



CHIEF CORONER

GUIDANCE No. 40

COUNSEL AND SOLICITORS TO THE INQUEST¹

1. In judge-led inquests or those where a judge has been appointed as an assistant coroner, it is usual for a legal team to be appointed including Counsel to the Inquest (CTI) and often a solicitor to the inquest. In such cases, which often involve lengthy and complex hearings, the team of counsel and solicitors will usually be chosen by the judge.
2. This Guidance is not concerned with such inquests being heard by judges, in which the make-up of the legal team will be a matter for the judge concerned. It is to assist a coroner (whether senior, area or assistant) in dealing with inquests that, by their very nature, may require the instruction of a barrister or solicitor to act as CTI and/or the instruction of a firm of solicitors to act at the coroner's direction.
3. The use of CTI by coroners is well-established and is analogous to the role of counsel to a public inquiry. Similarly, the use of a firm of solicitors to assist a coroner is well-established. In *R v Secretary of State for Northern Ireland, Ex Parte Devine and Breslin* [1998] 14 NIQB 10, Carswell J accepted that it had been proper for CTI to have been appointed and to have led questioning of witnesses. In *R (Plymouth CC) v HM Coroner for Devon* [2005] 1 Inquest LR at [10], Wilson J commented approvingly on the instruction of CTI.²
4. The purpose of this Guidance is to help coroners with their approach to the use of such lawyers in circumstances where their instruction is in contemplation.
5. Those inquests with features such as the following may justify the instruction of CTI and/or the use of solicitors to assist the coroner (although this list is not exhaustive):
 - Complexity;
 - Novel points of law;
 - Multiple Interested Persons with legal representation;
 - Large numbers of witnesses;
 - Disputed / complex expert evidence and factual issues;

¹ The Chief Coroner wishes to thank Jonathan Hough QC and Tim Suter for the first draft of this Guidance.

² The role was recognised in the DCA Briefing Note on Coroners Service Reform (February 2006). It is acknowledged in *Jervis on Coroners* (14th ed.) at [11-29] to [11-30] and in *Dorries on Coroners' Courts* (3rd ed.) at [7.117] to [7.119], as well as in para. 24 of Schedule 3 to the Investigatory Powers Act 2016.

- Voluminous and/or complex documentation;
 - National security concerns, materials covered by the Regulation of Investigatory Powers Act 2000 / Investigatory Powers Act 2016 and other sensitive materials giving rise to special difficulties (police firearms operations, terrorism, foreign cases);
 - Letters of request for evidence from jurisdictions outside the UK;
 - Special measures for vulnerable witnesses;
 - Adversarial subtext;
 - Lengthy or very complex jury inquests;
 - Long duration of the inquest; and
 - A mass fatality incident involving Disaster Victim Identification (DVI) processes
6. In some cases, CTI and/or solicitors may need to be Developed Vetted (DV cleared) in order to review material which may raise national security concerns. DV cleared counsel and solicitors may be used for the discrete task of reviewing such material even in cases which do not otherwise require the instruction of external lawyers (see Chief Coroner's Guidance No.30, para 28).
7. Coroners may use CTI or a team of solicitors to assist them in different ways. In particular:
- A coroner may instruct CTI to provide advice or submissions on specific points (e.g. to draft submissions on a difficult point of law arising at a pre-inquest hearing).
 - Alternatively, CTI may be instructed to assist more generally, in preparing for and conducting the inquest hearing on behalf of the coroner (including leading the examination of witnesses).
 - A coroner may instruct solicitors either from their local authority legal services department or from an appropriate law firm to assist with particular tasks. Such tasks may include review of documents; preparation of material for disclosure to Interested Persons; correspondence; and/or dealing with lay and expert witnesses.
 - A coroner may also use counsel in a junior support role for some cases where that junior counsel has supported the coroner in managing the documents, disclosure, liaison with other counsel and taking a detailed and accurate note of key parts of evidence during the process to feed into later witnesses' questions.
8. It will be a matter for the coroner to decide what forms of assistance are needed and who should provide them.
9. In cases where CTI or solicitors are instructed, the choice of barrister or solicitors is that of the coroner, but they will wish to have regard to factors such as: accreditations, experience, directory entries, security clearance, technical/specialist skills, recommendations, fee structure, accessibility, geographical location and any other matters of relevance to the close working relationship that will develop. It is usually sensible for the coroner to meet CTI personally before instructing them.
10. In cases where a barrister is instructed as CTI, the barrister should ordinarily be instructed via that local authority's legal department. As indicated above, the solicitors may be asked to assist the coroner with other tasks as well.

11. In accordance with Regulation 7 of the Coroners Allowances, Fees and Expenses Regulations 2013, the coroner should notify the relevant local authority of the unusual expenditure to be incurred by the instruction of CTI and/or solicitors. The coroner should provide sufficient and updated information about the likely costs to be incurred based on hourly rates/brief fees provided, so that the local authority can budget and settle fee notes and invoices in a timely way. It is sensible to agree with CTI and solicitors how frequently they will invoice in order to assist the local authority with budgeting.
12. The decision for the instruction of CTI and/or solicitors is ultimately for the coroner. The coroner does not need the permission of the funding local authority to do so as it is a judicial decision. The instruction of CTI and/or solicitors carries a cost which may be significant. From the coroner's perspective it would therefore be prudent to secure in writing the funding local authority's agreement to meet the costs and for this to be sent to CTI / solicitors.
13. An inquest which uses CTI and/or solicitors often also bring other expenditure due to their complex nature which the local authority will need to fund for example a website, recording and transcribing, alternative venue etc. Coroners should ensure that there is appropriate communication with the local authority on these points.
14. If CTI and/or solicitors are instructed, the responsibility for the investigation and inquest still remains that of the coroner. The coroner marshals the evidence, lists the hearing and deals personally with all associated matters in readiness for the inquest. The coroner has primary responsibility for the questioning of the witnesses throughout, no matter what the duration of the hearing is. The coroner may delegate administrative functions but may not delegate judicial functions: Regulation 7 of the Coroners (Investigations) Regulations 2013 (which reflects a general public law principle).
15. However, there is nothing improper about a coroner instructing CTI to provide assistance and to examine witnesses on their behalf, provided that the coroner retains overall control of proceedings and takes the judicial decisions. A coroner has a general power to rule on matters of procedure not specifically governed by statutory rules, subject to public law principles of fair procedure.³ The Courts have held that this extends to the use of assessors⁴, and to a general power to "allow anyone to question witnesses".⁵ Provided that the coroner retains overall control and a right to ask questions in addition to those of CTI, there is no question of improper delegation in that regard.
16. Instruction of CTI and/or solicitors may bring the following practical benefits, to set against the costs:
 - The ability of CTI to talk to other counsel (or solicitor to other solicitors) is advantageous as it can narrow the issues, reduce the number of documents/witnesses and reduce the length of the inquest accordingly;

³ See *R v North Humberside Coroner, Ex Parte Jamieson* [1995] QB 1 at 26; *R v HM Coroner for Lincoln, Ex Parte Hay* [2000] Lloyd's Rep Med 264 at [46]; *R (Coker) v HM Coroner for Inner South London* [2006] 1 Inquest LR 98 at

⁴ See *R v Surrey Coroner, Ex Parte Wright* [1997] QB 786; *R (Khan) v Secretary of State for Health* [2004] 1 WLR 971. The Chief Coroner is not aware of Coroners sitting with assessors in recent years, and legal assessors have largely been abandoned in favour of CTI and/or solicitors to the inquest.

⁵ See *Ex Parte Wright* (footnote 2 above) at 796; *R v Derby Coroner, Ex Parte Hart* (2000) 164 JP 429 at [68] and [99].

- Efficient allocation of resources (in that the coroner can concentrate on the hearing without distraction);
- Relieving work pressure on the coroner's officer and coroner's administrative staff;
- Allowing the investigation and inquest to proceed as expeditiously as possible;
- Promoting the ability of informal discussions with advocates that the coroner cannot hold directly;
- Reduced exposure to a Judicial Review and/or complaint with the associated costs (that may be more than the costs of CTI).

17. At the inquest, CTI and/or solicitors can advise and assist with:

- The management of pre-inquest review hearings (including decisions on the scope of the inquest, Article 2 engagement, whether a jury is required and the designation of Interested Persons);
- Securing and marshalling the evidence;
- The process for and disclosure of evidence, including the need for redactions;
- Bundling (and advice on the format of bundles);
- Selection of witnesses (evidence to be adduced under Rule 23 or giving evidence in person);
- Selection and instruction of experts;
- Public Interest Immunity issues (PII);
- Special measures (anonymity / screening);
- Practical considerations including whether evidence should be heard remotely, what CCTV / BWV should be used in court, etc;
- Witness schedule; and
- Other matters of relevance on the law and procedure.

18. At the inquest CTI will sit in court with the other advocates and family members / representatives.

19. Under the direction of the coroner, CTI and a solicitor as necessary may:

- advise and assist with the coroner's opening;
- prepare documents for use in the inquest, such as a chronology;
- examine witnesses by asking questions on behalf of the coroner before other Interested Persons (see Rule 21, Coroners (Inquests) Rules 2013);
- read statements under Rule 23;
- advise on any legal issues and procedure arising from time-to-time and make submissions in open court in respect of such issues;
- act as a bridge between the coroner, the family, other Interested Persons and advocates by liaising with each of them and assisting the smooth running of the inquisitorial procedure;
- advise on the coroner's summing up to a jury, any questions for their consideration and route to conclusion, if required, together with the framing of any narrative conclusion or questionnaire in contemplation.

20. After the inquest hearing CTI and /or solicitors can assist by advising on the process for and content of Prevent Future Death Reports and by advising on archiving of documents, post-inquest disclosure issues, etc.

21. There are some important boundaries which regulate the conduct of CTI and/or solicitors:

- Where CTI provides guidance to the coroner on potentially contentious issues of law or on significant and potentially contentious points of procedure, that guidance should either be given by way of submissions in open court or, if it is first given by way of advice directly to the coroner, it should usually be repeated in open court before the coroner has committed to a decision. This is because a court or tribunal should not determine contentious issues on the basis of private submissions.⁶ It is likely that the coroner will want to hear submissions on these issues from other Interested Persons in open court at that time as well.
 - There are some functions which by statutory provision are reserved to the coroner and which therefore a coroner could not ask CTI to perform (e.g. directing the jury as to law and summing up the evidence – see Rule 33).
 - Because submissions made by CTI are made from an independent viewpoint, they should reflect CTI’s honest view of the correct legal position, rather than “instructions” given by the coroner.
 - As should be obvious, any rulings of the coroner must represent the coroner’s own judicial decision. While a coroner may accept submissions of CTI and may receive assistance with the drafting of a ruling, it is important that the coroner always exercises independent judgment and takes responsibility for all rulings.
22. During or after the inquest, if there is an actual or potential challenge by way of Judicial Review or otherwise, a lawyer acting as CTI can advise more expediently and economically than if counsel is instructed for the first time to advise on the challenge. In such a situation, the advice of counsel on the actual or potential challenge would be privileged and would not have to be made public.⁷
23. As explained above, CTI and any solicitor instructed are independent and not responsible for the decision-making process - the decisions made are those of the coroner. In most cases, it will not be appropriate for an assistant coroner in the coroner area to perform the role of CTI.

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⁶ See *Nwabueze v GMC* [2000] 1 WLR 1760 at 1775D; *Public Inquiries (2nd edn, ed Beer)* at [4.94]; *Dato Tan Leong Min v Insider Dealing Tribunal* [1999] HKC 83; *R (Clarke) v Chairman of the Magnox Public Inquiry* [2019] EWHC 3596 (Admin).

⁷ See *Three Rivers DC v Bank of England* [2005] 1 AC 610 at 650G-651B (Lord Scott, at [37]).