



NOTICE OF DETERMINATION
CORE PARTICIPANT APPLICATION
MODULE 3 - CARE QUALITY COMMISSION

Introduction

1. In my Opening Statement on 21 July 2022, I explained that Modules would be announced and opened in sequence, with those wishing to take a formal role in the Inquiry invited to apply to become Core Participants for each Module. On 8 November 2022, the Inquiry opened Module 3 and invited anyone who wished to be considered as a Core Participant to that Module to submit an application in writing to the Solicitor to the Inquiry by 5 December 2022.
2. The Inquiry has published the Provisional Outline of Scope for Module 3, which states that this Module will consider the impact of the Covid-19 pandemic on healthcare systems in England, Wales, Scotland and Northern Ireland. Further Modules, some of which have since been announced, will be opened in due course to address other aspects of the Inquiry's Terms of Reference.
3. On 2 December 2022 the Inquiry received an application from the Care Quality Commission ("the Applicant") for Core Participant status in Module 3.
4. I made a provisional decision dated 9 January 2023 not to designate the Applicant as a Core Participant in Module 3, thereby declining the application ("the provisional decision"). The Applicant was provided with an opportunity to renew the application in writing by 4pm on 16 January 2023 ("the renewal deadline"). The application was not renewed by the renewal deadline and accordingly I issued a Notice of Determination on 13 February 2023 ("the original determination"), finalising the provisional decision and formally declining the application for Core Participant status.

5. On 3 May 2023, over 16 weeks after the issuing of the original determination and more than 15 weeks after the renewal deadline, the Applicant submitted a renewed application, seeking Core Participant status in both Module 2 and Module 3 (“the initial renewed application”). On 15 May 2023, and prior to any decision being taken by either Module in respect of the initial renewed application, the Applicant contacted the Inquiry and confirmed that it wished the initial renewed application to be “paused”. On 26 May 2023 the Applicant submitted an amended renewed application for Core Participant status in both Module 2 and 3 (“the renewed application”).
6. This Notice sets out my decision in relation to the renewed application for Core Participant status in Module 3. My decision in respect of Module 2 is set out in a separate Notice dated 19 June 2023.

Application

7. Applications for Core Participant status are considered in accordance with Rule 5 of the Inquiry Rules 2006, which provides:

5.—(1) The chairman may designate a person as a core participant at any time during the course of the inquiry, provided that person consents to being so designated.

(2) In deciding whether to designate a person as a core participant, the chairman must in particular consider whether—

(a) the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) the person has a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) the person may be subject to explicit or significant criticism during the inquiry proceedings or in the report, or in any interim report.

(3) A person ceases to be a core participant on—

(a) the date specified by the chairman in writing; or

(b) the end of the inquiry.

8. In accordance with the approach set out in my Opening Statement and the Inquiry’s Core Participant Protocol, I have considered whether the Applicant has provided an acceptable explanation as to why it did not submit a renewed application within the prescribed time frame and whether the renewed application fulfils the requirements

set out in Rule 5(2) in relation to the issues set out in the Provisional Outline of Scope for Module 3.

Summary of Application

9. The original application dated 2 December 2022 (“the original application”) set out that, pursuant to the Health and Social Care Act 2008, the Applicant was established in 2009 as the independent regulator of health and adult social care in England. The Applicant explained that it is responsible for the registration, monitoring, inspection and regulation of health and adult social care services which fall within its regulatory remit. The Applicant has a duty to monitor how these services exercise their powers and discharge their duties when patients are detained in hospital, subject to community treatment orders or guardianship.
10. The original application was put on the basis that it may be that the "care sector" Module is where the Applicant would best meet the criteria for being designated as a Core Participant. That said, the Applicant contended that it had a significant interest specifically in how decisions were made to discharge hospital patients into care homes where they may have been asymptomatic but were still capable of transmitting the virus. The Applicant also observed that it did not consider it met the relevant criteria for Core Participant status in relation to infection control, though it does hold material relevant to this topic.
11. The renewed application is made following a request for evidence from the Applicant by Module 2 of the Inquiry under Rule 9 of the Inquiry Rules 2006, initially on 29 March 2023 and then revised on 11 May 2023. This is the basis of both the Applicant’s initial renewed application and the renewed application on which it ultimately relies. The central premise of the renewed application is that the breadth of the questions in the Module 2 Rule 9 request indicates to the Applicant that it may now meet the criteria for designation as a Core Participant in both Module 2 and Module 3. The Applicant considers that the focus of the Module 2 Rule 9 request has “moved away” from enquiring about the information which the UK Government gave to the Applicant and is drafted to seek evidence which will capture all that the Applicant contributed to key UK Government decisions taken in response to the Covid-19 pandemic during the period from 1 January 2020 to 24 February 2022.

12. It is said that, in light of the breadth of questions posed in the Module 2 Rule 9 request, grounds are now made out for a possible view to be taken that the Applicant played a direct and significant role (Rule 5(2)(a)) in the UK's core political and administrative decision making regarding the Covid-19 pandemic (the subject matter of Module 2). Whether or not the test in Rule 5(2)(a) is met, it is submitted that the evidence now sought from the Applicant demonstrates that it has a significant interest in an important aspect of the matters being investigated in Module 2 (Rule 5(2)(b)). As far as Module 3 is concerned, it is said that the nature of the evidence which the Inquiry has sought in Module 2 means that the Applicant's role in Module 3 in relation to, for example, issues such as the discharge of patients from hospital, shielding and the impact on the clinically vulnerable, can no longer be considered to be "one step removed from the impact of the pandemic on patients, groups and services".
13. In order to explain the delay and its failure to meet the renewal deadline, the Applicant sets out the background to its approach to Modules 1, 2 and 3. It states that it applied for Core Participant status in Module 1 and summarised its involvement in the Covid-19 pandemic, specifically regarding the discharge of patients into care homes. The Applicant concluded that the examination of these issues were more likely to form part of Module 3 but indicated that it was willing to be considered in Module 1. The application for Core Participant status in Module 1 was declined. This is said to have informed the Applicant's decision not to apply for Core Participant status in Module 2 by the deadline of 23 September 2022. This view is said to have been "fortified" on 9 January 2023 when the Applicant's application for Core Participant status in Module 3 was declined. The delay in making the renewed application is explained by a change in the Applicant's view of the significance of its role and its evidence within Modules 2 and 3 following receipt of the Module 2 Rule 9 request.

Decision for the Applicant

Whether the application should be considered out of time

14. The deadline for the Applicant to renew its application for Core Participant Status in Module 3 was 16 January 2023, meaning that the renewed application was received 131 days after the renewal deadline.

15. I remind myself that paragraph 10 of the Inquiry's Core Participant protocol states:
"...The Inquiry will not consider applications that are outside the timescales provided by the Inquiry, unless the applicant provides an acceptable explanation as to why they did not submit their application within the relevant timeframe."
16. I intend to run this Inquiry as thoroughly and expeditiously as possible. This will include providing prompt and useful reports and recommendations. To achieve that aim, I impose firm deadlines at different stages of the Inquiry. Compliance with those deadlines is important to ensure that the challenging timetable will be met. I also have to consider the need to be fair to all applicants who have made and/or renewed their applications for Core Participant status within the time period available and more generally that there is no unfair advantage obtained by those making a late application. I have therefore first considered whether the Applicant has provided an acceptable explanation for the failure to comply with the renewal deadline.
17. The period for the Applicant to renew its application was open from 9 January 2023 to 4pm on 16 January 2023 ("the renewal period"). The renewed application was received over eighteen weeks after the closure of the renewal period, which provided the Applicant with a week in which to renew.
18. There is no explanation of any specific issue that prevented the Applicant from making a renewed application for Core Participant status in Module 3 at an earlier stage. Rather, the Applicant sets out the rationale for making or deciding not to make applications to the Inquiry for Core Participant status and why its position has now changed following receipt of the Module 2 Rule 9 request.
19. Module 3 will examine the response of healthcare systems to the Covid-19 pandemic and the impact of the pandemic upon healthcare systems. The Provisional Outline of Scope for Module 3 was published on the Inquiry website on 8 November 2022 and sets out a number of areas for investigation. The Applicant made an application for Core Participant status in Module 3 on 2 December 2022. This was declined on 9 January 2023. The Applicant has had ample time both to consider the issues within Module 3's Provisional Outline of Scope and to reflect upon the provisional decision. In my view, the Applicant has not provided an acceptable explanation for why its renewed application for Core Participant status is made out of time. I do not consider

that the nature of the Rule 9 request sent by Module 2 amounts to an acceptable reason for the delay in renewing the application to Module 3 or, as I set out below, for renewing the application at all. Even if I considered the Module 2 Rule 9 request to amount to an acceptable reason for the Applicant's delay in principle, the Applicant has not provided an adequate explanation for why it took until 26 May 2023 to finalise its renewed application when it had received the revised Module 2 Rule 9 request on 13 May 2023. Given the one week deadline provided to all other applicants who wished to renew their applications, I also do not consider that a good justification has been provided for this particular delay.

20. Accordingly, I consider that the Applicant has not provided an acceptable explanation as to why it did not submit the renewed application by the renewal deadline or at an earlier stage. I therefore consider that the renewed application for Core Participant status should be refused.

21. For completeness, however, I will also go on to provide my conclusion on whether the Applicant should have been granted Core Participant status in Module 3, had the renewed application been received by the renewal deadline or within an acceptable time thereafter.

The substance of the Application

22. I have considered with great care everything that is said in the Applicant's renewed application. I have also reminded myself of what was said in the original application to enable me to assess the merits of the application for Core Participant status as a whole, as well as my reasons for finally declining the application on 13 February 2023. Having done so, I remain of the view that the Applicant does not meet the criteria set out in Rule 5(2) for designation as a Core Participant in Module 3.

23. In my view, the renewed application in relation to Module 3 places too great an emphasis on the perceived effect of the Module 2 Rule 9 request. As I made clear in the original determination, it is not necessary for an individual or organisation to be a Core Participant in order to provide evidence to the Inquiry. Equally, the Inquiry is not limited to seeking evidence only from those designated or likely to be designated as Core Participants. It does not follow that simply because the Applicant has received a

potentially broad Rule 9 request that the criteria within Rule 5(2) is made out. It is entirely possible for an organisation to be in possession of evidence relevant to an issue or various issues being investigated by the Inquiry without that organisation itself forming the subject of the Inquiry's investigations. It is also possible for an organisation's role and/or actions to form part of the Inquiry's investigations but for that organisation not to have played a "significant and direct" role or have a "significant" interest in the matters being investigated. Further, while a request for evidence may appear detailed and broad to an organisation itself, this may not reach the threshold of significance within the context of the Inquiry, taking into account the scope of the Module as a whole and all the other organisations from whom evidence has or may be sought. As a matter of principle, I would therefore decline the Applicant's renewed application.

24. Even were the Module 2 Rule 9 request considered to have the effect which the Applicant contends, this would only extend to its involvement in Module 2. Each of the Inquiry's Modules will investigate different aspects of the Covid-19 pandemic within the Inquiry's Terms of Reference. The decision by Module 2 to seek evidence from the Applicant in relation to that Module (however broad that request is believed by the Applicant to be) does not indicate a change in the nature of the Applicant's role or interest in Module 3. There is nothing within the renewed application to support such a contention or to support the Applicant's belief that it can no longer be seen to be one step removed from the impact of the pandemic on patients, groups and services.

25. In my original determination, I stated that I did not consider that the Applicant had played a direct and significant role in the matters to which Module 3 relates or had a significant interest in Module 3. I remain of that view. I recognise the importance of the Applicant's role as the independent inspectorate and regulator of health and adult social care in England. However, I continue to consider that it is correctly characterised as being one step removed from the operation of healthcare systems and the impact of the pandemic on patients, groups and services. While the Applicant can be said to have a broad interest in health and adult social care and some of the matters being investigated in Module 3, including the issues relating to the discharge of patients from hospital, shielding and the clinically vulnerable, its interest is not significant within the context of the overall Module.

26. As I noted above, I intend to run the Inquiry as thoroughly and as efficiently as possible, bearing in mind the Inquiry's wide-ranging Terms of Reference. Given the vast numbers of people who were involved with or adversely affected by the Covid-19 pandemic, very many people and organisations in the UK could potentially have an interest in the Inquiry or in several of the Inquiry's Modules and not everyone can be granted Core Participant status. It is equally necessary to ensure that those who are designated as Core Participants are appropriately designated within the Module to which they have applied.
27. I take into account the fact that there are a number of ways in which the Applicant can participate in Module 3 without being a Core Participant, many of which have been recognised as adequate alternatives to Core Participant status in a number of other recent statutory inquiries. As I noted in my original determination, it is not necessary for an individual or organisation to be a Core Participant in order to provide evidence to the Inquiry. I am aware that the Applicant has recently received a request from the Inquiry for a witness statement in relation to Module 3. Through this process, the Applicant is able to provide to the Inquiry information relevant to the matters being examined in Module 3.
28. I also bear in mind that the fact that an applicant has been refused Core Participant status in one Module does not bar them from applying or being granted Core Participant status in a later Module or from providing relevant evidence to the Inquiry.
29. Having considered all of the information the Applicant provided in light of the Provisional Outline of Scope for Module 3, I remain of the view that the Applicant did not play a direct and significant role and does not have a significant interest in the matters for investigation in Module 3. I therefore confirm my decision that the Applicant should not be designated as a Core Participant in Module 3 and I confirm that this is my final decision.
30. My decision not to designate the Applicant as a Core Participant in Module 3 does not preclude the Applicant from making any further applications in respect of any later Modules. I will consider any future applications the Applicant may wish to make on their merits at the time they are made.

Rt Hon Baroness (Heather) Hallett DBE

Chair of the UK Covid-19 Inquiry

19 June 2023