



RULING FOLLOWING THE MODULE 1 PRELIMINARY HEARING ON 4 OCTOBER 2022

Background

1. On 4 October 2022 I held a Preliminary Hearing in relation to the first Module, Module 1, in this Inquiry.
2. Nine of the twenty-eight designated Core Participants filed written submissions (one was a joint note) and oral submissions were made on behalf of seven of the Core Participants. In this ruling I set out my decisions on those issues that require determination.

Scope

3. Dealing first with the issue of scope, I am grateful for the helpful submissions relating to the general scope of Module 1 and for the various suggestions on the specific reach of the Outline of Scope document. These will all be further considered by me and the Inquiry team. However, I can say that the majority of the evidential areas that have been raised are already reflected in the Rule 9 requests that are being sent out.

Position Statements

4. Mr Weatherby KC argued on behalf of Covid-19 Bereaved Families for Justice (and, by virtue of the written submissions, on behalf of the NI Covid-19 Bereaved Families for Justice) that I should order the provision of position statements by state and organisational Core Participants.
5. He submitted that the provision of position statements would assist the Inquiry to target further disclosure, to hone the expert evidence and to tailor the hearings to those areas that are in dispute or are unclear. It was also submitted that an order that such position statements be provided would reinforce the need for core participants

to act in accordance with their duty of candour.

6. I will of course make such orders as appear to me best to promote the fairness and efficiency of this Inquiry. However, I am not persuaded that the ordering of position statements from state and organisational Core Participants and material providers, at this stage, would promote these laudable aims.
7. In Module 1 the Inquiry will examine a wide range of policies and decisions over a number of years by a significant number of departments, bodies and entities in relation to the broad topic of preparedness and resilience. This subject matter does not lend itself readily to the preparation of position statements until a Core Participant or document provider is sufficiently confident of their knowledge of all the relevant issues and documents. That will take time given the large number of matters to be addressed and the voluminous documentation. The making of an order for position statements would therefore be likely to lead to delay.
8. In any event, an order for position statements is not necessary at this stage. The Inquiry has already requested the Rule 9 recipients to provide a corporate statement setting out a narrative of relevant events and of the lessons learned. These will serve a similar purpose to position statements.
9. If, at a later date, I conclude that I require written clarification of the position of an individual or organisation then I will request it, whether in a position statement or otherwise. However, to do so now would, as I say, be premature and may cause delay.

Disclosure

10. The obvious purpose of disclosure is to enable the Core Participants to participate effectively in the public hearings and I am determined that they should be able to do so. This Inquiry will be as open as possible with the Core Participants and with the public in relation to the disclosure of documents.

11. The Inquiry's approach has been, and will continue to be, to request document providers, through the Rule 9 process, to provide information and documents that are likely to be relevant to the issues and matters identified in a particular module. Recipients of Rule 9 requests are being made aware of this obligation and of the strict duties the law places upon them in relation to the preservation and retention of documentation.
12. The information and documents received will be assessed for relevance and then redacted in line with a Redactions Protocol that is being prepared, so as to remove sensitive material, such as personal data. It is neither necessary nor proportionate for the Inquiry to disclose every document that it receives, every request that it makes, or every piece of correspondence. That is not required and would hinder the Inquiry in the performance of its functions. It would also be a derogation of the Inquiry's functions to pass to the Core Participants all the material that it receives.
13. The disclosure of the relevant and redacted documentation will be in tranches. All Core Participants in the same module will receive all the disclosable documents for that module. In light of the general approach that I have set out, I do not consider it necessary also to publish a Disclosure Protocol.
14. Ms Gallagher KC, on behalf of the TUC, argued that a schedule should be provided that sets out an itemised list of documents and other material that is not intended to be disclosed to the Core Participants.
15. I do not consider this necessary. It is for the Inquiry to determine what material must be disclosed. It is therefore for the Inquiry to determine whether proper disclosure is being made and whether further areas should be explored and further documents produced. The production of a document setting out everything that has not been disclosed to Core Participants would require a very considerable amount of work for little practical gain and would cause Core Participants to duplicate work the Inquiry is already doing. In my view, this would not be consistent with my obligation to minimise

cost to the public purse (section 17(3) of the Inquiries Act 2005).

16. I should emphasise that each document provider has been asked, or will be asked, to provide an account setting out details of the nature of the review carried out, how the documents were originally stored and the search terms used or other processes used to locate documents.
17. Where the Inquiry has any queries or concerns about a provider's processes for locating relevant documents, it will raise and pursue them and as documents are reviewed and gaps identified, further documents will be sought.

Rule 9 Requests

18. I now turn to the submission that the Core Participants be provided with copies of the Rule 9 requests made by the Inquiry.
19. Disclosure to the Core Participants of the Rule 9 requests themselves (as opposed to the relevant documents and material generated by them) is neither required by the Rules nor generally established by past practice. Furthermore, it would serve little practical purpose given the wide scope and detailed nature of the Rule 9 requests that are being made.
20. However, to ensure the Core Participants are kept properly informed, I will ensure that the Module 1 lead solicitor provides monthly updates to Core Participants on the progress of Rule 9 work. Such updates would, in general terms, include details of what requests have been made, whether documents have been received, when further documents are expected and when further Rule 9 requests have been made.

Experts

21. Turning to the question of experts to assist the Inquiry, as was made clear in the 22 September 2022 Note from Mr Keith KC, Counsel to the Inquiry, the Inquiry will consider suggestions as to whom should be appointed. However, the decision as to

the selection of experts to be instructed by the Inquiry is one that is entirely for me.

22. In addition, the identity of the expert witnesses and the questions and issues that they will be asked to address will be disclosed to the Core Participants before the expert reports are finalised. Core Participants will therefore be provided with an opportunity to provide observations.

Relaying of proceedings

23. Ms Mitchell KC on behalf of the Scottish Covid 19 Bereaved Families for Justice asked that those who do not have computers, access to wifi, or the ability or means to watch online should have the opportunity to gather in one or more specific locations in Scotland to watch proceedings remotely. That is a useful suggestion and the Inquiry team will give consideration to it.

Circumstances of Death and Pen portrait evidence

24. I also received written submissions from Covid-19 Bereaved Families for Justice and NI Covid-19 Bereaved Families for Justice (but not from Scottish Covid-19 Bereaved Families for Justice or Covid-19 Bereaved Families for Justice Cymru), as well as oral submissions from Mr Weatherby, to the effect that the Inquiry should allow the admission of evidence of the circumstances of individual deaths and pen portrait evidence to be heard at the public hearings.
25. In relation to the admission of evidence relating to individual deaths, Mr Weatherby submitted that the public hearings of the Inquiry must receive statements or other material (for example videos). He conceded that this is a public inquiry and not an inquest and that it would be practically impossible for the Inquiry to consider the individual circumstances of 200,000 deaths, but claimed that nonetheless, it should receive such evidence to ensure the bereaved are properly involved in the Inquiry process and the Inquiry fulfils its Terms of Reference.

26. Further, he emphasised that it will be impossible for the Inquiry to consider, for example, the working of the NHS 111 system or the application of Do Not Resuscitate decisions, without hearing directly from members of bereaved families regarding what happened to their loved ones. On virtually all the issues relating to circumstances of death, including hospital infections and discharges to care homes, family members will have relevant evidence.
27. In relation to 'pen portrait' evidence, it was submitted that all bereaved family members should be invited to provide the Inquiry with pen portraits of the lives of their loved ones. The provision of such statements and other material should be purely voluntary and the Inquiry should provide sufficient resources namely funding of lawyers to assist families in providing them.
28. Given the huge number of deaths resulting from the pandemic, the identity of these pen portraits should, it was said, be subject to discussion between the Inquiry team and those representing the families. A 'significant' or 'proportionate' number of pen portraits should then be heard, read, or played to the Inquiry in open sessions and a period set aside for hearing pen portrait statements and materials at the outset of the Inquiry, or at the beginning of each module, or both. Where family members wished their statements to be published, these should be posted to the website.
29. These arguments were also reflected in written submissions, dated 30 June 2022, from Covid-19 Bereaved families for Justice.
30. I have carefully considered the written and oral submissions on these issues. It is important not to confuse the two issues namely evidence of circumstances of death that raise possible systemic issues and pen portrait evidence of individuals. I shall deal with them separately.
31. First, I need no persuading that bereaved family members may well have relevant evidence to give on possible systemic failings, for example the use of Do Not

Resuscitate Notices and the NHS 111 system. If so, they may well be called to give evidence that includes the circumstances of their loved one's death. These were the kind of issues raised repeatedly with me during the UK wide consultation on the draft Terms of Reference. It has always been my intention to call such evidence in the appropriate module.

32. Claims in the public domain that I do not propose to allow such evidence to be given are simply wrong. I hope that they are not repeated because they are incorrect and have the potential to be extremely distressing to other bereaved families.
33. Second, I have repeatedly given my promise to the public that those who suffered during the pandemic will be at the heart of the Inquiry. I can assure the bereaved that their accounts and the accounts of others who have suffered will be heard. Given the huge number of people affected by the pandemic, the issue is how that can be done in an appropriate and proportionate way.
34. I am acutely conscious of the need of many bereaved to have the life and death of their loved one properly recognised and I know the value that the provision and admission of pen portrait evidence can bring to an inquest or an inquiry performing the role of an inquest. Hence my decision to call for such evidence when I acted as Coroner at the inquests of the fifty two victims of the London bombings on 7 July 2005. However, this is a Statutory Inquiry not an inquest and it has a far broader remit than an inquiry performing the role of an inquest.
35. The starting point is Paragraph (b) of the Terms of Reference, by which I am bound. Paragraph (b) provides that the Inquiry will not consider, in detail, individual cases of harm or death. Arguably, this sub paragraph alone would prevent me hearing pen portrait evidence unless it falls into the category to which I have already referred of evidence relevant to a possible systemic failing.

36. More importantly, the Terms of Reference were drafted in this way because the Inquiry's core function is not to inquire into the direct circumstances of the tragic deaths that occurred, but to examine the pandemic that led to those deaths and the UK's response to it. In essence, it is an inquiry into high-level decision making and systemic issues and failures.
37. Given the breadth of the Inquiry's remit and the need to make timely recommendations about the preparedness for and the response to the pandemic, the receipt of pen portrait evidence at the public hearings is simply impracticable. It would also require the most invidious of decisions. Amongst the hundreds of thousands of deaths, which of the bereaved should be called upon to give pen portrait evidence? Mr Weatherby offered no solution to the problem, simply an assertion that it would not be insurmountable.
38. My present view, therefore, is that the best and most appropriate way for most of the bereaved to speak to the Inquiry about their loved one is through the Listening Exercise. I made a promise to the bereaved families I met during the public consultation exercise on the Terms of Reference that I would conduct such an exercise. It will also enable many people who suffered in other ways during the pandemic to contribute to the Inquiry's work.
39. The Listening Exercise is a fundamental part of the Inquiry's work and will allow individuals' experiences to be gathered, analysed and entered into evidence. This will inform and shape the Inquiry's findings and recommendations. The Inquiry team is seeking expert assistance on the design of the exercise so that it reaches as many people as possible including those whose voices are seldom heard. It will be designed and delivered with the needs of the bereaved and traumatised very much in mind. It has been welcomed by many bereaved families.
40. I am not therefore currently persuaded that pen portrait evidence should be admitted as a general rule either in this or later modules. I am also of the view that evidence of

circumstances of death should only be admitted in this and later modules, if it is relevant to possible systemic failings. I will, however, keep these two issues under review.

41. In addition to the Listening Exercise, I have also asked that consideration be given to alternative ways in which the tragedy wrought by the pandemic can be recognised at each of the Inquiry's module hearings.

42. There is, therefore, no question of 'sidelining' the bereaved as Mr Weatherby suggested at the hearing. I hope that the Covid-19 Bereaved Families for Justice and NI Covid-19 Bereaved Families for Justice groups will accept (as Scottish Covid-19 Bereaved Families for Justice and Covid-19 Bereaved Families for Justice Cymru have kindly accepted) that the Inquiry team has been working hard to keep them appropriately informed and, where appropriate, consulted. The Inquiry needs the full cooperation of all Core Participants if we are to meet the aims I set out in my Opening Statement.

17 October 2022