INQUEST

TRUTH, JUSTICE & ACCOUNTABILITY

INQUEST and Inquest Lawyers' Group Response to the Independent Human Rights Act Review Call for Evidence
March 2021

Background

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. INQUEST's specialist casework focuses on deaths in prison and other forms of detention, and mental health settings, as well as deaths where wider issues of state and corporate accountability are in question, such as Hillsborough and the Grenfell Tower tragedy. Our policy, parliamentary, campaigning and media work is grounded in the day to day experience of working with bereaved people.

2. The INQUEST Lawyers Group (ILG) is a national pool of lawyers who provide preparation 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 thirty years, ILG members have represented bereaved families in hundreds of inquests into contentious deaths.

3. We respond to the questions posed in this Call for Evidence while also reaffirming our support for the Human Rights Act 1998 (HRA), which has assisted many bereaved families to achieve some measure of justice and accountability in connection with the deaths of their loved ones.

4. 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 more central place and a right to participate in investigations and inquests, and strengthening equality of arms through the provision of legal aid in some cases. At the same time, the HRA has strengthened the protections for people held in detention or where State responsibilities are engaged through the interpretation of Article 3 (the prohibition on torture and inhuman or degrading treatment or punishment), Article 8 (the right to respect for private and family life) and Article 14 (the prohibition of discrimination), among other rights.

5. In reviewing the operation of the HRA it is essential to have regard to its purpose as set out in the Preamble to the Act, namely to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. Whilst there is more to do, the experience of INQUEST and its members 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 a living instrument.

6. 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 amendment. Instead, it illustrates its crucial role in enabling individuals to seek vindication of their Convention rights in the domestic courts, and thereby helping to make those rights more effective. We strongly believe that further progress is more likely to be achieved by widening access to justice than by amending the HRA.

7. The following response focusses on questions 1(a) and 2(a). We note and support the submission by the Police Action Lawyers' Group in respect of other questions in the call for evidence.

Theme One: the relationship between domestic courts and the European Court of Human Rights (ECtHR)

Question 1(a): How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

8. As other respondents will no doubt set out in detail, the case law has developed so as to challenge any concern that the domestic courts may interpret the duty "to take into account" as requiring them simply to follow the ECtHR in every case uncritically or without regard to the domestic context: see for example the observations of Lord Neuberger in *Manchester City Council v Pinnock:*[1]

> *"This Court is not bound to follow every decision of the [ECtHR]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the [ECtHR] which is of value to the development of Convention law (see e g R v Horncastle [2009] UKSC 14; [2010] 2 WLR 47). Of course, we should usually follow a clear and constant line of decisions by the [ECtHR]: R (Ullah) v Special Adjudicator [2004] UKHL 26; [2004] 2 AC 323. But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber. As Lord Mance pointed out in Doherty v Birmingham [2009] 1 AC 367, para 126, section 2 of the HRA requires our courts to "take into account" [ECtHR] decisions, not necessarily to follow them. Where, however, there is a clear and constant line of decisions whose effect is not*

[1] [2010] UKSC 45 at para 48. See also more recent jurisprudence such as *R (Hicks) v Commissioner of Police of the Metropolis* [2017] UKSC 9; [2017] A.C. 256; [2017] AC 624; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2; [2019] 2 W.L.R. 440.

inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this Court not to follow that line."

9. Importantly, section 2 also advances the underlying purpose of the HRA by enabling domestic courts, where appropriate, to reach their own conclusions as to the scope of individual rights rather than waiting for an express decision by the ECtHR. The case of *Rabone and another v Pennine Care NHS Trust* [2012] UKSC 2, in which INQUEST, together with JUSTICE, Liberty and Mind, intervened, provides a useful illustration.[2] One of the issues before the Supreme Court in that case was whether there was an operational duty under article 2 of the Convention to protect against the risk of suicide by informal psychiatric patients. At the time the case was decided there was no decision of the ECtHR which directly answered the question, but after careful analysis of the relevant jurisprudence, the Supreme Court held that such a duty could in principle arise and did arise in the circumstances of that case: that conclusion flowed naturally from existing Strasbourg case law.[3]

10. The decision of the Supreme Court was implicitly approved shortly afterwards by the European Court in the case of *Reynolds v UK*[4] and more recently the Grand Chamber has reached the same decision on the relevant principle in *Fernandes de Oliveira v Portugal.*[5] The courts have since reaffirmed the approach adopted in *Rabone*: see for example the observations of Lord Kerr and Lord Mance in *DSD v Commissioner of Police of the Metropolis*[6].

11. In conclusion, we do not consider there to be any need to amend the clear language of section 2(1), which is by now well-understood.

Theme Two: the impact of the HRA on the relationship between the judiciary, the executive and the legislature

Question 2(a): Should any change be made to the framework established by sections 3 and 4 of the HRA?

[2] [2012] UKSC 2. We note that Baroness Hale of Richmond referred to the case of *Rabone* in her recent evidence to the Joint Committee on Human Rights: https://committees.parliament.uk/oralevidence/1661/pdf/
[3] Ibid at §112
[4] (2012) 55 EHRR 35
[5] (2019) 69 EHRR 8
[6] [2018] UKSC 11 at §§77-78 and §153.

12. We focus specifically on the questions insofar as they relate to the section 3 requirement that so far as is possible, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights.

13. Whilst there has been political disquiet about the impact of section 3 on Parliamentary sovereignty,[7] in practice it is rare to find examples of cases which raise such concerns. In any event, at an early stage the House of Lords set out the boundaries of the interpretative obligation: the meaning which section 3 imports must be compatible with the underlying purpose of the legislation being construed and section 3 does not require courts to make decisions for which they are not equipped.[8]

14. The development of coronial law in the light of ECtHR jurisprudence on the State's investigative obligation under article 2 of the Convention provides a useful example of the operation of section 3 in practice.

15. Prior to the Coroners and Justice Act 2009, the statutory regime governing inquests was to be found in the Coroners Act 1988 and the Coroners Rules 1984. Section 11(5) of the 1988 Act specified the matters to be determined and recorded at the conclusion of an inquest, namely who the deceased was and how, when and where the deceased came by his death. Rule 36 of the 1984 Rules specified that the proceedings and evidence at an inquest should be directed solely at the matters set out in section 11(5), together with the registration particulars, and that neither the coroner nor the jury should express any opinion on any other matters.

16. The scope of these provisions was considered by the Court of Appeal in *R (Jamieson) v HM Coroner for North Humberside and Scunthorpe*[9] which concerned the death of Michael Jamieson, who had hanged himself in a prison hospital whilst serving a long custodial sentence. The court dismissed the family's challenge to the coroner's decision not to allow the jury to return a verdict incorporating lack of care, interpreting the question "how" the deceased came by his death in section 11(5)(b)(ii) of the 1988 Act narrowly as meaning "by what means" and not "in what broad circumstances."

17. Ten years later, the same provisions came to be considered by House of Lords in *R (Middleton) v West Somerset Coroner and another*[10], a case which also concerned the suicide of a prisoner, Colin Middleton. The court concluded that, having regard to the jurisprudence of the ECtHR, the inquest as the means by which the state sought to discharge its investigative obligation under article 2 of the Convention ought ordinarily to culminate in an expression of the jury's conclusion on the central, factual issues in the case. The conclusion was inescapable: there were some cases in which the regime for conducting inquests as explained in *Jamieson* did not meet the requirements of

[7] Conservatives, 'Protecting Human Rights in the UK: The Conservatives' Proposals for changing Britain's Human Rights Laws, published by Chris Grayling MP on 3 October 2014
[8] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 572
[9] [1994] 3 WLR 82
[10] [2004] 2 AC 182. INQUEST were granted leave to intervene in the appeal by way of written submissions.

the Convention. A change of interpretation was therefore necessary to comply with the state's obligations under article 2: to interpret "how" in section 11(5)(b)(ii) in the broader sense previously rejected, namely as meaning not simply "by what means" but "by what means and in what circumstances". This could be done by inviting an expanded form of verdict, which might be in the form of a narrative verdict or answers to questions put by the coroner.

18. After *Middleton* this approach was applied by coroners in inquests engaging the investigative obligation under article 2. Parliament later signalled its acceptance and approval of the change by enacting section 5 of the Coroners and Justice Act 2009, which enshrined in statute the broader approach to be adopted in cases engaging Convention rights.[11] The beneficial impact of the Middleton judgment on inquests can be seen in the opportunity that narrative conclusions bring to more meaningful inquest outcomes and the identification of systemic failings.

19. In practice, therefore, section 3 has provided, and can provide, a practical mechanism by which domestic courts may give immediate effect to rights guaranteed by the Convention. We do not consider that it should be amended or repealed.

[11] **5 Matters to be ascertained**
(1) The purpose of an investigation under this Part into a person's death is to ascertain—
(a) who the deceased was;
(b) how, when and where the deceased came by his or her death;
(c) the particulars (if any) required by the 1953 Act to be registered concerning the death.

(2) Where necessary in order to avoid a breach of any Convention rights (within the meaning of the Human Rights Act 1998 (c. 42)), the purpose mentioned in subsection (1)(b) is to be read as including the purpose of ascertaining in what circumstances the deceased came by his or her death.
(3) Neither the senior coroner conducting an investigation under this Part into a person's death nor the jury (if there is one) may express any opinion on any matter other than—
(a) the questions mentioned in subsection (1)(a) and (b) (read with subsection (2) where applicable);
(b) the particulars mentioned in subsection (1)(c).
This is subject to paragraph 7 of Schedule 5.

POLICY • ADVICE • CAMPAIGNS

3rd Floor 89-93 Fonthill Road • London • N4 3JH • Telephone: 020 7263 1111 • Fax: 020 7561 0799 • Website: inquest.org.uk