



A ‘Human Rights-Based Approach’ to the Scottish COVID-19 public inquiry

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Executive Summary

The Centre for the Study of Human Rights Law is a focal point for research and teaching in human rights law within the Law School at the University of Strathclyde.

The Scotland Branch of the Covid-19 Bereaved Families for Justice UK requested that the Centre provide them with a briefing paper on the key features of a human rights-based public inquiry.

Accordingly, the following briefing paper is not a comprehensive and detailed legal analysis. Rather its purpose is to offer an outline of how the values and principles of a human rights-based approach may be applied to the pending Scottish Covid-19 inquiry and, specifically, to the development of its Terms of Reference. This briefing paper is therefore for the benefit of the bereaved families and for those with whom they may wish to share it.

It is important to clarify at the outset that a human rights-based approach would not be an alternative to a traditional public inquiry but would rather be supplementary and add value. It provides a framework for a public inquiry and accordingly helps shape the Terms of Reference and the public legitimacy of the inquiry.

The underpinning value of all human rights law and therefore that of a human rights-based public inquiry is that of human dignity.

The principles of a human rights-based approach, as derived from the United Nations and promoted by the Scottish Human Rights Commission among others in Scotland, are contained within the PANEL Principles of Participation, Accountability, Non-discrimination, Empowerment and Legality.

These principles can be applied to a public inquiry through the lens of the human rights-based approach. This approach identifies three dimensions or pillars of a public inquiry – namely, its Structure, Process and Outcomes.

The Structure is the values base and legal framework of the public inquiry. For example, this will include recognition of the right of effective participation of bereaved families in the inquiry, the investigative duties of those conducting the inquiry and the consideration by the inquiry of all of the human rights at stake.

The Process is the effort made to apply the framework in the conduct of the inquiry. For example, this will include efforts to enable the effective participation of bereaved families through such measures as ensuring public awareness of the inquiry, inviting input to the development of the Terms of Reference of the inquiry, collection of and providing access to all relevant evidence, permitting relevant questions to be put on behalf of affected families, and providing an accessible venue for the inquiry and financial support where necessary to enable the participation of affected families.

The Outcomes are the actual public inquiry findings which result from this human rights-based approach. For example, this should include findings on accountability where rights have been breached and duties have not been met, as well as lessons to be learned to ensure no repetition.

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The Centre is pleased to be able to contribute to the establishment of a human rights-based Covid-19 public inquiry in Scotland and hopes that this briefing paper may be of some use to bereaved families.

Table: Human Rights-Based Approach and Relevance to Inquiry Terms of Reference

Pillars of Human Rights-Based Approach	Examples of application of PANEL Principles	Relevance to Terms of Reference
<p>Structure The values and legal framework of the public inquiry</p>	<p>Rights to effective participation of bereaved families</p> <p>Investigative duties of those conducting the inquiry to identify accountability as appropriate, and lessons to be learned for purposes of non-repetition</p> <p>Consideration by the inquiry of the human rights of bereaved families at stake</p>	<p>Recognition of right to participation of bereaved families</p> <p>Recognition of the relevant investigative duties in respect of the human rights of the bereaved families at stake</p>
<p>Process Effort made to apply the values and legal framework</p>	<p>Efforts to enable the effective participation of bereaved families through such measures as:</p> <p>Ensuring public awareness of the inquiry</p> <p>Inviting input to the development of the Terms of Reference of the inquiry</p> <p>Collection of and providing access to all relevant evidence</p> <p>Permitting relevant questions to be put on behalf of affected families</p> <p>Providing an accessible venue for the inquiry and financial and other support where necessary to enable the participation of bereaved families.</p>	<p>Recognition of need of specific measures enabling effective participation of bereaved families</p>
<p>Outcome Findings, as determined by the public inquiry, which result from the application of the above pillars</p>	<p>As determined by the public inquiry and including identification of accountability where appropriate and lessons to be learned for purposes of non-repetition</p>	<p>Recognition of need to identify accountability where appropriate and lessons learned for purposes of non-repetition</p>

Introduction

Following the COVID-19 pandemic in Scotland, the First Minister committed to a human rights-based approach public inquiry into the pandemic.¹ While a UK-wide independent inquiry was also announced by the Prime Minister on the 15th of July 2020,² the Scottish Government has now confirmed that a human rights-based inquiry will be carried out in Scotland.³

The purpose of this briefing paper is to provide information to bereaved families, and others with whom they would wish to share this briefing. This briefing outlines what a 'human rights-based approach' entails for a public inquiry, and how this can be used to safeguard the interests of those who come to the inquiry seeking answers.

It outlines that a human rights-based approach to a public inquiry should be understood as a supplement rather than an alternative to a traditional public inquiry. This briefing paper will:

- Offer readers an understanding of what a human rights-based approach consists of and how this supplements expectations of a traditional public inquiry;
- Empower bereaved families to help shape the Terms of Reference for the inquiry, reflecting their interests and rights;
- Empower bereaved families to maximise the effectiveness of their participation in the inquiry;
- Support others with responsibilities in relation to the inquiry to develop an understanding of their duties in light of a human rights-based approach.

Section 1 ('Introduction to a Human Rights-Based Approach') will introduce the concept of a human rights-based approach, offering background and an overview of its key features. Additionally, it will discuss existing rules for 'traditional' inquiries and the role of a human rights-based approach as a supplement, rather than replacement for them. This section will analyse a number of key sources in order to develop an understanding of the relationship between COVID-19 and human rights in Scotland. The conclusions drawn from these sources will be linked to the briefing paper's recommendations on how to establish a human rights-based public inquiry. The underpinning values of human rights law will be briefly explained to allow an understanding of how these are incorporated in the three pillars of the human rights-based approach, namely structure (values and legal framework), process (efforts to apply the framework), and outcomes (actual results of efforts).

Section 2 ('Structure, Process and Outcomes') will explain how the human rights-based approach can be broken down into three pillars and what the content of these pillars are. It will offer a summary of relevant international human rights law as well as practical concerns such as location, venue, and accessibility. Furthermore, it will begin to explain the link between structure, process and outcomes and the public inquiry's Terms of Reference. This can support participants to consider how they

might wish to influence the inquiry and to identify the added value of a human rights-based approach.

Section 3 ('COVID-19 and Human Rights') brings together the context of the COVID-19 pandemic and the legal framework outlined in Section 2, and will also provide a starting point to substantively influence the terms of reference of the inquiry.

Section 4 ('The PANEL Approach') sets out the recommended methodology that the inquiry could use to self-assess whether its operation meets the requirements of a human rights-based approach. The PANEL acronym represents principles of participation, accountability, non-discrimination, empowerment and legality. Each constituent part of this approach and its underpinning values will be explained. The aim is to summarise the duties relevant for the inquiry and how these can be used by participants to maximise the meaningfulness of their input and the inquiry outcomes.

Overview of a Human Rights-Based Approach

Public Inquiries and a Human Rights-Based Approach

Public inquiries in the UK are governed by the Inquiries Act 2005. Section 28 confers powers on the Scottish Ministers to conduct inquiries that relate to so-called 'Scottish matters' (i.e. matters that relate to Scotland and are not 'reserved' to the UK Parliament). The rules relating to such inquiries are contained in the Inquiries (Scotland) Rules 2007. These rules relate to such matters as procedure, evidence, the handling of documents and awards made by the inquiry Chair. However, given the nature and the consequences of the pandemic, the Scottish Government has committed to supplement the standard process with the incorporation of values and standards drawn from human rights law.

The human rights-based approach is a conceptual framework which gives practical effect to human rights law, values, and principles. Like the human rights legal framework, a human rights-based approach is underpinned by the value of respect for human dignity. It aims to promote respect for human rights and to support redress for those whose human rights have not been respected.⁴

This framework can be used to supplement a traditional approach to public inquiries. Applying the lens of a human rights-based approach means focusing on three main aspects (or 'pillars'): structure (the human rights legal framework and underpinning values); process (efforts to implement the values, legal rights and duties), and outcomes (the actual results of such efforts). A key benefit of adopting this approach is that participants, including bereaved families, should become empowered to have their voices heard and to have meaningful opportunities to influence the inquiry process and outcomes.

Key Scottish sources linking human rights to inquiries and COVID-19

In 2020, the Scottish Human Rights Commission (SHRC) released two key publications concerning COVID-19 in Scotland. In addition to presenting relevant data in respect of the pandemic, these reports also offer recommendations in relation to the inquiry. Both show why a human rights-based approach will be appropriate and add value.

The SHRC is an independent public body, accountable to the people of Scotland through the Scottish Parliament. The duties and powers of the SHRC are set out in the Scottish Commission for Human Rights Act 2006. The SHRC has powers to recommend changes to law, policy, and practice; promote human rights through education, training, and research; and to conduct inquiries into the policies and practices of Scottish public authorities.⁵

The first source is the SHRC's *Care Homes and Human Rights Report*.⁶ This report sets out a route map as to how the Scottish Government can conduct an inquiry into COVID-19 deaths in care homes in a way that complies with its human rights obligations. It also makes recommendations for establishing human rights leadership through the PANEL approach, which will be expanded upon later in this briefing. The SHRC Report explains in detail the relevant duties upon Government under human rights law in relation to both management of the pandemic, and the structure and process of any subsequent inquiries where care homes are concerned. For example, this includes a duty to investigate loss of life.⁷

Care homes can be expected to be the focus of a large part of any inquiry into COVID-19 deaths. The inquiry, however, could also address other issues. The second SHRC source shows a wider scope of COVID-19 related rights issues in Scotland.

This second source is an SHRC submission to the Scottish Parliament's Equalities and Human Rights Committee that focuses on a COVID-19 Inquiry.⁸ It includes a section on care homes which features some of the same data and raises the same questions regarding whether clinical guidance, PPE, and the availability and distribution of testing (including the transfer of patients from hospitals to care homes) was adequate.⁹ These are areas which could be central to the Terms of Reference for the inquiry.

This report also offers a broader account of how different groups have been impacted disproportionately in relation to a number of human rights standards.¹⁰ The recommendations in this source, and in the Care Homes Report, indicate relevant areas of focus and both of these reports should be important reference points for the scope of the inquiry.¹¹ They provide sound guidance for the human rights legal framework, values and principles that inform a human rights-based approach and which should permeate all aspects of the inquiry structure, process and outcome.

Structure, Process, Outcomes

This human rights-based approach will provide a framework for the inquiry. To help achieve this, the approach is composed of three main pillars: Structure, Process and Outcomes. Each pillar incorporates human rights legal standards, values and principles with the aim of bringing added value to the overall inquiry for all stakeholders.

Structure

The basic structure that the inquiry is required to follow comes from the legal rules set out in Article 2 (the right to life) of the European Convention on Human Rights (ECHR).¹² The ECHR is an international treaty to which the UK is a contracting state. The obligations of the ECHR are enshrined in the UK and Scotland's national law.¹³ The duties apply to central government, local government and other organisations that deliver services on behalf of the state.

Legal Framework

The first part of the right to life states that: "Everyone's right to life shall be protected by law". The rights places a duty on states to refrain from the intentional and unlawful taking of life, and also to take appropriate steps to safeguard the lives of those within their jurisdiction.¹⁴ The latter duty is described as a 'positive duty' to take appropriate steps. It is known to apply to a wide range of situations.¹⁵

At its most basic, this means that governments and parliaments have a duty to put in place a legislative framework for the purposes of avoiding deaths for which the state could be liability. In the context of the coronavirus pandemic, this translates to a legislative framework and policy imperatives to minimise the number of deaths.

Foreseeability and Preparedness

The European Court of Human Rights has found that, where there is a known risk, or a risk is foreseeable, parliaments are expected to have a framework of legislation in place to reduce that risk of harm. Where a risk was not foreseeable, the European Court of Human Rights would look at the emergency planning in place, or preparedness of governments, to deal with the unexpected.¹⁶ In the context of COVID-19 that could mean looking at both the general pandemic plans in place as the crisis hit, and the legislation put in place as it evolved.

However, the duty on governments is not open-ended, and in fulfilling their obligation to minimise deaths the European Court of Human Rights would look at the various steps the government could have taken, as well as having regard to its operational priorities and resources. States would not be held to an impossible standard, which they would not be able to meet.¹⁷

This point about foreseeability and expectation of preparedness provides markers for understanding where the beginning and the end of the positive duty lies. However, a public inquiry is not a judicial body and, therefore, its findings will not necessarily be restricted in the same way.

The Right to Life in Medical Settings

Traditionally, the European Court of Human Rights has taken the view that a death caused by negligence in the healthcare setting does not amount to a violation of the right to life in Article 2 of the ECHR.¹⁸ However, there are exceptions to that general rule.

In one case, the European Court of Human Rights considered medical negligence and the suitability of national professional standards. The Court suggested that two very exceptional sets of circumstances could lead to a violation of the right to life duties in a medical care setting.

The first were circumstances in which life was “knowingly put in danger by denial of access to lifesaving treatment” and the second were circumstances in which a “systematic or structural dysfunction in hospital services results in a patient being deprived of access to life-saving emergency treatment, and the authorities knew or ought to have known about the risks and failed to undertake the necessary measures to prevent that risk materialising.”¹⁹ The second set of circumstances may be of relevance to the inquiry into the handling of COVID-19.

Investigative Duty

There are three essential elements for ensuring a lawful investigation under Article 2 of the ECHR, as established in the European Court of Human Rights’ case law. These are: independence,²⁰ promptness,²¹ and involvement of the family.²²

Independent investigations reflect the principle of the rule of law, by providing an opportunity for courts, parliament or inquiry bodies to ensure that governments are acting within law. Independence ensures that there are no conflicts of interests between those conducting the inquiry and those under scrutiny. In addition, independence cannot be merely formal, but instead must be substantive and genuine to allow for a practically effective and independent investigation.

When an investigation is carried out promptly this minimises the chances of misremembered evidence, opportunity for collusion, and ensures that the state must be working to investigate the issues raised. While health and safety concerns surrounding the on-going nature of the pandemic have been highlighted, pre-inquiry investigative procedures and evidence gathering should be underway. This will ensure the promptness of an inquiry as soon as it is safe to be held.

In addition to ensuring the practical effectiveness of an investigation, involvement of the family affords the bereaved family dignity. This is a central component of the

investigative duty under the right to life, and of international human rights law in general.

This then is the legal framework which makes up the Structure, the first of the three pillars of a human rights-based approach. The obligations for those conducting the inquiry stem from here and these inform the baseline expectations for stakeholders in the inquiry.

Process

While the structure pillar relates to the inquiry's legal framework, the Process pillar comprises the practical implementation of the human rights standards and values contained within the structure. Thus, the following section will offer an overview of the inquiry through a human rights-based lens, referring to the underpinning human rights values discussed above and how these can be incorporated by the inquiry process.

Issues such as location, venue, accessibility, the ability to be able to have relevant questions put to decision-makers, travel and accommodation needs and support for those from disadvantaged socio-economic backgrounds will be outlined.

In this regard, lessons can be learned from the current Grenfell inquiry and a human rights assessment made of it by the GB Equality and Human Rights Commission (EHRC).²³ Some of the concerns of the ECHR highlight perceived shortcomings of this more traditional form of a public inquiry and can serve as an illustration of the added value of adopting a human rights-based approach to conducting the Scottish Covid-19 public inquiry.

The following sections outline some of the findings of the EHRC in relation to the Grenfell inquiry.

Venue

Concerns were raised in relation to access to the Grenfell inquiry.²⁴ These related to the inquiry venue which made it difficult for many survivors, bereaved, and members of the community to meaningfully participate in the process and to properly question witnesses (with the effect that some important issues were missed or not fully explored). COVID-19 has had a nationwide impact and so such concerns about location and accessibility are extremely important. The onus must fall on the inquiry to ensure that travel and accommodation is provided for witnesses, survivors, and affected members of the community, particularly where this is necessary for those seeking to provide evidence to the inquiry.

Thus, a duty falls upon those organising the inquiry to ensure that the venue has disability access, with travel and accommodation measures (including financial support) taken to ensure that participation and outcomes are consistent with a human rights-based approach.

Access to Questioning Witnesses

There were also concerns at Grenfell over the opportunity affected parties' representatives had to question witnesses and this concern will need to be addressed in a COVID-19 inquiry. Affected parties need to be able to have relevant questions addressed to those involved in decision-making processes surrounding key areas such as the decision to transfer patients into care homes without testing, PPE and the medical guidance. Participation and accountability are key features of a human rights-based approach.

Scope

The Grenfell inquiry also raises concerns about scope. The EHRC's report highlighted five key areas highlighted that will be necessary to satisfy investigative requirements. They were as follows:

“The Inquiry must address the following issues which relate to State responsibility:

whether the State violated the right to life in relation to the cladding combination on Grenfell Tower by either failing to put in place an adequate legislative framework or failing to implement that framework;

whether that violation is on-going in relation to other buildings in the UK;

whether the State violated the right to life in relation to vulnerable residents in particular;

whether the State violated the right to life through failing to implement appropriate fire fighter training, through implementing a stay put policy on buildings with the same cladding combination as Grenfell Tower, or through inadequate provision of fire safety advice to residents of such buildings and

whether the State failed to meet its equality and non-discrimination duties. In the Commission's view, an Inquiry that fails to address these broader issues relating to State responsibility will not satisfy the procedural investigative obligation inherent in Article 2 ECHR.”²⁵

The approach here indicates that any COVID-19 inquiry should seek to establish state responsibility or non-responsibility over a wide range of issues relating to COVID-19. It should also establish if there are ongoing violations, and how to avoid these in the future. The second SHRC source noted above (*Equalities and Human Rights Committee, Inquiry COVID-19 Report*) suggests the wider range of issues

that can be taken into consideration by the inquiry to avoid shortcomings with its scope.

Timeframe

Concerns were also raised about the delay in the Grenfell inquiry both at the beginning of phase one and now at the beginning of phase two. Health and safety restraints on a COVID-19 inquiry given the ongoing nature of the pandemic dictate that it should only be conducted when it is safe to do so. However, it must aim to be started as soon as possible after that is the case. Investigations and information gathering should already be underway.

Participation and Legitimacy

Participation and legitimacy are two of the paramount concerns for any inquiry and COVID-19 should be no different. In line with the Equality Act 2010²⁶ non-discrimination must be a priority in the structuring of the inquiry. This is particularly important as COVID-19 has had a disproportionate impact upon different groups within society. One participation concern surrounding the Grenfell inquiry related to the venue, which was initially not of an adequate size or in an appropriate location.²⁷ The other main participation concerns surrounding the Grenfell inquiry related to the ability of legal representatives of to directly question witnesses, and the resources available to legal representatives:

‘The legal representatives representing survivors, the bereaved and other affected members of the community have been prevented from putting questions to witnesses themselves.’²⁸

‘[...] the burden on the legal representatives representing the survivors, the bereaved and other affected members of the community appear to have been enormous given the limits of the resources available to them.’²⁹

In relation to disclosure concerns, the inquiry will need to ensure that legal professionals involved in the inquiry have adequate resources available to promote the efficacy of the inquiry.

These criticisms of the Grenfell inquiry serve, in conjunction with recommendations set out in the key Scottish sources earlier in this briefing, as a means by which the COVID-19 inquiry can self-assess its own functioning and appropriateness.

Outcomes

The Outcomes are the actual public inquiry findings which result from this human rights-based approach. These are of course to be determined by the public inquiry itself and cannot be pre-judged. However, they should flow from the human rights-based approach of the Structure and Process of the public inquiry and so include

findings on accountability where rights have been breached and duties have not been met, as well as lessons to be learned to ensure no repetition.

COVID-19 and Human Rights

The COVID-19 pandemic has resulted in the engagement of several rights included in the ECHR. This section will seek to link some of the experiences of inquiry participants during the pandemic with relevant human rights law. This can then be used to help form the inquiry Terms of Reference.

Protection of Life (Article 2 ECHR)

Article 2 of the ECHR, as we have seen earlier in this report, provides for the right to life. In the context of the pandemic, whether the state breached its obligations under this article will be central to any inquiry. It cuts across many issues including: whether clinical guidance, PPE availability and the availability and distribution of testing (particularly at the point of transfer of patients from hospitals to care homes) was adequate.³⁰ An inquiry into COVID-19 should therefore consider the policy decisions made by the Scottish Government and public bodies at relevant times and assess how this has impacted on these issues.

A main focus of the inquiry is likely to be the decision to move sick COVID-19 patients from hospitals into care homes without testing for the virus. As of 6th January 2021, 40% of COVID-19 registered deaths related to deaths in care homes.³¹ Public Health Scotland subsequently published a statement in response to this, outlining that:

“There were 3,599 discharges from hospital to a care home between 1 March and 21 April. The majority (81.9%) of which were not tested for COVID-19, in keeping with clinical guidance which restricted testing to those with symptoms of infection. Of the 650 who were tested, 78 received a positive result while in hospital.”³²

There can also be expected to be questions over whether care home residents, older people or disabled people were, or felt, pressurised into signing ‘Do Not Attempt CPR forms’,³³ whether clinical guidance was appropriate throughout the pandemic,³⁴ and whether adequate personal protective equipment was available to both staff and residents.³⁵ All these questions engage Article 2 of the ECHR and some of them extend beyond the realm of care homes. As such, it will be important that the inquiry does so as well.

Respect for Private and Family Life (Article 8 ECHR)

Article 8 of the ECHR provides a right to respect for private and family life. In the pandemic context this right is important in relation to hospital and care home visitation, particularly where patients have been in palliative care. The Scottish

Government will have to show that any encroachment on the private or family lives of those in care or in private residency were proportionate, or justified, in order to stop the spread of the virus. It may be expected that the inquiry will cover this aspect.

Article 8 will also apply to the inquiry process itself which needs to consider how best to ensure that those giving evidence have privacy measures in place pending the outcome of the inquiry.

Non-Discrimination in the Protection of Human Rights (Article 14 ECHR)

Article 14 ECHR provides the right to enjoy rights set out in the ECHR without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status. This article is of particular importance due to the discriminatory impact of the pandemic. COVID-19 and related measures and restrictions have affected various demographics differently and this can be expected to be an important part of the inquiry.

Ethnic Disparities

National Records of Scotland data can be used to understand the discriminate nature of the impact of the pandemic better. The following analysis is based on data for all deaths in Scotland, occurring on or after the 12th of March 2020 and registered by 14th of June 2020 (this period can be considered as the first 'wave'), and uses an odds ratio to look at whether the likelihood of a death involving coronavirus differs by ethnic group. Its key findings included:

“The data on deaths during this period shows that deaths amongst people in the South Asian ethnic group were almost twice as likely to involve COVID-19 as deaths in the White ethnic group, after accounting for age group, sex, area-level deprivation and urban rural classification”.³⁶

In order to reach this conclusion, the National Records of Scotland grouped ethnicities together into Chinese, South Asian, and White. These groups were established using a methodology of linking 2011 census records to NHS Central Register data, as although the death registration process is statutory, ethnicity information about the deceased person is collected on a voluntary basis. This meant that there were too many cases of ethnicity not being recorded to carry out analysis for each individual ethnic group.

By grouping these ethnicities and applying an odds ratio formula, wherein the likelihood of a death within the 'White ethnic group' relating to COVID-19 is represented by 1, the ratio for the 'Chinese ethnic group' was 1.7 and for the 'South Asian ethnic group' it was 1.9.³⁷ The result is that we find a considerably higher

likelihood that people of non-white ethnicity – who have died over the relevant period – have died because of, or in relation to, COVID-19.

Given the openness of this methodology, these statistics give an accurate reading of an ethnicity based proportional overview of all deaths connected to COVID-19. These grouping methods may be seen as effective as they offer workable data from demographics which may otherwise find themselves unrepresented in COVID-19 death ethnicity proportionality analysis. Given the disparity between white and non-white ethnicities, this data highlights a need to delve deeper into its causes. This will ultimately involve the de-grouping of the above ethnic groups to consider why deaths of those of non-white ethnicities are more likely to be COVID-19 related than those of white ethnicities. This, however, will be contingent upon more comprehensive data, the gathering of which would need to be prioritised. This can be done prior to a public inquiry to ensure the inquiry has the most comprehensive data possible. Although any inquiry will have to wait until it is safe to be held, given the ongoing nature of the pandemic, information gathering is not so impeded.

Age Disparities

In addition to disproportionality in ethnicity, there is also data showing differences in the age groups being affected. For example, the National Records of Scotland's report on week 51 shows that 81% (165 deaths) of deaths during the relevant period were aged 75+.³⁸ This is a microcosm of the entire pandemic in that those aged 75+ have died in the highest numbers of any of the typical age groupings. While there are clinical and virological reasons as to why older people are more likely to die after contracting COVID-19, social factors such as care-worker policy, travel accessibility, medical policy, and other factors which fall within governmental control or influence may also be worthy of investigation.

Gender Disparities

The pandemic has exposed various new situations where women have been worse affected than men. While there are also disparities affecting men which can be brought to the inquiry, such as men being almost twice as likely to be admitted to ICU with COVID-19,³⁹ the resultant social impacts were worst felt by women. In a research paper published by the Scottish Government into the impacts of COVID-19 on equality in Scotland it was found that:

“Women are experiencing significant mental health impacts from the pandemic and women in the UK continue to be more lonely than men. They are far more likely to report experiencing domestic abuse, as are younger people (16-24), and those living in the most deprived areas. Data from England and Wales also suggests that women of Mixed ethnicity, disabled women and those who lived in single-parent households are more likely to report experiencing domestic abuse. There are indications that domestic abuse may be rising and/or intensifying during the pandemic, which will have significant negative impacts on health, social, housing, education and employment outcomes in many cases. There are reports of women entering or re-

entering prostitution and commercial sexual exploitation as a result of current economic challenges.”⁴⁰

Both the medical and social impacts felt by women through the pandemic may also need to be analysed for any discrimination in associated policies and measures as well as any pre-existing underlying structural or systemic factors.

Anti-discrimination in relation to the inquiry

Following some of the issues raised previously regarding venue and accessibility, organisers must ensure that steps are taken to ensure the participation of those groups who have been worst affected in the pandemic. Indeed, the equality research carried out by the Scottish Government found that:

“Socio-economically disadvantaged people are more likely to experience poorer mental and physical wellbeing, lower life satisfaction, and feelings of loneliness, all of which either have already been impacted by COVID or are likely to be impacted by an economic downturn and increased poverty. Age-standardised death rates for COVID-19 have been twice as high for people living in the 20% most-deprived areas compared to the 20% least deprived areas. Delays in preventative services, diagnosis and treatment is likely to have long-term adverse impacts for many and these will continue to emerge for some time. It seems likely that health inequalities could widen going forwards.”⁴¹

If socio-economically disadvantaged people have suffered most through the pandemic, then steps should be taken to ensure their effective participation and contribution to this inquiry. This can be done through ensuring venue access and effective communications in various languages and ensuring that the socio-economically disadvantaged have suitable travel and accommodation arrangements where necessary.

The PANEL Approach

The PANEL approach offers a series of principles that should be applied in situations where human rights are engaged. In the context of an inquiry they raise the investigative duty above simple compliance with the Article 2 ECHR procedural standards (of independence, promptness and involvement of the family), to a wider human rights-based approach. Through this approach, people are empowered in relation to their own human rights while “increasing the ability and accountability of individuals and institutions who are responsible for respecting, protecting, and fulfilling human rights”.⁴² The following provides a summary explanation of each principle; a more detailed overview is provided in an annex to the SHRC’s *Care homes and human rights* Report.⁴³

Participation

In addition to the Article 2 procedural requirements for investigations, bereaved families should be able to take an active role in relation to the inquiry. They should have an opportunity to meaningfully contribute to decisions about how the inquiry will work, how it will be conducted, who will be involved, and potential remedies.⁴⁴ This principle of participation is particularly important considering the concerns raised in the GB Equalities and Human Rights Commission's Summary of Submissions Following Phase 1 of the Grenfell Tower Inquiry. With participation issues being one of the central concerns following stage 1 of the Grenfell Tower Inquiry, this guidance can be used as a practical method of avoiding the same shortcomings.

Accountability

Accountability as a principle means knowing who is responsible for upholding human rights, i.e. who/which organisations have responsibility. Accountability also implies that the decisions of those who are responsible can be scrutinised and, if appropriate, that remedies can be provided. In law, if human rights are violated, a remedy should be available. This is designed to ensure that rights can be effectively protected.⁴⁵ All of this will enhance the public legitimacy of the inquiry.

Non-discrimination

Here, non-discrimination is relevant in terms of access to the inquiry process, and its scope. Firstly, this means that there should not be discrimination on any grounds when deciding which families/family members will participate in the process. Secondly, it means that in the inquiry's examination of people's experiences, it should take into account all of the circumstances, including their particular status or characteristics (including their age, sex, race, or other status).⁴⁶ The importance of this principle in the context of the pandemic cannot be overstated. As noted earlier, for example, the virus has affected those of non-white ethnicities and the elderly significantly worse than other demographics.

Empowerment

Empowerment means that bereaved families should be actively supported to participate in the process. This active support includes practical measures to enable understanding of how the process will work and what people should expect, and measures to enable families to contribute as the inquiry unfolds and takes place.⁴⁷

Legality

Legality is about recognition of the legal human rights framework as a whole, and means that the inquiry should identify which specific human rights are implicated. Relevant ECHR rights have been outlined above, but there are likely to be other human rights standards in international – in addition to European – human rights law that will be relevant for the inquiry. The principle of legality highlights the Scottish Government's legal human rights duties.⁴⁸

PANEL summary

Each of these principles of participation, accountability, non-discrimination, empowerment and legality, are not necessarily guaranteed by the traditional public inquiry structure, but by being rooted in the values underpinning human rights law, will greatly enhance the traditional model. The PANEL approach is the most efficient methodology for implementing the values which underpin the human rights-based approach to a public inquiry. The implementation of the PANEL principles as a whole can also bring public legitimacy to the inquiry.

Conclusion

The key features and added value of a human rights-based approach and how these might support bereaved families influence the drafting of the Terms of Reference may be summarised and illustrated as follows:

1. A human right-based approach builds upon and adds value to a public inquiry under the *Inquiries Act 2005*. It offers a framework which helps shape the public inquiry's Terms of Reference and strengthens its public legitimacy;
2. The underlying value of all human rights law and therefore that of a human rights-based public inquiry is that of human dignity;
3. The principles of a human rights-based approach are contained within the PANEL Principles of Participation, Accountability, Non-discrimination, Empowerment and Legality;
4. The above principles apply to a public inquiry through the lens of a human rights-based approach and its three pillars of Structure, Process and Outcome;
5. Structure is the values and legal framework of the public inquiry; Process is the effort made to apply the framework via the conduct of the public inquiry; and Outcome is the findings, as determined by the public inquiry, which result from the application of the above pillars.

It follows from the above that the critical first step in establishing a human rights-based public inquiry is to ensure a meaningful role for the bereaved families in the preparation of the inquiry Terms of Reference.

Accordingly, the Centre hopes that this briefing paper may assist the bereaved families and others charged with the preparation of the Terms of Reference.

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- ² BBC News, 'Coronavirus: PM promises future independent inquiry', 15th July 2020, available at <https://www.bbc.co.uk/news/uk-politics-534195440>
- ³ Scottish Government, *A COVID-19 Inquiry for Scotland*, 24th August 2021, available at: <https://www.gov.scot/news/a-covid-19-inquiry-for-scotland/>
- ⁴ United Nations Sustainable Development Group, *Human Rights-Based Approach*, available at <https://unsdg.un.org/2030-agenda/universal-values/human-rights-based-approach>
- ⁵ Further information on the Scottish Human Rights Commission is available here: <https://www.scottishhumanrights.com/>
- ⁶ SHRC, *COVID-19: Care homes and human rights*, 14th August 2020, available at: https://www.scottishhumanrights.com/media/2054/coronavirus-care-homes-briefing-140720_vfinaldocx.pdf
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- ⁸ SHRC, *Equalities and Human Rights Committee, Inquiry COVID-19*, 22nd July 2020, available at: <https://www.scottishhumanrights.com/media/2063/covid-19-ehric-submission.pdf>
- ⁹ Ibid, para 4.1.
- ¹⁰ Ibid, para 1,
- ¹¹ Further detail on a range of human rights impacts of the pandemic can be found in a report by the Scottish Parliament's Equalities and Human Rights Committee, *Report on the impact of the COVID-19 pandemic on equalities and human rights*, 02 March 2021, available at: <https://digitalpublications.parliament.scot/Committees/Report/EHRiC/2021/3/2/1283533c-8aed-4a8c-8034-1ab216baca73-1#>
- ¹² Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, 4 November 1950, ETS 5, available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf
- ¹³ Human Rights Act 1998, available at <https://www.legislation.gov.uk/ukpga/1998/42/contents>
- ¹⁴ European Court of Human Rights, *LCB v United Kingdom* (App. 23413/94) 9, June 1998.
- ¹⁵ The European Court of Human Rights has stated: "That this obligation [to take appropriate steps to safeguard the lives of those within the State's jurisdiction] must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake"; *Öneriyildiz v Turkey* [GC] (App 48939/99), 30 November 2004, para 72
- ¹⁶ European Court of Human Rights, *Budayeva and Others v Russia* (Apps. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02), 20 March 2008
- ¹⁷ "An impossible or disproportionate burden must not be imposed on authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources... this results from the wide margin of appreciation States enjoy, as the Court has previously held, in difficult social and technical spheres... This consideration must be afforded even greater weight in the sphere of emergency relief... which is beyond human control, than in the sphere of dangerous activities of a man-made nature"; European Court of Human Rights, *Budayeva and Others v Russia* (Apps. 15339/02, 21166/02, 20058/02, 11673/02, and 15343/02), 20 March 2008, para 135
- ¹⁸ European Court of Human Rights, *Powell v United Kingdom* (App. 45305/99), 4 May 2000 (Decision on Admissibility)
- ¹⁹ Ibid.
- ²⁰ European Court of Human Rights, *Ramsahai and others v the Netherlands* [GC] (App. 52391/99), 15 May 2007
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- ²⁸ Ibid para 126
- ²⁹ Ibid para 126
- ³⁰ SHRC, *Equalities and Human Rights Committee, Inquiry COVID-19*, para 4.1. Care homes
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- ³³ SHRC, *COVID-19: Care homes and human rights*, Introduction, para 1
- ³⁴ Ibid.
- ³⁵ Ibid.
- ³⁶ National Records of Scotland, Analysis of deaths involving coronavirus (COVID-19) in Scotland, by ethnic group, para 1, 8th June 2020
- ³⁷ National Records of Scotland, Analysis of deaths involving coronavirus (COVID-19) in Scotland, by ethnic group, 4, Table 3, 8th June 2020
- ³⁸ National Records of Scotland, Deaths involving coronavirus (COVID-19) in Scotland, week 51, key findings, 23rd December 2020
- ³⁹ Scottish Government, *The Impacts of Covid-19 on Equality In Scotland*, Executive Summary, Men, at pg. 6, 17th September 2020, available at: <https://www.gov.scot/publications/the-impacts-of-covid-19-on-equality-in-scotland/>
- ⁴⁰ Ibid, Women, at pg 5
- ⁴¹ Ibid, Socio-economically disadvantaged, at pg 3
- ⁴² SHRC, *Equalities and Human Rights Committee, Inquiry COVID-19*, Annex 1 A human rights based approach to inquiries/investigations
- ⁴³ Ibid. at pg 19-20
- ⁴⁴ Ibid. at pg 19
- ⁴⁵ Ibid.
- ⁴⁶ Ibid. at pg 20
- ⁴⁷ Ibid.
- ⁴⁸ Ibid.