

## THE UK COVID-19 INQUIRY

---

### MODULE 2

#### SUBMISSIONS ON BEHALF OF TRADES UNION CONGRESS FOR THE SECOND PRELIMINARY HEARING, 1<sup>st</sup> MARCH 2023

---

#### INTRODUCTION

1. These written submissions are made by the Trades Union Congress (“TUC”) in advance of the second preliminary hearing in Module 2, concerning the UK’s core political and administrative decision-making, which will take place on 1<sup>st</sup> March 2023. The TUC intends to make oral submissions at the hearing, and is likely to have further developed its position in respect of a number of the items on the agenda by that time. These written submissions are in brief, outline form only for a number of practical reasons, primarily due to funding and resource constraints.
  
2. We note at the outset that the Update Notes and the 17<sup>th</sup> February 2023 Note provided by Counsel to the Inquiry (“CTI”) in advance of this hearing provide Core Participants (“CPs”) with significant detail on certain matters, including in particular the identities of those to whom Rule 9 requests have been sent and the status of those requests and anticipated timeframes (Annex A). This is extremely helpful information and very much appreciated. The TUC welcomes this approach and is grateful to the Inquiry team for this level of detail, and encourages a similar approach to be taken in other modules. We also note that the Inquiry has heeded the request made by the TUC in our October 2022 submissions (written and oral) that the Health and Safety Executive (“HSE”) be issued with a Rule 9 request, and again, the TUC is grateful for and welcomes this development.
  
3. We address, briefly, below the following matters:
  - (a) Funding;

- (b) Scope and the inter-relationship between modules 2, 2A, 2B and 2C, and in particular 2C given the unique position of Northern Ireland;
  - (c) Overall timetabling for Module 2;
  - (d) Rule 9 requests;
  - (e) Disclosure;
  - (f) Experts.
4. We do not at this stage address other agenda items, but will consider our position and reflect in advance of the hearing.

## FUNDING

5. It is important to put on record at the outset the position in relation to the TUC's funding for this Inquiry. The Inquiry is tackling issues of importance and considerable breadth, and doing so at pace. That inevitably demands resources for both the Inquiry and core participants. The Inquiry team itself is significant in number. The State core participants generally appear to have instructed multiple counsel. Where core participants are publicly funded, the Inquiry appears, quite rightly, to have recognised the need for relatively large legal teams. The demand for resources is certainly one faced by the TUC, as we try our best to represent the interests of multiple unions across several key sectors: health, social care, education, fire and rescue, transport, communications, manufacturing, and so on. We are core participants in each of the six modules identified by the Inquiry thus far (that is, Modules, 1, 2, 2A-C, 3).
6. The Inquiry has to date refused any funding for the TUC on the basis that the TUC is a "*substantial body*". As we made clear in our applications for funding, without it our effective participation would be severely circumscribed. We stated, in terms, that, "*absent an award of the cost of legal representation, the TUC will continue to engage with the Inquiry, but will have to do so on a very limited basis.*" That was not bluster. The TUC's reach is extremely wide and its commitments are correspondingly wide and deep. Each year, the TUC has an allocated budget of approximately £1.4 million for all of its projects. It cannot do nothing but the Inquiry. The TUC can dig into its reserves, as it has done, but it cannot drain them. It has expanded its envisaged

budget for the Inquiry, but, even so, we are limited to a legal team comprising one junior solicitor, very limited time from one junior counsel, and extremely limited time from lead counsel. All resources are currently committed to, and, frankly, struggling to respond to, detailed Rule 9 requests. We have, not yet, got to the first page of disclosure; we have not had the resources to do so. Our attendance at the substantive hearings themselves will be very limited.

7. This has the perverse effect of, first, disincentivising either the TUC or other large representative groups from applying for CP status as such, despite the Chair making clear from the outset of this Inquiry that she encourages collaboration, joint working and the involvement of larger, representative groups. In contrast, were a smaller, single-issue organisation to apply for funding, it would be more likely to receive public funding and have better access to resources than the TUC, despite its size and significance.
8. The context is, of course, that the TUC is the voice of millions of working people across the UK including many who were in the high risk, low wage jobs we referred to in our oral submissions at the first Preliminary Hearing, including in sectors such as health, social care, transport, food processing and textiles (transcript of 31<sup>st</sup> October 2022, page 25). Covid has been devastating to workers and the TUC affiliated unions. Much of their ongoing work now consists of repairing very significant damage wrought by Covid.
9. The Chair is empowered to provide public funding to a “*substantial body*” where there are “*special circumstances*.” “*Special circumstances*” is not defined and it is a test for the Chair to apply. We ask that the refusal of funding be reconsidered. Plainly it is open to the Chair to consider that the important role of the TUC in this Inquiry, the breadth of its interests, and the demand for resources needed to participate effectively satisfies the broad, “*special circumstances*” test.

10. We say this, as in our view it is important to put on the public record that, whilst on paper the interests of the working people of its many unions are represented by the TUC as a CP to this inquiry, that representation is, in practical terms, very limited. We are also concerned to see the repeated inference in CTI Notes (not only in this module) that silence means assent: see paragraph 12 of the Note for this upcoming hearing, for example (*"To date, it has not been suggested by Core Participants that there are significant gaps in the range or identity of organisations and entities to which the Inquiry has directed Rule 9 requests"*).

#### **SCOPE AND THE INTER-RELATIONSHIP BETWEEN MODULES 2, 2A, 2B AND 2C**

11. We addressed in our written and oral submissions for the first preliminary hearing our concern regarding the lack of clarity in respect of the interrelationship between Modules 2, 2A, 2B and 2C, and in particular the unique position of Northern Ireland. We remain unclear as to how the Inquiry intends to proceed. There has been no ruling addressing the issue and the Update Notes do not give an answer.
12. In respect of the overall approach to the interrelationship between Modules 2, 2A and 2B, we refer to our previous submissions and do not repeat them here. We request an update.
13. In respect of Northern Ireland, we note that Rule 9 requests in Module 2 have been issued to the former First Minister, Paul Givan, and former Deputy First Minister, Michelle O'Neill, but this does not provide the clarity we have been seeking since October regarding the Inquiry's intended approach. The TUC submitted then that urgent consideration must be given to how the particular position of Northern Ireland's pandemic preparedness in the period leading up to January 2020, and Northern Ireland's unique position in early 2020, will be addressed (i.e. whether the preparedness issue will be addressed in Module 1, or 2C; and whether the position in early 2020 will be addressed in Module 2, 2C or both). There are particularly acute and thorny issues arising in relation to Northern Ireland given the fact that Northern Ireland had no functioning Executive for a three-year period, until 9<sup>th</sup> January 2020.

In January 2017, the then Deputy First Minister Martin McGuinness resigned, and the Northern Irish Executive consequently collapsed. From January 2017 to January 2020 Northern Ireland was governed, in essence, by civil servants in a caretaker capacity, and the UK Government in Westminster had particular additional obligations as there was no functioning Executive. In early January 2020 the parties signed the 'New Decade, New Approach' agreement and an Executive was subsequently established.

14. The result of this chain of events is that, first, for a three year period in the lead-up to January 2020, there was no functioning Executive at all in Northern Ireland; and second, Northern Ireland was in the process of returning to having a functioning government at the same time that the pandemic hit.
15. During the hiatus period (January 2017 – January 2020), in other contexts, this led to judicial review challenges of the Secretary of State for Northern Ireland and the alleged failure to act to fill the lacuna resulting from the absence of a functioning Executive (e.g. provision of abortion services in Northern Ireland, to ensure that the UK as a whole complied with its obligations under the European Convention on Human Rights, “ECHR”). Similar complex issues arise here, in relation to the respective roles of central UK Government and the Northern Irish Executive, and the UK Government’s overall obligations in domestic and international law, including to ensure compliance with the ECHR in Northern Ireland.
16. We described this issue as the elephant in the room in our October 2022 submissions, and it remains so. We appreciate that the Inquiry may still be considering its position on this issue and its thinking may still be developing. However, we reiterate our plea that the Inquiry share that developing thinking with CPs rather than waiting until it is too late to influence it.
17. Further, we reiterate our request that the Chair consider the possibility of a stand-tying public hearing concerning Module 2 overall following the conclusion of the

public hearings in Modules 2A, 2B and 2C. We appreciate that this is not a matter upon which she intends to rule at this stage, but for the record it remains our view that this is essential.

18. Finally, in respect of scope, we are troubled by paragraphs 23 – 24 of CTI’s Note, combined with the indicated timetable for disclosure to CPs and the proposal that the next preliminary hearing should not take place until September 2023 (a matter to which we return below). What paragraph 23 says, in effect, is that it is *“important that the Inquiry legal team properly reflects, in light of the statements and documents that are now starting to be received, on the scope of Module 2 and identifies to Core Participants and the wider public the key issues which fall to be explored at the oral hearings.”* The chain of events then proposed is that CTI needs time to conduct a *“meaningful review”* of the relevant materials, which will take some time (para. 24); then in April 2023 a list of issues will be circulated to CPs; *“shortly”* followed by a provisional list of witnesses *“on which CPs’ views will be sought”* (para. 24).
  
19. From these paragraphs, it appears that CTI considers the reflection on scope and the distillation of the *“key issues”* is a matter exclusively for the Inquiry team. There is no indication that CPs’ views will be sought on the key issues; or if they are to be sought, it is plain that the timetable will be extremely tight given the sequence of events described. It also appears that the key issues are likely to be determined by the Inquiry team prior to the CPs having sight of some key central government statements, including those of the Prime Minister and other UK, Northern Irish, Scottish and Welsh Ministers. There is also no proposal for oral submissions on these vital points, which essentially involve narrowing the scope of the issues to be considered in the substantive public hearings. These are issues on which CPs should be afforded the opportunity to make meaningful submissions – including time for a *“meaningful review”* of the materials and the Inquiry team’s proposals, and the opportunity to address the Chair orally with sufficient time remaining to make a difference to the ultimate outcome.

## OVERALL TIMETABLING FOR MODULE 2

20. We note that CTI has provided an update on the need to reschedule the start date for the Module 2 hearings (CTI's Note, paras 4 – 6) and has proposed a third Preliminary Hearing (para 7).
21. The TUC of course agrees that the anticipated start date of 19<sup>th</sup> June 2023 is no longer achievable. We are grateful for the indication that it is intended to take a break during the week which coincides with half-term/ mid-term commitments for many of those with childcare commitments.
22. We remain concerned that a proposed start date of 2<sup>nd</sup> October 2023, seven months from now, means there is a huge amount to do in a very short timescale, and from the outlines provided by CTI and the detail in Annex A to their Note it does appear that disclosure of Ministerial statements is likely to be some way off: the earliest date provided is that eight statements of UK Ministers will be "*received by the end of March 2023*" but of course there is no indication of when onward disclosure to CPs will take place. It is clear that some crucial statements will not be provided to CPs until May at the earliest. However, we accept that there is in theory adequate time available to prepare for an October start date, should the evidence-gathering process and disclosure proceed apace.
23. We do, however, firmly disagree with the suggestion that there should only be a third preliminary hearing listed in September 2023. By September 2023 it will be within four weeks of the final hearings being due to commence. Not only will the "*key issues*" list have long been confirmed, and the witnesses and running order confirmed; the preliminary hearing is likely to take place after the process described at para. 49 of CTI's Note has commenced (evidence proposals for witnesses in week 1). We do not disagree with having a preliminary hearing in September but plainly this will be a final housekeeping-type hearing only and there will be no opportunity at that stage to influence the direction of travel of a hearing taking place imminently.

24. We propose, instead, that a third preliminary hearing be listed for May 2023, approximately four to five months before the final hearings in this module are scheduled. At that point CPs should be entitled to address CTI's proposed key issues and the question of scope, and we hope by that time that there will be clarity regarding the proposed interrelationship between Modules 2, 2A, 2B and 2C. This also allows for CPs to raise matters relating to any gaps in the evidence or other key points, or difficulties with disclosure, or other matters, with adequate time to influence the final hearing. Otherwise, a hearing only in September 2023 will be too little, too late. We agree with a fourth preliminary hearing being listed in September should that be needed, also.
25. In respect of the proposal at para. 25 of CTI's Note, we have indicated above our concern that it appears CPs will be asked to comment at short notice on potential witnesses against the backdrop of having only just learned the Inquiry team's proposed approach to the "key issues" for Module 2. A further benefit of an additional preliminary hearing would be that any witness issues which may merit oral submissions could be addressed (although we appreciate that much progress is likely to be made in writing, without the need for oral submissions).

## **RULE 9 REQUESTS**

26. We are grateful for the updates regarding Rule 9 requests and we will address any issues arising orally. Our primary concern is one of timetabling coupled with the need to have the opportunity to make submissions to the Chair, as addressed above.

## **DISCLOSURE**

27. We note the updates provided, and welcome the fact that disclosure in this module appears to be set to commence with far more lead-in time than in respect of module 1. Our central concern is that, to keep 2<sup>nd</sup> October as a realistic start-date, it is imperative that disclosure concerning central government decision-making be made as quickly as possible; we are concerned that the Ministerial statements in particular appear likely to arrive with the Inquiry team up to May 2023 and so speedy onward



disclosure to CPs will be of vital importance to keep the timetable on track. This is another reason why a May 2023 preliminary hearing would be helpful.

## **EXPERTS**

28. We note the updates regarding the experts instructed to date and the likely timetabling. The TUC have two short points at this stage.
  
29. First, we consider there to be a need for an expert in structural racism to be instructed. We are concerned that this aspect is not addressed in the instructions to date, and it is of vital importance.
  
30. Second, we note with concern the reference in paragraph 22 of CTI's Note to the possibility of limitations being imposed on CPs regarding "*the scope and/ or number of matters able to be raised*" by each CP. We are troubled by the suggestion that CPs would be restricted in this way, and request an explanation from CTI as to what is meant by it. Stating, "*further information about the intended process... will be provided in due course*" suggests that this may not be provided by the time of the upcoming second preliminary hearing, despite this being a plainly controversial course of action and one on which the TUC is likely to wish to have the opportunity to address the Chair.

## **OTHER MATTERS**

31. We are considering further the issues raised in respect of parliamentary privilege and other agenda items. We make no written submissions at this stage but reserve our position.

CAOILFHIONN GALLAGHER KC

SAM JACOBS

Doughty Street Chambers

24<sup>th</sup> February 2023