

COVID-19 PUBLIC INQUIRY

Module 2A

SUBMISSIONS ON BEHALF OF DISABLED PEOPLE’S ORGANISATIONS: INCLUSION SCOTLAND AND DISABILITY RIGHTS UK

Preliminary Hearing – 21 March 2023

Further to the Submissions served on behalf of the DPO for the M2 Preliminary Hearing dated 24 February 2023 (the ‘M2 Preliminary Hearing Submission’) the following addresses [I] Context [II] Human Rights [III] Expertise and Experts [IV] Selecting and Questioning Witnesses [V] Other Process Matters, all as they apply to M2A.

I: CONTEXT

- 1.1. COVID AND INEQUALITY: As in the rest of the United Kingdom, Disabled people in Scotland were differentially affected by Covid 19 in three main areas: the increased risk of poor outcomes from the disease itself, reduced access to routine health care and rehabilitation, and the adverse social impacts of efforts to mitigate the pandemic. The DPO anticipate from the terms of reference (TOR) that the Inquiry will examine the foresight, extent and the cause of those differential effects as they applied to Scotland, and the political and administrative decision making in Scotland as compared to the rest of the United Kingdom.
- 1.2. DISABLED PEOPLE’S SITUATION IN SCOTLAND: In 2017, the Scottish Health Survey estimated that 32% of adults and 10% of children were Disabled.¹ As in the rest of the United Kingdom, 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 appreciation of their situation as of December 2019. Further to the national analysis conducted by the EHRC in its study of a “*Journey Less Equal*”,² Scotland has a National Performance Framework with a range of wellbeing indicators, for which as of July 2019 Disabled people overall scored lower than the non-disabled population.³ For example, there is a higher

¹ Scottish Government ‘Scotland’s Wellbeing: Measuring the National Outcomes for Disabled People’ (July 2019) p.9

² EHRC, ‘*Being Disabled in Britain – A Journey Less Equal*’ (March 2017) Executive Summary pp 7-15

³ [Scotland’s Wellbeing: Measuring the National Outcomes for Disabled People \(July 2019\)](#) pp 6-7; See also INCLUSION SCOTLAND [Rights At Risk - Covid-19, Disabled people and emergency planning in Scotland - a baseline report from Inclusion Scotland](#) (October 2020) pp 2-3

prevalence of poverty, food insecurity and material deprivation among disabled adults and children. There are lower rates of employment and economic activity among Disabled people alongside evidence of a disability pay gap. There is lower mental wellbeing among Disabled adults along with higher engagement in health risk behaviours, and higher rates of difficulties among Disabled children. Disabled people were more likely to be worried about a range of crimes and there are potentially concerning trends in offline and online hate crime at a UK level. There are lower rates of cultural participation and attendance among Disabled people along with lower rates of access to green (parks, woods and countryside) and blue (rivers, lochs, coasts) space and visits to the outdoors. A minority of Disabled young people experience lower educational attainment and lack of positive destinations after school, but this is more prevalent among Disabled than non-disabled children (and for them consequently impacts on their outcomes adversely as they transition to adulthood).

1.3. INTERNATIONAL CRITICISM: As the Inquiry is aware, prior to the Covid pandemic, the United Nations Committee on the Rights of Persons with Disabilities issued a report on the UK which criticised it especially for its lack of consultation with Disabled people contrary to Art. 4(3) of the UNCRPD (§§10-11), ill-preparedness to protect them in the event of emergency contrary to Article 11 (§§28-29), damage done by austerity measures contrary to Arts 19, 27 and 28 (§§58-59) and a lack of reliable data, including impairment specific and disaggregated intersectional data contrary to Art. 31 (§§64-65).⁴ The DPO draw attention to those four criticisms as pertinent entry points to examining how the Covid response fared for Disabled people in Scotland.

1.4. AUSTERITY: In a separate Inquiry Report issued by the UN Committee under Article 6 of the Optional Protocol, that focussed especially on the impact of austerity measures, 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*"⁵ (§113). Of Scottish significance to this criticism was that its devolved Government (along with Wales) launched equality impact assessments of the extent of the cuts, and put in place mitigating measures to somewhat limit the cuts in social care support.⁶ This

⁴ [Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland: CPRPD/C/GBR/CO/1 \(3 October 2017\)](#)

⁵ [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 \(24 October 2017\)](#)

⁶ Ibid §§71, 77 and 94: citing official statistics that in 2009/10 and 2012/13, total gross expenditure on adult social care decreased by 5.5 per cent in England. That compares with reductions of 2.1 per cent in Wales and 3.4 per cent in Scotland.

included protecting households from the UK Government bedroom tax, 80% of which have a Disabled adult) and establishing a limited Independent Living Fund to assist Disabled people despite re-arrangements imposed by the Welfare Reform Act 2012.⁷

1.5. FAILURE OF HUMAN ACCOUNTING: Despite different approaches to austerity, prior to the pandemic Disabled people in Scotland still experienced worse outcomes than non-disabled peers in many areas of life. The situation after March 2020 then served to “*highlight and aggravate ... [pre-existing] inequalities, and to put the human rights of disabled people at further risk*”.⁸ As highlighted in the M2 Preliminary Hearing Submissions (§1.5), a significant issue in the fusion of science and government that constructed Covid policy is that it was so disconnected from the views and experience of Disabled people and their DPOs. INCLUSION SCOTLAND declared in real time that the pandemic and the measures to respond to it “*has changed all our lives in dramatic ways*” and that “[*there*] *has never been a more important time for disabled people to have a voice*”.⁹ The organisation later found as a result of surveying and community networking, “*It is not just the catastrophic impact of the virus itself that has caused so many problems for disabled people. Inaction, turmoil and the indifference to our lived experience and expertise all play a part in shutting off our rights and leaving us behind*”.¹⁰ That Disabled people faced the triple jeopardy of increased fatal outcomes from Covid, reduced access to routine health care, and disproportionate adverse impact from the pandemic response was belatedly recognised by some in hindsight, but should have been appreciated in foresight. This was a basic failure of human accounting.

II: HUMAN RIGHTS

2.1. HUMAN RIGHTS FOCUS: We note that paragraph 5 of the Scottish Covid 19 Inquiry TOR require it “*to demonstrate how a human rights based approach by the inquiry has contributed to the inquiry's findings in facts and recommendations*”. The ‘Human Rights Approach’ is pursued in Scotland under the Acronym of PANEL, which covers the

⁷ [A Fairer Scotland for Disabled People \(December 2016\)](#) p. 2. The Scottish fund (which replaced the closed UK fund in Scotland and opened in 2019) was only opened to those who already had an award from the UK fund. It is not and has not been open to new applicants. As people die the fund benefits are withering, There were 2364 recipients in August 2020: see <https://ilf.scot/publication/ilf-scotland-a-brief-history-and-current-context/#:~:text=At%20the%20point%20of%20transfer,this%20number%20is%20now%20%2C634>

⁸ [Rights At Risk - Covid-19, Disabled people and emergency planning in Scotland \(Oct. 2020\)](#) p.3

⁹ [Initial Findings of Inclusion Scotland's Covid-19 Survey \(PDF\) - Inclusion Scotland \(May 2020\)](#) p. 2. See also [Disabled people's lived experience of shielding: key survey results \(July 2020\)](#), “[We have been completely abandoned](#)”: [Experiences of social care during the 2020 lockdown \(July 2021\)](#)

¹⁰ [Rights At Risk - Covid-19, Disabled people and emergency planning in Scotland](#) (Oct 2020) p. 1

principles of Participation, Accountability, Non-Discrimination and Equality, Empowerment and Legality.¹¹ The PANEL principles accord with the approach that the Inquiry and its Legal Team have hitherto been keen to foster. The DPO therefore anticipate that this Inquiry would regard itself as human rights focussed in a similar manner as declared by its Scottish counterpart.

2.2. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD): We have previously commended the UNCRPD to the Inquiry for the tools it encompasses to assist in understanding what has happened to Disabled people during the Covid 19 pandemic and how to transition out of, and build back better.¹² We make the same commendation to transfer over to the module for Scotland. Unlike in England, the Scottish Government has produced a Delivery Plan to 2021 for achieving better compliance with the UNCRPD (and is currently drafting a follow-up report).¹³ Its declared ambitions for Scotland are (1) Support services that meet people’s needs, (2) Decent incomes and fairer working lives, (3) Places that are accessible to everyone, (4) Protected rights and (5) Active participation.¹⁴ INCLUSION SCOTLAND recognises the efforts of its Government but equally draws attention to the “abyss between the rhetoric of national policies and what happens on the ground”. Its report ‘Rights at Risk, Covid-19, Disabled people and emergency planning in Scotland’ constitutes an audit of how well intended compliance with the UNCRPD fell away under the strains of an unplanned for emergency.¹⁵

2.3. 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 the UNCRPD¹⁶ and was unequivocally accepted by the Government of Scotland prior to start of the pandemic.¹⁷ The Inquiry will wish to consider the extent to which that commitment in principle failed in practice during the emergency response and the extent to

¹¹ [shrc_hrba_leaflet.pdf \(scottishhumanrights.com\)](#)

¹² M2 Preliminary Hearing Submissions §§2.1-5

¹³ [A Fairer Scotland for Disabled People](#) (December 2016)

¹⁴ Ibid, pp 40-43

¹⁵ [Rights At Risk - Covid-19, Disabled people and emergency planning in Scotland \(Oct. 2020\)](#) p. 1 and see its Conclusions pp 28-30

¹⁶ [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.

¹⁷ [Scotland’s Wellbeing: Measuring the National Outcomes for Disabled People](#), p. 76 “As the report shows, for the outcomes for which we have data, a considerable number of indicators suggest that disabled people face barriers in fully participating in Scottish society.”

which the practices, as developed in the latter part of the pandemic response, compared and contrasted with the approach on the other four nations.

- 2.4. APPLICATION OF THE SOCIAL MODEL: The Scottish Government supports the social model approach, which in the words of its Delivery Plan “*views disability as the relationship between the individual and society. In other words, it sees the barriers created by society, such as negative attitudes towards disabled people, and inaccessible buildings, transport and communication, as the cause of disadvantage and exclusion, rather than the impairment itself. The aim, then, is to remove the barriers that isolate, exclude and so disable the individual*”.¹⁸ In terms of the submissions that have already been made in the Module 2 hearing and the assurances provided by the Chair and her counsel, it is noteworthy that structural discrimination is taken as a given as a matter of Scottish Government policy, and the acceptance of its existence acts as the starting position for change.
- 2.5. INTERSECTIONALITY: Further to the generic discussions during the Module 2 preliminary hearing and the ruling of the Chair dated 9 March 2023 on structural racism and other forms of discrimination, it is right to emphasise that the UNCRPD is the first international Treaty of its kind to recognise that discrimination can intersect across a range of characteristics, and for that reason it recognises discrete rights in relation to women and children and overriding context in relation to race and poverty.¹⁹ Intersectional understanding is accepted as a necessary discipline by the Scottish Government.²⁰ INCLUSION SCOTLAND have pressed the issue based on their surveys and connection to the lived experience of Disabled people during the Covid pandemic,²¹ and the reality of unequal impact across socio-economic and other protected characteristics is officially recognised.²²
- 2.6. SOCIO-ECONOMIC DUTY: Like Wales, but not England or Northern Ireland, Scotland has since 2018 brought into force the public sector duty regarding socio-economic inequalities

¹⁸ [Fairer Scotland for Disabled People \(December 2016\)](#) p. 7, [Scotland's Wellbeing: Measuring the National Outcomes for Disabled People](#) p. 9

¹⁹ UNCRPD, Preamble (p) - (t).e.g. (p) “*Concerned about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status*”.

²⁰ E.g. [Fairer Scotland for Disabled People](#) p. 7, [Scotland's Wellbeing: Measuring the National Outcomes for Disabled People](#) p. 7 (“*We...have to understand how other characteristics such as age, sex, race, religion, sexual orientation, transgender identity or being a Gypsy Traveller can impact on a disabled person's experiences and use this understanding to shape our actions*”)

²¹ [Rights At Risk - Covid-19, Disabled people and emergency planning in Scotland](#) (Oct 2020) pp 13 and 21

²² [Scottish Government, Scotland's Wellbeing: The Impact of COVID-19 \(December 2022\)](#) pp 64-70

contained in section 1 of the Equality Act 2010 as a distinct Fairer Scotland Duty.²³ It requires public bodies to whom the duty applies, “*When making decisions of a strategic nature about how to exercise its functions, [to] have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage*”.²⁴

2.7. RESPECT FOR HUMAN DIGNITY: 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 in the UNCRPD must be understood. All of this accords with the Human Rights Outcome aimed for under the Scottish National Performance Framework which is “*to provide the care people need with love, understanding and dignity while developing robust, independent means for people to hold government to account and encourage an active interest in politics and civic life*”²⁵. It also accords with the minimum core approach to Human Rights adopted by the Scottish Parliament to “*ensure that a person can live with human dignity*”.²⁶

2.8. HUMAN DIVERSITY: As the Scottish Government fully accepts the implications of the social model, the DPO repeat here that however much the calls to aid the ‘vulnerable’ during lockdowns may have been well meant, the discourse of vulnerability that was so central to Covid pandemic decision making and messaging on both sides of the border 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 government and society in Scotland has yet been able to do that and how it might fare better in the future. Preparation for Module 2A should bear that question in mind.

III: EXPERTISE AND EXPERTS

3.1. PROBLEMS WITH EXPERTISE: As set out in the M2 Preliminary Hearing Submissions, dating back to the Phillips Inquiry on BSE (2000) there has been a range of identified issues on the

²³ [Fairer Scotland Duty: interim guidance for public bodies - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/fairer-scotland-duty/interim-guidance-for-public-bodies/pages/11.aspx)

²⁴ Further to the [Scotland Act 2016 \(c. 11\) s. 38](#) and [The Equality Act 2010 \(Authorities subject to the Socio-economic Inequality Duty\) \(Scotland\) Regulations 2018 \(S.S.I. 2018/101\)](#)

²⁵ [National Outcomes, Human Rights.](#)

²⁶ [Equalities, Human Rights and Civil Justice Committee, Minimum Core Obligations](#)

use and misuse of experts in the formation of policy making, especially in times of crisis.²⁷

A recommendation of the BSE Report particularly relevant to this module was to ensure that (as then forthcoming) devolution did not compromise a sufficiently synchronised response to a UK wide risk.²⁸

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 available structure to provide scientific advice, or those in government who procured their advice, thought to point that out. The bulk of SAGE witness questionnaires have been disclosed but we are yet to see the results of a similar exercise with the members of the Scottish Covid 19 Advisory Group ('CAG'). For present purposes we know that the House of Commons Scottish Affairs Committee report, Coronavirus and Scotland identified a relative lack of public health officials on the expert advisory mechanisms in both nations and recommended increasing 'on the ground' public experts in key advisory roles to complement the expertise of academics.²⁹ It is presently unclear whether Scotland was quicker to work with service providers, but it is apparent that Disabled Peoples' Organisations were not adequately consulted, in keeping with what occurred across the four nations.³⁰ In the instruction of its own experts, and the questioning of others 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. INCLUSION SCOTLAND and in particular 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.³¹ It is in keeping with the approach of the Scottish Government that DPOs should be recognised as experts. As the Delivery Plan on the UNCPRD puts it, "*Disabled people are the experts on what needs to change. It is important that relationships are built between those who design and deliver policies and services and the people who will experience those policies and*

²⁷ [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}

²⁸ [BSE Report](#), §§1280-1282

²⁹ Report from Scottish Affairs Committee, Coronavirus and Scotland: Interim Report on Intergovernmental Working, First Report of Session 2019-21, 23/07/2020 {INQ000075335/31 §§85}

³⁰ E.g. Andrew Morris {INQ000056491/10-11 §7.1} as Chair of the CAG recognises as a lesson learned that there is a need to integrate industrial, academic and NHS expertise into the future development of diagnostics, vaccines and therapeutics. His statement does not deal with Disabled people at all

³¹ INCLUSION SCOTLAND Rule 9 Response 15.12.22 {pp.4-5 §5}

*services. We know that by involving disabled people and drawing on their experience, insight and skills, policies and services can be more responsive and better able to meet people's needs".*³²

- 3.4. OBSERVATIONS ON INSTRUCTED EXPERTS: The DPO have already made general observations on the instructed experts that are not repeated here,³³ save to add M2A specific matters.
- 3.5. SINGLE EPIDEMIOLOGICAL EVENT: A critical theme for M2 and likewise M2A-C is that across the four nations: *"epidemiologically, there was one epidemic. Wales, Scotland and England are sufficiently connected by travel that transmission in one nation influenced transmission in all the others. As health is a devolved responsibility, the understanding of the epidemic (e.g. data definitions, availability etc) and the measures introduced were different. Northern Ireland was different again, with a much closer epidemiological connection to Ireland. This created a number of problems in terms of understanding and providing evidence from the SPI-M-O viewpoint. A valuable outcome from the Inquiry would be a deeper understanding of the extent to which the differences were problematic, and potential mitigations"*.³⁴
- 3.6. DATA COLLECTION & USE: The DPO have drawn the Inquiry's attention to Art. 31 UNCRPD that requires disability data collection (including the acquisition of impairment specific and intersectional data). On this issue, the UK was criticised by the CRPD Committee in 2017, and the issue for M2A will be whether different arrangements and if so, of what quality and utility existed in Scotland.
- 3.7. MACHINERY OF GOVERNMENT: For both Bruce Mann instructed to report for M1 and Alex Thomas instructed to report for M2, there are issues relating to how fit for purpose the UK's disaster management system is, and the Inquiry is generally referred to the wholesale review of the situation contained in the *"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.³⁵ As regards the co-operation between the UK and Scottish Governments, the House of Commons Scottish Affairs Committee report identified a predominant collaboration between respective administrations in the early parts of the pandemic and then a comparative separation in the later period.³⁶ With respect to the MOU

³² [Fairer Scotland for Disabled People](#) (December 2016) p. 5

³³ DPO Module 2 Hearing Submission 24.02.23 §§3.4-3.10

³⁴ Professor Graham Medley {INQ000056535/10}

³⁵ [Independent Review of the 2004 Civil Contingencies Act 23 \(March 2022\)](#)

³⁶ Coronavirus and Scotland {INQ000075335/5-6 and 35-36}

and related discussions that have taken place between the two Chairs, this issue would appear to be the area of investigation that could best be carried out by this Inquiry rather than the Scottish Inquiry - that will be Scotland focused and not able to deal with reserved matters.

- 3.8. DISABLED PEOPLE DURING EMERGENCIES: Although the DPO do not have Module 1 CP status, they see this issue as particularly pertinent and cross-cutting into M2A given the criticism made of the UK generally by the 2017 UNCRPD Committee report (§§28-29).³⁷ This raises the questions of whether the Scottish Government approached the specific recommendations made by the Committee on emergency preparation for Disabled people in a manner that differed from the UK Government counterpart; and if not, why not?
- 3.9. DEVOLVED GOVERNMENT: In terms of reporting on the political structures for devolution within the UK and mechanisms for inter-governmental decision-making between the UK Government and the devolved administrations, the DPO particularly wish the Inquiry to examine how the responsibility to protect Disabled people's rights and wellbeing during the pandemic differed between the four nations in terms of policy, structures and respective functioning. More generally, the production by the expert or CTI of a provisional note summarising the key difference in Covid pandemic regulations and key decisions across the four nations is likely to save time and expense.
- 3.10. STRUCTURAL DISCRIMINATION: Further to the Chair's M2 ruling of 9 March 2023 (§37) that in addition to the expert evidence to be obtained in relation to structural racism, the Inquiry will explore the possibility of obtaining a single report covering other issues, if necessary, drafted by a (small) team of experts covering different specialisms, the DPO would add the following. (1) They maintain that the competency of the team of experts should include those with appreciation of structural discrimination as it is accepted to apply to Disabled people both by the underlying predicate of the Equality Act, the terms of the UNCRPD, but also (in the instance of M2A) because of Scottish Government policy.³⁸ (2) The DPO stance remains that these issues as they apply to Disabled people directly, as well as intersectionally, should be examined by asking (a) them and other witnesses, (b) the presently instructed experts (even if to establish what they don't know), (c) the relevant parts of the team of specialists to be assembled, but also (d) to take into account the core

³⁷ See above §1.3

³⁸ See above §§2.4-2.6

sources on the subject especially as they influenced UK and Devolved Government policies immediately prior to and during the pandemic.³⁹

IV: SELECTING & QUESTIONING WITNESSES

- 4.1. INFORMED CONSULTATION ON SELECTION AND ISSUES: Further to the M2 Submissions and what was said at the hearing, it is not the DPO's understanding that the Inquiry or its legal team has already decided on issues or witnesses, but that it has reached a stage when such matters will need to be decided, but it still wants to reflect and consult.⁴⁰ The approach of the DPO, focussed as they are on the discrete issues of Disabled people's treatment and experience during the pandemic, is to be proactive in drawing attention to salient issues, critical lines of enquiry, and obviously relevant documents as soon as possible. Given time and expense constraints, it is hoped that this will prompt early consideration of the types of issues and documents that should be raised with witnesses in due course (see §§4.3-4.4 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. INCLUSION SCOTLAND would fall into that category.
- 4.3. CO-DESIGN OF QUESTIONING: The DPO have already acknowledged 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)). Especially with regard to the short period of hearing time suggested for M2A, our caveats remain: (1) timescales for receiving and commenting on questioning proposals should not be too tight. (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

³⁹ DPO Oral Submission 1.03.23 {T/111/16-112/13}

⁴⁰ DPO M2 Hearing Submissions 24.02.23 §4.1 and repeated in Oral Submissions 01.03.23 {T/112/18 -113/1}

follow up questions based on the evidence that has been given. (4) Where it is possible to identify core issues and approaches with CTI prior to the production of proposed questions that should be done.

- 4.4. GENERIC TYPES OF QUESTIONING: At this stage the DPO do make a case for three types of generic lines of questioning that are particularly suited to the content of Module 2 and 2A-C and that CTI should ask and witnesses called to give oral evidence should be ready to answer.⁴¹ They are (1) hypothetical questions, (2) questions as to the proportionality of measures (derived from human rights law but of much broader application) and (3) lessons learned questions.

V: OTHER PROCESS MATTERS

- 5.1. OPENING AND CLOSING STATEMENTS: Further to the CTI Note §59 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 with confidentiality undertakings).
- 5.3. TIMETABLING: Everyone is conscious of wanting to balance rigour with expedition and is ultimately reliant on the Chair to resolve what will be an inescapable and continuing tension between the two. On this, it will help for requested time allocations for oral submissions to continue to be invited, and subject to their determination as acceptable to be published prior to hearings, with (if needs be) amendment of the allocations at the Chair's behest if there is an unexpected delay, or some other reason.
- 5.4. REASONABLE ADJUSTMENTS: The DPO have made submissions on the issue with the Module 2 framework, as have others in Module 3, and await the Inquiry's response. The DPO again reiterate that the absence of a BSL interpreter on the screen during these preliminary hearings adversely impacts on their public nature. That is because (a) the

⁴¹ M2 Hearing Submissions 24.02.23 §§4.5-4.7

subtitles on the YouTube channel are based on an algorithm and are not accurate, (b) transcripts and the video of the hearings are still taking some time⁴² to publish on the Inquiry website, and (c) for reasons explained in *R (Rowley) v Minister for the Cabinet Office* [2021] EWHC 2108 (Admin) §§5 and 15, there is a sizeable section of the D/deaf⁴³ population who do not necessarily read subtitles or transcripts and/or identify with them as a mode of communication.

5.4 PARLIAMENTARY PRIVILEGE: Further to the CTI Note §§32-47 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. The DPO do, however, note the constitutional difference between the UK Parliament and Scottish Parliament and if, and when, a concrete issue arises, the Inquiry should examine the matter with legal argument, not least because it could give rise to an Inquiry recommendation for law reform. Until then they will continue to refer to what was said in the UK Parliament as a matter of historical fact, for which there can be no opposition.⁴⁴ They will also use criticism made by Parliament as a means to engage the Inquiry's interest in the relevance of an issue which can then be pursued by other investigatory means.

5.5 EVERY STORY MATTERS: One of the real possibilities of the project is to collect accounts from across the four nations, including from Disabled people who live in all their parts, to reflect both national and UK experiences. The DPO hope that the event and progress of this and the other devolved Government modules will inspire participation in the project, especially (in this extant Module) from Scotland. The Inquiry is asked to continue to consider adjustments, accessibility and ethics that will enable the project to be realised to its full potential.

DANNY FRIEDMAN KC
ANITA DAVIES

SHAMIK DUTTA
BHATT MURPHY

14 March 2023

⁴² E.g. for the M2 hearing on 1 March the transcripts were published that evening and the video was available the following day

⁴³ See Scottish BSL National Plan 2017-2023 "The term 'deaf' includes people who are deaf, Deaf, Deafblind, deafened and hard of hearing. The capital D 'Deaf' is used as a cultural label and refers to people who are profoundly deaf, whose first or only language is sign language and are part of a cultural and linguistic minority known as the Deaf community".

⁴⁴ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, p. 337C endorsed and analysed in *R (Heathrow Hub) v SST* [2020] EWCA Civ 213 §§158-172