

COVID-19 PUBLIC INQUIRY

M2

SUBMISSIONS ON BEHALF OF DISABLED PEOPLE’S ORGANISATIONS: DISABILITY RIGHTS UK, DISABILITY ACTION NORTHERN IRELAND, INCLUSION SCOTLAND AND DISABILITY WALES

Preliminary Hearing – 1 March 2023

The following addresses [I] Context [II] Human Rights [III] Expertise and Experts [IV] Selecting and Questioning Witnesses [V] Other Process Matters.

I: CONTEXT

- 1.1. COVID AND INEQUALITY: The Inquiry has reached the point of making important process related decisions about what evidence to obtain, which witnesses to call and how to examine them. The Disabled People’s Organisations (‘DPO’) want certain realities to be borne in mind by the Inquiry when making those decisions. Contrary to some of the public discourse,¹ the virus and its response did discriminate. Covid 19 posed a drastically higher risk to life and of harm to specific population groups, of which Disabled people were one.² Furthermore, for Disabled people in particular, the Consequences of state intervention to manage the virus were fundamentally more negative. These consequences included food and resource scarcity, isolation from essential services, being put at risk of contracting the virus (e.g. care homes and PPE) - all of which were compounded by lack of accessible communication and information including sign language. Fundamentally, the political and administrative response to the pandemic has excluded Disabled people. Either no thought has been given to them, or thought given has been inadequate or too late.³
- 1.2. DISABLED PEOPLE’S SITUATION: There are around 14 million Disabled people living in the United Kingdom.⁴ The full impact of the Covid 19 pandemic and the political and administrative response to it upon Disabled people cannot be fully understood without some

¹ E.g. <https://news.sky.com/video/coronavirus-virus-does-not-discriminate-gove-11964771>

² See figures re. risk to disabled persons and morbidity levels, DPO M2 Joint Submissions, 27 October 2022 §4

³ E.g. <https://www.sheffield.ac.uk/ihuman/surviving-ableism-covid-times>

⁴ E.g. <https://www.gov.uk/government/statistics/family-resources-survey-financial-year-2020-to-2021/family-resources-survey-financial-year-2020-to-2021>

appreciation of their situation as of December 2019. On almost every metric, the lives of Disabled people are what the EHRC calls a “*Journey Less Equal*”. Disabled people overall have lower educational attainment, lower employment and pay rates, suffer greater levels of poverty, and significant levels of abuse, social isolation and stigmatisation.⁵ In 2016, the House of Lords Select Committee published a ground-breaking report that identified the unequal impact of the Equality Act 2010 on Disabled people. It found that they had not fared well. In the consideration of inequalities, the needs of Disabled people were too often the “*afterthought*” (§§15-20). Its five major issues were (1) reverse that ‘afterthought’ syndrome (2) plan proactively, (3) communicate better, including by engagement, listening and taking into account Disabled people’s views, (4) make rights more accessible and enforceable and (5) structure Government more effectively in order to discharge its responsibilities and secure dedication to lasting change.⁶ In 2017 the influential United Nations Committee on the Rights of Persons with Disabilities issued its first report on the UK.⁷ Of its many criticisms, it found serious deficiencies, including the lack of consultation with Disabled people on policy and legislation that impacted on their lives (§§10-11), ill-preparedness to protect them in the event of emergency (§§28-29), damage done by austerity measures (§§58-59) and a lack of reliable data, including impairment specific and disaggregated intersectional data (§§64-65). In a separate Inquiry Report issued under Article 6 of the Optional Protocol, that focussed especially on the impact of austerity measures on independent living and community inclusion (Art. 19), work and employment (Art. 27) and standard of living and social protection (Art. 28) the Committee concluded that “*there is reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities has been crossed in the State party*”⁸ (§113).

1.3. FAILURE OF HUMAN ACCOUNTING: The treatment of Disabled people as an ‘afterthought’ (if at all) is one of the essential features of a disabling society. The ‘Social Model’ that informs our clients’ perspective, organisation and advocacy is that essential injustices of being disabled are the product of socially constructed barriers and attitudes.⁹ The significant issue

⁵ [EHRC, ‘Being Disabled in Britain – A Journey Less Equal’ \(March 2017\) Executive Summary pp 7-15](#)

⁶ [House of Lords - The Equality Act 2010: the impact on disabled people - Select Committee on the Equality Act 2010 and Disability \(parliament.uk\)](#) Report of Session 2015-16 (March 2016) HL Paper 117

⁷ [Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland: C/CRPD/C/GBR/CO/1 \(3 October 2017\)](#): see further below

⁸ [Inquiry concerning the United Kingdom of Great Britain and Northern Ireland carried out by the Committee under article 6 of the Optional Protocol to the Convention CRPD/15/4 \(24 October 2017\)](#)

⁹ The Social Model developed by the disability rights movement makes an important distinction between ‘impairment’ and ‘disability’. It recognises that people with impairments are disabled by barriers that commonly

in the fusion of science and government that constructed Covid policy is that none of it contained Disability specialists, service providers, subject-matter experts or end users. Disabled people were (and are) all too often subsumed into other categories such as ‘care homes’, ‘the vulnerable’, or the ‘elderly’. Our clients complained in real time that their voices were being “*lost in the noise, or ignored*”.¹⁰ That Disabled people were significantly more likely to die from Covid 19 was in due course recognised, as was the disproportionate impact of lockdown upon Disabled people but the disclosure thus far strongly suggests that the acknowledgment of and response to these key issues was either belated or insufficient. This was a basic failure of human accounting.

II: HUMAN RIGHTS

- 2.1. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD)¹¹: There are tools available in international human rights law to understand what has happened to Disabled people during the Covid 19 pandemic and how to transition out of, and build back better. The DPO highlight them at this preliminary stage because they will assist the Inquiry in charting its own course and avoiding the errors of exclusion that characterised the Covid response. The UK has signed and ratified the UNCRPD and has undertaken to consider its terms in developing any policies that affect Disabled people.¹² Article 11 expressly requires “*all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of...humanitarian emergencies and the occurrence of natural disasters*”. As with other parts of the Convention there is a general duty to secure “*full and effective participation and inclusion in society*” (Art. 3(c)). With regard to the development and implementation of legislation and policies concerning issues relating to persons with disabilities, State Parties are required to “*closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations*” (Art. 4(3)).
- 2.2. CONSULTATION AND CO-DESIGN: The obligation that Disabled people must be included in law and policy making - to collaborate in their co-design and co-production - is central to

exist in society. These barriers include negative attitudes, and physical and organisational barriers, which can prevent disabled people’s inclusion and participation in all walks of life.

¹⁰ DISABILITY ACTION (NI), [‘The Impact of Covid-19 on Disabled People in Northern Ireland’](#) (September 2020) p. 4; [Welsh Government Disability Forum ‘Locked Out – Wales’](#) (July 2021) Key findings: the social versus the medical models of disability

¹¹ Based on Social Model terminology our clients often refer to and understand the Convention as a mechanism for protecting the “*Rights of Disabled People*” rather than the “*Rights of Persons with Disabilities*”

¹² [Government Response to the House of Lords Select Committee Report on The Equality Act 2010: The impact on disabled people \(publishing.service.gov.uk\)](#) (July 2016) (p. 9)

the UNCRPD and derives from the original Disability rights demand of “*Nothing About Us Without Us!*”. The UNCRPD Committee takes as its starting point that Disabled people have long been denied involvement in decision-making about matters relating to or affecting their lives, with decisions continuing to be made on their behalf without consultation. The corrective lies especially in consulting with representative organisations run by Disabled people not just *for* them.¹³ That should have happened more during the Covid 19 pandemic.¹⁴ It is of overall benefit to the wellbeing of society if it can happen now.¹⁵

2.3. APPLICATION OF THE SOCIAL MODEL: The UNCRPD endorses the Social Model. Its Preamble (Recital (e)) recognises that “*disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others*” and (Recital (g)) emphasises “*the importance of mainstreaming disability issues as an integral part of relevant strategies of sustainable development*”. Article 1 defines persons with disabilities to include those who have long-term physical, mental, intellectual or sensory impairments “*which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others*”. Various articles concerning awareness-raising (Art. 8) and accessibility (Art. 9) underscore the extent to which ‘disability’ is a form of structural and attitudinal discrimination. Additional articles concerning women (Art. 6), children (Art. 7) and adequate standards of living (Art. 28), as well as references to disadvantage on grounds of race and ethnicity (Recital (p)) and poverty (Recitals (m) and (t)) recognise that disability discrimination intersects with other forms of discrimination.

¹³ [General comment No. 7 \(2018\) on the participation of persons with disabilities, including children with disabilities, through their representative organizations, in the implementation and monitoring of the Convention, CRPD/C/GC/7](#): see generally §§3-5, 11, 13, 15, 18-20, 27, 42, As to Article 11, see §78: “*In situations of risk and humanitarian emergencies, it is important for States parties and humanitarian actors to ensure the active participation of and coordination and meaningful consultation with organizations of persons with disabilities, including those at all levels representing women, men and children with disabilities of all ages. This requires the active involvement of organizations of persons with disabilities in the development, implementation and monitoring of emergency-related legislation and policies, and the establishment of priorities for aid distribution, in accordance with article 4 (3).*”

¹⁴ For explanation of the relevance of this issue to the Inquiry, see [Women and Equalities Committee ‘Unequal impact? Coronavirus, disability and access to services: full Report’ Fourth Report of Session 2019–21](#) §§106-125 {Not yet on Relativity}

¹⁵ UNCRPD Recital (m) to Preamble recognises “*the valued existing and potential contributions made by persons with disabilities to the overall well-being and diversity of their communities, and that the promotion of the full enjoyment by persons with disabilities of their human rights and fundamental freedoms and of full participation by persons with disabilities will result in their enhanced sense of belonging and in significant advances in the human, social and economic development of society and the eradication of poverty.*”

- 2.4. RESPECT FOR HUMAN DIGNITY: The UNCRPD also recognises that Disabled people have different needs that derive from their impairments. There are discrete obligations relating to services in the aid of independent living (Art. 19), personal mobility (Art. 20), education (Art. 24), health care (Art. 25), *habilitation* and rehabilitation (Art. 26) and data collection (Art. 31). However, as with all other human rights treaties, respect for the inherent dignity of the human being is the fulcrum value through which all other rights must be understood. Dignity is referred to three times in the Preamble¹⁶ and in six of the substantive articles.¹⁷ It is included in the opening Recital (a) recalling “*the inherent dignity and worth and the equal and inalienable rights of all members of the human family*”, in the Treaty’s core purpose in Article 1 “*to promote respect for...inherent dignity*”, and in the first of its General Principles of interpretation in Article 3(a) being “*Respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons*”.
- 2.5. HUMAN DIVERSITY: The preeminent place of dignity in the UNCRPD provides an essential way into understanding Covid decision making. However much the calls to aid the ‘vulnerable’ during lockdowns may have been well meant, the discourse of vulnerability is problematic. It undermines the long-term aim of the DPO to mainstream societal understanding that impairment is not a tragic weakness requiring pity; still less should disability be understood as something that requires charity, welfare, special pleading, or ableist sacrifice, before the situation of Disabled people is granted recognition. The UNCRPD instead requires “*Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity*” (Art. 3(d)). The DPO question whether UK government and society has yet been able to do that and how it might fare better in the future. Preparation for Module 2 should bear that question in mind.

III: EXPERTISE AND EXPERTS

- 3.1. PROBLEMS WITH EXPERTISE: It bears consideration that dating back to the Phillips Inquiry on BSE (2000) there has been a range of identified issues on the use and misuse of experts in the formation of policy making, especially in times of crisis.¹⁸ As has already occurred in the disclosed SAGE Rule 9 requests, the instructed experts, as well as other Inquiry

¹⁶ Recitals (a), (h) and (y)

¹⁷ Arts 1, 3(a), 8(1)(a), 16(4), 25(1)(a) and 25(d)

¹⁸ [The Inquiry into BSE and variant CJD in the UK Vol. 1 Findings and Conclusions](#), Ch. 14 §§1275, 1278, 1282, 1290 and 1301: see also Report from Institute for Government, “*Science advice in a crisis*” (Dec. 2020) {INQ000075385}, HC Health and Social Care and Science and Technology Committee – ‘*Coronavirus : Lesson learned to date*’ (Sep 2021) {INQ000075336/42 §§97-161 }

witnesses with expertise, should be asked to consider how their disciplines can be better integrated in to the functioning of government and civil society during future pandemics and emergencies.

3.2. ABSENCE OF EXPERTISE: Regarding Covid’s implications for Disabled people, the principal problem with expertise is that for a long time there simply was none; and none of the experts within the SAGE structure, or those in government who procured their advice, thought to point that out. Of the initial disclosure from the SAGE personnel it appears that it belatedly became apparent that core gaps in expert advice concerned service providers and end users who would understand the impact of decision making on ordinary lives.¹⁹ Government similarly failed to incorporate such an analysis.²⁰ Even when SAGE sought to correct the problem by including public health and discrimination experts, they focussed on other valid parts of the population such as ethnic minorities, children and the elderly, rather than Disabled persons.²¹ In the instruction of its own experts, and their questioning in due course, the Inquiry is asked to consider this failure of due regard.

3.3. DISABLED PEOPLE ARE EXPERTS: Part of the gap in expertise can now be filled with the DPO as core participants. They and the reports they have cited show that the absence of expert advice and consultation resulted in failures of foresight of some of the most isolating and resource impoverishing experience of lockdown:²² for instance food and resource scarcity that led to hunger and degrading treatment;²³ absence of or limited provision of physical

¹⁹ E.g. Prof. James Rubin {INQ000056547/32 §6.4} (“It was also apparent early on that the Group lacked sufficient diversity in terms of gender and ethnicity: we made efforts during a refresh of the participant list to correct this”), Prof. Laura Bear {INQ000056563/7 §7(a)} (“The core group of experts on SAGE did not have training in considering questions of inequality in UK society (or in other words of the intersecting effects of class, gender, racialised, ethnic and religious distinctions). This meant that initial policies were framed without attention to the varying impact on social groups including minoritized groups. Over time this changed as SAGE began to consider the higher mortality rates among particular ethnicities and advised on how to prevent this differential impact”). Prof. Sir Stephen Holgate {INQ000056483/12 §7.2(1)} (recommends “Co-producing guidelines and engaging relevant communities” within “equal partnership with service users, carers and communities at the earliest stages of design, development and evaluation”). See also, Professor John Dury {INQ000056551/10 §7(1-4)} Stephen Reicher {INQ000056484/5 §7} Andrew Hayward {INQ000056490/73 §7} Dame Anne Johnson {INQ000056516/29-30 §7.3(2)}, Susan Mackie {INQ000056609/13-14 §6.16}, Melinda Mills {INQ000056575/51-53/§§ 7.18-7.22} and Sir Jeremy Farrar {INQ000056616/6 §7}

²⁰ For general recognition of the issue, see HC Health and Social Care and Science and Technology Committee – ‘Coronavirus: Lesson learned to date’ (Sep 2021) {INQ000075336/105 §§324-325}

²¹ For E.g. of looking at ethnicity but not disability, see Professor Iyiola Solanke {INQ000056545/6-8 §§2.1-3.3, 7.2-7.3} and Dr Atiya Kamal {INQ000056378/4-8, 12 §§3.4, 3.8-3.10(1) and (3), 3.11 and 7.1-7.2}

²² All Rule 9 Statements of the DPOs deal with this in some detail including by reference to surveys they conducted or contributed to: e.g. DISABILITY RIGHTS UK 15.12.22 {p.4 §5}; INCLUSION SCOTLAND 15.12.22 {pp.4-5 §5}, DISABILITY ACTION (NI) 15.12.22 {pp.13-21 §5}; DISABILITY WALES 15.12.22 {p.3 §5}

²³ [Women and Equalities Committee Report](#) §§8-36; DISABILITY ACTION (NI), [‘The Impact of Covid-19 on Disabled People in Northern Ireland’](#) (September 2020) pp. 27-9;

care for Disabled people and cessation of respite and day care services;²⁴ Disabled people's caring obligations for others;²⁵ insufficient access to information/lack of communication;²⁶ the negative aspects of face masks in terms of health and/or barrier to communication;²⁷ inadequate protection of individuals in social care settings;²⁸ and the exacerbation of pre-existing socio-economic inequalities in society and their consequence for health, employment and poverty.²⁹

3.4. OBSERVATIONS ON INSTRUCTED EXPERTS: The Inquiry is yet to disclose instructions that were given to its chosen experts, but it would help to have those as soon as possible and pending the disclosure of draft reports, because it will assist preparation for our reading of those and other materials. CTI have indicated that following disclosure of the drafts, “*Core Participants will be invited to raise points of clarification or new matters (that are agreed by the Inquiry to be relevant) with each expert*”.³⁰ In terms of the chosen subject matter for commissioned reporting, the DPOs are able to make the following general observations at this stage. They do so because it may be relevant to the scope of the expert reporting, but also because it will be relevant to the selection and questioning of other witnesses whose evidence overlaps with what the experts may deal with.

3.5. MODULE 1 EXPERT REPORTS: The Inquiry should make available Module 1 reports to Module 2 CPs, because like Module 1 itself, they provide context for understanding the decision-making environment that will be examined in Module 2. This is important for four reasons: (1) The reports will be significant reference points for the Inquiry in determining future lines of investigation. (2) Module 2 witnesses could be asked about their awareness

²⁴ [DISABILITY ACTION \(NI\), 'The Impact of Covid-19 on Disabled People in Northern Ireland' \(September 2020\) p. 21-2](#) ; [INCLUSION SCOTLAND 'We have been completely abandoned': Experiences of social care during the 2020 lockdown \(July 2021\)](#)

²⁵ For e.g. see paper by [Professor Jonathan Herring](#), part of the Oxford University Disability Law and Policy Report 'An Affront to Dignity, Inclusion and Equality: Coronavirus and the Impact of Law, Policy, Practice and Access to Services on People with Disabilities in the United Kingdom': “*Disability campaigners have long argued that disabled people are portrayed as isolated, unproductive and sexless. They are now ... The government advice is based around an image of unencumbered individual who has no responsibilities. The guidance seems written from another planet for the shielded person caring for a parent with dementia; looking after a child on the autism spectrum or living with a partner with depression. It seems based on the premise that the disabled and ill are passive recipients of care and cannot have caring responsibilities of their own.*”

²⁶ [Women and Equalities Committee Report](#) §§118-125; RNID '[Not Accessible, Not Acceptable](#)' 10 November 2020

²⁷ [Welsh Government Disability Forum 'Locked Out – Wales'](#) (July 2021) Key Findings, exclusion, accessibility and citizenship; DRUK '[Disabled people still facing discrimination over face coverings](#)' (20 July 2020).

²⁸ [Women and Equalities Committee](#) §§69-80

²⁹ E.g. [Welsh Government Disability Forum 'Locked Out – Wales'](#) (July 2021) Key findings: Socio-economic disadvantages

³⁰ CTI Note for the Second Preliminary Hearing ('CTI Note'), 17 February 2023 §22

and/or views of a matter raised in a Module 1 report. (3) The DPO have an obvious interest in the matters to be reported upon by Professors SIR MICHAEL MARMOT and CLAIRE BAMBRA (relating to health inequalities and public health structure) and BRUCE MANN and Professor DAVID ALEXANDER (regarding the civil contingency system in so far as it risk-assessed and was ready to respond to their situation). The DPO recognise the necessity to split the Inquiry into Modules, but as indicated above at §1.2, it is important that the context of Disabled people's situation is appreciated as part of the Module 2 investigation of decision making. Further reference to the overlap is made below.

3.6. DATA COLLECTION & USE: GAVIN FREEGUARD has been asked to provide a report on the access to and use of data by the UK Government and devolved administrations. His instruction will assist to investigate the premise that modelling based policy making is only as good as the data it is based upon.³¹ The DPO draw attention to Art. 31 UNCRPD that requires disability data collection (including the acquisition of impairment specific data). The UK has been criticised by the UNCRPD Committee for its lack of a unified data-collection system and the limited collection of disaggregated and intersectional data in surveys and censuses on the general population.³² The Rule 9 statements of the DPO make the same point.³³ If gaps in data affected modelling and policy then Mr Freeguard and other witnesses should be asked to consider accessibility of data concerning disability and various impairments, including its intersection with race, gender, age, childhood and income. If there were deficiencies in the data, how much was this accounted for (if at all)? Was the collection and use of data too focused on numbers and not enough on provision and end user experience? What are the reasons for the failure to create useful and aggregated data relating to Disabled people in the UK?

3.7. MACHINERY OF GOVERNMENT: ALEX THOMAS has been instructed to report on the decision-making structures of the UK Government in an emergency, in particular the Cabinet Office, Cabinet Committees and the Office of the Prime Minister. There is a broader context to his reporting that it is submitted the Inquiry should ask him to comment upon, but also explains

³¹ Professor Neil Ferguson {INQ000075336/44 §103} (“*Models can only be as reliable as the data that is feeding them*”): see also Professor Matthew Keeling {INQ000056476/39 §7(2)}, Professor Andrew Hayward {INQ000056490/73-74 §§7.1-7.4}, Professor Laura Bear {INQ000056563/7 §7(a)}, Adam Gordon {INQ000056487/5 §7}, Bruce Guthrie {INQ000056497/6-7 §7}, Professor Stephen Brett {INQ000056468/2 §7}

³² [Concluding observations CPRPD/C/GBR/CO/1 \(3 October 2017\)](#) §§64-67 – citing UN Sustainable Development Goal 17 and advocating methodology of the Washington Group on Disability Statistics

³³ DISABILITY RIGHTS UK 15.12.22 {p. 5 §7}, DISABILITY ACTION (NI) 15.12.22 {p. 23 §7(m)} DISABILITY WALES 15.12.22 {p. 4 §7}, INCLUSION SCOTLAND {p. 7 §7(c)}

why Module 2 CPs should have access to the Module 1 reports. Firstly, whether the Government had, or should have, prior to the Covid 19 pandemic implemented the BSE Inquiry Report's recommendations, a matter which Institute For Government has written on (see fn.18 above). Secondly, and further to Bruce Mann's and Professor Alexander's reporting, the absence in the UK of a sufficiently centralised disaster management system. Instead it has a Civil Contingency Secretariat that operates out of the Cabinet Office with no statutory duties, under a theory of 'subsidiarity' that emergency services will respond to local needs supported by local resilience forums. So-called Lead Government Departments are expected to co-ordinate local initiatives, but they too operate without statutory duties, and with minimal disaster management training or policy documents.³⁴

3.8. DISABLED PEOPLE DURING EMERGENCIES: The issue is particularly pertinent to the DPO. In 2017 the UNCRPD Committee expressed concern "*about the impact on persons with disabilities in situations of emergencies*" in the UK "*and the absence of comprehensive policies related to disaster risk reduction that include persons with disabilities in the planning, implementation and monitoring processes of disaster risk reduction*".³⁵ Following on from the Committee's recommendations, Mr Thomas and other witnesses (including the relevant M1 experts) should be asked whether, and if not why not, pandemic planning and strategies (a) "*Provide[d] for accessibility and inclusion of persons with disabilities, in close consultation with organizations of persons with disabilities*", (b) "*Mainstream[ed] disability in all humanitarian aid channels and involve organizations of persons with disabilities in setting priorities on aid distribution in the context of risk and humanitarian emergencies*", (c) "*Develop[ed] information and warning systems in humanitarian emergencies that [were] accessible for all persons with disabilities*"; and (d) "*Ensure[d] that organizations of persons with disabilities participate in resilience teams at the local level and [had] an active role in advising on and formulating policies and guidelines regarding disaster preparedness and planning*".

3.9. DEVOLVED GOVERNMENT: Professor ALISA HENDERSON has been instructed to report on the political structures for devolution within the UK and mechanisms for inter-governmental decision-making between the UK Government and the devolved administrations. Another relevant recommendation of the BSE Report was to ensure that devolution did not

³⁴ For wholesale review of the situation, see National Preparedness Commission: An Independent Review of the Civil Contingencies Act and its supporting arrangement (March 2022) of which Bruce Mann is one of the authors for Central government, see esp. Recs. 35, 75-76, 90-95

³⁵ [Concluding observations CPRPD/C/GBR/CO/1](#) (3 October 2017) §§28-29

compromise a sufficiently synchronised response to a UK wide risk.³⁶ The DPO are concerned to understand the extent to which their separate nations served or hindered the Covid 19 pandemic response, which would include consideration of whether the different Governments,³⁷ and their social policies, better included Disabled people or excluded them. It would be of assistance if Professor Henderson, and if not her, the Inquiry team, could provide a summary of the differences between the devolved nation responses to the Covid 19 pandemic, including differences in the statutory regulations and the provision of financial and other support services. The DPO will likewise wish to draw attention to the different ways in which the Equality Act 2010 (and in Northern Ireland the Disability Discrimination Act 1995 as amended as well as s. 75 of the Northern Ireland Act 1998) are monitored in the different parts of the country, and how those differences impacted on Disabled people during the emergency. In so far as Professor Henderson and other witnesses are able to assist on those issues, they should be asked about it.

3.10. TRANSNATIONAL COMPARISON: Professor THOMAS HALE has been instructed to report on international data relating to the Covid-19 pandemic, in particular analysing the effectiveness of the decision-making of the UK and each devolved administration to the Covid-19 pandemic in comparison to other countries. His instruction embraces the Inquiry's commitment in its terms of reference that in meeting its aims it will "*have reasonable regard to relevant international comparisons*". Given the Inquiry's other commitment "*to consider any disparities evident in the impact of the pandemic on different categories of people, including, but not limited to, those relating to protected characteristics under the Equality Act 2010 and equality categories under the Northern Ireland Act 1998*" the DPO would want Professor Hale and other witnesses to consider whether international comparison indicated better practices for including and consulting with Disabled people, as well as whether the design and reasonable adjustments of lockdown measures might have suited their situations better. The DPO would also want Professor Hale to consider to what extent international comparators took into account the WHO Guidance issued on 26 March 2020, that outlined Disability Considerations during

³⁶ [BSE Report](#), Fn. 18 above §§1280-1282

³⁷ The Inquiry is already well focussed on the fact that Northern Ireland Assembly had only just been renewed in January 2020 after a three-year hiatus.

the Covid 19 outbreak,³⁸ and to similar effect the United Nations Secretary General’s policy brief “*A Disability-Inclusive Response to Covid-19*” (May 2020).³⁹

IV: SELECTING & QUESTIONING WITNESSES

- 4.1. INFORMED CONSULTATION ON SELECTION AND ISSUES: The DPO agree with the approach outlined in the CTI Note for this hearing (§§23-26). Given the volume of disclosure that is being produced, CTI want time to reflect on issues and witnesses, and to consult on both. Informed consultation cuts both ways and with that in mind, the DPOs have tried to identify some of their own provisional issues and questions in this document in order to assist the CTI teams in their reflections, as well as prompt early consideration of the types of issues and documents that should be raised with witnesses (see §§4.3-4.6 below).
- 4.2. CIVIL SOCIETY GROUP WITNESSES: There is good reason for the Inquiry to consider calling CP witnesses from the civil society groups, especially those involved in trying to influence administrative and political decision making in real time. They can provide understanding from the perspective of subjects of state decision making, including lived experience of it, and explain how they sought, or would reasonably have sought, to influence policy, including to do things differently then, as well as the recommendations they would make for the future.
- 4.3. CO-DESIGN OF QUESTIONING: The DPO acknowledge the structure of Rule 10 of the Inquiry Rules 2006, including the default position that CTI and the Panel ask questions of witnesses (r. 10(1)), but that representatives of CPs can apply to the Chair for permission to ask questions themselves (r. 10(4) and (5)). The important feature of CTI’s suggested approach in their Note⁴⁰ is their aim to ensure that CPs are meaningfully engaged in the process of questioning (§43). To that end they propose producing “*evidence proposals*” containing a draft list of issues and documents that will be put to witnesses (§45), which CPs can respond

³⁸ ‘[Disability considerations during the COVID-19 outbreak](#)’ (26 March 2020). The WHO made recommendations for Government actions regarding Disabled people during the Covid 19 Pandemic. The WHO Guidance highlighted that certain populations, such as those with a disability, might be impacted more significantly by Covid 19 due to pre-existing health conditions underlying the disability, barriers to accessing healthcare and public health information and difficulty in enacting social distancing due to care needs (p. 2) . The recommendations included ensuring healthcare information was accessible, targeted measures for people with disability and their support networks, targeted measures for disability service providers in the community and ensuring that emergency measures include the needs of people with disability (pp 6-8)

³⁹ [The Policy Brief](#) outlined four overarching themes to ensure a disability inclusive response to Covid19, these included mainstreaming of disability in all COVID-19 response and recovery; accessibility of information, facilities, services and programmes; meaningful consultation with and active participation of persons with disabilities; and accountability mechanisms to ensure disability inclusion in the COVID-19 response.

⁴⁰ CTI Note 17.2.23 §§41-50

to in writing and then in (welcomed) meetings with CTI, including as opportunity to raise additional issues and documents that CTI should raise with a witness (§§46-47).

- 4.4. ADDITIONAL OBSERVATIONS: The DPO agree with CTI's proposed approach. Their only caveats concern timing and flexibility: (1) The timetable (including proposed meetings with CP legal teams) will be challenging, especially if disclosure continues into the summer and CPs, as well as their legal representatives, need to be meaningfully engaged in the process while also finalising opening statements. (2) Pre-disclosed issues for witnesses should not be treated as inflexible documents that cannot evolve during the course of evidence as a result of answers given. (3) In the event that only CTI ask questions of a witness, the Chair could very usefully build in approximate 15-minute breaks at the end of CTI prepared questions of witnesses to examine with CPs whether there are additional follow up questions based on the evidence that has been given. (4) Where it is possible to identify core issues and approaches with CTI earlier than September that should be done.
- 4.5. ESSENTIAL ROLE OF HYPOTHETICAL QUESTIONS AND ANSWERS: At this stage the DPO do make a case for three types of generic lines of questioning that CTI should ask and witnesses called to give oral evidence should be ready to answer. First, unlike a trial, or other legal process, it is intrinsic to the nature of this particular Inquiry to take an interest in hypothetical questions. (E.g. What if Lockdowns had started earlier? How could exceptions to social isolation regulations have operated for those in specific categories of need? What would have been the benefits of enabling children with SEN requirements to attend school? How might greater inclusion with DPO during emergency decision making have worked?).
- 4.6. QUESTIONING PROPORTIONALITY: Second, while there may be general consensus that state authorities needed to take action to contain Covid-19, there are a range of scientific, social and ethical opinions as to whether the measures taken were too little or too much. It may help the Inquiry to construct questioning in accordance with the human rights principle of proportionality that poses four questions of a given measure: (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.⁴¹ Although the above approach has emerged particularly as a

⁴¹ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 [2014] 1 AC 700 §§20 and 74

principle of rights-related judicial review, its broader benefit is that it introduces an element of rational structure into any examination of competing interests, and is all the more of the assistance where the conflict of competing interests is intense.⁴²

- 4.7. LESSONS LEARNED AND RECOMMENDATIONS FOR FUTURE RESPONSES: Third, in keeping with the aims and structure of the Inquiry, witnesses need to be asked what they have learned and how they would do things differently. The Rule 9 approach to this issue as already exemplified by the question put to SAGE witnesses - essentially ‘What worked? What could work better?’ – should be developed in oral questioning.
- 4.8. CQC RULE 9 REQUEST: CTI have invited CPs to indicate if there are organisations or individuals who do not appear in Annex A but, in relation to whom, there is reason to believe that the issuing of a Rule 9 request would benefit Module 2 (§12). Accordingly, the DPO suggest that a Rule 9 request is made to the Care Quality Commission (CQC). The CQC is the independent regulator of health and adult social care in England. The DPO’s understanding is that the CQC raised concerns in April 2020 regarding the increased risk to those with disabilities if they contracted Covid 19 and the concern that people requiring specialist health and social care support who have long-term conditions could have difficulty accessing regular services and support during the Covid 19 pandemic.⁴³ As set out at §§1.1 and 3.3 above those are issues of particular importance to the DPO. The disclosure to date indicates that the CQC provided feedback and advice to Government regarding policy, for example the Adult Social Care Winter Plan in autumn 2020 (in particular containment measures, vaccination of care staff and the use of DNACPRs)⁴⁴ and the approach to staff working in care settings when Covid positive.⁴⁵ A CQC Rule 9 statement is likely to provide useful information to the Inquiry on Government decision making relevant to §§2-4 of Module 2’s outline scope, namely advice to health and social care providers, the identification of at risk and other vulnerable groups, and the dissemination of data between the government and care sector.

⁴² *Pham v Secretary of State for the Home Department* [2015] UKSC 19 2015] WLR 159 §§95-96 (citing Professor Dr Lübke-Wolff *The Principle of Proportionality in the case-law of the German Federal Constitutional Court* (2014) 34 HRLJ 12, 16-17 - "a tool directing attention to different aspects of what is implied in any rational assessment of the reasonableness of a restriction", "just a rationalising heuristic tool".)

⁴³ ['Dr Kevin Cleary: Protecting people's safety, equality and rights during the coronavirus \(COVID-19\) pandemic'](#)

⁴⁴ {INQ000058202} ASC Winter Plan Draft V3.3 CQC Comments, dated 01/01/2020.

⁴⁵ {INQ000061314} Letter from Peter Wyman Chair Care Quality Commission to Helen Whately MP Minister for Care Department of Health and Social Care, dated 02/07/2021, regarding Involving the police in cases of care staff working in care settings when COVID-positive; {INQ000061313}

V: OTHER PROCESS MATTERS

- 5.1. OPENING AND CLOSING STATEMENTS: Further to the CTI Note §53 for those CPs who wish to exercise their rights to make written and oral opening and closing statements it is sensible to have page and time limits that apply multilaterally. What those are should be the subject of discussion prior to the next preparatory hearing.
- 5.2. DEADLINES: In the fixing of deadlines for the service of documents, the Chair and the Inquiry Team are asked to bear in mind that legal representatives will need to take instructions from clients who will provide their time for free while they do their day jobs, and who will require reasonable adjustments (a) to participate as representatives of Disabled people and (b) to ensure that their participation is as representative as possible by consulting others (albeit in accordance confidentiality undertakings).
- 5.3. REASONABLE ADJUSTMENTS: The DPO made submissions at the previous M2 preliminary hearing regarding suggested reasonable adjustments for the Inquiry proceedings, making a number of simple proposals to implement that would assist both physical access and other capacity to follow the hearings. The Inquiry indicated that it welcomed the suggestion and would review them but has not yet confirmed whether the DPO proposals will be implemented. The DPO request an update to that review, and again suggest that the Inquiry adopt the reasonable adjustments suggested by the DPO in previous submissions. They remain willing and available to assist on any issues arising.⁴⁶ In addition, those acting for the Long Covid Group have sensibly asked that HEPA filters, ventilation and CO2 monitors will be assured in all Inquiry venues and the DPO support that request.
- 5.4 PARLIAMENTARY PRIVILEGE: Further to the CTI Note §§27-40 as to whether Article 9 of the Bill of Rights applies to statutory inquiries, the DPO regard it as unnecessary to decide the point until, and if, a concrete issue arises based on a disputed Rule 9 statement that is unequivocally inconsistent with a statement provided to Parliament. They take that position because even if Article 9 applies, the embargo would not attach to referring the Inquiry to parliamentary reports and other statements in order to establish the arguable relevance of issues, proposed questioning, or further requests for disclosure. In light of the evidence gathering exercise being carried out as described in the CTI Note §§36-8 that takes account of parliamentary statements without directly questioning or impugning them, the DPO would

⁴⁶ DPO M2 Joint Submissions, 27 October 2022 §12, M2 Preliminary hearing 31 October 2022, Transcript pp.3, 103-104, 114

especially draw the Inquiry's attention to the [Women and Equalities Committee 'Unequal impact? Coronavirus, disability and access to services: full Report' Fourth Report of Session 2019–21](#) (and ask for it to be placed on Relativity). The DPO otherwise assume that the Inquiry (a) would want to come to its own conclusions regarding the matters covered by any Parliamentary or indeed any other Report, irrespective of the Bill of Rights, (b) is poised to investigate matters more comprehensively than previous reporting mechanisms and (c) will take account of previous recommendations in reports in order to decide on its own. Although it is not a complete answer to the problem, the DPO also assume that the Inquiry would – at least – disclose to them all statements that had the capacity to be read as inconsistent with what was said in Parliament and separate action could be taken by CPs including asking Parliament to investigate, and if necessary, sanction.

5.5 EVERY STORY MATTERS, COMMEMORATION: On any view the commemorative and learning project of Every Story Matters will be an endeavour of extraordinary sensitivity. The DPO have concerns about the companies contracted to provide communications expertise to the Inquiry. Initial contracts were in place with M&C Saatchi and Ipsos Mori, however the DPO understand these are to be replaced with new contracts (CTI Note Annex B §2.1, 3.1-3.2). The DPO note CTI assurances (at §3.2) that suppliers will be required to establish that no conflicts of interest arise. While the CTI Note does not name any appointed company, recent news reports⁴⁷ refer to confirmation by an Inquiry spokesperson that named companies have been awarded the contracts. The news reports refer to one company in particular handling government messaging during the Pandemic (for example the slogan “Stay at Home”). If those news reports are correct the DPO are concerned that, given that Government messaging and public communications are areas to be examined by the Inquiry in the course of Module 2 (see Module 2 outline scope §5), the involvement of such companies in promoting the listening exercise is problematic and may undermine the willingness of individuals to take part in such a sensitive and important exercise. Rather than the DPO relying on news reports the Inquiry is requested to adopt a robust and transparent approach and clarify to the Core

⁴⁷ <https://news.sky.com/story/covid-inquiry-bereaved-families-experiencing-anxiety-and-unease-over-hiring-of-pr-firms-preliminary-hearing-is-told-12810739> 14 February “A spokeswoman for the inquiry confirmed to Sky News that M&C Saatchi had been awarded the contract and that 23Red had been sub-contracted by the company “to provide the inquiry with expertise on working with external organisations to support public engagement and encourage people to share their experiences”; <https://www.theguardian.com/uk-news/2023/feb/16/pr-firm-behind-tory-pandemic-response-linked-to-covid-inquiry> “We sought legal advice and are satisfied there is no conflict of interest that affects the delivery of the listening exercise. M&C Saatchi and 23red do not have a decision making role with the inquiry, and they have no direct access to the inquiry’s legal team or the wider work of the inquiry,” an inquiry spokesperson said.”

Participants which companies have been appointed to carry out the work and how any conflict issues have been resolved.

- 5.4. ACCESSIBILITY: The DPO request that the Inquiry team confirm that the listening exercise will be accessible to Disabled people. This includes having information available in alternative formats and giving individuals a range of ways in which they can contribute. In addition, collection of equality data is essential for the listening exercise so that the analysis can identify themes for specific groups and intersectional issues. Finally, for the Commemoration the Inquiry has decided to produce a tapestry – thought should be given to how individuals with different impairments will be able to interact with this, for example visually impaired people, and how people will be able to engage with the tapestry online.

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24 February 2023