



BIHR Consultation Submission: The UK Covid-19 Inquiry: Draft Terms of Reference consultation

April 2022

Summary

1. Like many individuals and organisations, over the last two years BIHR has witnessed the very real impact on people across the UK when our legally protected human rights are not met. Covid-19 has (and continues to be) an unprecedented time, shining a spotlight on existing human rights issues in the UK, with measures taken by the Government often exacerbating these, or disproportionately impacting people who were already in vulnerable positions. The pandemic has highlighted the lack of support, resource, and training for public bodies to respect, protect and fulfil human rights, not simply as good practice, but as their legal duty set out in our Human Rights Act. This Inquiry is an opportunity to reflect on how those very real failures are addressed, ensuring that the state is held accountable, and that measures are put in place to prevent this from happening again.
2. As the lens is turned towards accountability, there must be an explicit commitment to human rights at this crucial first step, the Inquiry Terms of Reference. We call on the Inquiry to explicitly include reference to ensuring an examination of whether the rights and duties set out in the Human Rights Act have been upheld during the pandemic and set out clear measures to ensure these are upheld in the future. In doing so the Inquiry must take an explicit human rights-based approach, which we set out below.

Introduction

3. The British Institute of Human Rights (BIHR) is a charity working across the UK to enable positive change through the practical use of human rights law beyond the courts. We share this evidence of change and people's lived experiences to inform legal and policy debates. We work with three main stakeholder groups:
 - People interacting with public bodies and services, supporting them with the information they need to benefit from their human rights in daily life
 - Community and voluntary sector groups to support them to advocate for social justice using human rights standards
 - Staff across local and national public bodies and services to support them to make rights-respecting decisions.
4. Our direct work enables us to call for the development of national law and policy which truly understands people's experiences of their human rights. We work with over 2,000 people across our stakeholder groups each year, across the UK, including devolved countries. This increased dramatically during the first year of the pandemic, which saw us support 4,000 people directly, to help them mitigate the human rights breaches stemming from governmental measures to address Covid-19. This submission is directly

informed by our organisation's unique expertise of human rights law and practice, and people's real-life experiences of the issues.

Key points: a human rights crisis must be addressed through human rights accountability

5. We are responding to this consultation because both the impact of the Covid-19 pandemic including the measures taken by Governments to address it, and the recovery from it are a human rights issue, as made clear by the Secretary General:



The COVID-19 pandemic is a public health emergency – but it is far more. .. a human crisis that is fast becoming a human rights crisis ... human rights cannot be an afterthought in times of crisis – and we now face the biggest international crisis in generations ... human rights can and must guide COVID-19 response and recovery. The message is clear: People – and their rights – must be front and centre. A human rights lens puts everyone in the picture and ensures that no one is left behind. Human rights responses can help beat the pandemic, putting a focus on the imperative of healthcare for everyone. But they also serve as an essential warning system – highlighting who is suffering most, why, and what can be done about it.

António Guterres, Secretary-General of the United Nations, 23 April 2020



6. We strongly recommend that the Inquiry takes a human rights-based approach to its work; the pandemic and the responses to it have resulted in human rights breaches, these must be recognised, and any attempt to shine the spotlight of accountability must also be explicitly human rights based. A human rights-based approach is a conceptual framework which gives practical effect to human rights law – a way to focus on the rights of people, the responsibilities of governmental bodies to uphold these, ensuring accountability when those responsibilities are not met, and learning the lessons to prevent people's rights from being further breached in the future.
7. Rather than reinventing the system of accountability, the Inquiry should be making best use of the legal tools that are already available. Our Human Rights Act sets out the rights of every person in the UK – rights which have been significantly impacted during the pandemic through State interventions and measures. It also sets out the frameworks for balancing these rights, when legally appropriate, and thus when the state needs to be held to account for both failures to protect and actions which have breached our rights. Importantly, our Human Rights Act recognises that the “state” means central and local government, and individual public bodies. This therefore provides a route for accountability for breaches of rights through national measures (law and policy) and more localised actions/inactions. Additionally, whilst public inquiries in the UK are governed by the Inquiries Act 2005, as a public body the Inquiry must also comply with the Human Rights Act, and the legal duties set out in upholding the rights it protects. This

includes the investigative and procedural obligations which are especially relevant to the right to life (Article 2) and the right to not be treated in an inhuman and degrading way (Article 3), both of which have been clearly engaged over the course of the pandemic and the UK state's interventions.

8. BIHR recommends using the PANEL framework to support a human rights-based approach:

PARTICIPATION: People should be involved in decisions that affect their human rights.

ACCOUNTABILITY: There should be monitoring of how people's rights are being affected, as well as remedies when things go wrong.

NON-DISCRIMINATION: people with different protected characteristics should be able to enjoy their rights in the same way as others. Nobody should be treated unfairly because of their age, sex, ethnicity, disability, religion, belief, etc.

EMPOWERMENT: Everyone should understand their rights and be fully supported to take part in developing policy and practices which affect their lives.

LEGALITY: Approaches should be grounded in the legal rights that are set out in human rights law.

9. For example, in relation to each element of this approach – which maps to the questions asked in the consultation on the Inquiry Draft Terms of Reference – key elements include:

10. **PARTICIPATION:**

- Bereaved families and those who have experienced significant detriment as a result of state in/action should have an active and meaningful role in relation to the Inquiry – from how it will work to potential remedies.
- It is also important that those working on the frontline of the public bodies implementing Covid-19 measures are also able to participate in the Inquiry. For example, we know from our work that significant amounts of social work staff, health staff, and care staff, were placed in impossible positions to make decisions which they knew would breach people's human rights. In particular our experience-led research submitted to the [Joint Committee on Human Rights Inquiry](#), and on [Do Not Resuscitate Orders](#), specifically, shows staff we provided with very little guidance, support or training on how to uphold rights during the pandemic:



- We note that this consultation on the Draft Terms of Reference for such an important inquiry has been only 4 weeks, and through an online call for input. This does not constitute active and meaningful participation. We are concerned for what this means for the full Inquiry – much more must be done to ensure active and meaningful participation. This must happen in order to ensure that the Inquiry hears from the people who have important evidence to contribute to your investigation.
- As we have noted elsewhere the current approach to government consultations leaves much to be desired:

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At BIHR, we have concerns about the human rights implications of government approaches to policy consultations. Many groups we work with, and people with lived experience, have a lot to offer policy consultations, from the impact on individuals to the realities of staff implementing proposals. But engaging with government consultations takes valuable time and resources from all involved, and we are increasingly concerned about flawed processes which exclude or lead to "consultation fatigue". Governments have duties to uphold human rights; developing a human rights approach to policy consultation could offer civil society a proactive solution, helping to balance the power dynamics.

BIHR, "Government Policy Consultations: From a Human Rights Analysis to a Human Rights Approach" August 2021

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- Lessons should be learnt from former public inquiries, such as that into Grenfell, where the initial stages were heavily criticised for the lack of participation.

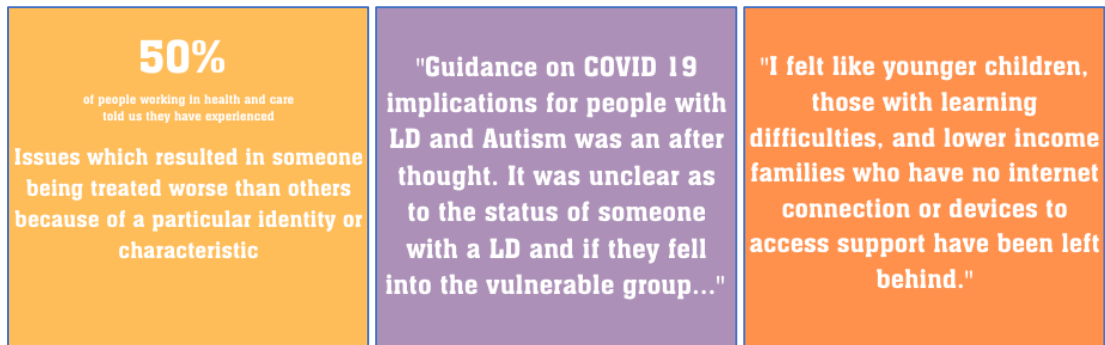
11. ACCOUNTABILITY:

- Accountability means both knowing who is responsible for upholding human rights and ensuring scrutiny of those decisions, as well as ensuring remedies are available where there have been breaches. This does not simply have to be about court-based processes, but applies across the actions of public bodies, including the Inquiry.
- It is therefore important that the two intended strands - COVID-19 response and the impact of the pandemic in England" and "response of the health and care sector" – do indeed cover the whole range of those Governmental and public bodies whose actions may have risked and breached human rights during the pandemic. For example, there is no specific reference to policing, which is vital given that the Government chose to use a criminal law approach to many of the public health regulations. Additionally, it is unclear educational provision fits, for example, in terms of the general disruption to education, the potential risk in educational environments, and the reduction of duties to meet the needs of children with special educational needs.
- The Inquiry itself also needs to be accountable. For example, key factors will be ensuring a timely production and public publication of its findings at interim and final stages. We endorse the recommendation of Equally Ours that this should be within one month of the reports being agreed internally by the panel.

12. NON-DISCRIMINATION:

- In addition to ensuring it upholds the HRA right to non-discrimination (Article 14), the Inquiry must also meet its legal duties under the Equality Act 2010.

- It is well-known that the pandemic and governmental measures to address it have had a disproportionate impact on a range of people and communities across the
- We have seen this directly and starkly in our work at BIHR, and through our own research submitted to the [Joint Committee on Human Rights Inquiry](#):



- The Inquiry's Terms of Reference must make explicit reference to, and commit to the investigation of, the discriminatory and disproportionate impacts of the pandemic.

13. EMPOWERMENT:

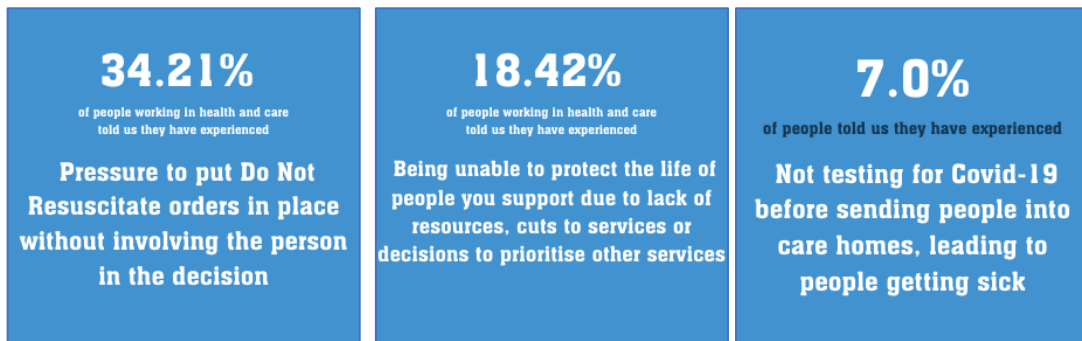
- Interlinking with participation, empowerment means that people should be proactively supported to take part in the process, which includes measures and reasonable adjustments throughout.
- We note that this consultation on the Draft Terms of Reference, as well as being open for only 4 weeks, has not been made available in any accessible alternative formats, such as Easy Read, audio, BSL, etc. Given the well-documented impact of Covid-19 measures on disabled people, this is not a good start for the Inquiry in regard to equalities and human rights and we are concerned about the lack of thought on participation, non-discrimination, and empowerment. Moving forward the Inquiry must ensure this is addressed both through its Terms of Reference and its operation.

14. LEGALITY:

- As noted above, it is vital that the Inquiry ensures it is explicitly (not implicitly) working within the framework of human rights law, and specifically our Human Rights Act, which sets out both the rights from the European Convention on Human Rights that belong to each person in the UK **and** the legal duties to uphold these. The latter in particular applies to both the Inquiry's review of governmental and public body in/action during the pandemic **and** the Inquiry's own operation.
- The following rights, at a minimum, have been engaged during the pandemic and must form an explicit part of the Inquiry's investigation into whether governmental and public body in/action breached rights (which includes both the duty to not breach the rights and the duty to step in and protect the rights):

The right to life (Article 2): In the context of the pandemic there are numerous issues to be investigated, including (but not limited to): lack of access to life saving treatment, clinical guidance, the availability of PPE, the creation of risk through discharge into care homes where there are increased health vulnerabilities,

disproportionate deaths of black and minoritized people, etc. From our JCHR evidence:



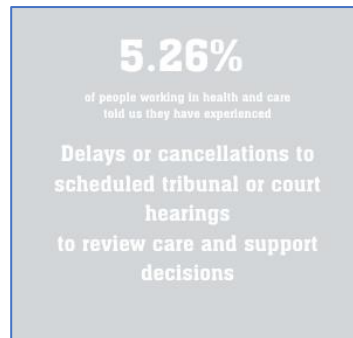
The right to not be treated in an inhuman or degrading way (Article 3): In the context of the pandemic there are numerous issues to be investigated, including (but not limited to): lack of access to treatment, care or support that left people in serious pain and suffering (both physical and mental), poor end of life care, separation of families and loved ones with mental health issues or other conditions resulting in serious harm. From our JCHR evidence:



The right to liberty (Article 5): In the context of the pandemic there are numerous issues to be investigated, including (but not limited to): detaining people in various health, care, and residential educational settings without relevant legal safeguards. From our JCHR evidence:



The right to fair trial (Article 6): In the context of the pandemic this includes processes used in criminal law measures to address a public health emergency. From our JCHR evidence:



The right to non-retrospective criminal sanctions (Article 7): In the context of the pandemic this includes the exceptionally late publication of public health regulations by the Government, which included criminal sanctions, coming into effect minutes after being published in the middle of the night.

The right to respect for private and family life, home and correspondence (Article 8): In the context of the pandemic there are numerous issues to be investigated, including (but not limited to): the separation of families and particularly blanket bans on visiting in health and care settings with significant impacts; the removal or reduction of care and support from people who rely on this for everyday life, significantly impacting their wellbeing; lack of discharge or inappropriately early discharge from health and care settings, etc. From our JCHR evidence:



The right to non-discrimination (Article 14): In the context of the pandemic there are numerous issues to be investigated, including (but not limited to), as noted above: older people, disabled people (of all ages, and across disabilities, including learning disabilities, mental health issues, neurodiversity, physical disabilities, etc.), women experiencing domestic abuse, people from lower socio-economic backgrounds, and black and minoritized people.

""Community Mental Health Teams stopped visiting care homes. This has meant people with mental health issues and/or dementia have remained in placement for significantly longer than needed.""

"Using online platforms for communication already alienates a population that is digitally impoverished."

"Age related.....truly feel all over 65s were written off, had do not resuscitate orders (DNRs) forced upon them and blanket Patient Specific Direction (PSD)/Covid specific Kardex's without individual assessment."

Conclusion

15. We strongly recommend that the Inquiry takes a human rights-based approach to its work; and in particular that the Human Rights Act – both in terms of the rights it protects and the legal duties it places on government and public bodies, including the Inquiry – is explicitly within the Inquiry's Terms of Reference **and** underpins its operation.
16. Over the last two years we have witnessed the very real impact on people across the UK when our legally protected human rights are not met. Covid-19 has (and continues to be) an unprecedented time, shining a spotlight on existing human rights issues in the UK, with measures taken by the Government often exacerbating these, or disproportionately impacting people who were already in vulnerable positions. The pandemic has highlighted the lack of support, resource, and training for public bodies to respect, protect and fulfil human rights, not simply as good practice, but as their legal duty set out in our Human Rights Act. This Inquiry is an opportunity to reflect on those very real failures, ensuring that the state is held accountable, and that measures are put in place to prevent this from happening again. As the lens is turned towards accountability, there must be an explicit commitment to human rights at this crucial first step, the Inquiry Terms of Reference.