

## **Consultation Response: Terms of Reference for COVID-19 Inquiry**

**September 2021**

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## 1. Introduction

The Commission welcomes the recent publication of [draft aims and principles](#) as a significant step in developing terms of reference for an independent public inquiry into the handling of the COVID-19 pandemic (“the Inquiry”).

The Commission particularly welcomes the Scottish Government’s stated expectation that the Inquiry should take “a person-centred, human rights based approach to ensure that every person and organisation taking part can meaningfully participate, be treated fairly and be empowered to take part in the Inquiry” and that “[i]n reporting ...the Inquiry ... demonstrate that this approach has informed its recommendations.”

The Commission first called for a human rights based approach to a public inquiry [last year](#), in the context of reporting on human rights in care homes, and has since [reiterated this call](#) in relation to an inquiry into all aspects of the handling of the pandemic.

Other positive aspects of the published document include the intention that the Inquiry be outcome focused and identify lessons throughout its work with timely reporting and recommendations. We also welcome the Ministers’ expectation that the Inquiry will be established by the end of the year.

In line with the Scottish Government’s commitment to take a human rights based approach to this Inquiry, we expect that human rights will play a crucial role in shaping its design, running and outcomes.

While a human rights based approach to the Inquiry will require and support meaningful participation, it should also be understood in terms of the following requirements:

- a) Analysing the full **impacts** of the pandemic on individuals' enjoyment and realisation of their human rights, particularly those disproportionately impacted;
- b) Meeting the **standards** of investigation derived from human rights law;
- c) Applying the **principles** of the human rights based approach in the design, process and analysis of the inquiry.

These requirements are overlapping, interrelated and mutually supportive. For example, it would not be possible to deliver a human rights based inquiry which did not analyse the pandemic's impact upon enjoyment of rights and meet the resulting standards of investigation.

A human rights-based public inquiry can be understood as an enhanced public inquiry, in which international human rights standards and principles support and supplement the domestic framework for public inquiries.

## **2. Human Rights Based Approach**

Throughout this response the Commission will refer to a "human rights based approach" ("HRBA").

A HRBA goes beyond simply ensuring compliance or accountability in relation to human rights law but rather sets out an approach to respect, protect and fulfil human rights in both process and outcome.

Taking a HRBA should ensure that human rights are respected, protected and fulfilled in the design, running and outcomes of the Inquiry. It further requires that human rights are fulfilled in terms of the implementation of the Inquiry's recommendations, and ensuring that the Inquiry and other available remedies together satisfy the human rights requirement for effective remedy.

A HRBA is about empowering people to know and claim their rights, and increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling human rights. There are some underlying principles which are of fundamental importance in applying HRBA in practice. These are known as the PANEL principles: Participation, Accountability, Non-Discrimination, Empowerment and Legality. In order to ensure that the Inquiry takes a human rights based approach, each of these elements ought to be addressed in the Terms of Reference, as well as in the development of those Terms of Reference.

### **Participation**

A HRBA requires that those who will be affected by processes and decisions, in terms of their human rights, should be involved in those processes and decisions.

In the context of the Inquiry, rights holders should be involved in the design, process and outcome. This will include effective and accessible communication, to ensure everyone who is affected knows about the Inquiry and any other remedies, and ensuring that support is in place to allow them to participate effectively. Importantly, rights holders should be involved in the design and in shaping how the inquiry will operate. Examples of questions that should involve rights holders and their families are how the independence of the Inquiry will be secured; how members of the Inquiry should be selected and selection criteria; how the Inquiry will operate – including mandate and powers and what remedies may look like.

The participation of those most impacted by the COVID-19 response is critical to: ensure the Inquiry is examining the right issues; secure public legitimacy, and deliver recommendations which are meaningful.

### **Accountability**

A HRBA requires accountability of those responsible for the respect, protection and fulfilment of human rights: the duty bearers.

Accountability involves identifying what there should be accountability for; who is accountable; how that accountability will be realised; and what will be done to fulfil the requirement for effective remedies.

Accountability in the broadest sense requires effective monitoring (through data collection and inspections), effective remedies (including independent complaints mechanisms and access to justice) and effective corrective action to be taken where deficiencies are identified. It requires the existence of appropriate law and policy structures, institutions, administrative procedures and other mechanisms where individuals can seek remedies and have access to justice where needed.

The Commission notes that a public inquiry into the impact of decisions-made in relation to COVID-19 sits within an important constellation of accountability measures - legal, administrative, regulatory, political and social. For example, some COVID-19 related deaths will be investigated by the Crown Office under its mandate to investigate sudden, unexpected and unexplained deaths in Scotland. COVID-19 related deaths in prison or police custody must be reported to the Procurator Fiscal (PF) and a Fatal Accident Inquiry (FAI) must be carried out in relation to these cases.<sup>1</sup> In May 2020 the Lord Advocate instructed that COVID-19 deaths of residents in care homes, and cases where the deceased may have contracted COVID-19 during the course of their employment, including care home workers, must also be reported to the PF for possible investigation.<sup>2</sup> What type of investigation will follow by the Crown will depend on the circumstances of the cases. Historically an FAI has taken place in only a small proportion of cases<sup>3</sup> and a Sheriff has made recommendations in only a very small proportion of FAI's.<sup>4</sup> In some cases a criminal prosecution may follow the PF's investigation. It is not yet clear if any criminal prosecution will follow the Crown's investigation of over 3,400 presumed COVID-19 related deaths in Scottish care homes.<sup>5</sup>

While focused investigations into some individual deaths will be very important, proceedings which are concerned with individual cases will inevitably have only a limited evidence-base from which to draw conclusions or make recommendations. A public inquiry will be

extremely important for the investigation of overarching policy decisions that impacted on the right to life, and to investigate the impact of decisions on other human rights.

Alongside the setting up of the Inquiry, the Scottish Government, with meaningful participation from rights holders, should examine the question of what the Inquiry can achieve, and what other actions or remedies will be necessary to ensure compliance with human rights law on accountability, access to justice and effective remedy.

### **Non-discrimination**

The principle of non-discrimination and equality should run throughout the Inquiry. This means assessing decision-making in relation to the legal obligation to consider how to address inequality and advance equality under the Equality Act 2010, as set out by the Equalities and Human Rights Commission in its input to this consultation. It also requires that all rights holders should be able to access the Inquiry and barriers to access should be removed. The Inquiry should have in mind the protected characteristics under the Equality Act 2010 as well as any other characteristic or relevant status which could be a relevant factor in determining whether their experience amounted to a rights violation.

### **Empowerment**

Rights holders must be empowered to know and claim their rights. This requires information to be delivered and made available through a variety of formats, and support to be made available to allow everyone to participate. This may include advocacy and psychological support at various stages of the Inquiry process, and should include longer-term support given the Inquiry could run for a number of years.

Rights holders and their families should also be kept informed of how their input is being dealt with and the process should ensure that expectations around what can and cannot be delivered are managed appropriately and effectively.

## **Legality**

A HRBA requires an explicit application of human rights law and standards. The Inquiry should include a full assessment of the wide range of human rights law and standards applicable to the many settings, groups and individuals impacted by pandemic. A full framework of human rights that apply should be produced to ensure that the Inquiry has human rights requirements at its core and applies them at all stages.<sup>6</sup> The human rights framework should include the full range of rights contained in human rights treaties ratified by the United Kingdom and for which the Scottish Government has devolved responsibility under the Scotland Act, civil and political as well as economic, social and cultural.

This will assist in ensuring that the Inquiry plays a significant role in meeting the Scottish Government's human rights obligations in relation to investigation and remedy, and in enabling duty bearers to be held to account.

### **3. Why take a rights based approach to the Inquiry?**

The benefit of a HRBA to the Inquiry will firstly be that it is driven by the experiences and outcomes of people on the ground. It will also ensure a focus on those most acutely affected by decision-making as a matter of priority.

Secondly, human rights provide a clear set of agreed standards to assess impacts and decisions against. It also gives us a set of agreed outcomes to drive improvement going forward. Where careful balancing of rights was required in decision-making around the pandemic response – such as balancing the right to family life with protecting public health in care homes, for example - human rights provides a legal basis to assess that balance.

Thirdly, taking a HRBA to the Inquiry will enable people who potentially experienced human rights violations during the pandemic to understand them as such, have clarity about whether their treatment or experience fell below the standards they were entitled to in the circumstances, and feel empowered to hold duty bearers to account.



Finally, taking a HRBA to the Inquiry will help deliver meaningful accountability in addressing issues. It should identify the full range of duty-bearers implicated in relation to decisions taken and impacts, and draw out systemic issues that resulted in negative and disproportionate impacts.

We consider the elements of a HRBA in more detail below in relation to the purpose, scope, design and outcome of the Inquiry.

## **4. Inquiries Act 2005**

The Inquiry is being established under the [Inquiries Act 2005](#). This will ensure that:

- the Inquiry can act with full independence from government and that the Chair has the authority to compel evidence from witnesses, oral and documentary;<sup>7</sup>
- the Inquiry is held in public, with the Chair taking all reasonable measures to ensure public access<sup>8</sup>, other than where it is deemed necessary to close the proceedings in the public interest or to enable uninhibited evidence to be provided;<sup>9</sup>
- the Chair will provide the Ministers with a report of findings in fact, and with recommendations if asked to do so in the Terms of Reference set by the Ministers.<sup>10</sup>

However, the Inquiries Act also accords the Chair a great deal of discretion in relation to the conduct and procedure of the Inquiry, including in terms of: who is asked or required to provide evidence; the manner in which evidence is taken; the way in which the public is given access to the proceedings; the order in which evidence is taken, and whether or not to produce interim findings during the course of the Inquiry, among other things. The Inquiries (Scotland) Rules 2007 also give the Chair discretion in relation to designating people as core participants, if they have a particularly significant interest in an important aspect of the proceedings.<sup>11</sup> Core participants can appoint a legal representative to represent them in the Inquiry,<sup>12</sup> who can ask witnesses questions if the Chair permits that.<sup>13</sup>

The flexibility of the Inquiries Act procedure has meant that very different approaches have been taken in previous inquiries, depending on the approach of the particular Chair or panel.

## **5. Terms of Reference**

Given that the Inquiries Act and Rules provide the Chair of the Inquiry with wide discretion regarding conduct and procedure, the terms of reference set by the Scottish Ministers will be critical.

### **5.1. Terms of Reference**

Under the Inquiries Act the Scottish Ministers appoint either a Chair or a panel, set the start date for the Inquiry and provide the Chair with terms of reference (“TOR”).<sup>14</sup> The TOR set the scope of the Inquiry: the particular matters as to which the Inquiry is to determine the facts, whether it is to make recommendations and any other matters the Ministers may specify. The TOR are critical as they set the limits of the Chair or panel’s powers.

### **5.2. Participation**

The Aims and Principles, which set out the Scottish Ministers’ suggested approach for the TOR, were published [online](#) on 24 August. People were invited to submit views on the proposals by the end of September. It is not clear what steps have been taken to notify the public about the existence of the call for views. Many people will have been deeply affected by the measures taken in response to the pandemic who would not ordinarily engage with a government consultation process. It is not clear how the Ministers have sought to reach people who may not be online or likely to be aware of the existence of this consultation. In the Aims and Principles the Ministers say “the views of those bereaved during the pandemic, will be fundamental in reviewing the suggested approach to establishing a COVID-19 inquiry in Scotland and finalising the terms of reference,” but it is not clear how they are being engaged with, nor the wider group of people who may have been disproportionately impacted by decision making.

While the Ministers have set up roundtable discussions, inviting known organisations, that is not a substitute for meaningful engagement with rights holders, nor a public information campaign to ensure there is general awareness of the invitation to provide views. Just over five weeks is a short period of time for people to respond to something of this nature, and we note that the questions people were invited to respond to were updated substantially on 16 September. The Commission is concerned that the steps taken will not be sufficient to support or secure the breadth and depth of participation required.

There are also inherent limits to the participative value of the standard consultative process. The British Institute of Human Rights has voiced concerns about the human rights implications of typical government approaches to policy consultations, citing inaccessible documents, short response periods, and ‘consultation fatigue’ as examples of some of the factors which undermine their effectiveness<sup>15</sup>.

Further measures to support participation could include targeted engagement with those particularly affected, such as the families of those who died in care homes, and children whose education was disrupted, to give but two examples.

The participation of those most impacted by the COVID-19 response is critical to: ensure the Inquiry is examining the right issues; secure public legitimacy, and deliver recommendations which are meaningful.

It is not clear from papers published to date what, if any, further steps Ministers intend to take in this respect prior to finalising and publishing the Terms of Reference.

Equally, it is important to recognise the potentially negative impacts for witnesses and participants who may be required to relive traumatic events, whether as a survivor, a family member, a professional, or in some other capacity. It will be necessary to put in place a trauma-informed participatory process, with adequate supports and safeguards to protect the well-being of those impacted.

**Recommendation 1:**

The Commission recommends that the Scottish Government:

- establishes a means and process for meaningful engagement directly with the people most impacted by the pandemic response, in relation to the TOR.
- publish and invite views on a draft TOR once prepared. The draft TOR should be published along with the report Ministers say will be produced by Scottish Government analytics to capture the input received on the Aims and Principles, on which the TOR will be based. A public awareness campaign should be undertaken to ensure people are aware of the draft TOR and the invitation for them to provide views. Sufficient time should be allowed for meaningful input.

**Recommendation 2:**

The Commission recommends that the Scottish Government include in the TOR the expectation that the Inquiry will put in place a trauma-informed participatory process, with adequate supports and safeguards to protect the well-being of those impacted.

**Recommendation 3:**

The Commission recommends that the Scottish Government ensure that adequate support is in place throughout the duration of the Inquiry, including advocacy and psychological support for those particularly affected by the handling of the pandemic.

We have made further recommendations throughout this briefing, in terms of other points that ought to be made explicit in the TOR to assist in ensuring that a HRBA is taken.

## 6. Design of the Inquiry

In addition to setting the TOR, the Scottish Ministers appoint the Chair, or panel.<sup>16</sup> The composition of the Chair and other panel members will be critically important, particularly given the degree of discretion they will have in how they run the Inquiry. We note that the (amended)

consultation specifically seeks views on “whether there should be a panel of members and/or assessors, in addition to the inquiry chair.”

However, the Scottish Ministers have given no indication that they are carrying out any public engagement in relation to the decision of who to appoint or how to select them. This is a key aspect of the design of the Inquiry and therefore, taking a HRBA, there ought to be meaningful participation on this.

The Inquiries Act requires that Ministers have regard to ensuring that the panel have the necessary expertise to conduct the Inquiry.<sup>17</sup> The approach that has often been taken to public inquiries has been to appoint a judge to act as Chair. While expertise in the taking and assessing of evidence and making findings of facts is important, the possibility of appointing a panel opens up the prospect of ensuring that other expertise is provided for on the panel. What expertise in particular ought to be reflected on the panel is a matter that ought to be the subject of meaningful participation, as well as being informed by views on the scope of the Inquiry.

The 2005 Public Administration Select Committee report *Government by Inquiry*, noted that the appointment of panels can serve to give confidence to people affected by the issues addressed by the inquiry.<sup>18</sup>

In legal submissions relating to the Grenfell Inquiry on behalf of the Equality and Human Rights Commission<sup>19</sup>, Karen Monaghan QC argued that “the allaying of public concern will only be achieved with a panel that is able to contribute something other than mere legal and forensic expertise [and] a panel with professional experience of the broader social issues that are likely to become material (if not central) during the Inquiry is essential.”<sup>20</sup>

Appointing a panel with diverse experience, reflective of those most impacted by the pandemic and/or expertise in the human rights based approach will help ensure that the values and aspirations expressed in the aims and principles document are embedded in the Inquiry and carried through to its completion.

The Ministers have the additional power to appoint assessors to assist the Inquiry panel with particular expertise.<sup>21</sup> The appointment of assessors would be a further way in which the Ministers could ensure that the Inquiry benefits from necessary expertise across the range of issues that will be considered and having regard to the requirements of a HRBA.

#### **Recommendation 4:**

The Commission recommends that the process of meaningful engagement established by the Scottish Government, referred to in Recommendation 1, should cover the appointment of Chair, panel members and assessors, as well as the TOR. The public awareness campaign referred to should also ensure people are aware of the call for views on the process of appointment of Chair, panel and assessors as well as on the draft TOR. Sufficient time should be allowed for meaningful input.

## **7. Purpose of the Inquiry**

We note the Aims and Principles document states that the Inquiry will have the purpose of “scrutinising decisions taken in the course of this pandemic so far, and learning lessons for future pandemics.”

In line with a HRBA, as outlined above, the purpose of the Inquiry should include learning lessons in relation to the ongoing pandemic situation. There is continuing risk to life due to COVID-19, and decisions continue to be made by government and other duty bearers which have an impact on people’s human rights. An important aspect of the Inquiry will be to learn lessons in order that action can be taken to address ongoing violations and better protect people as we continue to manage the virus. The TOR should make clear if that this is a purpose of the Inquiry, as that will have a bearing on procedure, as discussed below.

The lessons to be learned are also not only those relevant to handling pandemics, but more generally to assess our readiness to ensure that human rights are properly considered and balanced in challenging situations.

### **Recommendation 5:**

The Commission recommends that the TOR make it clear that the overall purpose of the Inquiry includes learning lessons regarding our readiness to ensure that human rights are properly considered and balanced in challenging situations, and make recommendations accordingly.

## **8. Scope of the Inquiry**

The Aims and Principles state that the Inquiry will “investigate events causing public concern, for example the experience of COVID-19 in care homes.” It also says “we will engage with people and their representatives to ensure its terms of reference cover issues that have caused concern.”

However, it is not clear what engagement to identify issues that have caused public concern will consist of. As set out above, we have concerns that the steps taken thus far are inadequate to ensure meaningful participation, and reiterate our recommendations that the Scottish Government set up a process of meaningful engagement on all of these questions.

The Aims and Principles also notes that the intention is that “the inquiry should examine the actions taken in response to the pandemic and should give particular consideration to the four harms of the pandemic in relation to Scotland:

- direct health impacts of COVID-19, including cases and deaths in care homes;
- other health impacts;
- societal impacts, including education;
- economic impacts”

Whilst these 4 harms may be broadly representative of impacts at a societal level in Scotland, the Commission is concerned they do not explicitly reflect the full range of human rights and equality impacts, particularly on those most impacted by pandemic response measures.

We recommend therefore that in relation to each of the four harms, a rights based approach is taken to identifying those most impacted, paying particular regard to people in already vulnerable or marginalised positions in society, including disabled people, ethnic minorities, those living in poverty, women and children and young people. This will mean working with the people directly impacted to fully understand the impacts both short and long term.

The term “societal impacts” is also extremely broad. Whilst this is welcome in the sense that it could cover many issues, for the purpose of clarity and certainty it would be beneficial to set out in more detail some of the specifics this covers.

For example, the Commission has previously highlighted impacts in areas such as prisons, policing, the justice system, and in terms of the rights to access food, housing and social security.<sup>22</sup> We know there have been disproportionate impacts on women, disabled people, carers, low income workers, students, black and minority ethnic communities and the prison population. This analysis is not comprehensive and further impacts have been identified elsewhere, for example in the report of the previous Equality and Human Rights Committee on the impact of the COVID-19 pandemic on equalities and human rights.

Further consideration must be given to how each of these four areas will be examined. The Commission believes that each area of the four harms should be considered through a human rights lens, assessing whether the balancing of policy choices took appropriate account of rights and equality standards, and the extent to which this resulted in rights respecting outcomes insofar as possible. In this way, the human rights legal framework can be of assistance where the four harms are interrelated and an assessment must be made of the decisions taken. For example, human rights provides a legal basis to assess a balance of public health aims with other rights, such as the right to family life, physical and psychological integrity or education.

In carrying out this analysis, an assessment must be made against all human rights standards, both those contained in the ECHR and international human rights law, including:



- International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention on the Rights of the Child (UNCRC)
- Convention on the Rights of Persons with Disabilities (CRPD)

Finally, the Commission believes that in order to secure the fullest form of accountability in line with human rights standards and principles, it must be made clear that the Inquiry will investigate not only the decisions of Scottish Ministers but also those of all public authorities and those carrying out functions of a public nature.

#### **Recommendation 6:**

The Commission recommends that the terms of reference of the Inquiry explicitly set out:

- the need to address the disproportionate impacts of the pandemic response on different groups' enjoyment of human rights across all settings (justice, social care, education etc.), both immediately and in the longer-term.
- that the process of decision-making and the impacts identified will be analysed for human rights compliance across the full range of international human rights law standards.

#### **Recommendation 7:**

The Commission recommends the Terms of Reference set out that the Inquiry will identify the full range of responsible actors across all public bodies and those performing public functions.

## 9. Procedure of Inquiry

### 9.1. HRBA

As discussed above, adoption of a HRBA means ensuring that the PANEL principles: Participation, Accountability, Non-Discrimination, Empowerment and Legality, are followed in the design, implementation and outcome of the Inquiry.

As discussed above, the Inquiries Act allows the Chair or panel considerable discretion in terms of how the Inquiry is run. The Inquiries Act does specify that in making these decisions the Chair must act with fairness.<sup>23</sup> Under the Human Rights Act 1998 this ought to be interpreted in line with the European Convention on Human Rights, however that ought to be made explicit in the TOR, as well as the expectation that the Chair will adopt a HRBA to the whole Inquiry.

#### **Recommendation 8:**

The Commission recommends that the Scottish Government make it explicit in the Terms of Reference its expectation that the Chair will:

- act in accordance with human rights requirements in making decisions in relation to the conduct and procedure of the Inquiry, and
- ensure that the PANEL principles are complied with in the running of the Inquiry.

### 9.2. Compliance with specific procedural requirements

To the extent that the Inquiry is considering deaths and/or situations amounting to torture or inhuman or degrading treatment, in situations which may engage state responsibility, it will be important to ensure that the human rights standards that apply to investigations of that nature are complied with.

#### **9.2.1. European Convention on Human Rights Procedural Requirements**

An element of the right to life, enshrined in the European Convention on Human Rights (ECHR) Article 2, is a procedural obligation upon the state to investigate deaths where state responsibility is potentially engaged. A similar procedural requirement arises for investigation into torture, inhuman or degrading treatment where state responsibility is potentially involved, under Article 3 ECHR. In both cases the state must conduct a thorough and effective investigation.

Given the unprecedented nature of the current public health crisis, the European Court of Human Rights (ECtHR) has not yet been asked to apply Articles 2 or 3 to the circumstances surrounding a global pandemic. That said, having regard to the principles already established in the ECtHR's case law, a number of issues that may be considered by the Inquiry could potentially engage state responsibility, therefore triggering the requirement for an effective investigation.

We note that in September 2020, the UK Government's Joint Committee on Human Rights analysed the procedural obligations to protect the right to life in the context of COVID-19 and concluded that "it is very likely that an inquiry will be needed in order to fulfil the State's obligations under Article 2 ECHR to investigate structural issues affecting COVID deaths"<sup>24</sup>. While the Scottish Government is clearly committed to holding an inquiry, the observation is relevant in the Scottish context because a public inquiry which aims to meet the state's Article 2 obligations must meet the standards set out below.

Further detailed information on how Articles 2 and 3 of the ECHR could be invoked, can be found in the Commission's fuller analysis in relation to deaths in care homes found [here](#).

### **9.2.2. Procedural standards**

The standards of investigation arising from Article's 2 and 3<sup>25</sup> can be summarised as follows:

- **Independence** – Those carrying out the investigation must be independent from those implicated in the events. This requires "not only a lack of hierarchical or institutional connection but also a practical independence"<sup>26</sup>.

- **Adequacy** – Investigation authorities must take reasonable steps to secure evidence concerning an incident.<sup>27</sup> Where there has been a use of force by state agents, the investigation must be adequate and effective in that it should be capable of leading to a determination of whether the force used was justified.<sup>28</sup>
- **Promptness and reasonable expedition** – The ECtHR has stressed that a prompt investigatory response is generally regarded as essential in maintaining public confidence in a state’s adherence to the rule of law and in preventing the appearance or perception of a state’s collusion in or tolerance of unlawful acts.<sup>29</sup> The Court has also found that the passage of time is liable to undermine an investigation and will compromise its chances of it being completed.<sup>30</sup>
- **Public scrutiny and participation of next-of-kin** – there must be involvement of a deceased’s next-of-kin to the extent necessary to safeguard their legitimate interests.<sup>31</sup>

- **Non-discrimination**

Article 14 protects the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. This means that the right not to be discriminated against must be connected to the fulfilment of another Convention right. This does not mean that there must be a violation of another Convention right before Article 14 applies, simply that the right must be engaged.<sup>32</sup>

Article 2 right to life investigations require particular attention to be paid to questions of prejudice and discrimination and whether this may have been a factor in a person’s death. The ECtHR has defined discrimination as “treating differently, without an objective and reasonable justification, persons in relatively similar situations”.<sup>33</sup>

While these standards are requirements of investigations regarding potential interference with the rights to life and freedom from torture, inhuman or degrading treatment, these procedural requirements will be useful for all aspects of the inquiry.

The Commission believes the application of these principles should extend not only to the issues which resulted in loss of life and inhuman and degrading treatment but across the breadth of the inquiry where possible as a matter of good practice.

**Recommendation 9:**

The Commission recommends that Scottish Government frame the terms of reference in such a way as to make clear that they expect the Inquiry to meet the specific procedural obligations arising from human rights law, as set out above.

We consider below the elements of an Article 2 and 3 compliant investigation in more detail as they relate to the Inquiry.

**9.2.3. Independence**

The Inquiries Act provides the Minister with various powers to be exercised during the running of the inquiry.

For example, Section 19 provides a power to issue ‘restriction notices’, restricting public access to the inquiry, Section 25 provides a power to withhold material from publication and Section 12 provides powers to terminate the appointment of chairmen or panel members.<sup>34</sup>

It is possible to imagine circumstances where the exercise of any of these powers might threaten the institutional, hierarchical and practical independence of the inquiry which Article 2 standards demand.

In the course of post-legislative scrutiny, the House of Lords Select Committee on the Inquiries Act 2005 raised these concerns and made a number of specific recommendations aimed at securing an inquiries’ independence by curtailing some of the powers which the Act confers on Ministers:

*We recommend that the power of the minister to issue a restriction notice under section 19, restricting public access to an inquiry, should be abrogated. The chairman's power to issue a restriction order is sufficient.*

*We recommend that, whoever is responsible for publication of the inquiry report, section 25(4) should be amended so that, save in matters of national security, only the chairman has the power to withhold material from publication.*

*We recommend that where the minister wishes to terminate the appointment of a panel member other than the chairman, section 12(6) should be amended to require the chairman's consent;*

*[And]*

*We recommend that section 12 should be amended to provide that where the minister wishes to terminate the appointment of the chairman of an inquiry, he should be required to lay before Parliament a notice of his intention, with the reasons.<sup>35</sup>*

Although these recommendations were never implemented, they identify the weaknesses of the current statutory framework when measured against Article 2 and 3 standards.

**Recommendation 10:**

The Commission recommends the Scottish Government include in the TOR their undertaking to follow the above recommendations of the Select Committee and commit not to exercise powers under the identified provisions. This will strengthen the independence of the Inquiry.

**9.2.4. Accountability**

Article 2 and 3 investigations must address broad issues of State responsibility, including systemic issues and such matters as training, policies and practices, failures of supervision or inspection and “lessons learned”<sup>36</sup>.

If the investigation reveals a violation of the right to life, States have an obligation to ensure that those responsible are brought to justice and to provide compensation.<sup>37</sup> Together, these aspects of an investigation will provide accountability.

The Inquiry alone will clearly not provide full accountability. It is notable that the Inquiries Act 2005 expressly prohibits an inquiry panel from ruling or determining civil or criminal liability.<sup>38</sup> Further, the Act does not make any provision for the implementation of inquiry recommendations and recommendations are necessarily non-binding.

Previously, the findings of an inquiry have provided a basis for launching subsequent civil and/ or criminal proceedings but, while this may provide an essential form of redress for victims, the inevitable delay in reaching the conclusion of consecutive proceedings is problematic when measured against the need for promptness, discussed below.

In December 2017, the Institute for Government published their report '[How public inquiries can lead to change](#)', which analysed the impact of past public inquiries and their recommendations.

While noting the particular achievements of a small number of inquiries, their overall assessment was that:

“The number of inquiries that have received some form of follow-up is disappointing. Of the 68 inquiries that have taken place since 1990, only six have received a full follow-up by a select committee to ensure that government has acted.”<sup>39</sup>

The report criticised the lack of formal scrutiny of Governments' responses to inquiry reports and argued that Parliaments can and should play a more significant role in holding Ministers to account.

In order for the Inquiry to play a significant role in achieving accountability it will be essential that all relevant public bodies and those carrying out public functions act with openness and transparency.

**Recommendation 11:**

The Commission recommends that the Scottish Government consider, with meaningful participation from those particularly affected, what accountability the Inquiry can achieve and what additional steps are required to achieve access to justice and effective remedy in compliance with human rights law.

**Recommendation 12:**

The Commission recommends that when publishing the Terms of Reference, the Minister give a public commitment to respond in full to all the recommendations made in the Inquiry's report.

**Recommendation 13:**

The Commission recommends that the Scottish Government take all necessary steps to ensure that all duty bearers, public bodies and all carrying out public functions act in accordance with the principles of full transparency and cooperation in relation to the Inquiry.

**9.2.5. Promptness and reasonable expedition**

A public inquiry must balance a variety of competing demands. In an Article 2 investigation, there is particular tension between the need for *promptness/reasonable expedition* on the one hand and *adequacy* and *participation* on the other.

The scope of the present inquiry is unprecedented in terms of the numbers affected. With over 10,000 deaths registered in Scotland where COVID-19 was mentioned on the death certificate, the total number of people with a legitimate interest in participating either as survivors, bereaved or other relevant status or qualification could run to hundreds of thousands.

It will be for the Chair of the Inquiry to determine how best to secure and manage participation, and they will be faced with an unprecedented volume of evidence and number of participants.

Public inquiries typically take a long time to complete. In May 2018, the National Audit Office analysed the duration of the 26 inquiries concluded at that point since 2005. They found that the average was 40 months and the longest (the Iraq Inquiry) was 84 months<sup>40</sup>.

Noting the Scottish Government's ambition to establish the Inquiry by the end of the year, the data on past inquiries would suggest that it would not report until April 2025, even assuming it is of average



duration. Given the unprecedented range of issues and participants, that assumption is unlikely to be correct and the actual duration may be significantly longer.

It is another unusual and unfortunate aspect of this Inquiry's subject-matter that the loss of life from COVID-19 will continue while the Inquiry proceeds and potentially beyond its completion. Hence the most urgent of the Government's procedural Article 2 obligations in the COVID-19 context is to ensure that lessons are being learned as soon as possible so as to avoid unnecessary deaths in the future.

In Article 2 case-law, the ECtHR has stressed that a prompt investigatory response is generally regarded as essential in maintaining public confidence in a state's adherence to the rule of law and in preventing the appearance or perception of a state's collusion in or tolerance of unlawful acts.<sup>41</sup> The Court has also found that the passage of time is liable to undermine an investigation and will compromise its chances of it being completed.<sup>42</sup>

The consultation seeks views on how the inquiry should report its progress, whether there should be interim reports and if so, what should be dealt with in interim reports. In considering the procedure to be adopted, careful consideration will require to be given to the need for reasonable expedition as well as adequacy and participation. The Chair and/or Panel should consider the experiences of other Inquiries and draw on best practice<sup>43</sup> to decide how the Inquiry will be run so as to meet those requirements. They should do so with active participation from those most affected.

We note that the Institute for Government report cited above also highlights the importance of promptness so as to minimise the risk of repeated mistakes, or the risk that systems and institutions move on to such an extent that recommendations are rendered redundant. They concluded that interim reports should be published as rapidly as possible, setting out any immediate necessary changes.

It may be that the correct balance of promptness and adequacy differs across the different settings and sectors which the Inquiry will need to look at. Dividing the Inquiry into phases, prioritising areas where ongoing

threat to life or dignity is greatest and sequencing the proceedings and reports accordingly, may provide the necessary flexibility to achieve this. Concurrent channels addressing different aspects of the pandemic may be another option worth consideration, with a view to ensuring reasonable expedition overall. What may be possible will be dependent on resourcing, among other things.

## **10. Outcome of Inquiry**

While the Scottish Government has indicated that the Chair will be asked to produce recommendations, as that is also included as a question for respondents, the Commission confirms that in its view the Inquiry should produce recommendations in line with the various recommendations set out above.

The Scottish Government should also take steps to ensure that expectations around what can and cannot be delivered through the Inquiry are managed appropriately and effectively.

Alongside the setting up of the Inquiry, the Scottish Government, with meaningful participation from rights holders, should examine the question of what the Inquiry can achieve, and what other actions or remedies will be necessary to ensure compliance with human rights law on accountability, access to justice and effective remedy, as noted in Recommendation 11 above.

### **Recommendation 14:**

The Commission recommends that the Scottish Government explicitly confirm in the Terms of Reference that the Inquiry is to produce meaningful recommendations.

## 11. Conclusion: Recommendations

### **Recommendation 1:**

The Commission recommends that the Scottish Government:

- establishes a means and process for meaningful engagement directly with the people most impacted by the pandemic response, in relation to the Terms of Reference (TOR).
- publish and invite views on a draft TOR once prepared. The draft TOR should be published along with the report Ministers say will be produced by Scottish Government analytics to capture the input received on the Aims and Principles, on which the TOR will be based. A public awareness campaign should be undertaken to ensure people are aware of the draft TOR and the invitation for them to provide views. Sufficient time should be allowed for meaningful input.

### **Recommendation 2:**

The Commission recommends that the Scottish Government include in the TOR the expectation that the Inquiry will put in place a trauma-informed participatory process, with adequate supports and safeguards to protect the well-being of those impacted.

### **Recommendation 3:**

The Commission recommends that the Scottish Government ensure that adequate support is in place throughout the duration of the Inquiry, including advocacy and psychological support for those particularly affected by the handling of the pandemic.

### **Recommendation 4:**

The Commission recommends that the process of meaningful engagement established by the Scottish Government, referred to in Recommendation 1, should cover the appointment of Chair, panel members and assessors, as well as the TOR. The public awareness campaign should also ensure people are aware of the call for views on the process of appointment of Chair, panel and assessors as well as

on the draft TOR. Sufficient time should be allowed for meaningful input.

**Recommendation 5:**

The Commission recommends that the TOR make it clear that the overall purpose of the Inquiry includes learning lessons regarding our readiness to ensure that human rights are properly considered and balanced in challenging situations, and make recommendations accordingly.

**Recommendation 6:**

The Commission recommends that the TOR of the Inquiry explicitly set out:

- the need to address the disproportionate impacts of the pandemic response on different group's enjoyment of human rights across all settings (justice, social care, education etc.), both immediately and in the longer-term.
- that the process of decision-making and the impacts identified will be analysed for human rights compliance across the full range of international human rights law standards.

**Recommendation 7:**

The Commission recommends the TOR set out that the Inquiry will identify the full range of responsible actors across all public bodies and those performing public functions.

**Recommendation 8:**

The Commission recommends that the Scottish Government make it explicit in the TOR its expectation that the Chair will:

- act in accordance with human rights requirements in making decisions in relation to the conduct and procedure of the Inquiry, and
- ensure that the PANEL principles are complied with in the running of the Inquiry.

**Recommendation 9:**

The Commission recommends that Scottish Government frame the TOR in such a way as to make clear that they expect the Inquiry to meet the specific procedural obligations arising from Articles 2 and 3 of the ECHR, as set out above.

**Recommendation 10:**

The Commission recommends the Scottish Government include in the TOR their undertaking to follow the recommendations of the Select Committee referred to above, and commit not to exercise powers under the identified provisions. This will strengthen the independence of the Inquiry.

**Recommendation 11:**

The Commission recommends that the Scottish Government consider, with meaningful participation from those particularly affected, what accountability the Inquiry can achieve and what additional steps are required to achieve access to justice and effective remedy in compliance with human rights law.

**Recommendation 12:**

The Commission recommends that when publishing the TOR the Ministers give a public commitment to respond in full to all the recommendations made by the Inquiry.

**Recommendation 13:**

The Commission recommends that the Scottish Government take all necessary steps to ensure that all duty bearers, public bodies and all carrying out public functions act in accordance with the principles of full transparency and cooperation in relation to the Inquiry.

**Recommendation 14:**

The Commission recommends that the Scottish Government explicitly confirm in the TOR that the Inquiry is to produce meaningful recommendations.

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<sup>1</sup> An FAI involves a public examination of the circumstances of a death in the public interest. FAIs are conducted before a sheriff, following an investigation by the procurator fiscal. The procurator fiscal is responsible for presenting the evidence. Other interested parties, including nearest relatives or employers are also entitled to lead evidence. An FAI must take place when someone dies in custody in prison or a police station or a death is caused by an accident at work. FAIs can be held in other circumstances if it is thought to be in the public interest.

<sup>2</sup> [Coronavirus \(COVID-19\): information for bereaved families \(copfs.gov.uk\)](https://www.copfs.gov.uk/coronavirus)

<sup>3</sup> In August 2016, the Scottish Government's [Thematic Review of Fatal Accident Inquiries](#) found only 0.7% of all deaths investigated led to an FAI

<sup>4</sup> Sheriffs made no recommendations in hundreds of FAIs into deaths in custody - Scottish Legal News

<sup>5</sup> Covid-19: Crown Office records 3,400 care home deaths - Scottish Legal News

<sup>6</sup> The Equality & Human Rights Commission's [Submissions following Phase 1 of the Grenfell Tower Inquiry](#) provide an example of a rights-based legal framework for a public inquiry (pages 9-24).

<sup>7</sup> Inquiries Act 2005, Section 21

<sup>8</sup> Inquiries Act 2005, Section 18

<sup>9</sup> Inquiries Act, Section 19

<sup>10</sup> Inquiries Act, Section 24

<sup>11</sup> Inquiries Rules (Scotland) 2007, Section 4

<sup>12</sup> Inquiries Rules (Scotland) 2007, Section 5

<sup>13</sup> Inquiries Rules (Scotland) 2007, Section 9

<sup>14</sup> Inquiries Act, Section 5

<sup>15</sup> [Government Policy \(bih.org.uk\)](https://www.bih.org.uk/government-policy)

<sup>16</sup> Inquiries Act 2005, Section 4

<sup>17</sup> Inquiries Act 2005, Section 8

<sup>18</sup> Public Administration Select Committee, Government by Inquiry, HC 51-1, 3 February 2005, p. 31

<sup>19</sup> The Commission applied to be a core participant in the inquiry but their application was declined. Their subsequent 'Following Grenfell' project sought to highlight the human rights and equality dimension of the Grenfell Tower fire.

<sup>20</sup> [Article 2 of the ECHR, the Equality Act 2010 and participation of the survivors and bereaved \(Word\)](#)

<sup>21</sup> Inquiries Act, Section 11 (2)(a).

<sup>22</sup> See [www.scottishhumanrights.com/COVID-19/](http://www.scottishhumanrights.com/COVID-19/) for links to the Commission's work on various aspects of the pandemic response.

<sup>23</sup> Inquiries Act 2005, Section 17(3)

<sup>24</sup> [The Government's response to COVID-19: human rights implications](#), at paragraph 215

<sup>25</sup> *Nachova v Bulgaria*, no. 43577/98, 6 July 2005, at para. 110.

<sup>26</sup> *Armani da Silva v UK*, at para. 232

<sup>27</sup> *Armani Da Silva v UK*.

<sup>28</sup> *Armani Da Silva v UK*.

<sup>29</sup> *Al-Skeini and Others v UK*, no. 55721/07, 7 July 2011.

<sup>30</sup> *Mocanu and Others v Romania*, nos. 45886/07, 32431/08 and 10865/09, 13 November 2012.

<sup>31</sup> *Al-Skeini and Others v UK*.

<sup>32</sup> This is referred to as the Court's 'ambit test'. See *Rasmussen v Denmark*, no. 8777/79, 28 November 1984.

<sup>33</sup> *Zarb Adami v Malta*, no. 17209/02, 20 September 2006.

<sup>34</sup> Although the powers provided in Sections 19 and 25 are subject to restriction, these restrictions are capable of broad interpretation, for instance where the Minister considers there to be 'any risk of harm or damage' to the economic interests of the UK.

<sup>35</sup> [House of Lords Select Committee on the Inquiries Act 2005](#)

<sup>36</sup> *Al-Skeini* at §174

<sup>37</sup> *Boboev* at §11.16

<sup>38</sup> Inquiries Act 2005, section 2(1)

<sup>39</sup> [How public inquiries can lead to change](#) at page 25-26.

<sup>40</sup> <https://www.nao.org.uk/wp-content/uploads/2018/05/Investigation-into-government-funded-inquiries.pdf> at paragraph 2.5

<sup>41</sup> *Al-Skeini and Others v UK*, no. 55721/07, 7 July 2011.

<sup>42</sup> *Mocanu and Others v Romania*, nos. 45886/07, 32431/08 and 10865/09, 13 November 2012.

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<sup>43</sup> Examples of analysis of procedure adopted in previous inquiries include: Making public inquiries transformative : a human rights analysis of the Grenfell Tower Inquiry (gchumanrights.org); <https://www.kenova.co.uk/INDEPENDENT%20REVIEW%20OF%20ARTICLE%202%20ECHR%20ALYSON%20KILPATRICK%20updated.doc>; Article 2 of the ECHR, the Equality Act 2010 and participation of the survivors and bereaved (Word); [Investigation into government funded inquiries \(nao.org.uk\)](#) ; [Following Grenfell | Equality and Human Rights Commission \(equalityhumanrights.com\)](#) ; [SN06410.pdf \(parliament.uk\)](#)