# Counsel to the Inquiry's Note for the Second Preliminary Hearing in Module 1 of the UK Covid-19 Inquiry on 14 February 2023

## Introduction

1. The purposes of this note are to provide the agenda and introduce the issues for the second preliminary hearing on 14 February 2023. Those who have been granted core participant status have been provided with regular updates over the past few months. However, the preliminary hearing is an opportunity to draw this information together and ensure that it is up to date, as well as allowing a public update on the Inquiry's work so far. Should any core participant wish to file brief written submissions on any of the issues set out below, they must be received by the Inquiry by **4pm on Wednesday 8 February 2023**.

2. The second preliminary hearing in Module 1 will address the following issues:

    a. Update on Rule 9 requests

    b. Disclosure to Core Participants

    c. Parliamentary privilege

    d. Instruction of expert witnesses

    e. Evidence proposal procedure and Rule 10

    f. Witnesses and hearing timetable

    g. Opening and Closing Statements

    h. The Listening Exercise - Every Story Matters

    i. Commemoration

    j. Public hearings

## Update on Rule 9 requests

3. The Inquiry has now issued formal requests for evidence, pursuant to Rule 9 of the Inquiry Rules 2006, to 114 government departments, adversely impacted groups and organisations representing the bereaved, trade unions, the voluntary and charitable sector and scientific, medical and other relevant professional organisations. A list of the Rule 9 requests sent is provided at **Annex A** to this Note.

4. The Inquiry has issued two update notes (this is the third) and, other than a small number of discrete suggestions from Core Participants for organisations that should receive a Rule 9 request, it has not been suggested that there are significant gaps in the range or identity of organisations and entities to which the inquiry has directed Rule 9 requests.

5. Annex A also includes an indication of the further organisations and individuals that Module 1 anticipates sending Rule 9 requests to.

6. The Inquiry is also likely to issue discrete follow up Rule 9 requests to organisations where it considers that matters have not been explained or addressed sufficiently in the first statement or where the Inquiry's review of material received gives rise to further questions or areas of investigation.

7. The number of Rule 9 requests, and the wide range of organisations, entities and individuals who have received such requests, although highlighting the scale of the Inquiry's task, provides reassurance that the Inquiry has cast its investigative net sufficiently widely. However, should any Core Participant consider that 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 1 then please indicate this as soon as possible. Any suggestions will be considered and, where appropriate, acted upon.

## **Disclosure to Core Participants**

8. The Inquiry has received material from:

    a. The Cabinet Office.

    b. DHSC.

    c. DLUHC.

    d. HMT.

    e. The Executive Office of Northern Ireland.

    f. The Northern Ireland Local Government Association.

    g. Public Health Wales.

    h. The Local Government Association.

    i. The Welsh Local Government Association.

    j. UKHSA (partial).

9. Each and every document received by the Inquiry undergoes a careful review by the Inquiry legal team, and is managed through a staged process before being disclosed to Core Participants.

10. As part of that review process, it is necessary for the Inquiry to apply redactions to certain categories of information. The Inquiry has published a Protocol on the approach it takes to redactions, which, amongst other things, confirms that personal data such as dates of birth, personal addresses and signatures will be removed.

11. The Inquiry also considers it appropriate to redact from materials the names of junior officials where it can be demonstrated that (a) the disclosure of that individual's name is not considered necessary and (b) by virtue of their junior position, they have a reasonable expectation of privacy. In practice, however, the Inquiry has found that this is a difficult and time-consuming task.

12. As explained in the last update note from the Module Lead Solicitor, the Inquiry agreed with GLD that the names of junior officials will be provisionally redacted from materials before they are disclosed to CPs, save for when a junior official has exceptionally taken decisions themselves, or substantially contributed to decision-making, or had an important role in implementation of decisions.

13. In order to assist with the identification of names for redaction, all Government departments providing disclosure to Module 1 were asked to provide a list of staff of SCS level holding relevant positions for the period 2009 - June 2022. ''Relevant positions'' was defined as 'those working in each department with a role advising on planning for, preparing for and managing the risk of civil emergencies, including whole system civil emergencies'. In spite of the receipt of these lists, it is often difficult for the junior staff to be confidently distinguished, without wider context or information about their job title or role. Conducting research into any individual's wider role or job title is taking time.

14. The Inquiry legal team's chief concern is ensuring the swift disclosure of materials to Core Participants, so as to enable them to commence as soon as possible their preparation for the scheduled hearing. To this end, the Inquiry review team has been directed to take a broad approach to redactions of names and contact details and, in particular, where they appear in lengthy lists of email recipients or those ''cc'd'' into email chains. Where such an approach has been taken, a redaction type of 'Name(s) Redacted' is being applied. This is not to avoid transparency, nor to avoid any proper scrutiny of the materials, but is considered the most proportionate and pragmatic approach to achieve swift disclosure to Core Participants.

15. Each redaction applied is provisional and is subject to change as a result of the Inquiry's own scrutiny of the evidence, or in response to matters raised by Core Participants. Should the Inquiry be informed that there are good grounds for believing that any document has had relevant content redacted, it will be reconsidered without delay.

16. The application of redactions to junior officials' names is very time consuming, and has inevitably impacted on the speed with which materials can be reviewed and disclosed to Core Participants. The Inquiry is closely monitoring this and the impact it has on the overall timetable for the disclosure of materials to CPs.

17. The Inquiry has disclosed 351 documents to Core participants, comprising the following categories of material:

    a. a witness statement and exhibits provided by the DHSC;

    b. exhibits provided by the DLUHC;

    c. and exhibits provided by HMT.

18. A further tranche of 244 documents will be disclosed to core participants today, comprising:

    a. exhibits provided by the Cabinet Office;

    b. a witness statement and the balance of the exhibits and annexes provided by DLUHC;

    c. exhibits provided by the Local Government Association;

    d. exhibits provided by the Northern Ireland Local Government Association;

    e. further exhibits provided by DHSC.

19. As set out in Annex A, a considerable number of the deadlines set in the Inquiry's Rule 9 requests fall within the next couple of weeks. Therefore, it is not possible at this stage to give a precise indication of the volume of documents that Core Participants may expect by way of disclosure.

20. However, the inquiry hopes to make regular disclosure to Core Participants on a fortnightly, if not weekly, basis. It has c.2000 documents from the Cabinet Office, the Northern Ireland Executive Office, the DHSC, the Welsh Local Government Association, Public Health Wales, and the UKHSA which are in the latter stages of the Inquiry's disclosure process. It is anticipated that the majority of these will be disclosed to Core Participants in advance of the preliminary hearing.

21. Ideally, material should be disclosed in an organised and collated way. For example, with each statement being disclosed with its exhibits in one tranche. However, the reality is that some documents are easier to progress through to disclosure to Core Participants than others. The Inquiry must therefore strike a balance to ensure that material gets to Core Participants as soon as possible.

## Parliamentary privilege

22. It is necessary to address, shortly, the issue of parliamentary privilege arising in connection with the UK Parliament[1], given the unprecedented amount of parliamentary debate, reports and other material discussing many of the issues which fall to be examined within the Inquiry's Terms of Reference. It is important to understand the ways in which the application of parliamentary privilege impacts upon the Inquiry's work, for example the use that the Inquiry can make of specific categories of material.

23. The doctrine of parliamentary privilege originates from Article IX of the Bill of Rights 1689, which provides, "*That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*". The Inquiry has taken the view that, as a statutory public inquiry with powers to compel evidence and witnesses, it constitutes a "*court or place out of Parliament*", and so engages the principles of parliamentary privilege. It is also important to note at the outset that parliamentary privilege cannot be waived.

24. The broad principles as to when debates or proceedings in Parliament might be "*impeached or questioned*" are as follows:

    a. It is permissible to refer to things that were said and done in Parliament as a matter of historical fact or to provide context. A mere reference to, or production in legal proceedings of, what was said in Parliament, or production of a report, does not of itself infringe Article IX.

    b. It is not permissible:

        i. to draw inferences from parliamentary material or to use it as evidence for or against disputed factual matters;

        ii. to rely upon parliamentary material as evidence of the truth of a proposition; or

        iii. to deny, dispute or question the worth, truth, genuineness or accuracy of the content of parliamentary material.

25. A wide range of different categories of parliamentary material is protected by parliamentary privilege as "*debates or proceedings in Parliament*", including:

    a. Opinions of an individual member of either the House of Commons or the House of Lords, expressed in either House.

    b. Evidence or memoranda given to a select committee of either House.

[1] The principles set out in this note apply only to the Parliament of the United Kingdom; they do not apply to the Scottish Parliament (Pàrlamaid na h-Alba), the Welsh Parliament (the Senedd Cymru) or the Northern Ireland Assembly.

c. Any document published by order of either House. This includes all National Audit Office ("NAO") reports.

d. Reports put before Parliament.

26. There will be other categories of material which, whilst not themselves covered by parliamentary privilege, may raise issues of parliamentary privilege by quoting, referring to or relying upon material which would itself be covered by parliamentary privilege if adduced within the context of the Inquiry. Given the wide variety of forms in which this material might exist, the Inquiry proposes to approach such material on a case by case basis.

27. These principles are easier to understand in context. By way of non-exhaustive examples only, we have set out below a few common scenarios where parliamentary privilege is likely to arise as an issue in a witness' oral or written evidence, as well as the Inquiry's understanding of the position that the principles of parliamentary privilege require:

a. Witness A refers to evidence previously given in parliament: It is unlikely to be permissible for Witness A simply to refer back to his or her previous evidence to a parliamentary committee and rely on it before the Inquiry. This is due to the fact that, if anyone wishes to cross-examine Witness A, it is likely that they will be unable to do so without "*impeaching or questioning*" proceedings in Parliament, contrary to Article IX. The position would be the same if the reference was to a previous statement made in proceedings in the Chamber of either House. However, a witness may provide fresh evidence to the Inquiry. It does not matter if it is the same in substance as the evidence provided to the select committee or the statement made in proceedings in the Chamber of either House. Once the fresh evidence is provided, that is a statement made outside proceedings in Parliament and may be examined by the Inquiry in any way that it thinks appropriate.

b. Witness A refers to evidence previously given by Witness B in Parliament: It is likely to be permissible for Witness A to cite evidence given by Witness B to either House as part of the background to his or her own evidence (for example, citing the fact that a particular matter was raised in parliamentary evidence on a particular date, for the purpose of showing that the issue had been mentioned in public by that date). A summary is also permissible provided it complies with the principles set out above. However, any commentary on Witness B's evidence is likely to be impermissible, given the risks of impeaching or questioning the content of that evidence.

c. Witness A refers to the content of a report published by a select committee: Whether or not it is permissible for a witness to refer to, or summarise, the evidence, findings and conclusions included in a report published by a select committee will depend on the purpose for which the evidence is included and

the nature of the evidence. It is likely to be permissible to receive into evidence, or summarise, the content of a report as long as it is done for the purposes of setting the historical scene and providing context, so that the focus of the witness' evidence is not on the content of the report but on what was done or said in response to it. However, the receipt into the Inquiry's process of parliamentary materials as evidence of the truth of proposition contained in them is as objectionable as an attempt to deny or dispute the content of that material, as it puts the Inquiry into the position of having to risk questioning the proceedings in Parliament or of leaving the point undisputed. If a statement made in a report is, or may be, contentious then any questioning upon the basis of the evidence contained in the statement is likely to infringe Article IX. Similarly, one cannot refer to the opinion or finding of a select committee on an issue which the Inquiry has to determine for itself. The Inquiry considers that this is likely to apply equally to formal responses to a select committee report which is submitted to the select committee, at least to some degree where those formal responses evaluate, engage critically with or respond directly to the report.

28. The Inquiry is, of course, a search for the truth and it will work to that end, while still respecting parliamentary privilege. It will question Ministers and officials on their role and decision-making before, during and after the Covid-19 pandemic, notwithstanding that they have contributed to parliamentary debates or given evidence to select committees. It will do so by seeking stand-alone statements from those witnesses, which may be requested to cover the same issues on which they have previously given evidence, pursuant to Rule 9 of the Inquiry Rules 2006. It will then conduct any questioning of such witnesses based on the content of their evidence to the Inquiry, not on any statements that they may have made previously to Parliament.

29. It may also be necessary for the Inquiry to navigate the findings and conclusions of select committee reports, particularly where they have contributed to the process whereby the government has drawn lessons from the Covid-19 pandemic. The Inquiry proposes to disclose them to Core Participants so as to provide necessary explanatory context. However, in order to avoid the risk of impeaching or questioning the content of those reports, the Inquiry will, again, seek stand-alone statements which do not refer to proceedings in Parliament, other by way of historical context. Where a witness seeks to rely upon information that was presented to a select committee, or activity that was undertaken in response to its reports, that witness can of course replicate that information in his or her statement.

30. The Inquiry will also, within the context of certain modules, examine the structures available to provide oversight of the public health and coronavirus legislation and regulations that were proposed and enacted during the Covid-19 pandemic. It will, however, do so without seeking to question or impeach proceedings in Parliament.

## Instruction of expert witnesses

31. Professor David Heymann has provided the Inquiry with a first draft of his report, which the Inquiry has reviewed. Professor Heymann anticipates completing a further draft of his report by early February 2023.

32. It is likely that this draft will then be circulated to Core Participants so that they can request that specific issues be clarified or expanded upon. Further information about that process will be provided when the draft report is circulated. The topics that he has been asked to address are set out in **Annex B** (as circulated to Core Participants in December).

33. The Inquiry has now confirmed its instructions to the following experts and details of the topics that they have been asked to address are set out in **Annex C, D and E**, respectively.

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| **Professor Jimmy Whitworth and Dr Charlotte Hammer** | Forecasting of epidemic trends; transmission of diseases from animals to humans; international processes dealing with surveillance and control of infectious diseases and viruses.<br><br>The Inquiry anticipates receiving their draft report in early March 2023. |
| **Prof Sir Michael Marmot and Professor Claire Bambra** | Health inequalities and consideration of the same prior to the pandemic in public health structures in the UK and in planning for a pandemic.<br><br>The Inquiry anticipates receiving their draft report in early March 2023. |
| **Bruce Mann and Professor David Alexander** | To provide views on, amongst other matters, resilience and risk management, a description of the structures in place in the UK, the suitability of those structures and views on the Civil Contingencies Act 2004.<br><br>The Inquiry anticipates receiving their draft report in early March 2023. |

## Evidence proposal procedure and Rule 10

34. Rule 10 of the Inquiry Rules 2006 states:

> *10.— (1) Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry (or, if counsel has not been appointed, the solicitor to the inquiry) and the inquiry panel may ask questions of that witness.*

*(2) Where a witness, whether a core participant or otherwise, has been questioned orally in the course of an inquiry hearing pursuant to paragraph (1), the chairman may direct that the recognised legal representative of that witness may ask the witness questions.*

*(3) Where—*

*(a) a witness other than a core participant has been questioned orally in the course of an inquiry hearing by counsel to the inquiry, or by the inquiry panel; and*

*(b) that witness's evidence directly relates to the evidence of another witness, the recognised legal representative of the witness to whom the evidence relates may apply to the chairman for permission to question the witness who has given oral evidence.*

*(4) The recognised legal representative of a core participant may apply to the chairman for permission to ask questions of a witness giving oral evidence.*

*(5) When making an application under paragraphs (3) or (4), the recognised legal representative must state—*

*(a) the issues in respect of which a witness is to be questioned; and*

*(b) whether the questioning will raise new issues or, if not, why the questioning should be permitted.*

35. Module 1 has a very significant amount of ground to cover during its hearing, and a relatively limited amount of time within which to do so. As with all aspects of the Inquiry's work, it is important that the hearing is conducted as efficiently and swiftly as possible.

36. CTI considers that it will only be possible to conduct the hearing within the time available, if the presumption envisaged by Rule 10(1) is generally applied, namely that only Counsel to the Inquiry may conduct the questioning of the witnesses. However, the Inquiry recognises the important part that Core Participants have to play and the process of evidence proposals (set out below), together with the ability to make applications under Rule 10(4), will ensure that Core Participants have a meaningful opportunity to engage in the process by which areas for the questioning of witnesses are identified.

37. Each witness called to give oral evidence at the hearing before the Inquiry will have a paper bundle of documents prepared for them for use at the hearing. This will include the witness' Inquiry witness statement(s) and any documents to which the witness may be referred.

38. An evidence proposal will be prepared for every such witness, which will be circulated to Core Participants in advance of the witness giving evidence. This will include a list of the topics that the witness will be examined about, references to relevant parts of the witness statements and exhibits, and a draft index of those documents that will form the witness bundle, including those documents about which the witness may be asked questions.

39. Core Participants will be asked to review the evidence proposals and to provide any comments, as well as submissions as to any additional issues which they wish to be raised with a particular witness or any new documents they consider should be included. The Inquiry will consider these carefully and a finalised proposal will be circulated before the witness gives evidence.

40. On the basis of the current proposal, which is that the public hearing commences on Tuesday 2 May 2023, the provisional timetable in relation to witnesses giving evidence in Week 1 of the public hearing would be as follows (subject to submissions):

    a. **w/c 3 April** - Circulation of evidence proposals for witnesses in Week 1 to Core Participants. Core Participants will have 7 days to consider the evidence proposal in respect of each witness;

    b. **w/c 10 April** - The Inquiry legal team to review Core Participants' observations on the Week 1 evidence proposals;

    c. **w/c 17 April** - The Inquiry legal team to provide finalised evidence proposals for Week 1 witnesses.

    The same would apply for Week 2 witnesses but a week later, and so on.

41. We are giving further thought as to how Core Participants can provide any additional input into the topics to be covered by witnesses, beyond the evidence proposal process set out above. We are also considering the process that will be put in place for Rule 10 applications. We will update all Core Participants about that as soon as possible.

## Witnesses and hearing timetable

42. Much of the documentation is still to be received, and so it is not possible at this stage to provide further detail of the scope of the module or the areas about which witnesses will be questioned.

43. However, if it is possible to provide further information at the preliminary hearing, then this will be done. In any event, it is anticipated that more information and an overall structure to the hearing will be provided by the end of February.

44. In so far as witnesses are concerned, the Inquiry legal team envisages the supply to Core Participants of a provisional list of witnesses in the **week commencing 6 March**

**2023**. Core Participants will be given a short period in which to provide observations on that provisional list. Once those observations have been considered, a provisional timetable will be circulated to Core Participants.

45. In advance of circulating the provisional list of witnesses, the Inquiry will be writing to all those who have received Rule 9 requests to ask that the individual providing the witness statement submits to the Inquiry any dates to avoid.

## Opening and Closing Statements

46. Rule 11 of the Inquiry Rules 2006 states

*11.—(1) The recognised legal representative of a core participant may—*

*(a) make an opening statement to the inquiry panel at the commencement of the first of any oral hearings, and*

*(b) make a closing statement to the inquiry panel.*

*(2) A core participant who does not have a recognised legal representative may make the opening and closing statements referred to in paragraph (1).*

47. It is the current intention of CTI to make an opening statement at the commencement of the public hearing. It is unlikely that there will be a closing statement.

48. Those Core Participants who wish to make opening and closing statements will of course be permitted to do so. However, CTI will be inviting the Chair to impose strict time limits in which to do so. This is likely to be determined in part by the number of participants. Written statements must be submitted to the Inquiry within a time frame which will be set out in due course.

## The Listening Exercise - Every Story Matters and Commemoration

49. A note from the Solicitor to the Inquiry is attached as Annex F.

**Hugo Keith KC**
**Kate Blackwell KC**
**Jamie Sharma**
**Bo-Eun Jung**
**Zeenat Islam**
**Joshua Cainer**

**30 January 2023**