

IN THE MATTER OF THE UK COVID-19 PUBLIC INQUIRY BEFORE BARONESS HALLETT

MODULE 2 THIRD PRELIMINARY HEARING

SUBMISSIONS FROM THE FEDERATION OF ETHNIC MINORITY HEALTHCARE ORGANISATIONS ("FEMHO")

Introduction

1. These written submissions are made ahead of the third preliminary hearing, set for 6 June 2023.
2. FEMHO's submissions provide observations on three matters: i) the Chair's ruling under s21(4) of the Inquiries Act 2005, on the application of the Cabinet Office, dated 22 May 2023; ii) the Inquiry's impending determination of the Cabinet Office's planned s19 application(s); and iii) procedural points arising from Counsel to the Inquiry's (CTT's) note dated 17 May 2023.

I. The Chair's s21(4) ruling

3. FEMHO welcomes and supports the Chair's ruling on the Cabinet Office's application to revoke her Notice under s21(2)(b) requiring a range of unredacted material including WhatsApp communications and former Prime Minister Boris Johnson's diaries and notebooks. The Cabinet Office sought to resist the production of material in unredacted form, which they consider to be "*unambiguously irrelevant material*", for the Inquiry's

investigations. FEMHO commends the basis on which this application was refused and particularly notes para 21(d) of the ruling, which affirmed the following position:

“Those who hold documents will never be in as good a position as the Inquiry itself to judge the possible relevance to the Inquiry of documents they hold. Necessarily, they do not know all that the Inquiry knows about the investigation it is conducting, or that it is considering whether to conduct. They are not in a position to keep charges in relevance properly under review. The relevance of documents, apparently unconnected to the Terms of Reference may lie in information or further documents known or held only by the Inquiry.”

4. It is further noted that the Cabinet Office’s s21 application, made on 15 May 2023, came a few days before it handed over emails, WhatsApp messages and other material to the police for investigation, on 18 May 2023. Of critical importance to this Inquiry’s investigations, will be the attitude towards Covid-19 amongst the most senior leaders during the early (and critical) stages of the pandemic. (For example, the ruling notes: *“...There is, for example, well established public concern as to the attention given to the emergence of covid-19 in early 2020 by the then Prime Minister...”* [§19]). This Inquiry must examine material that may provide an insight into the response of government and of any individual Minister to the pandemic in terms of prioritisation, assessment of risks, and decision making during the pandemic.
5. The Inquiry, in asserting the rationale that underpins their approach, stated that it: *“undertake[s] a large number of extremely diverse lines of investigation ...collateral to ...the terms of reference...”* [§18] which make it relevant for the entire contents of documents to be produced. FEMHO is grateful and heartened by, and firmly supports, the Inquiry’s handling of, and the principled approach it indicates it is taking, to these matters. On the contrary, we are concerned about the Cabinet Office’s attempts to narrow the scope of the Inquiry by their application under s21(4) and the intimated application(s) under s19 (addressed further below). We submit that there are two bases in principle which should continue to ground the Inquiry’s approach to disclosure: i) ensuring the proper discharge of the duty of candour; and ii) upholding the importance of effective participation.

Duty of candour

6. The duty of candour, defined as the ethical or legal obligation for public authorities to be open, honest, and transparent, forms the backbone of public accountability. Sir Robert Francis KC, who headed the Francis Inquiry into the Mid-Staffordshire NHS Trust, describes it as “*the volunteering of all relevant information to persons who have or may have been harmed by the provision of services, whether or not the information has been requested and whether or not a complaint or a report about that provision has been made*”.¹ Buttressed and underscored by the Seven Nolan Principles of Public Life², it ensures that public officials, who are responsible for vital decisions affecting citizens' lives, disclose all relevant information transparently. In a similar vein, public officials are usually required to uphold professional standards or codes of behaviour, such as the Civil Service Code³ and the NHS Terms and Conditions of Service Handbook⁴, which enshrine the principles of candour and usually require that they act with integrity and impartiality. The Chair's ruling illustrates this principle in action, ensuring that the duty of candour is discharged. She noted: “*The key flaw, as it seems to me, is that it wrongly allocates to the holder of the documents, rather than the inquiry chair, the final decision on whether documents are not relevant to the inquiry's investigation.*” [§21]

7. Public officials are, at their core, servants of the people. Upholding the duty of candour meets the public's right to information, an important consideration in this Inquiry. The duty of candour is also integral to maintaining the rule of law. It confirms that public authorities are accountable for their actions and underscores that no one, not even those in power, are above the law.

8. Encouraging the duty of candour is particularly important in this Inquiry as it enables a more open approach to problem recognition and solution, which subsequently leads to better risk management within public bodies. By being open about what has gone wrong, government can transform mistakes into valuable learning experiences, enhancing the functioning of our public institutions and making the country more resilient to modern risks and emergencies. It bears stating that an effective pandemic risk management strategy necessitates the recognition of potential and existing issues. Institutional defensiveness

¹ See para 22.1, Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry, Volume 3: accessible at: <https://www.gov.uk/government/publications/report-of-the-mid-staffordshire-nhs-foundation-trust-public-inquiry>

² Namely: Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty and Leadership. The Seven Principles of Public Life outline the ethical standards those working in the public sector are expected to adhere to. They were first set out by Lord Nolan in 1995 in the first report of the Committee on Standards in Public Life and they are included in a range of codes of conduct across public life.

³ <https://www.gov.uk/government/publications/civil-service-code/the-civil-service-code>

⁴ <https://www.nhsemployers.org/publications/tchandbook> See in particular for example Annex 27 and Section 32.

serves no positive purpose and instead simply hinders and delays the Inquiry's ability to efficiently uncover and identify what went wrong and why, as required if lessons are truly to be learned.

9. Not to do so, we submit, would be a disservice to, and result in a second injustice to, our members and all those who have suffered during the pandemic. In the context of a public health crisis or pandemic, transparency is not just desirable, but a necessity. Transparency can directly impact governmental decisions, public health responses, and public trust in these responses. The principle of a duty of candour acts as a safeguard, promoting integrity and ensuring that such transparency is maintained, facilitating understanding, accountability, and learning from past mistakes; it is often pivotal in unearthing and addressing potential wrongdoing, corruption and illegality within public authorities. Failings in the public response to the pandemic and any decisions that may have contributed to the severity of the crisis must be brought to light. The duty of candour mandates public bodies to willingly and honestly disclose these failings and the factors leading to them.
10. We consider this an important issue to raise at this juncture given not only the Cabinet Office's stance regarding the s21 Notice but also the wider issues identified in CTP's note regarding theirs and other government department's compliance with and approach to disclosure so far. In particular:
 - a. The lack of clarity and explanation as to the apparently missing WhatsApp messages from almost 30 Cabinet Office witnesses now overdue for disclosure. [§21]
 - b. The complete lack of disclosure by the Cabinet Office, despite the Inquiry's requests, of:
 - i. any Google Spaces communications [§23]; or
 - ii. any of the requested material relevant to Whitehall's engagement with the Devolved Administrations. [§§24-25]
 - c. The overdue corporate statements from DHSC and UKHSA. [§§26-29]

We agree with the Chair's comment in her ruling that this is "*a disappointing start*" and we very much hope this is not indicative of how government departments will engage going forward.

11. FEMHO welcomes and supports the efforts of the Chair and Inquiry team so far in pursuing these issues and urge them to continue to be mindful of the duty of candour as a guiding tenet, in order to ensure that public and private bodies fully disclose their actions and decisions, accept responsibility for failings, and learn from these mistakes. Additionally, we urge all those involved to engage with and approach the Inquiry with underlying principles of frankness, clarity and transparency; not obfuscation.

Effective participation

12. It is axiomatic that in the context of a public inquiry, robust disclosure can make way for more effective participation of both CPs and the wider public. This is noted in the Chair's ruling, where she acknowledged that there was: "*an expectation on the part of Core Participants, and also on the part of the public generally, that I will satisfy myself that all relevant contents of these documents are disclosed for use in the Inquiry and that I and my team will keep that position under review as the Inquiry progresses, and ensure that any additional disclosure is made as necessary.*" [§7]
13. The UK Supreme Court case of *Al Rami v Security Service* [2012] 1 AC 531 emphasised the principle of open justice and as such, its importance in ensuring effective participation, even in circumstances where there are national security considerations. It is important to note that in the Cabinet Office's s21 application, they did not seek to justify redactions with any concerns about national security. Instead, it is arguable that the application was driven by a desire to remove from scrutiny of CPs and the public, matters which may be politically embarrassing.
14. The Inquiry's ruling was robust in repudiating any "*carve-out*" on the part of the Cabinet Office, in their apparent attempt to prevent disclosure of material that may be politically sensitive, though not justifiably immune to disclosure. If this position had been upheld, it might have created an unhelpful precedent that stymies effective participation in public inquiries. FEMHO supports the Inquiry's rounded dismissal of this proposition in these terms:

"...The application seeks to establish a principle that the Chair of a public inquiry will be acting ultra vires in requiring the production of material where the recipient of a section 21 notice declares that material to be 'unambiguously irrelevant.' I reject that proposition..." [§21]

II. Impending s19 determination

15. The CTT's note has alerted us to impending s19 application(s) the Cabinet Office intends to make, for restriction orders to cover certain material on the basis that disclosure is likely to damage the principle of Cabinet Collective Responsibility [§30]. We are promised that *“more information will be provided at the preliminary hearing about the basis for, and ambit of, this claim.”* [§32]
16. FEMHO trusts that the Chair will approach any such s19 application with the same robust manner she did the s21 application.
17. Even from this remove, FEMHO submits that a restriction order must, under section 19, be narrowly framed so as embrace only that which is required to comply with statute, or the rule of law. This, it is submitted, is a more constrained power than that provided by section 23 which provides that the Chair must not permit information to be revealed which might damage the economy, unless satisfied that the public interest in revealing the information outweighs the public interest in avoiding the risk of damage to the economy.
18. Further, we submit that the Chair, when making her determination, is bound to have in mind her obligation to ensure that CPs are afforded an effective opportunity to participate in the proceedings. We note and welcome the provision in the Inquiry's published Protocol on Applications for Restriction Orders for CPs to be provided with at least the open section of any application and to have the opportunity to make submissions to the Chair on the application. Given the public attention that this controversy has had recently, such an approach is necessary to allay the concerns of the public, achieve fairness and cost effectiveness. For the purpose of the determination of this matter, there should be at least limited disclosure prior to a hearing. It is envisaged that this could include correspondence between the Inquiry and the Cabinet Office, prior to the making of this application.

III. CTT's note

19. FEMHO seeks to make the following observations on matters raised by CTT:

Witnesses, experts, rule 9 requests and the list of issues.

20. We note the CTT's remarks on these topics and, whilst we recognise some of these matters are somewhat out of the Inquiry's control and it must balance the need for progress, we wish to raise a concern about the timetabling implications arising from these issues which impact upon CP's ability to properly prepare for the evidential hearings.
21. FEMHO is keen to ensure that there is adequate opportunity to make observations about witnesses when disclosure is at hand. We look forward to the opportunity to make observations on the provisional list of witnesses in June 2023, but given the indications that key disclosure including witness statements will continue into July, it may well be that disclosure made subsequent to the June submissions will identify further individuals that our clients consider should be called to give evidence. We would therefore be grateful for confirmation that June will not be the final opportunity for CPs to make such submissions.
22. We have made detailed observations on the matter of experts and the provisional list of issues and are keen to learn the extent to which the Inquiry has incorporated any of our feedback that it has received in these matters as we have received no indication as yet. In particular:
- a. Regarding the observations submitted on the draft expert report of Professor Hale, FEMHO notes from CTT's update that Professor Hale has been "*given sight*" of all observations but has not been instructed to consider or address all of them in his final report. FEMHO would be grateful if the Inquiry would confirm which of its observations Professor Hale has/has not been instructed to consider.
 - b. We would be grateful for further clarity on the planned timescales for the expert reports on structural racism and structural discrimination. Given the limited time between now and the start of evidential hearings, we consider it would be most time-efficient if CPs were given sight of the draft instructions to these experts and the opportunity to make observations on the scope of those instructions instead of waiting for sight of the draft reports.
23. On the issue of Rule 9 requests, we continue to be of the view that it would be helpful if the Rule 9 request letters themselves are disclosed, in order for CPs to feed into the lines of enquiry that might be pursued in the relevant aspects of the Inquiry's investigations. Given the indication from CTT that there remains a considerable amount of disclosure to be released to CPs, we consider there is a real risk that there will be insufficient time for

any gaps identified to be filled. Giving CPs sight of the full Rule 9 requests now would enable CPs to assist the Inquiry in alerting them to any further categories of documents they consider relevant that are missing from the requests, allowing time for the Inquiry to pursue and obtain any such documents they agree should be considered.

Cross-module disclosure

24. FEMHO recognises that the division of this Inquiry into separate modules, with its unique set of participants and issues for each module, creates a mammoth challenge of managing and appropriately disclosing vast quantities of information. We propose, if such a system is not already in place, the establishment of a cross-module information sharing system. This system would serve as a conduit for granting core participants from each module, access to information disclosed in other modules, should it bear relevance to their representation. This would secure full and fair disclosure of information and enhance the robustness of the Inquiry's findings, significantly contributing to the richness and thoroughness of the Inquiry's outcomes.
25. Ensuring a comprehensive view of the evidence will allow the Inquiry to best achieve its goal of investigating and learning from the UK Government's response to the Covid-19 pandemic. By adopting a robust cross-module information sharing system, the Inquiry would not only uphold the principles of fairness and transparency but also ensure the comprehensiveness of the Inquiry's findings. Therefore, we urge the Inquiry to consider the points raised here, focusing on maintaining the integrity, transparency, and comprehensiveness of the proceedings, thus ensuring the public's trust and confidence in its findings and recommendations.
26. FEMHO invites the Inquiry to confirm whether a cross module disclosure system exists, and if so, what checks and balances are in place to ensure that there is appropriate and efficient disclosure. Transparency regarding these safeguards is key to upholding public trust in the proceedings.

Inquiry Panel

27. Whilst we recognise that this is not a matter within the Chair or the Inquiry team's control, FEMHO wishes to publicly register its disappointment at the current Prime Minister's

recent decision not to appoint panel members to assist the Chair. Given previous public statements and apparent commitments by the former Prime Minister to appoint a panel, this decision is seen as a U-turn in the wrong direction and a missed opportunity to enhance and support the work of the Chair and the Inquiry team.

28. FEMHO has the utmost respect for the Chair's experience and expertise, a respect further strengthened by her recent robust handling of the aforementioned s21 matter. Our position regarding the need for the Chair to sit with a panel is a principled one, that is animated by the need for burden sharing in public inquiry decision-making. FEMHO is writing to the Prime Minister on this matter, respectfully requesting that he reconsiders this decision.

Conclusion

29. FEMHO invites the Chair to give favourable consideration to all the matters that are raised herein.

31 May 2023

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