Parliamentary debate on legal aid for inquests – 10 April 2019

Against the backdrop of mounting evidence of injustice, there are growing calls for automatic non means tested public funding for legal representation for families following state related deaths, in order to "level the playing field" and provide access to justice for all. On 10 April 2019, this issue was debated in Parliament.

What's the issue?

The purpose of the debate was to identify the current issues bereaved families face in accessing the truth through the inquest process, particularly in those inquests which occur in relation to state-related deaths. These include issues accessing legal aid to secure legal representation, and the arduous and complex means testing process which this entails. In identifying and voicing the current difficulties, it is hoped that change will happen.

Many of the speakers in the debate expressed their concerns for families facing this stressful task, commenting on: the invasive requests made of family members by the Legal Aid Agency (LAA) about their financial circumstances, in the midst of processing their grief; the inherent need to understand complex human rights law to satisfy eligibility for Exceptional Case Funding (ECF); and the lack of legal representation for those who cannot afford it in a process that is unfairly weighted in favour of the state – despite claims that it is 'non adversarial'.

This highlighted the fundamental flaws of the current system in which state bodies have the resources to instruct the best legal representation in order to protect their interests, while bereaved families fight for recognition and a voice. The positive impact that wider access to public funding would have was also acknowledged: if a fair inquest take place, it is much more likely that the acts and omissions that led to the death will be exposed and become part of the preventative solution for others.

In response to the speakers, the (then) Parliamentary Under-Secretary of State for Justice, Lucy Frazer MP, spoke of the Government's work towards improving this process. In discussing this, she explained what has already been done to improve the system:

- For cases involving a death in custody, the procedural duty on the state under Article 2 ECHR is automatically triggered and therefore the starting presumption is that the criteria will be met for the ECF scheme;
- The LAA, as a result, will have the power to disregard the means-testing process entirely; and
- It was confirmed that only the individual applicant themselves will be considered in the financial means-test, and no longer their family members.

In the future, with further reviews and more discussions, there are plans to: link the LAA to banks and Her Majesty's Revenue and Customs (HMRC), so that the LAA can automatically assess whether an individual satisfies the means test without the need to fill in long and complex forms; allow the LAA to backdate the Legal Help waiver; launch a campaign with the purpose of raising awareness about the availability of legal support more generally; and to

explore further avenues to improve funding issues, including communication with other government.

Frazer stressed the importance of legal aid and the process in relation to state deaths, but commented that "legal aid is only one part of the jigsaw"; it is essential that the whole system is assessed and improved in order to deliver access to justice.

An "unfair and unjust" system

A common theme running through the discussion was the "inequality of arms" that exists at state-related inquests between the state and bereaved families. The current system is weighted disproportionately in favour of the state: while the resources for state bodies are often seemingly unlimited, families seeking answers regarding their loss often face an uphill struggle to secure adequate levels of funding. The inherent difficulties in successfully satisfying the current tests for funding have left many to represent themselves in court or turn to the generosity of others, for example through crowd funding their legal costs. Stephanie Peacock MP (LAB) stated that "the system is simply unfair".

Peacock described the discrepancy in funding for legal representation in inquests into deaths in 2017 "a disgrace": according to figures obtained by INQUEST, where the Ministry of Justice (MOJ) spent £4.2 million on legal representation for the Prison & Probation Service, the families of those who died were granted only a fraction of this in legal aid - just £92,000.

Marie Rimmer MP (LAB) highlighted the current trend for families to fund their own legal representation in inquests. Another difficult situation emerges when families pool their resources and solicitors end up having to represent huge numbers of individuals collectively; for example, in the inquests into the deaths caused during the Hillsborough disaster, a single solicitor was tasked with representing the interests of over 90 families. In order to prevent an arms race between the interested parties, it was suggested that "like-for-like spending" is applied to both state bodies and the families involved.

An overly complex system

Inquests do not fall within the main body of legal aid provision, and as such, funding is only available under the ECF provisions which were introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO). Tim Loughton MP (CON) labelled ECF applications "complex and time-consuming", due to the need to understand human rights law, and the ability to justify why Article 2 ECHR (the right of life) is engaged or why it is an issue of wider public interest in order to obtain a grant of funding. In closing, he explained that the system needs to be automatically in favour of families, instead of "putting further obstacles in the way of securing justice and access to the truth".

The demand on individuals to understand complex legal terminology and human rights law is restrictive towards those who deserve funding for legal representation. The Law Society agrees that the application for ECF is "highly complex and time consuming, and requires the applicants to have an understanding of human rights law". In addition to this, as Peacock commented, families must navigate many other complex issues "such as access to and release of a body, post mortems, communication with investigation teams, securing evidence and criminal investigations." To expect a family to go through this process whilst they are grieving for their loss is cruel and unrealistic.

Gloria De Piero MP (LAB), shadow Justice Minister, referenced a case involving five men who were killed when a wall collapsed at a recycling plant. Not only did the families of these men not speak English and lacked an understanding of the legal system, but there was an evident public interest; however, they were denied legal aid. The families were faced with the prospect of crowdfunding to cover the costs of their legal expenses, before their appeal was heard and legal aid was granted – but only after the inquest had already started.

Other speakers drew on evidence from those who had suffered through the system who explained the damage it had on them, labelling it as "incredibly stressful", "a source of anger and hurt" and "very damaging". Others who were not successful in securing funding described the inquest process as "the most terrifying thing [they've] ever done".

Adversarial or inquisitorial?

Victoria Prentis MP (CON), a former Government lawyer, stated that in her experience inquests were inquisitorial. Where the state invested great financial expenses into the inquest itself, she argued that it was more often than not to protect Government secrets, rather than to harm the families involved or to prevent the access of justice and truth. She accepted though that "inquests themselves are horrible", and hearing the evidence of a loved one's death is very difficult. She highlighted her experience of coroners as highly trained and very sensitive. While it is evident families need more support with the process, she suggested that "there might be better people than lawyers to provide it".

Voicing dissent, Andy Slaughter MP (LAB) explained that "not all coroners treat families well in those situations, not all lawyers acting for state agents behave well, and not all witnesses tell the truth". Peacock also highlighted this, arguing that hearings are rarely inquisitorial, but rather "adversarial, law-drenched, distressing journeys" where "families are silenced". This was mentioned in many of the speeches, with those arguing that while inquests ought to be inquisitorial by nature, the dynamics of the inquest are adversarial because of the imbalance between bereaved families and the legal dominance of state bodies. It is imperative that families have access to legal representation so that they can gather information to ensure this process is inquisitorial.

Review of legal aid for inquests – February 2019 report

In July 2018, the MOJ announced a call for evidence as part of its review of legal aid funding for inquests. Peacock (LAB) labelled the submission document "erroneous" and said that it failed to take the subject seriously.

Additionally, at just six weeks, the timescale for providing evidence was much shorter than generally given for government consultations, and it was suggested that this afforded insufficient opportunity for those with direct experience of the system and its flaws to provide their feedback. In the final report published in February 2019, the MOJ apparently opted to dismiss the evidence provided and failed to implement changes to the current means-tested process for obtaining legal aid for inquests.

Slaughter put this down to the fact that the review coincided with the more general post-implementation review of LASPO, and thus, the pertinent questions concerning inquests were lost in the broader review. The charity INQUEST, who provides much-needed expertise on

state related deaths through their work with bereaved families, lawyers and support agencies spoke out on the Government's inaction, labelling it as "a betrayal of those who invested in this review in the hope of securing meaningful change".

Prentis (CON) disagreed with the suggestion that the review was deliberately timed so as to overshadow the discussion over inquest funding, contending instead that the timeframe was adhered to so as to ensure the review would fit with the timeline of the legal aid review more generally.

Learning from failings and improving things for the future

One of the most pressing concerns driving the debate in favour of non means tested funding revolved around the concept of improvement. Justin Madders MP (LAB) spoke of the need for bereaved families to be involved in the process, with proper representation, to ensure that lessons are learnt. He referenced the case of Rita Cuthell, who sadly died when an ambulance call made via a community alarm service failed to be prioritised correctly. It was through proper understanding, and a willingness to learn, he said, that improvements have been made to the procedures since.

Ruth George MP (LAB) also highlighted that families can provide necessary input to help coroners correctly identify the facts and recommend strategies to avoid mistakes in the future. Through proper legal representation, it is more likely that the facts teased out will prevent further suffering and loss. It is necessary that these lessons are learnt and that needless loss is not repeated under similar circumstances, both for the families involved and for the wider public.

In conclusion, the debate brought to light real stories and persuasive evidence from those who are being failed by the current system. It was consistently highlighted that bereaved families require the support and advice of legal representatives within a system that is weighted heavily in favour of the state. While the improvements that Frazer spoke of are a step in the right direction, however, in the interests of justice there is a desperate need for immediate progress to be made. In the words of INQUEST, it is now or never.