

COVID-19 PUBLIC INQUIRY

Module 2B

SUBMISSIONS ON BEHALF OF DISABLED PEOPLE'S ORGANISATIONS: DISABILITY WALES (ANABLEDD CYMRU) & DISABILITY RIGHTS UK

Preliminary Hearing – 29 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 and [V] Other Process Matters, all as they apply to M2B.

I: CONTEXT

1.1. COVID AND INEQUALITY: In Wales, the statistics are stark. Sixty-Eight per cent of deaths from Covid 19 between 2 March 2020 and 14 July 2020 were among Disabled people.¹ In addition to the significantly higher risk of fatal outcomes from infection, as a consequence of the pandemic, Disabled people in Wales experienced reduced access to routine health care and rehabilitation, and the adverse social impacts of efforts to mitigate the pandemic.² The DPO anticipate from its terms of reference (TOR) that the Inquiry will examine the foresight, extent and cause of these consequences for Disabled people in Wales, and the political and administrative decision making in Wales as compared to the rest of the United Kingdom.

1.2. DISABLED PEOPLE'S SITUATION IN WALES: In September 2020, the Annual Population Survey estimated that there were 415,600 Disabled people (Equality Act 2010 definition) aged 16 to 64 in Wales, representing 21.9% of the 16 to 64 population.³ As in the rest of the United Kingdom, the full impact of the Covid 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

¹ [ONS](#) Coronavirus (COVID-19) related deaths by disability status, England and Wales: 2 March to 14 July 2020, [Locked out: liberating disabled people's lives and rights in Wales beyond COVID-19](#), p. 39

² E.g. [Locked out: liberating disabled people's lives and rights in Wales beyond COVID-19](#), pp.7, 52-4, 78, 82 (citing medical discrimination, restricted access to public services, social support and food resources, exclusion from public spaces and public life, restrictions on independent living and increased levels of poverty)

³ [Annual Population Survey](#)

EHRC in its study of a “*Journey Less Equal*”,⁴ a series of consultations in Wales in 2017-2018 as part of the formulation of an updated “*Framework For Action on Independent Living*” (see §2.2 below) demonstrated that there were overall lower rates of educational attainment, employment and economic activity amongst Disabled people (particularly for people with learning disabilities) and lack of meaningful paid work.⁵ In 2018, 39% of Disabled people in Wales were in poverty compared with 22% of non-disabled people; and the poverty rate amongst Disabled people in Wales was the highest in all of the UK.⁶ There was a lack of accessible housing, and inadequate access to public transport and leisure facilities.⁷ There was lower mental wellbeing among disabled adults.⁸ Disabled people faced significant barriers in accessing healthcare, including access to health checks, suitably trained staff and rehabilitation services.⁹

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 reports 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 Art. 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).¹⁰ The DPO draw attention to those four criticisms as pertinent entry points to examining how the Covid response fared for Disabled people in Wales.

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*”¹¹ (§113). Of Welsh significance to this criticism was that notwithstanding the

⁴ EHRC, ‘*Being Disabled in Britain – A Journey Less Equal*’ (March 2017) Executive Summary pp 7-15

⁵ [Action on Disability: The Right to Independent Living Framework and Action Plan](#), (October 2019) pp 20, 24

⁶ <https://www.jrf.org.uk/report/poverty-wales-2018>

⁷ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), pp.21, 26-7; [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), p.55

⁸ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), p.22

⁹ <https://www.gov.wales/sites/default/files/statistics-and-research/2018-12/151015-review-evidence-inequalities-access-healthcare-sevices-disabled-people-summary-en.pdf>

¹⁰ [Concluding observations on the initial report of the United Kingdom of Great Britain and Northern Ireland: CPRPD/C/GBR/CO/1 \(3 October 2017\)](#)

¹¹ [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 \(24 October 2017\)](#)

reserved status of social security, the devolved Government launched equality impact assessments of the extent of the cuts, and put in place mitigating measures to somewhat limit the cuts in social care.¹² The Welsh Government explicitly recognised that austerity policies had “*blighted*” the lives of Disabled people and had “*a devastating impact on thousands of individuals, carers and families*” and its updated Framework for Independent Living was in part a response to that impact.¹³

- 1.5. FAILURE OF HUMAN ACCOUNTING: Despite different approaches to austerity, prior to the pandemic, Disabled people in Wales still experienced worse outcomes than non-disabled peers in many areas of life. The situation after March 2020 “*amplified pre-existing socio-economic inequalities in society and their influence on health outcomes*”.¹⁴ As highlighted in the M2 Preliminary Hearing Submissions (§1.5), a significant flaw 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. As early as March 2020 DISABILITY WALES urged government “*to intervene urgently to ensure disabled people are not treated as unavoidable casualties in this pandemic*”.¹⁵ Many Disabled people “*reported confusion, helplessness, abandonment, isolation, fear and frustration. The root cause of much of this exclusion, however, has been simple thoughtlessness, ultimately robbing disabled people of access to public spaces and a sense of basic citizenship.*”¹⁶ As the problem is characterised in the Welsh Government commissioned report *Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19*, “*This kind of ‘thoughtlessness’ helps to illustrate a much more pervasive problem: the way taken-for-granted ableist assumptions dominate in decision-making but can have life-limiting consequences for disabled people*”.¹⁷ That thoughtlessness was a categorical failure of human accounting.

II: HUMAN RIGHTS

- 2.1. CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (UNCRPD)¹⁸: We have previously commended the UNCRPD to the Inquiry for the tools it encompasses to assist in

¹² 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.

¹³ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), p.1

¹⁴ [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), p.7

¹⁵ <https://www.ldw.org.uk/joint-response-to-coronavirus-outbreak-across-wales/>, 19 March 2020

¹⁶ [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), p.9

¹⁷ Ibid, pp 21-22

¹⁸ In Wales, the Convention is commonly described as the Convention on the Rights of Disabled People (UNCRDP) to reflect the application of the social model.

understanding what has happened to Disabled people during the Covid 19 pandemic and how to transition out of, and build back better.¹⁹ We make the same commendation to transfer over to the module for Wales. Unlike in England, the Welsh Government produced a *Framework For Action on Independent Living* in 2013, updated in 2019, which set out how it planned to fulfil its obligations under the UNCRPD.²⁰ Its declared ambitions are to work for continuous improvement in how Wales fulfils its obligations with regard to Convention, and doing everything within its power to ensure that Disabled people are offered the same life chances as everybody else. In particular the Framework set out an Action Plan to ensure that Disabled people are supported in being (1) prosperous and secure (2) healthy and active (3) ambitious and learning and (4) united and connected.²¹

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 the UNCRPD²² and was unequivocally accepted by the Government of Wales prior to the start of the pandemic.²³ In addition, public bodies in Wales have a duty under section 5 of the Well-being of Future Generations (Wales) Act 2015 to adopt an integrated, inclusive and collaborative approach to service delivery²⁴ with regard to defined well-being goals including developing a More Equal Wales.²⁵ The Welsh Government sees this as an obligation to focus on giving people and communities a voice in how their services are provided.²⁶ Furthermore, the Social Services and Well-Being in Wales Act 2014 establishes the principle that everyone has the right to be heard as an individual to shape the decisions

¹⁹ M2 Preliminary Hearing Submissions §§2.1-5.

²⁰ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019)

²¹ Ibid, pp 35-53

²² [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

²³ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019) p. 11 “Co-production is an important concept for this framework because the Welsh Government recognises that services cannot be improved to fully meet the needs of disabled people unless they are actively involved in the design and delivery of those services. This approach is also fully in line with the Welsh Government’s commitment to Social Partnership and the principle of “Nothing About Us Without Us”, which recognises that no policy should be decided without the full and active participation of members of the group affected by the policy, as well as the involvement and collaboration principle of the Well-being of Future Generations Act.”

²⁴ The relevant parts of s. 5 of the Well-being of Future Generations Act entitled the “the sustainable development principle” require public bodies to take account of “the importance of involving other persons with an interest in achieving the well-being goals and of ensuring those persons reflect the diversity of the population” and “how acting in collaboration with any other person (or how different parts of the body acting together) could assist the body to meet its well-being objectives, or assist another body to meet its objectives”

²⁵ As specified in s. 4 of the Act to be “A society that enables people to fulfil their potential no matter what their background or circumstances (including their socio economic background and circumstances)”

²⁶ <https://www.futuregenerations.wales/about-us/future-generations-act/>

that affect them, and to have control over their day to day lives.²⁷ The Act also gives effect to a requirement, through its Part 2 Code of Practice, that local authorities have due regard to the UNCRPD when exercising their social services functions in relation to Disabled people who need care and support, and Disabled carers who need support.²⁸

2.3. APPLICATION OF THE SOCIAL MODEL IN WALES: The Welsh Government formally supports the social model approach (which it first adopted in 2002),²⁹ and reaffirmed its commitment to in December 2022 following the establishment of the Disability Rights Taskforce and the updated Framework and Action Plan. The Welsh Government has made it clear that *“promoting and embedding the Social Model of Disability, in both Welsh Government and public bodies across Wales, is a firm priority of this Government. Through helping those who make decisions and develop policy to understand their part in pulling down the barriers that ‘disable’ people, real transformation can begin.”* The aim of the Taskforce is to develop *“solutions to challenge the structural, physical, and attitudinal barriers that disabled people face”*.³⁰ 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 significant that structural discrimination is taken as a given as a matter of Welsh Government policy, and the acceptance of its existence acts as the starting position for change.

2.4. INTERSECTIONALITY: Further to the generic submissions 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.³¹ Intersectional understanding³² is accepted as a necessary discipline by the Welsh Government.³³ Regarding the specific

²⁷ This follows from s. 6 of the Act *“that in so far as is reasonably practicable”* those exercising functions under the Act must *“ascertain and have regard to the individual's views, wishes and feelings”*

²⁸ <https://socialcare.wales/resources-guidance/information-and-learning-hub/sswbact/overview>

²⁹ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), pp.7-9

³⁰ <https://www.gov.wales/we-are-committed-embedding-social-model-disability-and-removing-barriers-are-limiting-independence>

³¹ UNCRPD, Preamble (p) – (t).

³² For the general definition, see *Advancing Gender Equality in Wales* (March 2020) pp 6-7 *“By Intersectionality we mean recognising the way in which power structures based on factors such as gender, race, sexuality, disability, class, age and faith interact with each other and create inequalities, discrimination and oppression. Crucially, it is about understanding the way in which characteristics, such as gender, race or class, can interact and produce unique and often multiple experiences and disadvantage in specific situations ... One single form of discrimination cannot and should not be understood in isolation from another. A truly intersectional approach ensures that this does not happen.”*

³³ E.g. [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), p. 11

impacts of Covid 19, DISABILITY WALES have pressed the issue based on their surveys and connection to the lived experience of Disabled people during the Covid pandemic.³⁴

- 2.5. SOCIO-ECONOMIC DUTY: Like Scotland, but not England or Northern Ireland, since March 2021, Wales has brought into force the Socio-economic duty contained in section 1 of the Equality Act 2010 that 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*”.³⁵
- 2.6. 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 aim of the updated Framework and Action Plan for Independent Living, which defines Independent Living as “*all disabled people having the same freedom, dignity, choice and control as other citizens at home, work, in education and in the community*”.³⁶
- 2.7. HUMAN DIVERSITY: As the Welsh 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. On this, particular emphasis is placed on the Welsh Government commissioned report *Locked Out*, which identified a resurgence of medical and vulnerability models for explaining Covid’s impact, at the expense of comprehending its social causation.³⁷ The UNCRPD instead requires “*Respect for difference and acceptance of persons with disabilities as part of human diversity and*

Intersectionality “*is very relevant to this framework because the lives of disabled people are often affected by other personal characteristics and circumstances such as age, ethnicity, income, and sexuality. It is generally unhelpful to define people by any single characteristic, whether that be an impairment or anything else. On the contrary, it is usually very important to take account of all the issues which may affect them. With this in mind, it is very important that disability action policy is closely linked to other aspects of equality, including other protected characteristics (as defined by the Equality Act 2010) and, perhaps most importantly, issues relating to income and poverty.*”.

³⁴ [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), p.6

³⁵ For guidance, see <https://www.gov.wales/sites/default/files/publications/2021-03/a-more-equal-wales.pdf>

³⁶ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), p. 6

³⁷ [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), pp 24-29

humanity” (Art. 3(d)). The DPO question whether government and society in Wales has yet been able to do that and how it might fare better in the future.³⁸ Preparation for Module 2B should bear that question in mind.

- 2.8. LESSONS FROM AND FOR WALES: Cumulatively, there is a body of law and policy concerning human rights, equality and wellbeing in Wales that distinguishes it from the other four nations. The Inquiry will need to consider the extent to which those commitments in principle were achieved or failed in practice during the emergency response and the extent to which the practices, as developed in the latter part of the pandemic response, compared and contrasted with the approach on the other four nations. For its part DISABILITY WALES recognises the efforts of its Government but equally draws attention to the gap between the rhetoric of national policies and what happens on the ground.³⁹ The report *Locked out* provides evidence of how well intended compliance with the UNCRPD, the various well-being devolved legislative initiatives, together with a commitment to the social model of disability, too often fell away under the strains of an unplanned for emergency.⁴⁰

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 use and misuse of experts in the formation of policy making, especially in times of crisis.⁴¹ 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.⁴²
- 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

³⁸ Moreover, the ease by which the social model of disability was abandoned suggested “*that it was poorly understood or insufficiently embedded in governance and public service decision-making*” (Ibid. p. 24).

³⁹ DISABILITY WALES, Rule 9 Response, 15.12.22 {3 §5} (“*Many expressed the view that it was not necessarily the attitude and commitment of Welsh Government to disabled people that is the problem but the implementation gap between policy and practice. The lack of engagement with disabled people in local service planning and policy development has led to even greater exclusion, ranging from lack of access to shops and suitable housing to timely and appropriate health and social care.*”)

⁴⁰ [Locked out: liberating disabled people’s lives and rights in Wales beyond COVID-19](#), pp 24, 31

⁴¹ [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}

⁴² BSE Report §§1280-1282

procured their advice, thought to point that out. On present disclosure it appears that there was no expertise regarding disability present at the Welsh Technical Advisory Group (‘TAG’).⁴³ However, unlike in England and more generally for the UK Government, the Deputy Minister convened a Disability Equality Forum,⁴⁴ which met five times in the four months following the first lockdown, and which DISABILITY WALES participated in, including by substantially contributing to the sub-committee investigation that produced the *Locked Out* report. In addition, the DPO was enrolled into the Covid 19 Moral and Ethical Advisory Group.⁴⁵ As yet it is unclear how the product of those mechanisms fed into scientific advice, or how otherwise the situation of Disabled people was effectively taken into account in the construction and delivery of non-pharmaceutical intervention policies. Moreover, notwithstanding the comparatively greater opportunities for stakeholder engagement with Welsh Government, the Inquiry will need to consider the extent to which the lack of engagement with Disabled people in local service planning and policy development,⁴⁶ together with the significant socio-economic disadvantages facing Disabled people in Welsh society, nevertheless resulted in an amplification of pre-existing inequalities and greater social exclusion.⁴⁷

3.3. DISABLED PEOPLE ARE EXPERTS: Part of the gap in expertise can now be filled with the DPO as core participants. DISABILITY WALES and in particular the “*Locked Out*” report shows that the absence of expert advice and consultation, and lack of engagement with Disabled people resulted in failures of foresight of some of the most isolating and resource impoverishing experience of lockdown.⁴⁸ It is in keeping with the current approach of the Welsh Government that DPOs should be recognised as experts. As the updated Framework for Independent Living puts it, “*Engaging with people is the only way of knowing that services are providing what people need and want and can generate better ideas and more*

⁴³ TAG Terms of Reference {INQ000066196} (which at its point of formation began without a disability related sub-group or disability related expertise named)

⁴⁴ Disability Equality Forum Terms of Reference 01.05.20 {INQ000066080}

⁴⁵ DISABILITY WALES Rule 9 Response 15.12.22 {p. 1 §3}

⁴⁶ DISABILITY WALES Rule 9 Response 15.12.22 {pp 4-5 §5}: see also e.g. PHW International Horizon Scanning and Learning to Inform Wales’s COVID-19 Public Health Response and Recovery Summary Calendar April 2020-March 2021, 01.03.21 {INQ000056293/8} (which collated international learning in order to inform PHW’s actions, approaches and decision making) and mentions only once in passing that people disabilities are more vulnerable to Covid 19

⁴⁷ DISABILITY WALES Rule 9 Response, 15.12.22 {p. 3}

⁴⁸ DISABILITY WALES Rule 9 Response 15.12.22 {pp 4-5 §5}

*innovative approaches.*⁴⁹ DISABILITY WALES has taken a key role in that process. It should do the same in the Inquiry.

- 3.4. OBSERVATIONS ON INSTRUCTED EXPERTS: The DPO have already made general observations on the instructed experts that are not repeated here,⁵⁰ save to add M2B 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”*.⁵¹
- 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 M2B will be whether different arrangements and if so, of what quality and utility existed in Wales.
- 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.⁵² Although written evidence from the Secretary of State for Wales has referred the Inquiry to cooperation between the Welsh and UK Governments,⁵³ it is apparent that from a relatively early stage in the pandemic there

⁴⁹ [Action on Disability: The Right to Independent Living Framework and Action Plan](#) (October 2019), p. 14

⁵⁰ DPO Module 2 Hearing Submission 24.02.23 §§3.4-3.10

⁵¹ Professor Graham Medley {INQ000056535/10}

⁵² [Independent Review of the 2004 Civil Contingencies Act 23 \(March 2022\)](#)

⁵³ Written evidence from the Secretary of State for Wales, undated. Statement provided in support of the Welsh Affairs Committee Inquiry into the Welsh economy and Covid-19 14.10.22 {INQ000022631/3,16}

was a significant divergence between England and Wales in terms of rules and regulations in response to the pandemic.⁵⁴

- 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 M2B given the criticism made of the UK generally by the 2017 UNCRPD Committee report (§§28-29).⁵⁵ This raises the questions of whether the Welsh 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 refer to the submissions made in Module 2A at §3.10. In summary, the issue can be cumulatively investigated through (a) asking them and other witnesses, (b) asking instructed witnesses, (c) commissioning additional specialist reporting and (d) referring to core sources on the subject. Reliance is additionally placed upon the extent to which the Welsh Government accepts both structural discrimination as it relates to Disabled people and the general importance of the intersectional discipline, for which see §§2.3-2.5 above.

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

⁵⁴ Welsh Affairs Committee - Oral evidence: Responsibilities of the Secretary of State for Wales 28.05.20 {INQ000022628/3-4, 8}

⁵⁵ See above §1.3

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.⁵⁶ 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. DISABILITY WALES 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)). CTI recommends that hearings ought to commence on 26 February 2024 and to run for approximately three weeks. The DPO would repeat the submissions made in Module 2 and 2A, namely: (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 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-

⁵⁶ DPO M2 Hearing Submissions 24.02.23 §4.1 and repeated in Oral Submissions 01.03.23 {T/112/18 -113/1}

C and that CTI should ask and witnesses called to give oral evidence should be ready to answer.⁵⁷ 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 §56, 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. TIMETABLING: Everyone is conscious of wanting to balance rigour with expedition. We are ultimately reliant on the Chair to resolve what will be an inescapable and continuing tension between the two. On this it will help if requested time allocations for oral submissions 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. PARLIAMENTARY PRIVILEGE: Further to the CTI Note §29-45 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 Welsh 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 matter of

⁵⁷ M2 Hearing Submissions 24.02.23 §§4.5-4.7

historical fact, for which there can be no opposition.⁵⁸ 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.

5.4 REASONABLE ADJUSTMENTS: DISABILITY WALES adopts the submissions made previously by the DPO in Modules 2 and 2A,⁵⁹ including that the absence of a British Sign Language interpreter on the screen during these preliminary hearings adversely impacts on their public nature. It is appreciated that the Inquiry will now wish to develop an overall approach to adjustments in a systematic manner.

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 2B) from Wales. The Inquiry is asked to continue to consider adjustments, accessibility and ethics that will enable the project to be realised to its full potential. In particular, the DPO invite the Inquiry to ensure that it is possible to provide accounts to the listening exercise through BSL and International Sign Language, in order to ensure that the D/deaf community can tell their stories.

DANNY FRIEDMAN KC

SHAMIK DUTTA

ANITA DAVIES

BHATT MURPHY

22 March 2023

⁵⁸ *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

⁵⁹ DPO M2 Hearing Submissions 24.02.23 §5.2, M2 Transcript 01.03.23 {T/116/12 -117/13}, DPO M2A Hearing Submissions 24.02.23 §5.4, M2A Transcript 21.03.22 {T/73/11-74/15}