

UK COVID-19 INQUIRY

SUBMISSIONS FOR PRELIMINARY HEARING IN MODULE 2A ON 1 NOVEMBER

2022

ON BEHALF OF NHS NATIONAL SERVICES SCOTLAND (NHS NSS)

1. NHS NSS makes submissions on three matters: (a) duplication with the Scottish Covid-19 Inquiry; (b) chronologies; and (c) practicalities in relation to further hearings.

Duplication with the Scottish Covid-19 Inquiry

2. This was a matter of concern to NHS NSS in Module 1 and is the matter of most concern to NHS NSS in the Inquiry as a whole. NHS NSS raised this matter specifically at a meeting on 26 July 2022 attended by inter alia the NHS NSS CEO Mary Morgan, the Inquiry Module 1 solicitor team, and the Module 2A solicitor. It re-emphasised its concern in its written submissions (sent to the Inquiry on 28 September 2022) in advance of the preliminary hearing that took place on 4 October 2022.
3. Since 4 October 2022 NHS NSS has been aware that a draft Memorandum of Understanding is being negotiated between the respective Inquiry teams. NHS NSS has requested sight of the present draft Memorandum but regrettably that request has been refused. In paragraphs [41] and [42] of the Note dated 21 October 2022 by Counsel to the Inquiry (“CTI’s Note”), some information is given as to steps taken to explore how best to fulfil the obligation to minimise of duplication. While it is reassuring to be told that there is recognition of the need to minimise duplication in the efforts required by document providers, witnesses, Core Participants and other interested parties, and to be told that there have been productive discussions between the two inquiries, the reference to the results of those discussions being published “in due course” leaves NHS NSS in an uncertain situation.

4. CTI's Note explains that Rule 9 requests are to be made within the next few weeks and that NHS NSS will be a document provider (paragraph [44]). At present it appears that NHS NSS will require to start responding to such requests without any clear indication of what practical steps will be in place to minimise duplication.

5. The Inquiry's Terms of Reference state:

“In carrying out its work, the Inquiry will consider reserved and devolved matters across the United Kingdom, as necessary, but will seek to minimise duplication of investigation, evidence gathering and reporting with any other public inquiry established by the devolved governments. To achieve this, the Inquiry will set out publicly how it intends to minimise duplication, and will liaise with any such inquiry before it investigates any matter which is also within that inquiry's scope.” [Emphasis added]

6. NHS NSS does not believe that there has been a public statement by the Inquiry about how it intends to minimise duplication. The Terms of Reference clearly state that the public statement is additional to liaison with the Scottish Inquiry. Accordingly, NHS NSS respectfully raises a concern about whether it is appropriate for the Inquiry to begin issuing Rule 9 requests before it has set out publicly how it intends to minimise duplication.

7. NHS NSS appreciates the difficulties that the Inquiry faces in circumstances where the Scottish Inquiry awaits the appointment of a new Chair and has a reduced team of counsel. The Terms of Reference, however, seem unambiguous in their requirements.

Position statements and corporate statements

8. CTI's Note points out – correctly NHS NSS submits – that the subject matter of Module 2A does not lend itself readily to the preparation of position statements until a Core Participant is sufficiently confident of its knowledge of all relevant issues and documents (paragraph [50]).

9. It goes on to explain that the Inquiry is requesting that key Rule 9 recipients provide a corporate statement setting out a narrative of relevant events and of the lessons learned, and that these corporate statements will serve a similar purpose to position statements (paragraph [51]).
10. It appears to NHS NSS that the same problem that CTI identify in paragraph [50] of their note in relation to position statements (namely that a Core Participant cannot reasonably be asked at an early stage to provide a position statement) applies equally to the corporate statements contemplated by paragraph [51]. NHS NSS suggests that neither position statements nor corporate statements should be ordered at this stage. If the Inquiry is minded to order corporate statements no doubt the order will explain precisely what matters it is intended those statements should address.

Practicalities in relation to further hearings

11. A further Preliminary Hearing for Module 2A will be held in London in early 2023 per paragraph [77] of CTI's Note. NHS NSS wonders whether that hearing might be more appropriately held virtually, given that all but one of the Core Participants are based in Scotland.
12. The public hearing in Module 2A is contemplated as taking place in Scotland in Autumn 2023. NHS NSS would welcome the provision of further information about the contemplated duration of this hearing and an indication of in which month or months it is likely to take place.

Una Doherty KC

James McConnell

Mark Boni

Counsel