

**Ministry of Justice**

**Human Rights Act Reform - A Modern Bill of Rights**

**A response by the Association of Personal Injury Lawyers**

**March 2022**

**Introduction**

We welcome the opportunity to respond to the Government’s consultation on reform of the Human Rights Act. We are providing comments on the proposals and content in the consultation from a personal injury perspective, as this is where our members’ expertise lies. We will provide comments on the importance of human rights claims relating to military claims, abuse claims and clinical negligence claims, and set out why the ability of claimants in these areas to bring a human rights claim should not be fettered. The proposed changes would be detrimental to access to justice, and are unnecessary and likely to create uncertainty and satellite litigation.

**Overview**

The Human Rights Act protects the most fundamental rights for all individuals and these rights must remain protected. The consultation focuses on reducing the positive obligations on public bodies to protect human rights and reducing the remedies available to people when human rights are breached. It is extremely important that those positive obligations on public bodies to protect rights remain. Human rights are rendered meaningless, effectively, if public bodies are no longer required to take steps to safeguard against breaches of those rights. In addition to proposals to reduce positive obligations, there is no mention within the consultation of how human rights breaches can or should be prevented. There should be a focus on prevention of breaches, rather than a reduction in the scope of rights.

Throughout the consultation, there are indications that human rights claims are easily brought and won, and claims brought under the Human Rights Act are largely unmeritorious. This is far from the case in relation to those claims brought by personal injury claimants. There are also comments throughout the consultation that the ability to bring a human rights claim creates uncertainty for public bodies. This is not the case in our members’ experience. The law surrounding Article 2 in a medical setting, for example, establishes a high threshold to prove a breach, but the law is settled and provides certainty. Changes to the way that these claims can be brought will undo this certainty and create satellite litigation.

There is another common theme in the consultation that the development of human rights law has caused increased litigation. Litigation provides an important system of checks and balances, identifying systemic failures and positive steps that public bodies can take to mitigate loss, in particular to prevent future injuries and deaths. Human rights claims can be a powerful tool in holding public bodies to account. Inquests which involve a breach of Article 2, for example, will be, by their nature, wider in scope than other inquests, and will allow the coroner to reach additional conclusions.

As well as being a route to providing a more full investigation of the wrongdoing via inquest, human rights claims are vital in providing vindication for the claimant and their families. An acknowledgement in court that the claimant’s human rights have been breached can help the claimant and their loved ones to obtain closure, where perhaps there is no other remedy available. Human rights claims are vital in recognising wrong doing – this is not simply about compensation, but recognition that the claimant’s rights have been violated and those who violated those rights are being held to account.

We require more detail on the proposals being put forward and how they would work in practice. The consultation proposes to introduce a permission stage and a requirement for the claimant to exhaust every other remedy before bringing a Human Rights Act claim and we are concerned these additional barriers will restrict access to justice for claimants.

**General comments on proposals**

**Permission stage**

The addition of a permission stage for human rights claims is unnecessary and will provide a further hurdle for claimants in bringing a claim for a breach of their human rights. We are uncertain how it would be determined whether a claimant is “significantly disadvantaged”, and question how this could be determined when human rights are universal – one particular person’s human rights are not worth more than another’s. It would be wrong to determine that a particular person was significantly disadvantaged because their claim is worth more in monetary terms, for example. This flies in the face of the very purpose and desired effect of ‘human rights’, philosophically and legally. We also believe there would be an increase in satellite litigation in relation to what a “significant disadvantage” would be.

The consultation indicates that the rationale for an additional permission stage is to ensure that spurious cases do not undermine public confidence in human rights. From our members’ perspective, human rights claims are not spurious or trivial, and these claims are not easy to bring, as evidenced below. It is also stated within the consultation that human rights claims should not simply be used as another avenue of litigation to obtain compensation. As set out below, the ability to bring human rights claims is an important tool to allow the claimant to be heard, to obtain justice, closure and to hold public bodies such as the Ministry of Defence to account, particularly where there are no other routes to redress

We also believe that the introduction of a permission stage for Human Rights Act claims would result in additional costs for claimants. Currently, claimants are able to bring a claim in tort and under the Human Rights Act together. If a permission stage is required in human rights claims, this may mean that the two claims will need to be dealt with separately, and less efficiently, increasing costs together with increasing backlogs at Court and causing further delays. In the context of civil law, a separate permission stage would simply not be workable.

*Judicial remedies*

The proposal to strengthen section 8 of the Human Rights Act, to require applicants to pursue any other claims that they may have before pursuing a rights-based claim, would simply make it harder for people to bring those human rights based claims. There is a one-year limitation period on human rights claims at present, which begins to expire from the time of the breach, and it would be extremely difficult, if not impossible, to bring another claim and then still be within the limitation period to bring a human rights claim.

*Emphasising the role of responsibilities in the human rights framework*

Paragraph 307 of the consultation indicates that the Bill of Rights would permit the UK courts to consider the claimant’s conduct in deciding whether to award a remedy. The court will be invited to hear about the lawfulness of the claimant’s conduct in the circumstances surrounding the claim, but could also be empowered to consider relevant past conduct, such as whether the claimant has respected the rights of others. This is worryingly vague, goes against recent case law decision(s) and seems unnecessary when the courts, as detailed in paragraph 306, can and do already take into account a claimant’s conduct when determining remedies. We are concerned that this vague and broad brush approach would be applied to all claimants, and we fail to see how the past conduct of our members’ clients, some of whom have been injured while in service to the UK, is relevant to their ability to claim for a human rights violation.

This requirement could also be particularly detrimental to abuse claimants and those who have been brought up in care. Those who have been abused are more likely to go on to commit offences themselves in later life. The Prison Reform Trust has also reported that those in care between the ages of 10-17 are ten times more likely to come into contact with the criminal justice system. To withhold the right of the most vulnerable people to exercise their human rights due to criminal activity that is a direct result of those human rights breaches, would be simply abhorrent.

Again, human rights are universal, and no one is more “worthy” of protection for their human rights than another.

*Key non-monetised benefits for main affected groups*

The key non-monetised benefits for the main affected groups set out in the consultation are alarming. We fail to see how the potential reduction in compensation awards, which may in turn lead some litigants to decide to no longer pursue their claim could be seen as a benefit for justice. Further, removing or reducing awarded damages leading to savings for government departments cannot be seen as a benefit for justice. This would likely only shift costs to other government bodies e.g. the NHS for treatment costs and/or to the Department for Work and Pensions in relation to benefits.

As mentioned throughout this response, human rights claims play an essential role in keeping organisations in check and ensuring justice where those human rights are breached. To fetter or remove this ability will adversely affect access to justice.

**Comments from specific practice areas**

**Military claims**

*Importance of Human Rights Act claims*

Human rights claims provide an important route to redress for military personnel and their families where domestic law does not provide “just satisfaction”. For example, under the current law, partners who do not cohabit and parents of a child over 18 who were not financially dependent on that child, are ineligible to bring a negligence claim in the event of a death. If the death was caused by a breach of Article 2, a claim under the Human Rights Act provides a way for claimants to obtain legal representation, justice, hold the Ministry of Defence (“MoD”) to account, and help to bring closure.

Further, a claim under the Human Rights Act can sometimes provide the only recompense for the injuries and/or death itself. For example, if a death is deemed instantaneous there is often very little or no non-pecuniary loss awarded for the death itself.

The case studies below highlight how claims under the Human Rights Act are extremely important in allowing claimants to obtain justice, and in holding the Ministry of Defence to account.

**Case study two**

A Corporal was killed following an IED explosion in Iraq in January 2006. The Corporal was travelling in a Snatch Land Rover, which was known to provide limited protection from IED’s.

Combat immunity was engaged, as the incident happened on Tour. Solicitors on behalf of the deceased’s family alleged that the decision to provide inadequate equipment was made in Westminster, not on the battlefield (*Smith v MoD*).

A claim was not pursued on behalf of the Estate due to instantaneous nature of the death. The Deceased’s family claimed as ‘victims’ as required by s7(7) Human Rights Act 1998 and Article 34 of the European Convention on Human Rights. Solicitors for the deceased’s family argued that the making of an award was necessary to ensure ‘just recompense’ since there will be no other method by which non-pecuniary losses could be marked and compensated for.

**Case study one**

Ms A was over eighteen at the time of her death and had no financial dependents. She was an Officer Cadet embarking on a promising military career. Her parents are ineligible for a bereavement award, and they were not financially reliant on Ms A at the time of her death.

The evidence points to both a systemic failure and a breach of the operational duty to protect Ms A’s right to life on the part of the MoD.

The *only* compensation route available to Ms A’s family will be through the Human Rights Act.

*Article two inquests related to military claims*

Article two inquests are vital in allowing a deeper dive into the circumstances that lead to a person’s death, and opening up a much broader inquiry into the circumstances of the death. The coroner has an inquisitorial role and usually has to only look at four questions: who, where, when and how an individual died. When Article 2 is engaged, however, the coroner will explore ‘how and in what circumstances’ a person died, which allows for a much wider analysis and, ultimately, for lessons to be learned that could save lives in the future.

Inquests are an important method of bringing the MoD to account, and helping to ensure policy changes so that other families do not have to suffer. Additionally, as of January 2022, a finding of an Article 2 breach will mean that a family can receive non means tested funding to allow them to have legal representation at an inquest of their loved one. Inquests are often extremely daunting for the deceased’s family, and it is important that they are represented to ensure an equality of arms. While there are no suggestions within the consultation that coroners will not be able to continue to investigate deaths where there is a breach of Article 2, we fear that if it is more difficult to bring a human rights claim, it may also become more difficult to prove that Article 2 is engaged for the purposes of an inquest.

Even if the decisions as to whether circumstances warrant an Article 2 inquest remain unaffected by the proposals, the proposals are likely to make it more difficult to bring a separate human rights claim for compensation once the inquest has concluded. Inquests can/will make findings of wrongdoing, findings that the deceased’s human rights were breached, and the coroner may issue prevention of future deaths reports, which from a military claims perspective will require the MoD to make changes to protect the health and wellbeing of personnel in the future. Despite this, the family of the deceased may be unable to bring a separate human rights claim due to the additional hurdles being proposed. Where wrongdoing is found and the deceased’s Article 2 rights are found to have been breached, there should be the right to bring a separate human rights claim for compensation.

It can take a number of years for an inquest to even take place, let alone conclude and the additional hurdles of exhausting every other claim before commencing proceedings under the Human Rights Acts could result in claimants being out of time. From a military claims perspective, it must also be taken into account that the MoD has been the subject of numerous Crown censures – there is evidence of many human rights violations by the MoD some of which sadly continue to occur. Military personnel must continue to be able to bring these claims to continue to hold the MoD to account.

**Case studies three and four**

One of our members acted for the family and Estate of Fusilier Dean Griffiths, who died at Lydd Range in September 2011. Following an inquest in 2013, the coroner determined that Fusilier Griffiths had died because a target was wrongly place on a wall during a simulated battle exercise. Unfortunately, Fusilier Griffiths had been standing behind the target on the other side of the wall, and suffered fatal injuries when another soldier fired at the target. The HSE, having investigated, issued a Crown Censure against the MoD for its failings to provide a safe system of work.

Our member acted for Fusilier Griffiths’ family and loved ones, including bringing a claim under the HRA. Whilst it was impossible to undo the loss of life in this case, it was settled for a significant sum that at least provided a financial pillow for the family, which relied heavily on Fusilier Griffith’s income and career.

In fact, the MoD is a repeat offender and its failings are not limited in the sense of its duty to Service personnel, but also to civilian employees.

In November 2013 Mr Graham Wood, an agency driver working for the MoD, was crushed between a reversing lorry and a stationary vehicle after delivering munitions to an Army base. He suffered fatal injuries. Our member brought a civil claim for his dependant mother, an elderly woman who relied on him for care, and an associated Human Rights Act claim for the breach of Mr Wood’s article 2 rights.

The HSE issued the MoD with a Crown Censure in relation to a number of breaches of statutory duty. They were assessed as having failing to assess risks to life and to ensure a safe system of work. The case was settled for a significant sum to include a contribution towards the care that Mr Woods would have provided to his elderly mother.

Both of the above cases involved Human Rights Act claims, and an engagement of Article 2, which enabled a wider scope of inquiry at inquest stage. They also both resulted in Crown censures against the MoD. A Crown censure is the most serious sanction that can be levied by the Health and Safety Executive against a government body. It is an administrative procedure, whereby the HSE may summon a Crown employer to be censured for a breach of the Health and Safety at Work Act or a subordinate regulation which, but for Crown Immunity, would have led to prosecution with a realistic prospect of conviction. 42 Crown Censures have been taken by the HSE since 1999, and the MoD has amassed 21 of those, more than any other government body[[1]](#footnote-1). Despite the implications of the failings which led to the Crown censures, there is no associated fine or prosecution i.e. if the MoD were a private organisation then these censures would almost certainly have resulted in fines, prosecutions and/or, in the case of a public or private limited company, it would have failed or been wound-up. Importantly, the Human Rights Act played an essential part in uncovering truths in these cases. Without a Human Rights Act claim and/or the possibility of associated civil claims, it would have been highly unlikely that the families of the deceased would have been able to find specialist solicitors to represent them in the inquest process. Therefore, the Human Rights Act remains an essential avenue to justice for the families of those killed in unsafe working environments.

*Comments on the proposals*

*Justification based on the “protection of armed forces personnel”*

There are comments throughout the consultation suggesting that the proposals will be to the benefit of armed forces personnel because there will no longer be uncertainty in relation to the law of armed conflict. For example, paragraph 10 of the consultation states “we want to protect our armed forces from human rights claims for actions taking place overseas, and avoid the uncertainty of applying different rules in an area already covered by the law of armed conflict.”. Further, paragraph 142 states “Since the Human Rights Act came into force, the legal framework within which public authorities operate has been rendered less certain, and they are more likely to find operational decisions challenged and to have a court retrospectively second-guess their professional judgement exercised under considerable pressure. This uncertainty has affected those services operating within devolved competence, like police forces, and those operating within reserved competence, like the armed forces.”

We challenge the assertion that the ability to bring human rights claims leads to uncertainty for armed forces personnel on the front line, and that it leads to second guessing decisions made under pressure. The MoD already enjoys a blanket ban on claims brought in relation to combat and this principle of “combat immunity” will always protect it from civil actions related to decisions made in combat. There are already clear rules in place to prevent claims being brought for decisions made in the heat of battle and this has recently been buttressed by the Overseas Operations Act 2021 – mentioned below – an Act designed to limit further the ability of such claims, including Human Rights Act claims. It is simply not correct and potentially misleading to imply that the MoD is at risk of being taken to court for decisions made on the front line. There is no objective evidence to support this suggestion and it also does not take into account the already robust legal protections the MoD has in place.

The reality is that the vast majority of claims brought against the MoD have nothing to do with combat. The MoD faced 3,431 claims for the financial year 2020/21 alone [[2]](#footnote-2). In our members’ experience, the vast majority of claims relate to those brought by Service personal and/or their families against the MoD for acts occurring in this jurisdiction and in circumstances which have nothing to do with combat and everything to do with breaches of statutory duties, including the Human Rights Act.

We would also challenge the suggestion that the MoD needs to be protected from human rights claims for actions taking place overseas. There are in fact frequent circumstances in which armed forces personnel are posted overseas, but are not involved in armed conflict and so the principle of combat immunity does not apply. For example, if personnel are undertaking training or accessing medical facilities at a UK Army base in Cyprus, this is not a combat situation, and if there is a violation of the personnel’s human rights, they should be able to pursue a claim. The fact that a service person is simply overseas is not a sufficient justification for restricting rights, and there is a danger that if these claims cannot be brought, then human rights violations in these situations will increase because the MoD will no longer be held to account.

The idea that any such changes and restrictions on the ability to bring a human rights claim would be of benefit to armed forces personnel echoes the rationale for the Overseas Operations (Service Personnel and Veterans) Act 2021. During consultation and throughout the Bill’s progression through Parliament, the Government maintained that the introduction of a six year absolute limit on bringing claims against the MoD would be of benefit to service personnel. This was not only misleading and false but contrary to the Armed Forces Covenant and the promise to treat service personnel fairly. It is insulting that the Government continues to attempt to fetter the Court’s discretion together with the ability of armed forces personnel to bring claims against the MoD, and to hold the MoD to account, under the guise of being for the armed forces personnel’s benefit. A similar approach was taken in 2016 when the MoD published the “Better Combat Compensation” consultation, which sought to enshrine combat immunity in legislation, while at the same time extending its scope to allow the MoD to escape scrutiny in a wider range of situations that would currently be outside of the scope of combat immunity. The current law strikes the correct balance between holding the MoD to account, providing compensation to those who are injured and the families of those who have lost their lives, and recognising that the heat of battle is a unique circumstance. It is simply not the case that there has been judicialization of warfare, or that those on the front line are affected in their decision making by threats of civil action. Instead, the current law strikes the correct balance between holding the MoD to account, and ensuring that decisions made in combat are not the subject of civil claims.

We would also disagree with paragraph 134, which states “The scope of this obligation under Article 2 remains uncertain and it is not always clear when it applies, creating operational difficulties for medical practitioners on the front line.”. The scope of Article 2 is not uncertain, and it does not create uncertainty for medical professionals operating on the front line. The wording here gives the impression that claims for breaches of Article 2 can constantly be brought against those in a medical setting, and this is simply not the case. The reality is that breaches in a medical setting are very hard to prove (see below references to cases of *Lopes* and *R(Parkinson)*), and where a claim is successful, this is because there has been a systemic or catastrophic failing which has created a risk to life.

*Expanding the Territorial scope of rights – comments under paragraph 150 of the consultation*

Again, after paragraph 150 of the consultation, there is a further assertion that the extension of human rights law to armed conflict has resulted in the actions of armed forces personnel being subject to increasing legal challenge, and that this has created operational uncertainties. The case of *Smith v Ministry of Defence[[3]](#footnote-3)* is referenced as an example of how the actions of troops and military decision makers can now be subject to human rights challenges. As above, the principle of combat immunity protects the MoD against claims relating to decisions made in the heat of battle. When cases highlight issues with equipment or training, lessons can be learnt and changes implemented to ensure that more people are not harmed or killed by defective equipment or bad practices. In *Smith, s*everal cases were jointly heard. In the Challenger case, a Sergeant ordered a tank to fire on hot-spots, believing them to be personnel moving in and out of a bunker. In fact, the hot-spots were other British soldiers standing on a tank, and they were killed as a result of the blast. In the Ellis claim, part of the “Snatch Land Rover” set of claims, a soldier was killed by an IED while travelling in a Snatch Land Rover, and it was alleged by the family of the deceased that there had been a failure to provide suitable armoured vehicles for patrolling. In both cases, the MoD sought to have the claims struck out because they fell under the principle of combat immunity. It was held that both claims could proceed to trial on the ground of falling outside the scope of combat immunity or on the ground that it would be fair, just and reasonable to extend the MoD’s duty of care to those cases. There was an acknowledgement at paragraph 64 of the judgment that “there is a fundamental difference between manoeuvres conducted under controlled conditions in the training area which can be accurately planned for, and what happens when troops are deployed on active service in situations over which they do not have complete control”, and that “ A court should be very slow indeed to question operational decisions made on the ground by commanders, whatever their rank or level of seniority.”

It was held, at paragraph 92 of the judgment, that combat immunity should be narrowly construed to apply only to actual or imminent armed conflict. The Challenger claims, for example, were upheld because they fell into the category of training and preparation, sufficiently far removed from the pressures and risks of active operations against the enemy. It was held that the Ellis claim was less obviously directed to things away from the theatre of battle, and that the issue should be open to further argument in the light of evidence. Because the principle of combat immunity can be open to interpretation, it should be decided on a case by case basis, examining the facts and hearing the arguments of both sides, with the well-equipped judiciary left to come to a decision based on their knowledge of the well-established body of case law in this area. If, as proposed by the MoD, the Snatch Land Rover claims had simply been barred from the courts because they fell within the scope of combat immunity, the issues arising from the case would have been swept under the carpet. Instead, as a result of the Snatch Land Rover claims, the ineffectiveness of the vehicles was brought into the public eye via the Chilcot Inquiry, and the MoD was forced to acknowledge that there was an issue likely saving many more lives. Complaints to the MoD before the claims had gone ignored*.*

There is no evidence that concerns over human rights claims are causing uncertainty in the area of armed conflict. Instead, there is a real risk that service personnel who are in training or receiving medical care in either the UK or abroad, will not have their human rights protected. There must be checks and balances in place to protect personnel in these circumstances.

**Abuse claims**

*An important route to redress*

The Human Rights Act is an important alternative route to redress for some abuse claimants, helping to bring closure to survivors, and recognition of wrongdoing in circumstances where a negligence claim would not be possible.

Following the case of *Poole Borough Council v GN and Another[[4]](#footnote-4)[[5]](#footnote-5),* it has become much more difficult to hold local authorities to account in common law for a failure to remove children from a harmful environment.In *Poole,* the Supreme Court held that the local authority did not owe a duty of care to claimants who, along with their mother, were harassed by their neighbours in social housing that they had been placed in by the local authority, although the Supreme Court were clear that there were some limited circumstances in which public authorities could owe a duty of care to Claimants for the negligent or wrongful actions of third parties. The Supreme Court re-iterated that there is ordinarily no duty on public authorities (just as there is no duty on private individuals) to fail to confer a benefit on an individual (i.e. protecting them from harm by a third party). Since *Poole,* local authorities generally do not owe a duty of care to children in their area to protect them from harm from a third party, except in very limited circumstances. These limited circumstances are still being litigated through the courts, such as in the recent appeal decisions in HXA v Surrey County Council and YXA v Wolverhampton City Council*[[6]](#footnote-6)*l . *HXA* and *YXA* confirmed that Social Services professionals will rarely be liable for a claim for compensation at common law unless the alleged negligent failures occurred whilst a child was already in the care of the Local Authority and/or where social services have actively make the situation worse for the child (rather than simply failing to confer a benefit onto that child, e.g. by not removing a child into care earlier in circumstances where they are being abused at home).

Local authorities do have a duty under human rights law, however, to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. Article 3 of the Human Rights Act imposes a general positive obligation to establish a framework of laws, precautions and means of enforcement to prevent the occurrence of torture, inhuman or degrading treatment, to the greatest extent possible; and an operational obligation to take all reasonable preventative measures to protect people from known risks of inhuman or degrading treatment. The state is required to take reasonable measures to protect individuals from a real and immediate risk of Article 3 treatment of which the authorities know or ought to know. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. The case of *Z v UK*[[7]](#footnote-7) established that a failure by the local authority to remove children from a situation where they are suffering neglect and abuse amounted to a breach of article 3 of the Human Rights Act. The Government at the time conceded that the range of remedies at the disposal of the applicants was insufficiently effective and that, in the future, under the Human Rights Act 1998, victims of human rights breaches would be able to bring proceedings in courts empowered to award damages for those breaches. There is no doubt under current case law that sexual abuse, physical abuse and serious neglect of children amounts to “inhuman and degrading” treatment for the purposes of Article 3.

In *The Commissioner of the Police of the Metropolis v DSD[[8]](#footnote-8),* for example, survivors were able to bring a human rights claim against the Metropolitan Police for failing to apprehend the rapist, John Worboys. Had the police conducted an effective investigation, he would have been caught sooner and the women who were attacked later on would have been spared. The court held that there were positive obligations on the state to investigate rape and sexual assault promptly and effectively, and if there were serious failings in this regard then compensation may be payable for breaches to the victims’ human rights.

In light of the current difficulties survivors of childhood abuse face in holding public authorities to account under the common law of negligence where there have been serious failures to protect them from abuse, it is vital that accountability and redress can still be achieved under human rights legislation to protect some of the most vulnerable persons in our society. The positive obligations imposed upon States pursuant to Article 3 and the ability for claimants to seek redress for any related breaches in the domestic courts under the HRA 1998 is an important safeguard that must be protected.

*Further hurdles would be a retrograde step*

APIL has previously highlighted the restrictive nature of the Human Rights Act limitation period and that it is problematic for survivors of historic sexual abuse. As was set out in APIL’s evidence to the Independent Inquiry into Child Sexual Abuse investigation into accountability and reparations for abuse survivors, the time limit for Human Rights Act claims is even more restrictive than the civil claims process. It is either one year (s7(5)(a) HRA 1998) or *‘such longer period as the court or tribunal considers equitable having regard to all the circumstances’* (s 7(5)(b))*.* The one year applies in all circumstances against protected parties, including those at any age who lack capacity and also children. If a breach of a child’s human rights occurred on their 1st birthday, the time limit for bring any HRA claim would expire the day before their 2nd birthday. This is inherently restrictive and unfair. Despite the wording in s7(5)(b), the case law relating to extension of time in HRA cases of all kinds has not, by and large, interpreted this favourably to the claimant and therefore it is very rare that the courts will allow any HRA claim to proceed later than the one year period. APIL invited the inquiry to consider this aspect when looking at possible reform of the law of limitation.

Given that the limitation period for Human Rights Act claims is already problematic for survivors of abuse, it would be a retrograde step for survivors if further hurdles were put in place to make the bringing of a human rights claim even more difficult. It is clear from the evidence to the Independent Inquiry into Child Sexual Abuse investigation into accountability and reparations for survivors of historic child sexual abuse that claimant and insurer representatives alike are in favour of steps to remove hurdles to bringing historic abuse claims. The proposals relating to human rights claims that the Government suggests in this paper will simply add more hurdles, going against the clear evidence provided by the parties to the IICSA inquiry of the issues that arise in these claims in relation to limitation.

**Clinical negligence claims**

As above in the both military and abuse claims, in a medical setting the Human Rights Act can provide a route to redress for families where others are not available, for example in the case of *Rabone v Penine Care NHS Trust[[9]](#footnote-9),* where the family of a young girl who committed suicide were unable to claim bereavement damages, and there was no claim for dependency. The inquest was complex and the ability to rely on the human rights element ensured that the bereaved family had access to justice and a remedy that was not available under any other means. In our members’ experience, the majority of clinical negligence claims that include a claim under the Human Rights Act are suicides where the patient has been sectioned under the Mental Health Act. As mentioned above, an engagement of Article 2 means that legal aid will be available to the family of the deceased for representation at the inquest. This enables the family to be properly represented and allows them to fully engage with the inquest process. If, as expressed above, changes to human rights law in the UK made it more difficult to prove that these rights are engaged, many will find it impossible to obtain representation by other means. Funding can sometimes be offered through a Conditional Fee Agreement (CFA), but this must be linked to a separate civil claim. The prospects of such a claim will be unknown until the conclusion of the inquest, and are often limited in value, if there are grounds for such a claim to be brought at all. This often means that a CFA is not a viable option. Even if a CFA is put in place and a separate civil claim is brought, there is also a risk that this could be settled before the inquest with an aim of preventing recovery of legal costs by the family, which leaves them with no representation at the inquest.

Application of Article 2 to clinical negligence inquests has become more limited in recent years following the judgement in *Lopes de Sousa Fernandes v Portugal[[10]](#footnote-10),* and the High Court decision in *(R) Parkinson v Senior Coroner for Kent[[11]](#footnote-11).* Article 2 is not engaged where there is “mere negligence”, but only where there is a failure which results from a “dysfunction in the hospital’s services that is a structural issue linked to deficiencies in the regulatory framework”. This demonstrates that the law surrounding human rights claims is robust and does not allow for “trivial” claims to be brought – the “trivial” or “unmeritorious” nature of human rights claims is a key theme throughout the consultation. Secondly, it is vital that no further hurdles are put in place to prevent those seeking to engage Article 2 in a clinical negligence claim, from doing so.

As mentioned in relation to military claims, consideration of Article 2 at an inquest can allow for a wider scope of investigation, and non-causative findings and criticisms being included in the conclusion. If it becomes more difficult to engage Article 2 at inquests, this may result in coroners conducting narrower enquiries and failing to consider wider issues. There have been a number of systemic failings in the NHS over recent years, for example those identified at Shrewsbury and Telford and Nottingham NHS Trusts relating to maternity services. Failures to join together repeated mistakes, including not carrying out inquests in the event of a stillbirth has often meant that each death was treated as a separate entity, rather than consideration of the wider structure and failings at an earlier stage. Funding for families at inquest will allow failures to be identified and lessons to be learned earlier. Restricting access to Article 2 even further than at present will only have a detrimental effect on bereaved families, and on the healthcare system as a whole, as repeated and systemic failures will go unrecognised, and avoidable deaths and harm will continue.

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1. <https://resources.hse.gov.uk/convictions/documents/crowncensures.htm#Table2> [↑](#footnote-ref-1)
2. <https://www.gov.uk/government/statistics/mod-common-law-compensation-claims-statistics-202021/mod-common-law-compensation-claims-statistics-202021#:~:text=The%20total%20number%20of%20new%20claims%20brought%20against%20MOD%20was%203%2C431.&text=206%20Civilian%20Employer's%20Liability%20claims,were%20third%20party%20motor%20claims>. [↑](#footnote-ref-2)
3. [2013] UKSC 41 [↑](#footnote-ref-3)
4. [↑](#footnote-ref-4)
5. [2019] UKSC 25  [↑](#footnote-ref-5)
6. [2021] EWHC 2974 (QB) [↑](#footnote-ref-6)
7. [2021] EWHC 2974 (QB) [↑](#footnote-ref-7)
8. [2015] EWCA Civ 646 [↑](#footnote-ref-8)
9. [2012] UKSC 2 [↑](#footnote-ref-9)
10. 2017] ECHR 1174 [↑](#footnote-ref-10)
11. [2018] EWHC 1501 (Admin) [↑](#footnote-ref-11)