

# Coronial investigation of stillbirths

British Pregnancy Advisory Service response to government consultation  
June 2019

The British Pregnancy Advisory Services (BPAS) is a British reproductive healthcare charity that offers pregnancy counselling, abortion care, miscarriage management, contraception and STI testing to 85,000 women each year via our clinics in England, Wales, and Scotland.

We advocate for women's reproductive choice, the provision of accurate and balanced information, and the right to make their own choices about their bodies and treatments including during pregnancy and birth.

## 1. Do you think coroners should have a role in investigating stillbirths?

**No.**

We understand and support the aims of greater independence and transparency into investigations of unexpected stillbirths, as well as the aim to reduce stillbirths by 50% by 2030. These are exceptionally distressing for women and parents, and we recognise that some parents feel that the investigations into their stillbirth have not been either sufficiently independent or reflective of their experience – and have not provided the closure they need, particularly when that relates to poor care.

However, we have serious concerns about the impact such an extension of coronial remit could have on both the care and autonomy of pregnant women and the experience of parents.

The reason why stillbirths thus far have not been covered by coronial jurisdiction is that until an independent breath is taken, a baby is not legally considered an independent person but an entity which is bound up entirely with that of its mother. The consultation document states it is the Government's view that there is "no difference in principle between an inquest into the death of a recently born baby and that of a stillborn baby" and for that reason the consent of the mother for a coronial investigation is not necessary. While emotionally true for many parents, this fundamentally misunderstands the legal status of a baby which demised while within its mother. This lack of independent personhood is reflected by existing law where there is a distinction between infanticide or murder of a new-born baby versus child destruction of an unborn baby, and by the fact that a stillborn child is not issued with a birth or death certificate.

As such, the introduction of coronial powers which reflect those present in deaths risks fundamentally undermining the uncontested legal understanding that a stillborn child remains part of its mother. This, in turn, risks endangering the legal understanding of women's rights to her own body during pregnancy and birth – conferring a degree of foetal personhood which can only be attained by removing fundamental, long-standing rights from women.

Within the wider political and scientific context there is already a sizeable focus on maternal actions or inactions during pregnancy, for instance around drinking, smoking, age, or weight, which at a macro scale may have an impact on pregnancy outcomes. In as many as 6 in 10 stillbirths, the cause of death is not known. We are particularly concerned that in the

current climate we will effectively see women held legally accountable for the demise of their babies.

Beyond this, we believe the framing of the proposals in this consultation so as not to extend existing coronial powers but to broaden them by not allowing coroners to decline to open or complete an inquest at any stage goes against the calls by parents, advocates, and the Kirkup Review into Morecambe Bay to treat stillbirths in the same way as neonatal deaths.

Given these points, we believe that stillbirth should be legally treated as a negative outcome in the pregnant woman's care and so any further, specific investigation (beyond those which take place to gain learning for medical professionals to ensure the same thing does not happen again) should be undertaken only at her request. Forcing a woman through a semi-judicial process against her will in order to investigate something which legally happened to her (rather than a legally-distinct person) reflects a fundamental lack of recognition that pregnant women retain legal control over their own, and their baby's bodies, until the baby has taken an independent breath.

As a result, we believe that coronial powers as they currently exist are fundamentally inappropriate in cases of stillbirth. The only way to ensure investigation (coronial or not) meets with the legal understanding of maternal autonomy during pregnancy and birth would be if investigations into stillbirths could only occur at the mother's (or, where relevant, her next-of-kin's) request.

**2. Do you consider that coronial investigations of stillbirths would achieve the policy objectives set out in §41? Are there any other policy objectives that we should consider in improving the systems for determining the causes of stillbirths and delivering better services?**

**No.**

We accept that a coronial investigation may allow for an independent assessment of the facts and causes of the stillbirth being investigated. However, we do not accept it gives parents an "opportunity" to express their views as this implies that parents are free to choose whether to use this opportunity (as opposed to being called and examined as witnesses).

We also believe that a semi-judicial process is not the best way to contribute to system-wide learning and may, rather than promoting an open and continuous learning environment, lead to a system which focuses on reducing perceived liability, for instance by not sharing information with parents outside formal investigations. The impact of a huge, unprecedented increase in the number of coronial inquests into maternity professionals' work (approximately ten-fold) should not be underestimated.

As previously noted, we are particularly concerned that in the context of stillbirths, a woman's medical history, including reproductive choices or behaviour in this or previous pregnancies would likely form part of an investigation. We also believe that the proposal to introduce coronial investigation could have a severe detrimental impact on bereaved families as has been observed by the introduction of a similar system in Northern Ireland

In addition, given the recent developments in investigations of stillbirths, including using the standardised perinatal mortality review tool, the involvement of HSIB, and the potential for

independent investigation in serious case reviews, we would question whether coronial involvement is necessary to meet the aims laid out in §41.

**3. Do you agree with the proposal about ascertaining who the mother of the stillborn baby is and the baby's name if they have been given one? Do you think that there is anything else that should be considered?**

**No.**

We do not believe coroners should have the power to investigate stillbirths and therefore do not agree that the coroner should have the power to ascertain the name of the woman and stillborn baby.

We are also concerned that including a power to ascertain the name of the woman is indicative of the fact that the investigation would not focus solely on the stillborn baby but on the behaviour of the woman involved. It also reflects the understanding that legally the stillborn child did not have legal personhood separate to that of its mother – further undermining the case for coronial involvement.

Were a different form of investigation (coronial or not) developed that relied on maternal request, then part of that process would clearly involve ascertaining the name of the mother and that of the stillborn baby.

**4. Do you agree with the proposal about ascertaining how it was that the baby was not born alive?**

**No.**

We do not believe coroners should have the power to investigate stillbirths.

Were a different form of investigation (coronial or not) developed that relied on maternal request, then part of that process would clearly involve ascertaining how it was that the baby was not born alive.

**5. Do you agree with the proposal about ascertaining when foetal death occurred or was likely to have occurred and when the baby was delivered stillborn? Do you think there is anything that should be considered?**

**No.**

We do not believe coroners should have the power to investigate stillbirths.

We also believe it is inappropriate to refer to foetal demise as 'death' in relation to legislation as this indicates a legal personhood which the stillborn baby did not have.

Were a different form of investigation (coronial or not) developed that relied on maternal request, then part of that process would clearly involve ascertaining when foetal demise occurred (if possible) and when the baby was delivered stillborn.

**6. Do you agree with the proposal about ascertaining where foetal death occurred or was likely to have occurred and where the baby was delivered stillborn? Do you think there is anything that should be considered?**

**No.**

We do not believe coroners should have the power to investigate stillbirths.

We also believe it is inappropriate to refer to foetal demise as 'death' in relation to legislation as this indicates a legal personhood which the stillborn baby did not have.

Were a different form of investigation (coronial or not) developed that relied on maternal request, then part of that process would clearly involve ascertaining where foetal demise occurred (if possible) and where the baby was delivered stillborn.

**7. Do you agree that, as part of their findings, coroners should identify learning points and issue recommendations to the persons and bodies they consider relevant? If not, how do you think coroners should disseminate learning points?**

**No.**

Coroners' powers in this regards are currently relatively narrow and focus on the Prevention of Future Deaths report. We do not believe that this power is best-placed to identify learning points in relation to stillbirths. This is partly due to the potential for lengthy delays in coronial investigation until after other bodies have completed their investigations, partly because during this delay women may well have become pregnant again, and partly because of the existing investigations into stillbirths which may be better-placed to provide learning points. We have also previously raised concerns about the impact on the ongoing learning culture of medical teams if they are subject to an unprecedented increase (around ten-fold) in the number of coronial inquests into their work.

We are also concerned by the wording of §54 which specifically makes clear that the intention of coroner's determinations should extend to identifying any lessons for 'the mother concerned', indicating that far from simply providing lessons for medical professionals and providers, the expectation is that coroners may include recommendations for individual behaviour change. This could have a serious detrimental impact on patient rights and autonomous medical decision-making during pregnancy – undermining the legal and ethical rights of women to make decisions about medical treatment, even where medical professionals may consider that a decision could have a negative outcome for the foetus. This impact on antenatal care can only be seen as a gross and inappropriate extension of coronial power into the decision-making rights of pregnant women.

**8. Beyond identifying learning points in individual cases, do you think coroners should have a role in promoting best practice in antenatal care?**

**No.**

The notion of extending coronial power to include promoting best practice clearly falls beyond the nature and purpose of Prevention of Future Death reports. There have recently been many changes and updates to the processes around learning from stillbirths and adverse obstetric outcomes and we believe these are better-placed to promote best practice.

**9. Is there anything else you would like to see come out of a coroner's investigation into a stillbirth? What other determinations should be made?**

**No.**

**10. Do you agree that no consent or permission from the bereaved parents, or anyone else, should be required for a coronial investigation into a stillbirth to be opened? Please give your reasons.**

**No.**

To seek consent or permission for a coronial investigation is to fundamentally change the nature of such investigations. Coroners perform a function of the state and they should be bound by law to complete their duty regardless of whether or not interested parties consent to their function. This is why we believe that coronial powers as they stand should not be extended to stillbirths, so that women are not subjected to a semi-judicial investigation into something that happened to them (rather than an independent person) without their consent.

If these proposals were to go ahead in their current form, the impact of not seeking consent from the 900 families a year that the change in law proposed in this consultation should not be understated. For parents who have just experienced a stillbirth, this loss of control could be incredibly damaging. It must be recognised that under current guidance, all parents who experience a stillbirth are offered a post-mortem examination to attempt to find a cause, but only around half of families choose to proceed. Due to the rigid and legalistic nature of coronial investigations, many bereaved parents may not wish to engage in such a lengthy and harrowing process and the failure in the consultation document to acknowledge this is striking.

If these proposals were to go ahead in their current form, it is our view that recognising a distinction between natural and unnatural stillbirths, with only the latter proceeding to investigation and inquest could be a means of harm reduction. The consultation document suggests “drawing a distinction between natural and unnatural term stillbirths would likely be impracticable”, but clearly there are cases where the causes are known and natural, including where a foetus has been diagnosed with a fatal anomaly. There would be no reason for these to proceed to inquest.

This question also raises further concerns in how interested parties are identified prior to investigation. As coronial investigations would need to be completed before a stillbirth could be registered (and, by necessity, unlike existing coronial investigations there is no birth certificate), questions should be raised concerning how parties are identified, for example in cases of surrogacy or where the pregnancy was the result of abuse or a crime.

**11. Do you agree that the coroner’s duty to hold an inquest should apply to investigations of stillbirths? Please give your reasons.**

**No.**

We do not believe coroners should have the power to investigate stillbirths and therefore do not agree that the coroner should have the duty to open an inquest.

With regards to the proposals as they stand, it is important to note that coroners are currently only under a duty to investigate certain deaths – namely if the deceased died a violent or unnatural death, if the cause of death is unknown, or if the deceased died while in custody or state detention. There is therefore a sizeable proportion of deaths which are not reported to the coroner for investigation, and a further percentage where the inquest is discontinued because it has been concluded that the death does not meet these criteria. The most comparable cohort of figures for stillbirths are neonatal deaths – where 42.5% of

neonatal deaths are referred to the coroner, with only 5.4% proceeding to inquest – or 102 neonatal deaths in 2016 (ONS User guide to child and infant mortality statistics, 2018, Table 1). By contrast, the proposals in this consultation, with the conscious exclusion of the option for doctors to certify term or late-term natural stillbirths, would result in 100% these stillbirths being referred to the coroner and 100% proceeding to inquest – meaning around 900 inquests a year.

We have further concerns related to the estimations as included in the Impact Assessment. Within table 1, point 5, it is estimated that ‘80% of inquests would require witnesses to attend and provide oral evidence and 20% would be conducted solely on the basis of written evidence’. The reality of this estimation is forcing the majority of bereaved parents (720 a year) through a semi-judicial process in which they are required to give oral evidence and subject to cross-examination from other interested parties. As previously noted, witnesses are legally obliged to attend if called and any interested person has the right to question them. A woman giving evidence about her care in hospital may well be questioned by professional barristers about other factors that may be interpreted to have had an impact on the outcome of her pregnancy- such as her alcohol consumption or her working habits. If the woman is estranged from the stillborn baby’s father, he would also be entitled to be named an interested person, even in the event of estrangement as a result of domestic abuse, and thus he would be entitled to question the woman under oath.

We have further concerns relating to how compulsory inquests in all cases of full and post-term stillbirths will sit alongside necessary bereavement care. The experience of an inquest that takes place without request or consent could cause lasting damage to bereaved parents, particularly those where engagement with state authorities is not generally positive, and could have a detrimental effect on their future healthcare decisions.

## 12. Do you agree with the proposals for the links and sequencing between coronial and non-coronial investigations?

**No.**

We have concerns relating to how coronial investigations will be integrated with other processes, such as those conducted by HSIB or under the Perinatal Mortality Review Tool (PMRT). Coronial inquests are lengthy processes which must be adjourned while other investigations are ongoing. Given the number of cases currently being undertaken by HSIB (around 1000), it is not unreasonable to expect that there may be a delay of more than a year before a coronial verdict is handed down. In this time, women may well have become pregnant again and be relying on the ability of medical professionals to use notes, experiences, and learning from their previous pregnancy to ensure that she does not experience another stillbirth – but this documentation may be restricted and form part of the coronial investigation files, which would rely on families knowing enough about the process to know they can request this information while the investigation is ongoing. We are therefore concerned, not only about the impact such lengthy waiting periods may have on bereaved families, but also the impact coronial jurisdiction would have on what information clinicians are able to provide to bereaved families in the interim period.

Furthermore, the consultation proposes that a coronial investigation is suspended if anyone is charged with an offence that relates to the conception of the stillborn baby (§67 of the consultation) – meaning that a woman who has been raped and whose child was subsequently stillborn is then forced to wait to have her child’s inquest completed until her rapist’s trial has concluded. This issue of sexual crime also relates back to the lack of a birth

certificate and determination of interested parties – if a man is found not guilty, if the CPS refuses to prosecute, or if the pregnant woman has not reported a crime, we are concerned that men who have committed a sexual crime could apply to be an interested person. This status could confer the ability to cross-examine a bereaved woman and at the bare minimum mean that they are entitled to information about the stillbirth of her child – which would be likely to have a negative impact on the woman’s mental health. This is all the more true given that in the proposals as they stand, the woman involved will once again have been subjected to a process over which she has no control or consent.

This problem is recognised in relation to family proceedings in the Draft Domestic Abuse Bill and we urge the Department to consider similar measures if these proposals are pursued.

**13. Do you think coroners should have the same powers in relation to evidence, documentation and witnesses in stillbirth investigations, as well as in ordering medical examinations, as they do for death investigations now?**

**No.**

We do not believe coroners should have the power to investigate stillbirths and therefore do not agree that the coroner should have powers over evidence, documentation and witnesses except at the woman’s request. It is questionable whether it would be possible to determine the cause of many stillbirths without the woman’s medical records, but she is not the subject of the inquest and in these proposals is not required to give consent for her records to be passed to the coroner. The stillborn child at no point had legal personhood and therefore had no medical records of its own – and so collection of information without the requirement for consent will require a fundamental intrusion into the medical privacy of the woman involved.

We also question whether this process is suitable to serve the needs of bereaved parents. The coronial process is an extremely rigid and legalistic process, which many people will not have had experience with. We would want to ensure that explanations of the processes related to coronial powers, and any corresponding rights belonging to interested parties are offered and clarified in full. For example, rules of disclosure of documents (such as any reports produced by medical examinations) by the coroner. The onus to request disclosure is placed on the interested party, so it is vital that bereaved parents are given full information in a sensitive and accessible way during this highly upsetting time.

Additionally we have concerns with how such powers will be exercised alongside bereavement care. The quality of care that bereaved families receive after a stillbirth can have long-lasting effects, and we would want to ensure that families are provided with adequate time with their baby before the coroner gains custody of the body. The collection of evidence, which does not require consent, can involve a post-mortem. As previously noted, under current guidance all parents who experience a stillbirth are offered a post-mortem examination to attempt to find a cause, but only around half of families choose to proceed. A mandatory post-mortem may be extremely upsetting for some bereaved families, and this loss of control could be incredibly damaging.

**14. What, if any, other powers should coroners exercise to aid in their investigations into stillbirths?**

No other powers.

**15. Do you think it is appropriate for coroners to assume legal custody of the placenta? If not, why?**

**No.**

We do not believe coroners should have the power to investigate stillbirths and therefore do not agree that the coroner should have powers over the placenta except at the woman's request.

If these proposals were to proceed as planned, we still disagree with coronial custody of the placenta. While we acknowledge that placental pathology plays an important role in identifying the causes of stillbirths, usefulness cannot justify automatic assumption of custody of evidence that does not form a part of the stillborn baby. The placenta is a part of the pregnant woman and as the stillborn baby has not a separate legal identity, it is not possible for the stillborn baby to have 'ownership' over the placenta for the purposes of their demise conferring such on the coroner. Custody can only be conferred with the consent of the woman.

**16. Do you agree that coroners should not have to obtain consent or permission from any third party in exercising their powers, except where existing rules already provide for such a requirement? Please give your reasons.**

**No.**

The question here is 'what do we consider a third party'? Given that as we have noted above, personal medical evidence is being obtained under the proposals as they stand without the woman's consent, is the woman involved considered a third party or a co-subject of the inquiry? It seems inappropriate to conclude that the coroner is only investigating the stillbirth of a child when as a part of their investigation they are entitled under the proposals as they stand to the stillborn baby's body (which never had legal personhood), the placenta, the mother's medical records, evidence, and witnesses which are likely to include the woman herself without any need to obtain consent. In this way, investigations into stillbirths are fundamentally different to investigations into deaths of independent people.

To be clear, we believe that consent should be sought from the woman involved in the form of maternal request for an investigation (coronial or not). The effects of not doing so and forcing 900 families through the Coronial process every year, including those have received a diagnosis of a fatal foetal anomaly, cannot be understated.

**17. Do you agree with the proposal to investigate only full-term stillbirths? Or do you think the obligation should encompass all stillbirths?**

**Yes, then no.**

**18. If you answered 'no' to both parts of the above, which group of stillbirths do you think should be investigated?**

We want to take the opportunity to state that if these proposals were to continue, we believe strongly that only term and late-term stillbirths should be within the coroner's remit and only as a result of maternal request. Stillbirth refers to all babies born dead after 24 weeks' gestation. However, the causes of stillbirth at this gestation compared to term are noticeably different. Prematurity or maternal illness can both have a sizeable impact on the ability of a child to be born alive at 24 weeks. This is compared to the apparently

assumption behind the focus on term and late-term that a disproportionate number of stillbirths at this stage could have had an improved outcome if care was improved.

We would be highly concerned that an extension to encompass all stillbirths would focus disproportionately on maternal activity in lieu of care failings, and that the impact on women would therefore be greater.

As a basic level there would also be a significant increase in the number of compulsory inquests and this would need significant additional investment into the Coroners' service.

**19. Do you agree that coroners should investigate all full-term stillbirths (i.e. all stillbirths in scope)? Or do you think a further distinction should be made within this category?**

**No.**

Although we disagree with the proposals at a basic level, if they are to proceed we believe that the proposals about which stillbirths require coronial investigation should mirror the existing provisions of s1(2) of the Coroners and Justice Act 2009 – i.e. that there should be a distinction between natural and unnatural stillbirths. We disagree with the finding that such a distinction would be 'impractical' in cases of stillbirths as indicated in the consultation, and disagree with the implication that there are no natural stillbirths.

We are of the opinion that such a distinction is not only practical, but will work to better serve bereaved parents if the proposal is to proceed. It would enable coroners to retain their discretion in halting an investigation or declining an inquest – which is a fundamental part of their work and one which they are well-used to exercising. It is also a distinction which is made by existing models of stillbirth investigation such as MMBRACE where the 2016 Perinatal Mortality Confidential Inquiry found that 78% of stillbirth cases may have had a different outcome with improved care (with the corollary that 22% would not). This could be the case for stillbirths where parents had received a diagnosis of Fatal Foetal Abnormality, or where no discernible cause of death could be found (as is the case for as many as 6 in 10 stillbirths).

We are of the opinion that if this proposal were to proceed, only clear cases of 'unnatural' stillbirth should proceed to investigation or inquest. This could include clear failures of care within intrapartum stillbirths, cases of child destruction or other instances of external injury leading to foetal death, with the exception of lawful abortion. Maintaining such a distinction would, not only mitigate the aforementioned potential for Coroners to rely on risk factors and maternal conduct, but would further bring the coronial treatment of stillbirths into line with other deaths (including neonatal deaths) and existing powers.

We are aware that bodies who will be responding to this consultation, including individual coroners and advice services, are viewing the proposals solely as an extension of coronial powers (thereby retaining the natural/unnatural distinction) as opposed to the proposals which are made clear in the consultation. We would hope that this will be taken into account when reviewing responses – as we know that some of these bodies continue to believe that coroners will have discretion to conclude an investigation prior to inquest if they do not believe there is anything to investigate, which does not appear to be the case on close reading of the proposals. This is likely because no advocacy groups have been calling for the proposals to be formulated in this way – instead expecting stillbirths to be treated in the same way as neonatal deaths.

The impact of this on families who are not being asked for consent should be clear – that under current proposals coroners would be obliged to carry out 900 inquests a year, compared to roughly 50 if investigations were in line with those in place for neonatal deaths.

**20. Do you agree with the above proposal as to how stillbirth should be registered when a coronial investigation has taken place?**

**No.**

**If you would like to add any other comments on issues raised in this consultation please do so below:**

We would urge the Department of Health and Social Care and Ministry of Justice to consider the experiences of the change in coronial remit in Northern Ireland. Since 2013, Northern Irish coroners have had stillbirths included in their remit. The experience of parents in Northern Ireland has not been positive, and raises serious concerns about the potential for ramifications of a law change in England and Wales.

It is our opinion that the Department of Health and Ministry of Justice should consider the negative impact the extension of remit has had on both bereaved families and on the coronial and paediatric pathology system in Northern Ireland. This is of utmost importance when considering the proposal could have a harsher impact due to the aforementioned revision of coronial power. By finding it 'impractical' to distinguish between 'natural' and 'unnatural' deaths in the case of stillbirth, 100% of stillbirths would proceed both to investigation and inquest. By contrast, in 2013-14 after the court ruling in Northern Ireland, while 61 stillbirths (not including stillbirths with a diagnosis of fatal foetal anomaly) were referred to the coroner, 47 were subsequently closed by way of a stillbirth certificate – which would not be an option open to coroners and doctors in England and Wales. Only 2 resulted in an inquest.

**29. Do you think the proposals in Chapters 1 to 6 may have any further impact on a group with a protected characteristic? If so, please explain what these impacts would be and which groups could be affected.**

Under the Equality Act 2010, pregnancy and maternity are deemed protected characteristics, and we are of the opinion that pregnant women could be adversely affected by the proposals. We are concerned as to the impact coronial investigations could have on maternity care and practice. It is conceivable that we could see a further chill effect on the advice given by healthcare practitioners regarding conduct that could potentially lead to negative outcomes for pregnancy. As previously noted within our response, requiring a coroner to find 'how' a death occurred creates the potential for reliance on risk factors and behaviour which may have had no involvement in any particular stillbirth.

Concerns about the impact of certain behaviours and decisions (including medical decisions) on the foetus may also mean that in an effort to avoid a negative finding from a coroner, healthcare professionals become more precautionary about allowing women to make informed decisions about their own care and could increase the use of their existing powers with the Court of Protection to prevent women, for instance, declining a caesarean section or opting for a home birth.