INQUEST

TRUTH, JUSTICE & ACCOUNTABILITY

INQUEST and Inquest Lawyers Group Response to the Human Rights Act consultation

8 March 2022

Executive Summary

The Human Rights Act (HRA) and the incorporation of Article 2 (the right to life) of the European Convention on Human Rights has resulted in significant changes to the laws, procedures, policy and practice of investigating deaths.

Obligations under Article 2 have had an overwhelmingly positive impact: we are all protected by the systems that are in place because of the right to life as codified in the Convention and construed by the courts. From hospital policies to public safety regulations, we enjoy protections in many areas of our lives because of the HRA legal framework.

By setting out a range of positive obligations on the State when it is arguable that the State does or may bear some responsibility for a death, it has transformed and improved our framework for investigations and strengthened the coronial process to give bereaved families a right to effectively participate in investigations and inquests.

These changes were essential. The old provisions facilitated catastrophic miscarriages of justice and investigative failure such as the first Bloody Sunday inquiry and the original Hillsborough inquests.

As a result of the HRA and Article 2 in particular:

- Families have had a chance to better understand the full circumstances in which their loved ones died.
- Inquests and inquiries have achieved some degree of accountability.
- Lives have been saved by changes which have resulted from the fact-finding, accountability and Prevention of Future Death reports made at the end of many such investigations.

INQUEST and the INQUEST Lawyers Group are strongly opposed to any changes which may diminish the legal rights allowing crucial investigations to happen or that risk reducing the intensity of their scrutiny.

Introduction

1. INQUEST is the only charity providing expertise on state related deaths and their investigation to bereaved people, lawyers, advice and support agencies, the media and parliamentarians. Our specialist casework includes deaths in prison and police custody, immigration detention, mental health settings and deaths involving multi-agency failings or where wider issues of state and corporate accountability are in question such as Hillsborough and the Grenfell Tower tragedy.

2. The INQUEST Lawyers Group (ILG) is a national pool of lawyers who provide advice and legal representation for bereaved families. It supports the work of INQUEST, promotes and develops knowledge and expertise in the law and practice of inquests, and campaigns for reform on issues of concern. Over the last 40 years, ILG members have represented bereaved families in thousands of inquests into contentious deaths.

3. We welcome the fact the consultation document reaffirms the commitment of the Government to the principles set out in the European Convention on Human Rights (ECHR). However, we are concerned at the confused messages set out elsewhere in the document which indicate that the proposed 'rebalancing' should shift the balance of human rights protection to parliament and the executive and away from the courts. With respect to the UK courts, on the one hand the document calls for enhanced jurisdiction to determine Convention arguments without having to follow decisions of the Strasbourg court while also seeking to restrain the reach of those same courts with regard to positive obligations.

4. In addition, we are concerned at the misconception that the UK is somehow 'straightjacketed' by decisions of the Strasbourg Court. The Convention organs, and in particular the Strasbourg court, work on the basis of subsidiarity which means encouraging human rights compliance to be decided at the national level. The Court also applies principles with a margin of appreciation, recognising the different legal frameworks, cultures and social norms within member states.

5. Furthermore, there are cases which evidence a 'dialogue' between the domestic and Strasbourg courts regarding complex issues such as the admission of hearsay evidence in criminal cases. The proposal contained in the consultation document suggesting that domestic courts should consider the learning and jurisprudence of other common law systems as well as that of the Convention likewise shows a lack of understanding of the current arrangements. Both the UK Supreme Court and indeed the Strasbourg court currently require the parties to any case to provide them with such learning and any other relevant international experience as well.

6. INQUEST and ILG respond to the questions posed in this consultation while also reaffirming our support for the HRA which has assisted many bereaved families to achieve some measure of justice and accountability in connection with the deaths of their loved ones. The HRA and the incorporation of Article 2 (the right to life) of the ECHR has resulted in significant changes to the laws, procedures, policy and practice of investigating deaths. By setting out a range of positive obligations on the State when it is arguable that the State does or may bear some responsibility for a death, it has transformed our own institutional framework for investigations and strengthened the coronial process to give bereaved families a right to effectively participate in investigations and inquests. It has also strengthened the equality of arms through the provision of legal aid in some cases.

7. At the same time, the HRA has strengthened the protections for people held in detention or where State responsibilities are engaged including through the application of Article 3 (the prohibition on torture and inhuman or degrading treatment or punishment), Article 5 (the prohibition on arbitrary detention), Article 6 (the right to due process), Article 8 (the right to respect for private and family life) and Article 14 (the prohibition of discrimination), among other rights.

8. In reviewing the operation of the HRA it is essential to have regard to its purpose, namely to give further effect to rights and freedoms guaranteed under the ECHR.[1] Whilst there is more to do, the experience of INQUEST and the ILG is that the HRA has done just this in the twenty years it has been in force. Indeed, it has been the collective efforts of bereaved people, lawyers and NGOs that have been the driving force behind making the HRA effective.

9. It is our view, based on decades of practical experience as lawyers and activists working directly in support of bereaved families, that the significant body of HRA case law which has developed over this period does not support the argument that the HRA requires replacement or radical amendment. Instead, our collective experience illustrates the crucial role of the HRA in enabling individuals to seek vindication of their Convention rights in the domestic courts, and thereby helping to make those rights effective. We strongly believe further progress is more likely to be achieved by widening access to justice than by replacing the HRA with a new 'British' Bill of Rights.

10. We remind the Government that British lawyers and political leaders had substantial involvement in the drafting of the Convention and most of its Articles relate to common law values that are well known in our jurisdiction. We do not doubt that the HRA can be enhanced (INQUEST has contributed to that debate since it was established) but the current proposals are plainly aimed at reducing a practical legal framework to that which is merely aspirational. That is a backward step.

11. The following response focusses on question 11 and question 22, concentrating on the right to life.

The right to life in context[2]

12. Human rights are sometimes categorised into 'absolute', 'limited' and 'qualified' rights. The right to life is an absolute right. This means the State and public authorities cannot violate this right even in times of war and it cannot be 'balanced' against the needs of other individuals or the public interest. The only circumstance where the State can take life without violating Article 2 will be where lethal force is necessary to prevent other loss of life. The right to a fair trial is a limited right: the State is always required to ensure fairness and due process is not to be 'balanced' against other rights, however it applies in different ways depending upon the circumstances. On the other hand, the right to a family and private life is a 'qualified right' meaning the particular right of the individual has to be balanced against the rights of others and the public interest.

13. Question 11 is concerned with 'positive obligations'. We focus here on the positive obligations associated with the right to life as these have a significant impact on what happens when a person dies and an inquest takes place.

14. Article 2 prohibits the state and public bodies (such as the police) from taking life apart from in the very specific circumstances referred to above. Article 2 requires the state to have a framework of laws and regulations to prevent avoidable loss of life either by prosecution and deterrence or by public safety measures, commonly referred to as the systemic duty. In

[1] As set out in the Preamble to the Act.

[2] One of the key recommendations from the Independent Human Rights Act Review was that consideration needs to be given to an education programme on human rights for all ages. This is important because, when asked about 'the imposition and expansion of positive obligations', most people are unlikely to know what 'positive obligations' are in the context of human rights.

some situations, Article 2 also requires the state to take steps to protect a person's life or the lives of an identifiable section of the public. This arises where the state assumes a responsibility for the safety of a person, such as where they are detained by law in a prison, mental health or immigration setting. This positive duty also arises where there is a known real and immediate risk to life, usually referred to as the operational duty.

15. It is settled law, both in Strasbourg and domestically at the highest level, that there is an implied investigative duty within Article 2. Where a person dies in circumstances where there is reason to believe that a state agent or a public body might have caused or contributed to the death or failed to take steps to prevent it in circumstances where the systemic or operational duties arise, there must be an independent official investigation into what happened. In our jurisdictions, the default investigation which meets this obligation is an inquest which considers the circumstances in which the person died and makes conclusions.

16. For many people supported by INQUEST, this has been a crucial process to get answers about how and why their loved ones died and has led to changes to prevent other similar deaths happening in the future. In some circumstances, public inquiries under the Inquiries Act 2005 have been more appropriate to meet the Article 2 investigative duty. In other cases, compliance with the duty has been met by a combination of inquiries.

17. **INQUEST and ILG are strongly opposed to any changes which may diminish the legal rights allowing crucial investigations to happen or that risk reducing the intensity of their scrutiny. Before the HRA the scope of inquests was narrow and the permitted conclusions were very limited. The coming into force of the HRA was a watershed moment in the development of proper investigations into state-related deaths. As a result of the HRA and Article 2 in particular:**

    - **Families have had a chance to better understand the full circumstances in which their loved ones died.**
    - **Inquests and inquiries have achieved some degree of accountability.**
    - **Lives have been saved by changes which have resulted from the fact-finding, accountability, more meaningful inquest conclusions, Prevention of Future Death reports and recommendations made by inquiry chairs at the end of many such investigations.**

18. INQUEST continues to campaign to make investigations into state-related deaths more effective and efficient. Our three central campaign issues are:

    a. Provision of non-means tested public funding for legal representation of the bereaved at inquests where Article 2 may be engaged or public authorities are involved.
    b. A statutory duty of candour. This would enhance the investigatory process for all interested persons, make the task of the coroner far easier, and result in swifter and more efficient inquests.
    c. A national oversight mechanism for the proper and expeditious consideration of PFD and inquiry recommendations and effective implementation of changes to improve public safety.

19. If the Government wishes to improve human rights protection within our jurisdiction, we submit that it should address these three issues rather than look to reduce the impact of the HRA.

The consultation document

20. The Government pledges that it will retain all substantive rights currently protected under the Convention. In particular, the proposed Bill of Rights will '*safeguard the vital protection for the right to life*'[3] which is described as '*essential*' and '*a fundamental part of a modern democratic society*'[4]. At the same time, the Government asks, '*How the Bill of Rights can address the imposition and expansion of positive obligations to prevent public service priorities from being impacted by costly human rights litigation?*' There appears to be a tension between these two statements. On the one hand, the Government is committed to protecting the right to life; but in the second question rests a presumption that positive obligations have affected the delivery of public service priorities by 'human rights litigation'.

21. Inquests and inquiries into controversial deaths are not litigation but official investigations which promote transparency, accountability and progressive change to improve public safety. They are essential for the bereaved but also to the public authorities involved. Healthy public authorities welcome scrutiny and accountability because it enhances their processes and performance. A backward step to narrow the scope and reach of public investigations into unnecessary and controversial deaths would only protect inefficient, badly managed, or even corrupt public authorities. It would not improve service delivery and it would certainly not make these processes more efficient. The old provisions facilitated catastrophic miscarriages of justice and investigative failure such as the first Bloody Sunday inquiry and the original Hillsborough inquests. The Government should reflect on these failures before amending the current legal framework.

22. There is in fact very little litigation of any sort relating to Article 2. That which has occurred is necessary in a democracy committed to the rule of law. Such litigation has also been necessary to refine the limits of the obligations referred to above (and would be required in any case, whether the obligations were located in the HRA or a 'Bill of Rights'), or to compensate those who have suffered grievous loss as the result of failures by state agents or public authorities.

23. If legislation were to restrict the positive obligations required by Article 2, it would necessarily put the UK in conflict with its international legal obligations under the Convention, which the consultation expressly rules out. Furthermore, which obligations would the Government wish to curtail? The police and criminal justice system or health and safety legislation which provides a framework of laws to prevent crime and negligent injury? Would it seek to curtail public health system obligations, the protection of vulnerable people known to be in imminent danger from criminals or natural disasters, or the duty to train police officers in the limits of the use of force?

24. **INQUEST and ILG welcome the Government commitment to maintaining fundamental rights but asserts in the strongest terms that the positive and investigative obligations required by Article 2 and the HRA have improved public safety and enhanced existing domestic law proceedings. Further, there is no evidence that 'human rights litigation' has caused any detriment to public service priorities.**

[3] p.7, §9.
[4] p.5, §3.

"Mission creep" and positive obligations

25. The case of *Rabone*[5] clarified the scope of Article 2 obligations in the mental health context. Although it applied Article 2 to voluntary patients in very limited circumstances, it was not intended to and has not led to any substantial expansion outside the setting of detained mental health inpatients. For good reason, arguments frequently arise as to the applicability of Article 2 in complex cases involving community care, and indeed recent case law has tended to limit the application of Article 2 outside of settings where a person is deprived of their liberty.[6] Rights to protect the most vulnerable should not be reduced to a blunt instrument dependent upon whether a very unwell person was formally sectioned or not. The application of Article 2 should involve flexibility and a wide reach. The decision in *Rabone* was a reflection of that. Far from creating uncertainty, the decision in *Rabone* focussed the issue on risk rather than the formality of a section.

26. In the same paragraph as the consultation document suggests that *Rabone* created difficulties for the frontline, it references the case of *Kent*[7] in which, on the general facts, the court held that the positive obligation under Article 2 might arise, but on the particular facts it did not. The case concerned a 14-year-old who was known to children's social care as a 'Child in Need' and died from an overdose. Although it is correct to say that the court held that the operational duty could apply in these circumstances, it found that the real and immediate risk was only one of harm, not of death. Therefore, it could not be said that the state had breached the child's right to life. Right or wrong, the court identified the relevant legal right but determined that the precise facts fell out with its reach.

27. The courts in *Rabone*, *Kent* and many other such cases have striven to strike the correct balance between the rights of the most vulnerable in our society, generally those least capable of ensuring their own security and wellbeing, and the extent to which the state should be under a duty to protect them. Whether the duty to protect falls under the Convention or under some new 'Bill of Rights', the courts will have to adjudicate on where the line is drawn. If a new Bill of Rights redefines the duties which are currently protected by the Convention and the HRA or limits their reach in contradiction to the Convention or the organs which interpret it, then the UK will inevitably be in conflict with its international treaty obligations.

28. The Government suggests the Supreme Court judgment in the case of *Rabone* went further than the Strasbourg court with respect to the operational duty to protect voluntary as well as detained mental health patients, creating uncertainty for medical practitioners on the frontline.[8] We do not understand this argument as the consultation proposes giving the Supreme Court more jurisdiction over rights, not less. If it were the case that the Supreme Court had gone further than Strasbourg, and that was considered a vice, then the solution would hardly be to give it more jurisdiction. In fact, the principles in *Rabone* are now considered well-established and frequently used in determining whether the operational duty applies to the facts of a particular case. We hasten to add that in doing so the principles are used to ensure courts do not impose an unreasonable or excessive burden on public bodies.

[5] *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, [2012] 2 AC 72.
[6] see for instance *R (Morahan)* [2021] EWHC Civ 1603.
[7] *R (Kent County Council) v HM Coroner for Kent (North West District) and others* [2012] EWHC 2768 (Admin).
[8] P.39 §134

Public protection

29. The positive obligation on the state to mitigate known 'real and imminent' threats to life was set out in the landmark case *Osman* v UK. One of the consequences of this case has been the issuance of '*Osman* warnings' to those who are under a perceived threat. In 2015 it was reported that approximately 1,900 warnings had been issued in the UK in the previous four years. According to the BBC, a spokesperson from the National Police Chiefs' Council described threat to life warnings as '*one of a number of options that police forces can use to deal with a situation when there is a threat to an individual's life*' and said they '*proved highly effective in the overwhelming majority of cases*.'[9] Such research suggests the risk to 1,900 lives was potentially averted by state action which is surely something to be celebrated.

30. The consultation document suggests that threat to life warnings are disproportionately issued to people with links to serious crime and '*displaces the policing resources available for other serious crime perpetrated against law-abiding citizens*'[10], however we are unaware of any evidence to support either assertion. Furthermore, we would question the premise of this statement. If it is being suggested that the police should apply a value judgment whenever they have information that there is an imminent threat to a person's life, then we note that would conflict with the rule of law itself and not only human rights provisions. If a person has a lifestyle where they have brought risk upon themselves then that may limit the ability, never mind the duty, on the state to safeguard their life, but it would be a wholly different matter to draw a distinction between 'deserving' and 'undeserving' people where the state is in possession of information which indicates a real and imminent threat, with respect to a warning. Once again, this is an area where the Strasbourg and domestic courts have recognised a duty on the state, but the caselaw shows a very conservative approach to breach of that duty for good reason, including the recognition that policing resources are stretched. What is reasonable in the circumstances is often an 'Osman warning' and little else.

31. The consultation is silent on the many ways in which the public is protected by positive obligations emanating from the right to life. For example, the systems duty requires that frontline hospital staff and police officers are trained in safeguarding vulnerable adults and children. The systems duty also requires that firearms officers understand the use of lethal force is only justified if their life or the lives of others are in immediate peril and are trained to carry this through to practice. In this way, positive obligations provide a framework to support decision-making that reduces the burden on frontline workers who would otherwise have to rely on their own sense or judgement of what is appropriate.

Public spending

32. The consultation suggests that reform is necessary to preserve public resources. There is no evidence that positive obligations under human rights provisions have had any deleterious effect on public spending or service priorities. Such arguments were not considered by the Independent Human Rights Act Review. Better policies and training which protect lives or identify risks to life which can be mitigated are not only positive in the preservation of life but are likely to reduce resources expended on investigations and compensation in cases where there is culpable liability.

[9] BBC, Police letters warn 1,900 people of 'threat to life' https://www.bbc.co.uk/news/uk-3465168, October 2015
[10] p.42, §148.

33. In contrast, public bodies spend substantial amounts of public money on legal representation at inquests and inquiries to protect their institutional reputation rather than to assist investigations. This happens regardless of whether or not bereaved family members are represented. For example, Freedom of Information requests in 2019 revealed the Ministry of Justice alone had spent £4.2 million representing prison officers at inquests[11]. This is despite the fact that many inquests become needlessly long and adversarial because state bodies do not approach the process with openness and candour from an early stage to enhance the preventative potential of inquests and inquiries.

34. The Hillsborough inquests were a case in point: South Yorkshire Police publicly admitted the fault of senior officers prior to the inquests taking place, but then sat back while retired senior officers blamed supporters for the disaster. If there had been a statutory duty of candour, as has been called for by countless inquiry chairs, bereaved groups and INQUEST, then the Hillsborough inquests would have progressed from the outset on the basis that the police force accepted the disaster had occurred as a result of police failures and not those of the supporters. The establishment of a statutory duty of candour would not only limit the anguish of the bereaved at inquests and inquiries but it would hugely reduce the time and resources wasted by coroners and inquiry chairs chasing needles in haystacks, while public authorities try to protect reputation and seek to avoid censure.

Expanding the territorial scope of rights

35. Most but not all laws are applicable within their own jurisdiction. After the enactment of the Human Rights Act, the UK deployed troops to Iraq and Afghanistan to fight in the war on terror. Those wars resulted in claims being brought by both civilians and army personnel, on the basis that the UK had assumed control of territory or had assumed a duty of care for servicemen and women and persons in detention. Only a handful of these claims have been successful.

36. Through that litigation, it has become clear the state may only be held responsible for a person's death abroad under Article 2 in very limited circumstances. In order for that to happen, the state must either exercise effective control over an area outside its territory or exercise physical control or authority over a person. The Supreme Court in *Mohammed*[12] limited the scope of human rights claims further by holding that a British common law defence could defeat them. [13]

37. There are, however, a small number of cases that did engage the right to life such as the case of *Susan Smith*[14] which involved servicemen killed by improvised explosive devices while driving Snatch Land Rovers. The courts have been astute not to extend the reach of convention rights to war zones for obvious reasons, however they have been willing to do so where the relevant claims relate to matters which are beyond democratic decision making or the prerogative or relate to egregious mistreatment of detainees. If human rights protections did not apply in such circumstances servicemen and women and detainees would be without the normal protections which are applied in our system without any good reason. The care with which the domestic judiciary has approached this subject and the application of rights extraterritorially can be seen per Lord Hope in *Smith:*

[11] https://www.inquest.org.uk/legal-aid-fileon4.
[12] *Mohammed v Secretary of State for Defence* [2017] UKSC 2, [2017] AC 821.
[13] Known as the 'Crown act of state'.
[14] *Smith and others v Ministry of Defence* [2013] UKSC 41, [2014] AC 52.

…the court must avoid imposing positive obligations on the state in connection with the planning for and conduct of military operations in situations which are unrealistic or disproportionate. But it must give effect to those obligations where it would be reasonable to expect the individual to be afforded the protection of the article. It will be easy to find that allegations are beyond the reach of Article 2 if the decisions… [were] closely linked to the exercise of political judgment and issues of policy. So too if they relate to things done or not done when those who might be thought to be responsible for avoiding the risk of death or injury to others were actively engaged in direct contact with the enemy. But finding whether there is room for claims to be brought in the middle ground, so that the wide margin of appreciation which must be given to the authorities or to those actively engaged in armed conflict is fully recognised without depriving the article of content, is much more difficult. No hard and fast rules can be laid down. It will require the exercise of judgment. This can only be done in the light of the facts of each case[15]

38. INQUEST agrees with the statement made by Liberty that the current position does not go far enough and leaves a protection vacuum in situations where states exert force but do not have territorial control.[16] INQUEST similarly endorses the UN Human Rights Council position on the International Covenant on Civil and Political Rights that control over a person's 'enjoyment of their right to life' is the key consideration in whether they are subject to a State's jurisdiction.[17]

39. **INQUEST and ILG firmly believe that there must be no weakening of the HRA's extraterritorial application, and the suggestion that the current position is too wide is misplaced.**

Conclusion

40. Positive obligations under Article 2 ensure that the state must have systems in place to prevent foreseeable risks to life, and where there is a real and immediate risk to life, the state has a duty to take reasonable steps to avoid that risk.

41. The Convention is a living instrument and it is construed to make its articles practical and effective. As Professor Mowbray puts it,

    we must not underestimate the practical benefits for the 800 million persons living under the protective jurisdiction of the Convention that have been achieved by the Court's creative approach to [positive] obligations.[18]

42. However, those words should not be seen to evidence a judicial over-reach to impose impossible demands on member states. Indeed, the Government should reflect on the restraint of both the Strasbourg and domestic courts with respect to operational and systems duties. The legal principles underpinning these duties carefully balance the need to

[15] Ibid, §76.
[16] Liberty, Liberty's short guide to responding to the consultation on Human Rights Act Reform, https://www.libertyhumanrights.org.uk/wp-content/uploads/2019/12/Libertys-HRA-consultation-tip-sheet-Feb-22.pdf, February 2022
[17] Human Rights Committee, General Comment 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para 63.
[18] *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004), p.230.

ensure that an excessive burden is not placed on public bodies against the imperative of protecting the right to life.

43. Obligations under Article 2 have had an overwhelmingly positive impact; we are all protected by the systems that are in place because of the right to life as codified in the Convention and construed by the courts. From hospital policies to general health and safety and public safety regulations, we enjoy protections in many areas of our lives because of the HRA legal framework. Furthermore, inquests and inquiries into deaths where Article 2 is engaged have been crucial in exposing state failures and guiding changes to policies and practices that help to prevent further deaths.

44. **The systems duties require public authorities to have robust policies and training to safeguard life and wellbeing. The operational duties require public authorities to have systems to recognise and act upon real and immediate risks, whether they are environmental, industrial or criminal and the investigative obligation requires independent official investigations which allow the loved ones of those who have died to get crucial answers about what happened and to help prevent others going through the same loss. INQUEST and ILG are strongly opposed to any attempts to take away legal rights allowing this to happen. INQUEST and ILG are committed to supporting the current human rights framework and to improving it through our campaigning work as set out above. Article 2 protects us all.**