 2009 because of their relationship to the deceased; and (b) One or more public authorities are Interested Persons in relation to the inquest pursuant to section 47(2) of the Coroners and Justice Act 2009 or are likely to be designated as such.

(8) For the purposes of this section “public authority” has the meaning given by section 6(3) of the Human Rights Act 1998.”

Explanatory statement: This new clause would ensure that bereaved people (such as family members) are entitled to publicly funded legal representation in inquests where public bodies (such as the police or a hospital trust) are legally represented.

Removal of the means test for legal help prior to inquest hearing

(1) Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows. (2) In paragraph 41, after sub-paragraph (3), insert—

“(4) For the purposes of this paragraph, the “Financial resources” provisions at section 21 (and in The Civil Legal Aid (Financial Resources and Payment for Services) Regulations 2013 do not apply.”

Explanatory statement: This new clause would remove the means test for legal aid applications for legal help for bereaved people at inquests.

Eligibility for bereaved people to access legal aid under existing provisions

(1) Section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows. (2) In subsection (4)(a), after “family”, insert— “or where the individual is an Interested Person pursuant to section 47(2)(m) of the Coroners and Justice Act 2009 because of their relationship with the deceased.” (3) In subsection (6), after paragraph (c), insert—

“(d) or they fall within any of the groups named at section 47 (2)(a), (b) or (m) of the Coroners and Justice Act 2009.”

(4) Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is amended as follows.

(5) In paragraph 41, after sub-paragraph (3)(c), insert—

“(d) or they fall within any of the groups named at section 47 (2)(a), (b) or (m) of the Coroners and Justice Act 2009.””

Explanatory statement: This new clause would bring the Legal Aid, Sentencing and Punishment of Offenders Act 2012 into line with the definition of family used in the Coroners and Justice Act 2009.

Clause 38: Discontinuance of investigation where cause of death becomes clear

13. Clause 38 allows for the discontinuance of an investigation where the cause of death becomes clear before the inquest. This decision can be based on evidence which might change once tested and could have a significant effect on cases of deaths in the community

which are often viewed to be ostensibly from natural causes but where evidence may later emerge that would engage Article 2 of the European Convention on Human Rights (the right to life).

14. An investigation can currently only be discontinued if a post-mortem examination reveals the cause of death. Clause 38 drastically changes this – allowing investigations to be discontinued for an unlimited and undefined range of circumstances and evidence. Specific safeguards are required to mitigate the risks this introduces.
15. INQUEST and JUSTICE believe amendments to clause 38 are required to ensure investigations are not terminated prematurely where there may be evidence which could change once tested, or where relevant evidence may later emerge. Such evidence, and the accompanying investigations and inquests, could have a vital role in understanding the reasons for a death and in ensuring that failures of the state do not reoccur. Safeguards are necessary also to ensure the coroner has considered whether Article 2 is engaged and is satisfied it is not. Further, clause 38 must include safeguards to ensure the wishes of bereaved families are taken into account in the decision of the coroner, and that the family have an ultimate veto on the decision to discontinue an inquest.

PROPOSED AMENDMENTS

INQUEST and JUSTICE support the following amendments to Clause 38 of this Bill:

Clause 38, page 53, at end insert—

“(4) After subsection (2), insert—

“(2A) The coroner is not to decide that the investigation should be discontinued unless—

- (a) the coroner is satisfied that no outstanding evidence that is relevant to the death is available,
- (b) the coroner has considered whether Article 2 of the European Convention on Human Rights is engaged and is satisfied that it is not,
- (c) there are no ongoing investigations by public bodies into the death,
- (d) the coroner has invited and considered representations from any interested person known to the coroner named at section 47 (2)(a) or (b) of this Act, and
- (e) all interested persons known to the coroner named at section 47 (2)(a) or (b) of this Act consent to discontinuation of the investigation.”

Explanatory statement: this amendment would ensure that certain safeguards are met before a coroner can discontinue an investigation into a death.

Clause 38, page 53, at end insert—

“(4) After subsection (2), insert—

“(2B) If a coroner is satisfied that subsection (1) applies and has complied with the provisions at subsection (2A)(a) to (d), prior to discontinuing the investigation, the coroner must—

(a) inform each interested person known to the coroner named at section 47(2)(a) or (b) of this Act of the coroner's intended decision and provide a written explanation as to the reasons for this intended decision,

(b) explain to each interested person known to the coroner named at section 47(2)(a) or (b) of this Act that the investigation may only be discontinued if all such interested persons consent, and

(c) invite each interested person known to the coroner named at section 47(2)(a) or (b) of this Act to consent to the discontinuation of the investigation."

Explanatory statement: this amendment would ensure that family members and personal representatives of the deceased are provided with the coroner's provisional reasons for why the coroner considers that the investigation should be discontinued, to ensure that family members can make an informed decision as to whether to consent to the discontinuation.

Clause 38, page 53, at end insert—

"(4) Omit subsection (4) and insert—

"(4) A senior coroner who discontinues an investigation into a death under this section must—

(a) as soon as practicable, notify each interested person known to the coroner named at section 47(2)(a) or (b) of this Act of the discontinuation of the investigation and provide a written explanation as to why the investigation was discontinued, and

(b) if requested to do so in writing by an interested person, give to that person as soon as practicable a written explanation as to why the investigation was discontinued.""

Explanatory statement: this amendment would ensure that family members are informed in writing for the reasons for a discontinuation of an investigation, without being required to request this information.

Clause 39: Power to conduct non-contentious inquests in writing

16. Clause 39 gives coroners the power to hold inquests in writing where they decide a hearing is unnecessary. INQUEST and JUSTICE acknowledge clause 39 does provide some safeguards. However, we believe these are deficient. Of particular concern is the fact that clause 39 does not mention the need to consider the bereaved family's wishes in terms. The current drafting of clause 39 does not make it clear whether the family's wishes would constitute the 'reasonable grounds' needed for a coroner to decide against conducting an inquest in writing, leaving a wide discretion to individual coroners to determine whether 'reasonable grounds' for a hearing have been made out by a family.

17. At the early stage in the inquest process when many bereaved families are unrepresented while dealing with the impact of a death, and unaware of the purpose of an inquest and their rights in the process, it may be hard for them to argue in favour of an inquest hearing if other IPs or the coroner argue otherwise. Therefore, an amendment to clause 39 should be introduced to ensure that inquests are not held without a hearing if that is against the wishes of the deceased's family.

PROPOSED AMENDMENTS

INQUEST and JUSTICE support the following amendments to Clause 39 of this Bill:

Clause 39, page 54, after “hearing” insert—

“(e) the coroner has considered the views of any of the interested persons named at section 47(2)(a) or (b) of this Act who are known to the coroner, (f) all of the interested persons named at section 47(2)(a) or (b) of this Act who are known to the coroner consent to a hearing in writing.”

Explanatory statement: this amendment will ensure that inquests are not held without a hearing if that is against the wishes of the deceased’s family.

Clause 40: Use of audio or video links at inquest

18. Clause 40 would enable remote attendance at inquest hearings by amending the Coroners Rules to allow for hearings to be done either wholly or partly by way of electronic sounds or images. Clause 40 (2A) also sets out a provision to allow members of the jury to take part in a hearing virtually (with the jury present in the same place). JUSTICE supports the principle of increased use of technology in the form of remote proceedings. However, remote proceedings cannot be applied without restriction across the justice system and must be implemented only where appropriate with caution, prior evaluation, and suitable safeguards. INQUEST and JUSTICE are concerned about the potential impact of remote inquest hearings on families, as well as on the principles of accessibility, transparency, participation, and open justice.¹⁰
19. For some families, the experience of attending remotely from home has added to, rather than diminished, their distress. We believe amendments must be made to this Bill that would ensure the consent of families is sought by the coroner before a remote hearing is introduced.¹¹ It was urged by Conservative MP Sir John Hayes during Committee Stage of this Bill that the Government must think again about the impact of remote hearings on disadvantaged groups such as disabled people.¹² Remote hearings have also raised concerns about digital poverty and some families lack of access to the necessary technology. Despite amendments which would, *inter alia*, ensure family consent has been given prior to a hearing proceeding remotely, the Government voted such important changes down.

¹⁰ See page 9 onwards of our more detailed briefing on clauses 37, 38 and 39 of the Judicial Review and Courts Bill, <https://www.inquest.org.uk/Handlers/Download.ashx?IDMF=82aaf325-60a1-4cfc-9678-c164d299e191>, November 2021

¹¹ See amendments 74 to 79 tabled at Committee Stage on safeguards needed for remote inquest hearings, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/amend/judicial_review_day_pbc_1118.pdf, November 2021

¹² Judicial Review and Courts Bill, Committee Stage (compilation of sittings as of 18 November 2021), page 366, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/PBC152_JudicialReview_1st-11th_Compilation_23_11_2021_REV.pdf, November 2021

20. The Government must also be asked to produce evidence to support the changes included in clause 40, or be asked to conduct further research and consultation with bereaved families into the implications of remote hearings prior to enacting clause 40.

PROPOSED AMENDMENTS

INQUEST and JUSTICE support the following amendments to Clause 40 of this Bill:

Clause 40, page 54, after “place” insert –

“(2D) Coroners rules that provide for the conduct of hearings wholly or partly by way of electronic transmission of sounds or images must specify that, other than for any pre-inquest hearing, such a hearing, may only be held if –

- (a) all interested persons known to the coroner named at section 47(2)(a) or (b) of this Act 2009 consent to such a hearing,
- (b) the coroner is satisfied, and continues to be satisfied until the conclusion of any such hearing, that such a hearing is in the interests of justice, considering all the circumstances of the case,
- (c) the coroner has considered the likely complexity of the inquest, and
- (d) the coroner has considered the ability of interested persons known to the coroner to engage effectively with the hearing by way of electronic transmission of sounds or images.”

Explanatory statement: this amendment would ensure that certain safeguards are met before a remote inquest hearing is held.

Clause 40, page 54, after “place” insert –

“(2E) Coroners rules that provide for the conduct of hearings wholly or partly by way of electronic transmission of sounds or images must require coroners to set out to all interested persons the reasons for why such a hearing, other than for any pre inquest hearing, is to be held—

- (a) at the conclusion of any pre-inquest hearing where any such hearing is ordered, if applicable, and
- (b) in writing as soon as practicable after a decision has been taken for such a hearing to be held and prior to the commencement of the hearing.”

Explanatory note: this amendment would ensure that interested persons are provided with the reasons for any remote inquest hearings.

Clause 40, page 54, at end insert—

“(2B) Coroner rules that provide for the conduct of hearings wholly or partly by way of electronic transmission of sounds or images must not allow the conduct of hearings wholly or partly by sound only.”

Explanatory note: the purpose of this amendment is to prevent an inquest from being conducted by telephone or other means which are audio only.

Clause 40, page 54, after “place” insert –

“(2F) Coroners rules that provide for the conduct of hearings wholly or partly by way of electronic transmission of sounds or images must provide for such hearings to comply with, and be subject to, Rule 11 of The Coroners (Inquests) Rules 2013 (Inquest hearings to be held in public).”

Explanatory note: this amendment would ensure that remote inquest hearings and pre-inquest hearings are still held in a manner accessible to the public.

Clause 40, page 54, after “place” insert –

“(4) Before this Clause may be commenced, the Lord Chancellor must – (a) commission an independent review, including a consultation, of the potential impact of the conduct of inquest hearings wholly or partly by way of electronic transmission of sounds or images, considering in particular the impact on the participation of interested persons, and open justice, (b) lay before Parliament the report and findings of such independent review, and (c) provide a response explaining whether and how such issues which have been identified would be mitigated.”

Explanatory note: this amendment would require a review, including a consultation, of the potential impact of remote inquest hearings before Clause 40 comes into effect.

Conclusion

21. Overall, INQUEST and JUSTICE have concerns clauses 38, 39 and 40 will further entrench inconsistency in coroners’ courts by increasing the level of a single coroner’s discretion. They could also exacerbate the difficulties faced by bereaved families who are not eligible for legal aid during the inquest process, making it all the more important that an amendment be brought forward to finally bring equality of arms to inquests and provide automatic, non-means tested public funding for bereaved people where the state is an Interested Person. At Committee Stage in the Commons, the Minister acknowledged the importance of safeguards for the coroners provisions of this Bill, but implied the Chief Coroner’s guidance would address some of these issues.¹³ INQUEST and JUSTICE believe this is not good enough – such important safeguards on the wishes of bereaved families need to be included on the face of the Bill.

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Further resources

[INQUEST and JUSTICE briefing for Report Stage of the Judicial Review and Courts Bill](#)

[INQUEST briefing for Second Reading of the Judicial Review and Courts Bill](#)

¹³ Judicial Review and Courts Bill, Committee Stage (compilation of sittings as of 18 November 2021), page 370, https://publications.parliament.uk/pa/bills/cbill/58-02/0152/PBC152_JudicialReview_1st-11th_Compilation_23_11_2021_REV.pdf, November 2021

[INQUEST briefing for Committee Stage of the Judicial Review and Courts Bill: public funding for bereaved families](#)

[INQUEST briefing for Committee Stage of the Judicial Review and Courts Bill: clauses 37, 38 and 39](#)

[Joint INQUEST letter to the Judicial Review and Courts Bill Committee on funding for bereaved families at inquests](#)

[INQUEST briefing, Now or never! Legal aid for inquests](#)

[INQUEST written submission to Justice Committee inquiry on coroners service](#)

[INQUEST family submission to Justice Committee inquiry on coroners service](#)

[INQUEST written submission to Justice Committee inquiry on the future of legal aid](#)

[JUSTICE Judicial Review and Courts Bill, House of Commons Second Reading Briefing \(Part 2\)](#)[JUSTICE Judicial Review and Courts Bill, House of Commons Committee Stage Briefing \(Part 2 - Coroners\)](#)

[JUSTICE written evidence, The Coroner Service Justice Committee Inquiry](#)

[JUSTICE, When Things Go Wrong: the response of the justice system](#)