

## **SUBMISSION FROM KRW LAW LLP**

### **MINISTRY OF JUSTICE**

#### **Review of legal aid for inquests: call for evidence**

#### **KRW LAW LLP**

**27<sup>th</sup> August 2018**

KRW LAW LLP (KRW) is a solicitor's practice located in Belfast. KRW provides specialist knowledge and skills in all aspects of litigation relating to the Legacy of the Conflict in Northern Ireland (NI).<sup>1</sup> This work covers the provision of both legal help and legal representation at Legacy inquests and inquiries, public law challenges by way of judicial review arising thereon and claims for civil liability breaches relating to the actions of state agents and agencies during the Conflict including tortious breaches.

We are one of the law firms instructed in the matter of both The Birmingham Pub Bombing Inquest 1974 and The Guildford Pub Bombings Inquest 1974.

#### **Introduction**

We note the comments of the Joint Committee of Human Rights in its Report Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019):

"71. A number of high profile reports published in 2017 have all concluded that bereaved families should be given non-means tested funding for legal representation at inquests."

The Chief Coroner for England and Wales (now Coroner to the Birmingham Pub Bombings 1974 Inquest) made the following recommendation in his Annual Report 2016 – 2017 (November 2017):

"185. The Chief Coroner therefore recommends that the Lord Chancellor gives consideration to amending the Exceptional Funding Guidance (Inquests) so as to provide exceptional funding for legal representation for the family where the state has agreed to provide separate representation for one or more interested persons."<sup>2</sup>

We note the recommendation of the Joint Committee of Human Rights in its Report Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019):

"74. While inquests are theoretically inquisitorial, in practice they often have a more adversarial nature. It is extremely difficult for families of the deceased to participate effectively without legal representation, leading to inequality of arms and consequent concerns about fairness, access to justice and compliance with the procedural requirements of Article 2 ECHR. *If inquests are to remain inquisitorial, families must be given non-means tested funding for legal representation at inquests where the state has separate representation for one or more interested persons. Consideration should be given as to funding models that might be employed, such as whether there should be a requirement on public bodies to pay a proportion of their own legal costs to fund families' representation.*"

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<sup>1</sup> The Troubles refers to a violent thirty-year conflict framed by a [civil rights march in Londonderry on 5<sup>th</sup> October 1968](#) and the [Belfast/The Good Friday Agreement on 10<sup>th</sup> April 1998](#). At the heart of the Conflict lay the constitutional status of Northern Ireland. The Troubles is accepted as a colloquial and euphemistic term whilst Conflict describes the international recognition of the period. <http://www.bbc.co.uk/history/troubles>

<sup>2</sup> We welcome the recent revisions to The Lord Chancellor's Guidance

It should be made clear that public funding for the legal representation of the families of victims of The Hillsborough Stadium Disaster 1989 was not made under the legal aid scheme for inquests but by way of direct funding from the Home Office.<sup>3</sup> It has been made clear – at least to the families of the victims of the Birmingham Pub Bombings 1974 represented by KRW – that such an arrangements will not be repeated and that provision under LASPO 2012 will suffice in complex multi-death inquests.<sup>4</sup>

### **The Human Rights Framework**

The introduction to the Review provides a *partial* description of the parameters of Article 2 ECHR framework (3) (7) (22(a)) relating to inquests in England and Wales. For example, at (2) ‘Coroner’s investigation and inquest’ it is noted that:

“(2) There may be preparatory hearings which take place before the action inquest itself. If the death may have involved a breach of the deceased’s ‘right to life’ under Article 2 of the European Convention of Human Rights (ECHR), the coroner will additionally establish in what circumstance the deceased came by his or her death.”

KRW contend that this statement requires clarification and further interpretation in order to expose the complexities involved here.

First, the statement identifies a tension between UK domestic law and jurisprudence and ECHR law and jurisprudence as articulated by the European Court of Human Rights (ECtHR). In short, that the exact purpose or scope of a human compliant investigation when Article 2 has been breached or violated is not yet settled in either domestic law or ECHR law. Inevitably there will be case specific dimension to the scope or purpose of an examination of circumstances but core criteria remain to settled with the jurisprudence which regulates these investigations, which in the UK are conducted by way or an inquest or statutory inquiry.

Second, the pre-inquest review hearings (PIRH), described in the Review as preparatory hearings, in which a Coroner will received and hear submissions as to the scope and purpose of the inquest, is a core part of the inquisitorial process in determining whether the inquest will be human rights compliant investigation in accordance with the positive procedural elements demanded under the jurisprudence of Article 2 ECHR (and Article 3 ECHR when surviving victims apply for Interested Person Status as per the 7/7 inquests in England and in the Kingsmills Inquest in Northern Ireland).<sup>5</sup> An Article 2 is currently described as a *Middleton* inquest. The former Chief Coroner draws no distinction between a *Middleton* and a *Jamieson* inquest, which perhaps signals a shift in policy in these matters.

Third, from the Coroner’s decision on the scope of the inquest (at present described as a *Middleton* inquest) and the engagement of Article 2 compliance, will run the legal funding decision for

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/564737/Home Of fice Spend - Bereaved Hillsborough Families Legal Representation Costs September 2012 - June 2016 CSV.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/564737/Home_Of_fice_Spend_-_Bereaved_Hillsborough_Families_Legal_Representation_Costs_September_2012_-_June_2016_CSV.csv/preview)

<sup>4</sup> In a meeting with the former Home Secretary Amber Rudd and in correspondence between Amber Rudd and Julie Hambleton, the sister of Maxine Hambleton who died in the Birmingham Pub Bombings 1974 and who has instructed KRW.

<sup>5</sup> And with a mind to recent developments in the jurisprudence regarding the extent of the Article 3 positive procedural investigatory obligation: *DSB and NVD*. In 1) *DSD*; 2) *NBV Claimants - and - The Commissioner of Police for the Metropolis* [2014] EWHC 436.

Exceptional Case Funding (ECF) (this is recognised at page 18 of the Review at (1) – (6)) if the Coroner makes a decision or ruling that the inquest investigation will be Article 2 compliant and therefore require legal aid under the ECF schema of the Legal Aid Agency (LAA) for relatives of the victims who apply for Interested Person (IP) status.

KRW contends that an investigation (and we stress the inquest is an investigation in the sense that when Article 2 is engaged following a breach, violation, failure by commission or omission and is accepted as being engaged by the Coroner, the inquest becomes the mechanism through which the state discharges its accepted Article 2 investigatory obligation following breach) in which the circumstances of the death or deaths are to be examined means that first, the circumstances of the deaths will be to be proscribed with the (partial) agreement of the Coroner and the Interested Persons (IPs) and second, the definition of circumstances remains to be settled in both UK domestic law and jurisprudence and ECHR law and jurisprudence despite its apparent settled interpretation in the legislation.

It should also be noted that if the Coroner decides or rules to undertake an Article 2 inquiry or investigation then the scope of the investigation will remain open to review and interpretation dependent on the evidence adduced.

The review of the scope of an Article 2 ECHR inquest being dependent on the evidence adduced is something of a conundrum in that the evidence to be adduced will in part be dependent on the investigatory parameters to be pursued given the initial ruling or decision on scope.

This is where the assistance of the families of the victims – the Next-of-Kin – can serve an additional useful role (if aided by legal representation) in contributing to the process whereby evidence is sought and adduced.

The relatives of the victims may expect, demand or want as broad a scope as possible in order to examine all the available evidence.<sup>6</sup> That expectation or demand may be based on the parameters of initial disclosure (or rumour and suspicion) which in turn will be set in part by the initial decision or ruling on scope (and the relatives of the victims ability to interrogate the evidence that has been and will be disclosed at its earliest possible opportunity - including during the preparatory stages of the inquest- whether Article 2 ECHR compliant or not) and their ability to interpret and understand that disclosure which maybe technical, forensic, specialist.

As the Review identifies, the point of arriving at a decision or ruling on the engagement of Article 2 ECHR is a key point in the inquest process for families in both contributing to that decision-making process of the Coroner (page 18 (5)) and the onward scope and shape of the inquest and what can be achieved in terms of its conclusions and recommendations, including possible criminal (or civil) proceedings.

What the Review omits to consider is the requirement under the Article 2 ECHR jurisprudence for effective participation by the relatives of the victims when Article 2 ECHR has been accepted as being engaged by a Coroner and in the process of informing that decision which therefore leads to an Article 2 ECHR compliant investigation.

Effective participation is part of the language of the Article 2 (and, we would suggest, Article 3) ECHR law and jurisprudence and was usefully addressed by Katie Gallop QC in her written evidence to the

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<sup>6</sup> This will especially be the case when in an historic multi-death inquest when the surviving family members may only have this opportunity for a human rights compliant investigation into the death of their loved one(s).

Joint Committee on Human Rights Inquiry Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019) (AET0044).<sup>7</sup>

First, Katie Gollop QC notes that:

*“First, coroners are making wrong decisions about whether the inquest should be Article 2. They often make the decision at an early stage and at a hearing where the next of kin is not represented. That means the only legal submissions the coroner hears are made by Interested Persons who want to keep the focus as narrow as possible. Without access to legal advice, it is almost impossible for next of kin to understand the significance of Article 2 or the law on the issue. If they make submissions, those submissions are unlikely to be on point. If the family don’t understand the significance of Article 2, they are unlikely to challenge the decision that the inquest should not be Article 2. If a coroner makes a decision that an inquest is not Article 2, s/he often fails to review that decision and unrepresented families do not know that they can ask again. Lawyers are used to “pushing back” and renewing submissions. Unrepresented next of kin assume that the coroner must be right and give up as soon as the coroner is against them.”*

Second, she notes that:

*“An Article 2 compliant inquest requires “effective” participation of the Next-of-Kin. There is no statutory right to representation at inquest. Does effective participation mandate that the state pays for representation at inquest? On rare occasions, it does not. Representation will add little where: a) the circumstances of the death are straightforward b) there has already been a full and open reliable, independent investigation (or more than one) which lays bare all the facts and which has reached conclusions agreed by all Interested Persons.*

*We need to work towards a society in which the Coroner can rely heavily on the investigations undertaken by the state prior to inquest. See below. The default position should be that representation of Next-of-Kin at an Article 2 inquest is paid for by Legal Aid.”*

There are considerable benefits if the Next-of-Kin are represented. Procedural hearings are smoother and quicker, irrelevant questions are avoided, the coroner is assisted by Next-of-Kin legal submissions so the full range of case law is drawn to the court’s attention and there is greater balance. In a non-paragraph 22 inquest where Next-of-Kin have protected characteristics to do with race or disability, the Next-of-Kin will often struggle more than in other tribunals where the emotional factors are less potent. It is difficult for coroners to liaise directly with next of kin in the absence of other Interested Persons for reasons of fairness. It is difficult and sensitive for the coroner to explore such issues with the next of kin at a court hearing which is open to the public and attended by all the other Interested Persons.

And, arguably, representation of next of kin is necessary to comply with the Equality Act 2010 and its Codes. That legislation does not have legal force in itself but Courts are required to take it into account.”

Third, Katie Gollop QC, identifies failings in the ECF scheme of the LAA system for legal aid of inquests in that:

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<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Human%20Rights%20Joint%20Committee/Enforcing%20Human%20Rights/written/80710.html>

“Some exceptional funding applications are refused when they should be granted. The only remedy against a refusal is judicial review. Legal Aid for judicial review is very limited. And the judicial review is forbidding to a litigant in person.

The application process for exceptional funding is slow and often, literally, inaccessible. I am told that it can take an experienced solicitor (longer for a non-lawyer) at least two days, if the system doesn't crash, to upload an application form onto the computer. Then it can be days before the information is considered and a decision given.

Where a coroner will not adjourn, the slow pace of the process to decide whether to grant exceptional funding means that a decision is not made until the inquest is up and running.

Rightly or wrongly, the perception is that the process for applying for exceptional funding and the slow pace are deliberate and that the purpose is to deter applications and thereby conserve the Legal Aid budget. The more cynical view is that the state's aim in minimising next of kin representation at inquest is to avoid public criticism of state bodies and thus avoid having to make compensation payments.”

KRW concur with these points made by Katie Gollop QC. In addition, she addresses a concern which has been recently highlighted in the Birmingham Pub Bombings 1974 Inquest and is currently subject to litigation before the Court of Appeal relating to the point we have made regarding the interpretation of the circumstance of a death or deaths and this relation of circumstances to the scope of that inquest where there have been previous state-lead or sponsored investigations. K

Katie Gollop QC notes:

“The inquest is not the only mechanism for enforcing Article 2 rights. Thorough, reliable, fair and independent internal investigations by state agencies prior to inquest should leave little for the coroner to do. *But the reality is that we are not there yet*” (emphasis added)

This is an important point where there has been a flawed or partial prior investigation and a state agency continues to have an investigatory role where it was responsible for those flaws, for example the role of the West Midlands Police in investigating the Birmingham Pub Bombings 1974 which lead to the conviction of the Birmingham Six and a miscarriage of justice.

An inquest which is compliant with the Article 2 ECHR procedural requirements (including in the Equality of Arms and independence – within the prism of Article 6 ECHR rights) would ensure that any appearance of bias attaching to a prior state agency lead or sponsored investigation would be effectively managed by an independent law officer.

This point also goes to core principle that one of the roles of the Article 2 ECHR inquest is to restore confidence in The Rule of Law through dispelling pervasive rumour and suspicion that may attach to previous flawed investigations where there is an appearance or actual or perceived impunity of actions leading to death either within a criminal or tortious series or set of circumstances.

Also on prior state investigations, Katie Gollop QC notes that:

“Further, state agency investigation reports have the limitation, from an Article 2 inquest perspective, that they focus on the internal workings of that agency in isolation. So each of them leaves out of account what is often the single most important factor (or at least one of them) leading to a multi-agency death namely deficient inter-agency communication. If an agency's investigation does consider

interagency working, it is often from a partisan perspective. That will be for a variety of reasons: ignorance (due to lack of opportunity for a multi-agency communication to share information), pressure to report quickly, practical difficulties and – given that there may well be a compensation claim in the background – a conscious or unconscious desire to spread the culpability and thereby the cost.”<sup>8</sup>

As we have noted, once an inquest has been ruled or decided by a Coroner to be conducted in a manner compliant with Article 2 ECHR (*Middleton*), then the inquest investigation must be undertaken in compliance with the procedural demand established through the jurisprudence on Article 2 ECHR in both UK domestic law and jurisprudence and of the law and jurisprudence of ECHR and interpreted through the ECtHR.

It is important – in the context of the present legal aid for inquests Review – to reiterate the principles of an Article 2 ECHR investigation (as they are set now but mindful that they are subject to continued dynamic judicial interpretation – as the ‘living instrument of human rights’ enforcement as noted by the Joint Committee on Human Rights in its recent Report (HC 669 HL Paper 171) (2017 – 2019)):

- the state must act of its own motion;
- there must be a sufficient element of public scrutiny;
- there must be sufficient involvement of the Next-of-Kin;
- the investigation must be independent;
- it must be effective; and
- it must be reasonably prompt.<sup>9</sup>

It is clear that elements of these requirements are inter-linked and that they are not stand-alone requirements:

In all cases the Next-of-Kin of the victim must be *involved* in the procedure. This is subject to an important qualification: that the right of involvement is not absolute but is “to the extent necessary to safeguard his or her legitimate interests”.

KRW would contend that the legitimate interest of the Next-of-Kin are protected by legal representation (as defined within the present Review) if any state agency or agency or agencies (and we would add any employee federation or union) insists on a right to legal representation to protect their interests (be they legitimate or not). As Katie Gollop QC noted in this context, there should be a presumption that in order for the family to play an effective part in the investigation (to effectively participate), it will often be the case that legal representation, or more particularly state funding for legal representation, will be required.<sup>10</sup>

KRW contends that this requirement is the realisation of effective participation by the Next-of-Kin in the inquest investigation into the circumstances surrounding the death of their loved one(s). Effective participation - involvement - by way of legal representation is *ipso facto* a method through which public scrutiny (for example the interrogation of the evidence adduced through disclosure or by

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<sup>8</sup> KRW suggest that the MOJ consider the analysis of Katie Gollop QC and our point above regarding prior ‘investigative integrity’ further in light of the proposed ‘Hillsborough Law’ Public Authority (Accountability) Bill 2016-17:

<https://services.parliament.uk/bills/2016-17/publicauthorityaccountability.html>

<sup>9</sup> Distilled from *Jordan v UK* [2003] 37 EHRR 2

<sup>10</sup> See for example *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 at paragraph 62.

witnesses') and independence (key in an Article 2 ECHR process of investigation where there has been a violation or breach of the right of life where the state is involved by commission or omission – a flawed investigation) by way of assisting the Coroner through articulating the investigatory demands of the Next-of-Kin.

This assistance to the Coroner through the legal representation of the Next-of-Kin is complimentary to the independent investigation of the Coroner herself and goes to the inquisitorial nature of the inquest as stressed within the Review as assistance (adducing and testing evidence for example) is a non-contentious mechanism contributing to the investigation.

The expression of this causal link is a way in which effectiveness of participation is achieved and how the Next-of-Kin can reflect both the public concern and the public interest in maintaining the integrity in the Rule of Law. It is also an expression of the Right to Truth of the relatives of victims of Article 2 ECHR violations.<sup>11</sup> Therefore, in terms of the present ECF for inquests legal aid schema, KRW contends that Article 2 compliance equates with the wider public interest determination currently required by the LAA if the wider public interest includes maintaining the integrity of the Rule of Law.

Subject to the contested proviso that effective participation – involvement of the Next-of-Kin – is subject “to the extent necessary to safeguard his or her legitimate interests” this must be examined in the context of the ability of others to effectively participate, particularly, state agencies (for example a police force) and professional employee federations and unions (for example the Police Federation) and how this provision of legal representation is funded. We would also include survivors in this equation.

The anomaly is that in an Article 2 ECHR inquest the Next-of-Kin may only be granted legal representation by way of ECF at the discretion of the Director of the LAA in accordance with the Lord Chancellor’s Exceptional Funding Guidance (as amended), whereas state agencies can decide which public funding source will be used to resource legal representation on their behalf to protect their interests (whether legitimate or not) in the name of the public interest (as publically accountable authorities),<sup>12</sup> when in fact as important point to the inquest is reflecting the public interest in allaying public concern when the integrity in the Rule of Law is in question because of apparent or real impunity.

KRW understands the position that an inquisitorial process may satisfy the Article 2 ECHR procedural demands described above in *Jordan* by way of the Coroner articulating the legitimate interests of the Next-of-Kin but this position is unsustainable in terms of the balance between effective participation – involvement – public scrutiny - independence and effectiveness as required under the law and jurisprudence of the ECHR and the demands to protect the interests of state agencies.

KRW contends that there are two solutions to this anomaly around state agency involvement and accountability within the inquest process.

First, that in an Article 2 ECHR inquest there is a *presumption* that the Next-of-Kin have legal representation as soon as the Article 2 (all the surrounding) circumstances have been identified as being in any possible breach or violation having been engaged, as proposed by Katie Gallop QC and others, including the Chief Coroner. This should at the preparatory stage in addition to any substantive investigation.

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<sup>11</sup> See for example the jurisprudence being developed by the ECtHR on foot on *El Masri v FYR Macedonia* (Application no. 39630/09) 12<sup>th</sup> December 2012

<sup>12</sup> We refer you to the Hillsborough Law proposal Note: 7 above

Therefore, an independent person should direct the allocation of legal aid for legal representation for all those applying for Interested Person Status including Next-of-Kin and state agencies. This would remove the contentious issue of ECF under LASPO 2012 and the role of an Executive Agency of the State (LAA) and the discretion of an individual civil servant (The Director of the LAA).

In first instance the Coroner making the decision or ruling should have the powers and authority to grant funds for legal representation. Her decision should be challengeable to the Senior Coroner or Chief Coroner and thereon to a High Court Judge and be subject to judicial review (see further below). There should be no ouster clause given the fact human rights issues (note section 6 of The Human Rights 1998) are engaged. This would remove executive authority and power from the process as presently 'devolved' to the LAA as an agency of the Executive.

Second, if there is a reasonable or probable likelihood of section 1 of the Inquiries Act 2005 being triggered (public concern) and/or issues of National Security (including international relations) arising, then the Coroner should make a ruling or recommendation that the inquest becomes a statutory public inquiry (subject to amendment to section 19(2) of the Inquiries Act 2005 regarding restriction notices – thus removing the threat of Executive power from the process).

The relationship between inquests and inquiries has been considered at length but, from the point of view of KRW, not satisfactorily resolved. There is, of course, a case-by-case assessment to be undertaken in each instance or circumstance (which in part will be determined by previous investigations).

There are, of course, differences in structure and purpose (including constitutional purpose) and the possibility of contentious 'closed proceedings' in which to hear and assess sensitive material touching upon National Security or international relations.

However, the House of Lords Report Select Committee on the Inquiries Act 2005 and the Government response need examination on these points and KRW suggests the Review undertakes a broader assessment in this regard in terms of its evidence base and criteria.<sup>13</sup>

We note particularly the view of Sir Stephen Sedley and LIBERTY in their evidence to the House of Lords Select Committee on the relationship between inquests and inquiries.

The House of Lords Select Committee noted:

"91. We received evidence from Liberty supporting the need for a statutory inquiry in instances where the coronial system is not engaged: "wherever there are human rights allegations involved there should always be a statutory inquiry if there is not an inquest." *The most important contributory factor when deciding whether to hold an inquest or an inquiry into the circumstances of a particular death*

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<sup>13</sup> <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/14302.htm>

and

[https://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA\\_Written\\_Oral\\_evidencevol.pdf](https://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf)

and [https://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/Cm8903\\_Government%20response%20to%20HL%20Committee%20on%20the%20Inquiries%20Act%2005\\_260614\\_TSO\\_Print.pdf](https://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/Cm8903_Government%20response%20to%20HL%20Committee%20on%20the%20Inquiries%20Act%2005_260614_TSO_Print.pdf)



*seems to us to be whether wider areas of public concern are present, or policy issues which require examination.*

92. Where public concern extends significantly beyond a death itself to wider related issues, *an inquiry may be preferable to an inquest. If such issues emerge in the course of an inquest, consideration should be given to suspending the inquest and appointing a senior judge as chairman of an inquiry under the Inquiries Act 2005.* [Emphasis added]

KRW contend that given the criteria above, the transition from an inquest to an inquiry – or an inquiry in preference to an inquest in first instance dependent on circumstances and public interest – would be that either a Coroner, Senior Coroner or Chief Coroner could make that recommendation to either an independent judicial officer (for example High Court Judge) or, as was suggested in evidence to the House of Lords Select Committee, by transferring the power to set up an inquiry to Parliament, for instance via a motion in either House, or a new independent body as a statutory authority such as a Permanent Commission of Inquiry or a quasi-statutory authority such public truth commission (at 101 and 102).

In any event an independent law officer or statutory body to oversee and decide on the inquest-inquiry form of investigation when human rights issues are engaged would ensure the necessary degree of independence to satisfy ECHR standards and prevent interference (actual or perceived) by the Executive, either directly by a Minister (who we agree is accountable to the legislature through Parliamentary scrutiny) or indirectly by a discretionary decision of a Civil Servant in terms of the provision of public funding for legal representation, as in the current policy and practice through the ECF schema whereby the Director of the LAA is charged with this decision-making role.

We agree with the House of Lord Select Committee that “A decision on a request by a coroner for an inquest to be converted into an inquiry should always be the subject of reasons.” (At 112)

The importance of providing reasons is important because whatever system is in place to determine a) the nature of an Article 2 ECHR human rights compliant investigation be it by inquest or statutory inquiry and b) the decision as to whether public funding for both legal help and legal representation is made available to the Next-of-Kin when a human rights violation of breach either by commission or omission or with prior knowledge going to preventability of systemic failing resulting directly or indirectly to the violation or breach of after the event in terms of a previous state led or sponsored investigation that decision on form and that decision of funding must be subject to challenge by way of judicial review.

Again, KRW note recent UK government concerns regarding the use and (apparent) abuse of judicial review in England and Wales. Nevertheless, judicial review remains a necessary and satisfactory mechanism, indeed the only mechanism, for independent judicial oversight of decision-making effecting individual citizens.

Therefore, a judicial review challenge to a decision as to form or funding must be subject to judicial review and not subject to ouster or limitation and be enabled by legal representation in the matter of human rights issues, including matters requiring challenge arising from an inquest or statutory inquiry

KRW note the anomaly within the present system regarding decisions and rulings of Coroner’s in that legal representation for judicial review applications is not subject to the same ECF criteria as for the inquest to which the challenge emanates from and therefore legal representation for the judicial review of a Coronal decision is subject to stricter merits and means rules, regulations and criteria being applied by the Director of the LAA which can ultimately defeat the application for judicial review

at its earliest stage as the applicant is starved of legal representation because of the many well-known factors around costs, fee arrangements insurance and *pro bono* and default reliance upon private means or public subscription such as Crowd Justice.

The apparent interference of the Director of the LAA in making decisions as to merits of judicial review applications has been criticised by the judiciary.<sup>14</sup>

## Conclusions

KRW can summaries its position thus:

- When there has been a human rights violation or breach that engages the positive procedural investigatory demands of Article 2 ECHR (or Article 3 in the case of a Survivor of such a breach of violation) then there must be a presumption that the Next-of-Kin, at the earliest stage of the identification that there are circumstances demanding investigation (including questions over prior state agency led or sponsored investigation), will be provided with legal help and legal representation by legal aid and that this must be provided on the recommendation of the decision-maker
- In the present instance that will be the recommendation of the Coroner making the decision that the investigation will be Article 2 ECHR compliant
- In the present instance the Director of the LAA would have no discretion to make refusal either on the grounds of means or merits or the wider public interest but to endorse the decision or ruling of the Coroner
- The decision or ruling of the Coroner on both form and funding will be subject to judicial review by an IP to the proceedings (including state agencies). In the case of the Next-of-Kin legal representation will be provided legal aid
- Whilst it is accepted that the inquest is an inquisitorial and not adversarial investigation of facts concerning all the surrounding circumstances of the death(s), if the inquest investigation proceeds as being Article 2 compliant then legal representation must continue to be provided as above in order to satisfy the procedural demands for both effective participation by the Next-of-Kin (involvement through their own interrogation of the evidence by way of legal representation) and independence in terms of providing a supplementary form of assistance for the Coroner.
- This is particularly where state agencies continue to protect their interests (whether legitimate or not) by way of legal representation at public expense. The Next-of-Kin in effect are assisting the Coroner by way of the provision of an additional level of independence in the conduct of the investigation through their own interrogation of the evidence which is adduced and by way of representations on that adducement and disclosure.
- The Next-of-Kin therefore represent public concern whilst the Coroner represents the public interest. Both protect the integrity of the Rule of Law.
- In effect the role of the LAA in relation to the public funding of Article 2 inquests would be greatly reduced. In any event the *de facto* presumption would be that legal representation will be provided when there has been a breach or violation of Article 2 (or Article 3) and the

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<sup>14</sup> See: *R (Gudanaviciene and Others) v The Director of Legal Aid Casework and Others* [2014] EWCA Civ 1622.

circumstances – including previous investigations and systemic failures before and after the breach or violation – have been identified as being in need of investigation at the preparatory stage of the Coronial investigation.

KRW ask the Review to take account the comments of the Joint Committee on Human Rights in its recent Report Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019).

KRW asks the Review to take account of the Report of the House of Lords Select Committee on the Inquiries Act 2005 regarding the subject of this Review of legal aid for inquests and the wider proposals of removing funding for inquests from the jurisdiction of the Director of the Legal Aid Agency for England and Wales entirely and into an independent inquest and inquiry (quasi)-statutory body either within the judiciary or by way of a Commission. This would have the benefit of ensuring independence from the Executive.

KRW would ask to Review to take account of the Report of the House of Lords Select Committee on the Inquiries Act 2005 regarding decisions relating to forms of human rights compliant investigations when Article 2 (or Article 3) has been breached or violated and the circumstances identified at the preparatory stage of an independent judicial review (as opposed to a prior state agency led or sponsored investigation) in the UK by way of inquest or inquiry from the prism of ECHR law and jurisprudence (both domestic and ECtHR).<sup>15</sup>

Finally, KRW would ask the Review to consider the Public Accountability Bill within the context of this Review of legal aid for inquests.

#### **FOR IMMEDIATE CONSIDERATION**

- That there is a presumption that any human rights violation which has led to death(s), could have been prevented by the intervention of an agency of the state or there was a systemic failure (by omission or commission) by a state agency resulting in death(s) or failure to investigate following death(s) engages the public interest in addition to any ECHR (Article 2 or 3) rightd
- During the preparatory stage of an inquest should there be an indication (reasonable or probable) that Article 2 ECHR will be engaged then Legal Help will be made available immediately by the Director of the LAA without reference to either means or merit under until a final decision or ruling on Article 2 form or public interest is made by the Coroner or by another judicial means
- Once a decision or ruling has been made that an inquest will be conducted in accordance with the human standards demanded following a breach of violation of Article 2 ECHR then ECF will be provided by the Director of the LAA without reference to either means or merits
- Following a decision or ruling that an inquest will be not be conducted in accordance with the human standards demanded following a breach of violation of Article 2 (or Article 3) ECHR or will be conducted but limited in terms of scope as to the interpretation of circumstance made by a Coroner then legal help will be provided by the Director of the LAA without reference to either means or merits until the decision of the Administrative Court (QBD) of the Permission Stage has been determined. **ENDS**

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<sup>15</sup> And also amendment to the Inquiries Act 2005 removing Restriction Orders under section 19.

## **APPENDIX**

### **MOJ QUESTIONNAIRE**

Question 1: 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.

If an inquest is to be considered as engaging Article 2 ECHR or commences as being Article ECHR compliant then legal help and legal representation should be made available without recourse to means or merits being applied, assessed or tested by an Executive agency of the government.

This would apply also to inquests which commence as engaging the wider public interest out-with Article 2 ECHR (or other human rights engagement)

Question 2: 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.

See answer to (1) above

Question 3: 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?

We refer you to work of INQUEST in this matter.

Question 4: 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?

See the inquest into the death of Zane Gbangbola

Question 5: 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?

We refer you to the extensive representations made by the family of Zane Gbangbola on his behalf

Question 6: 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? Please provide details.

We refer you to work of INQUEST in this matter.

Question 7: In your experience, is Article 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?

Yes. The Birmingham Pub Bombings 1974 (see also Legacy inquests in Northern Ireland). See also the inquest/inquiry into the death of Alexander Litvinenko and the shootings of both Azelle Rodney and Mark Duggan

Question 8: Where applications for legal help and / or legal representations are refused, does the LAA give clear reasons for this decision?

Decisions are given by the LAA but from the point of view of the Applicant they are not clear. We refer you to the Joint Committee on Human Rights Report Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019):

“42. One of the main problems is the complexity of the system. The Legal Aid Agency claims that individuals can apply directly for ECF without the assistance of a solicitor, but those submitting evidence to the inquiry, such as the Public Law Project, told us that the forms are extremely complex and almost impossible for most individuals to complete themselves:

‘None of these forms is designed for completion by a person who is not familiar with the legal aid scheme. They are all designed to be completed by legal aid providers who have detailed knowledge of the legal aid contract and relevant Regulations.’

43. A further barrier to take-up is that legal aid providers are not paid for compiling, completing and submitting applications on behalf of potential clients. Richard Miller from the Law Society told us:

‘Lawyers say that it takes a good three to four hours minimum to complete the application forms here. That is work for which they are not entitled to be paid. Most lawyers feel that they cannot do this work. They cannot afford to do those many hours of unpaid work.’

*44. The Exceptional Case Funding scheme was expected to support up to 7,000 cases per year, whereas in reality it only funds hundreds of cases. Urgent reform is needed to ensure that human rights cases are properly supported and therefore to ensure meaningful and effective access to justice. The LASPO review should consider how to remove barriers to accessing Exceptional Case Funding where this is needed to secure effective enforcement of human rights. This should include ensuring simplification of the application process, and access to legal advice and assistance (legally aid funded where necessary) to navigate complex legal process forms.”*

Question 9: Are there any ways in which the LAA can provide greater clarity regarding their decision-making?

See answer to Question 11 above. The LAA should not engage in merits testing on the application of legal principles. See *R (Gudanaviciene and Others) v The Director of Legal Aid Casework and Others* [2014] EWCA Civ 1622.

Question 10: 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 refer you to work of INQUEST in this matter.

Question 11: 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.

The definition of ‘wider public interest’ should at its core equate with maintaining integrity in the Rule of Law and avoiding the appearance of condoning impunity and be an expression of a right to truth. To base the wider public interest test on a real or sufficient benefit is too subjective to be applied by a decision-maker employed by the Executive. If a law-officer, such as Coroner, has decided or ruled, or is minded to decide or rule, that the wider public interest is engaged, then there would be no need for a benefit criteria as the result of the investigation/inquiry will be result produce a benefit either in terms of onward action (for example a recommendation for another police investigation or referral to a prosecutor) or by way of a narrative verdict or Report to Prevent Future Deaths.

Question 12: 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?

We refer you to work of INQUEST in this matter.

Question 13: 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.

Katie Gollop QC answered this question succinctly in her evidence to the Joint Committee on Human Rights Report Enforcing Human Rights (HC 669 HL Paper 171) (2017 – 2019):

“There are considerable benefits if the Next-of-Kin are represented. Procedural hearings are smoother and quicker, irrelevant questions are avoided, the coroner is assisted by next of kin legal submissions so the full range of case law is drawn to the court’s attention and there is greater balance. In a non-paragraph 22 inquest where next of kin have protected characteristics to do with race or disability, the next of kin will often struggle more than in other tribunals where the emotional factors are less potent. It is difficult for coroners to liaise directly with next of kin in the absence of other Interested Persons for reasons of fairness. It is difficult and sensitive for the coroner to explore such issues with the Next-of-Kin at a court hearing which is open to the public and attended by all the other Interested Persons. And, arguably, representation of next of kin is necessary to comply with the Equality Act 2010 and its Codes. That legislation does not have legal force in itself but Courts are required to take it into account.”<sup>16</sup>

“Rightly or wrongly, the perception is that the process for applying for exceptional funding and the slow pace are deliberate and that the purpose is to deter applications and thereby conserve the Legal Aid budget. The more cynical view is that the state’s aim in minimising next of kin representation at inquest is to avoid public criticism of state bodies and thus avoid having to make compensation payments.”<sup>17</sup>

Question 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?

By listening to the needs of the relatives of the victims.  
By working with groups (such as INQUEST) who enable the needs of victims to be articulated.  
To listen to the recommendations of those who engage with the coronial process.

Question 15: In your opinion, do inquests where the state has legal representation meet the criteria used to determine the need for a financial means test?

NO

Question 16: 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.

NO – see the case of Zane Gbangbola

Question 17: For cases where the bereaved family has legal representation, do you feel their lawyer(s) are effective in representing the family’s interest? Please give examples where possible.

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<sup>16</sup>

<http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Human%20Rights%20Joint%20Committee/Enforcing%20Human%20Rights/written/80710.html> at paragraphs 24 and 25

<sup>17</sup> Ibid at 32

It should be noted that lawyers representing the bereaved at inquests are accountable to a) their clients who provide instruction b) their duty to the Coroner c) their professional obligations to the Law Society of England and Wales or the Bar Council of England and Wales.

The inquest is a public process and therefore the lawyer is performing a public role. Granted the present concerns regarding legal aid for inquests – and hence this Review – lawyers are constrained to the extent of performing their role to the best of their ability on behalf of those they represent often *pro bono* or with uncertainty over fiscal remuneration given that legal aid is not payable on account but way of interim or staged payments or on conclusion of the inquest and subject to taxation.

Question 18: In your experience, what impact does the number of lawyers representing the state have on the experience of the bereaved family?

Inevitably it will appear to the family – and others – that the inquest is less inquisitorial and more adversarial (which impacts upon their own legal representation) because of publically funded lawyers representing state agencies (at their expense) when often it is the actions or inactions of state agencies and agents that are at issue in the inquests (or the failure of prior investigations lead or sponsor by the same state agencies). As Kate Gollop QC notes: “The more cynical view is that the state’s aim in minimising next of kin representation at inquest is to avoid public criticism of state bodies and thus avoid having to make compensation payments.”<sup>18</sup>

Question 19: 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.

Yes – and what interests are being represented or protected.

Question 20: 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?

We refer you to work of INQUEST in this matter.

Question 21: Do you consider that the MoJ Guide meets the needs of bereaved people? If not, what do you suggest?

That should be answered by those bereaved families who rely upon the MoJ Guide. If no response is received to this question then the MoJ must assume that both its Review and the MoJ Guide have failed in purpose.

Question 22: Have you found any other information useful? If so, please can you give details.

See response to Question 2 above.

Question 23: What else do you think could be done to support bereaved families better throughout the inquest process?

Introduce a presumption that legal help and legal representation will be available to the relatives of victims in inquests when Article 2 ECHR is engaged and/or where the wider public interest is engaged

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<sup>18</sup> Ibid at 32

without reference to either means or merits by subjective tests being applied by an unaccountable officer of Executive agencies.

Introduce a presumption that legal representation will be made available to the relatives of victims in inquests when Article 2 ECHR is engaged and/or where the wider public interest is engaged and where a decision or ruling of a Coroner merits challenge by way of judicial review enabling a decision to the point of permissions to be made.

Question 24: Is there anything else you would like us to consider?

We refer you to our main Report above.

**ENDS**



