



Counsel to the Inquiry's Note for the Third Preliminary Hearing in Module 2A of the UK Covid-19 Inquiry on Thursday 26 October 2023

Introduction

1. The first and second preliminary hearings in Module 2A took place on 1 November 2022 and 21 March 2023 respectively. The purpose of this note is to provide the background to, agenda for, and introduce matters to be addressed at, the third Module 2A preliminary hearing on Thursday 26 October 2023. This will be a hybrid hearing with Core Participants either appearing virtually or in person at Dorland House, 121-141 Westbourne Terrace, Paddington W2 6BU. Counsel to the Inquiry will address the Chair in person at Dorland House.
2. There are ten Core Participants in Module 2A, and all are legally represented. These Core Participants have been provided with regular updates on the progress of the Module since the last preliminary hearing. The third preliminary hearing is an opportunity to provide a public update on the Inquiry's work so far.
3. This note, and the third preliminary hearing, will address the following:
 - a. Update on Rule 9 requests - statements and exhibits
 - b. The gathering of documentary evidence from the Scottish Government
 - c. Documentary discovery and disclosure to Core Participants
 - d. List of Issues, plans for the hearings in January 2024 and provisional list of witnesses
 - e. Expert witnesses
 - f. Every Story Matters, Commemoration and Impact Film
 - g. Scottish Covid Inquiry update
 - h. Core Participant meetings
4. Should any Core Participant wish to file brief written submissions on any of the issues set out above, these must be received by the Inquiry by **4pm on Thursday 19 October 2023**.

Update on Rule 9 requests - statements and exhibits

5. The Module 2A Solicitor team circulated an update note to Core Participants on 9 October 2023. This provided an update on the status of the requests made under Rule 9 of the Inquiry Rules 2006 by the Module 2A team and on other Rule 9 requests issued by the Inquiry concerning matters which relate, in part, to the scope of Module 2A.

6. To this point, Module 2A has issued more than 140 Rule 9 requests for evidence, including: those issued jointly by Modules 2, 2A, 2B and/or 2C, 66 impact questionnaires, and 16 questionnaires sent to Scottish Government Covid-19 Advisory Group (“SGCAG”) participants. Requests have been made to numerous Scottish Government directorates, the Office of the Secretary of State for Scotland, other public bodies in Scotland including within the NHS in Scotland, organisations and bodies representing at-risk or vulnerable groups, members of the Scottish Government Covid-19 Advisory Group and other relevant organisations which played a role in or have a relevant perspective to share on the core decisions taken in the management of the Covid-19 pandemic in Scotland. Of these corporate requests 28 have been issued by the Module 2A team relating to matters falling within the ambit of Module 2A along with 66 impact questionnaires. These requests have sought both corporate statements from these organisations and also extensive documentation relating to the scope of Module 2A.
7. Additionally, Module 2A has sent detailed Rule 9 requests to a large number of individuals within these bodies; to date a total of 103 requests have been sent to individuals. These requests have been issued to the key Scottish Government decision makers at the time of the Covid-19 pandemic, including Nicola Sturgeon, John Swinney, Jeane Freeman, Humza Yousaf, Kate Forbes and other Cabinet Secretaries and ministers. These requests have also been issued to the key advisers to the Scottish Government at the time, including Catherine Calderwood, Gregor Smith, Jason Leitch and numerous members of the Scottish Government Covid-19 Advisory Group. There have also been separate individual Rule 9 requests issued to those UK Government ministers involved in intergovernmental working, such as Michael Gove and Alister Jack.
8. In particular and in connection with the Rule 9 requests issued to individuals, the Module 2A team have made clear to those in receipt of the requests that the Inquiry expects the matters raised in the request to be answered fully. The Inquiry is grateful to those bodies and individuals who have engaged fully with the requests issued and provided statements and supporting documentation in accordance with the requests. Efforts are being made to ensure that signed statements and their exhibits will be disclosed in plenty of time ahead of the oral hearings.
9. A significant proportion of the Rule 9 requests for documents and witness statements have been made to Scottish Government directorates and individuals who played prominent roles in the Scottish Government’s response to the pandemic. In most cases, the requests that have been made have required considerable work to be completed within demanding timescales. The Inquiry notes that the Scottish Government directorates, the individuals and their legal teams have worked hard to respond to these requests, and the Inquiry is grateful for their cooperation. That said, the Inquiry has concerns about aspects of this important part of the Module’s work. Given the relatively short period of time remaining before the substantive hearings in Module 2A commence, where the witness statements do not address all the matters raised in the Rule 9 request and/or there are delays in meeting the Rule 9 requests for documents and witness statements, these difficulties have the potential to disrupt the Inquiry’s process unless they are swiftly resolved. Considerable efforts have been made on the part of the Inquiry to reiterate what is expected of witnesses and Material Providers. It is appropriate that Core Participants are aware of these difficulties.
10. Module 2A has already commenced the process of having the Rule 9 responses from individuals signed in order that they can be disclosed to Core Participants without

further delay. Where the Rule 9 responses do not (contrary to the clear instruction given to all Rule 9 recipients) address all of the matters raised in the Rule 9 request, Module 2A may send a supplemental Rule 9 request to the organisations or individuals concerned. These will be processed, signed and disclosed without delay. In others cases, it may be necessary to explore the reasons why there are unanswered matters at the hearings.

The gathering of documentary evidence from the Scottish Government

11. The majority of the documentary material which has been recovered so far by Module 2A has come from the Scottish Government (or its various directorates) and individuals who worked within it as part of the Covid-19 response. These documents have been provided in response to the numerous corporate and individual Rule 9 requests which have been issued by, or are relevant to, the Module and are additional to exhibits provided to statements. The following highlights a number of important aspects of that documentary recovery exercise.

Potentially relevant messages from WhatsApp and other informal messaging platforms

12. The Inquiry is aware that any informal communications between key decision-makers and/or their advisers discussing information, advice and the management of the pandemic in Scotland sent during the relevant period can provide important information about, and context to, the decisions and issues which are to be addressed in Module 2A. Where the term “WhatsApp” is referred to below, this is used to encompass all other informal forms of messaging which may have been used to communicate in relation to the core decisions made by the Scottish Government in connection with its Covid-19 response, including (but not limited to) texts, Microsoft Teams and Signal messages. This wide definition has been adopted in requests for information and documents issued by the Module.
13. The numerous Rule 9 Requests which Module 2A has issued to directorates of the Scottish Government and individual witnesses include requests in connection with WhatsApps and other informal messages which fall into this category. These requests seek information about the use of WhatsApps in connection with Scottish Government decision making in the pandemic, policies surrounding their use, and details of groups and individual messaging. These requests have sought not only information but also access to potentially relevant messages. Corporate requests for such information and such messages were issued in late 2022, which were followed up by a further corporate Rule 9 request seeking more detailed information about the Scottish Government’s policies concerning the use of informal messaging. In addition, further such requests were made for this information and/or these messages to around 70 Scottish Government witnesses as part of the individual Rule 9 process.
14. Currently, the Scottish Government’s position as regards the use of and access to WhatsApps is incomplete and they continue to provide further information and evidence. Module 2A has received a draft corporate Rule 9 statement in relation to the general policy and use of such communications. A final version is awaited, and this will be disclosed to Core Participants imminently. Furthermore, a number of individual witnesses have provided some evidence as to their use of and retention (or otherwise) of WhatsApps. These statements will also be disclosed shortly. It is anticipated that the remaining statements to be received from individual witnesses will also include evidence in this regard.

15. At present, the Scottish Government has provided the Inquiry with no WhatsApp material and has very recently requested that disclosure of such material be required by the provision of a Notice served under section 21 of the Inquiries Act 2005 in order to address data protection concerns.
16. Given the potential significance of any such material, and in order to provide a clearer statement of the position, the Scottish Government has been asked to provide a full update on its position and that of all relevant Scottish Government witnesses as regards to their use of WhatsApps and their current availability for disclosure. It is anticipated that a table setting out this update will be disclosed to Core Participants in advance of the preliminary hearing. It is currently understood that although WhatsApps appear to have been used to send messages relating to and surrounding key decisions by some members of Scottish Government, the majority of the messages have not been retained by witnesses. Consequently, there is a lack of certainty about what potentially relevant content is still held, where it might be held and what can be recovered by the Inquiry. The Inquiry has sought further information about the circumstances in which such messages have not been retained.
17. For the avoidance of doubt, similar requests have been made of other witnesses who played a role in the Module 2A response. In response, Public Health Scotland (for example) has provided access to certain WhatsApp conversations as a part of its general disclosure to the Module.

Notebooks and Diaries

18. The Inquiry has made requests for notebooks and diaries from all Scottish Government witnesses. It is currently understood from the witnesses that the vast majority of them do not hold and may never have kept such materials.
19. The Scottish Government has provided the Inquiry with one e-copy notebook from Andrew Millar which was disclosed to Core Participants on 9 October. Hard copy notebooks from two further individuals were provided to the Scottish Government and these have been reviewed by the legal team for relevancy. Once the review process has been completed in relation to these notebooks, Module 2A will disclose any relevant material as soon as they can.
20. These are the only notebooks Module 2A has been provided. The Scottish Government continues to carry out checks and will be asked to confirm that no other notebooks or diaries are held either within the Scottish Government or by relevant individual witnesses. The Inquiry has also asked the Scottish Government to provide a clear update on the position of the various Scottish Government witnesses in this regard in advance of the preliminary hearing.

Legal Professional Privilege (“LPP”) waiver request

21. After prior discussions in this regard, on 3 August 2023, Module 2A formally requested that the Scottish Government waive privilege in the documents being provided to the Inquiry. Further to this, on 14 August 2023 the Inquiry wrote to the Scottish Government explaining that the Inquiry was constrained from fully carrying out its function as a result of not having access to material which had been redacted from documents by reason of LPP or pursuant to the Law Officers Convention.

22. Module 2A stated that for the Inquiry to understand, to the fullest extent possible, all of the considerations which were taken into account by Ministers and officials, it needs to see all advice provided to them of any description, including any legal advice they were given. If legal advice is redacted, the Inquiry can only see part of the story and may miss important material that might help to explain the decisions taken.
23. In light of the above and the significant practical advantages of doing so, the Inquiry requested that the Scottish Government waive LPP and Law Officers Convention privilege. If this is not provided, Module 2A requested that a schedule be completed by the Scottish Government in respect of each redacted document which justifies the claims to privilege that have been made.
24. This request has been discussed on a number of subsequent occasions, but no formal answer has been forthcoming to date. We are fast approaching a point by which any advantage from such a waiver will be redundant for Module 2A given the proximity of the hearing. The Inquiry awaits the Scottish Government's response in this regard.

Documentary discovery and disclosure to Core Participants

25. In summary, Module 2A has received 31,235 documents in total including:
 - a. 52 questionnaire responses from impact organisations;
 - b. 15 questionnaire responses from members of the SGCAG;
 - c. 76 draft Rule 9 statements (these include 71 draft individual statements);
 - d. 26 finalised Rule 9 corporate statements (whether disclosed or not); and
 - e. 3 finalised Rule 9 individual statements (whether disclosed or not).
26. The Inquiry has disclosed 5,929 documents in total to Module 2A Core Participants including:
 - a. 40 Rule 9 statements and supporting documents (these consist of 6 individual statements and 34 corporate statements which include Module 2 statements relevant to Module 2A);
 - b. 52 questionnaire responses from impact organisations including those jointly instructed with Modules 2, 2B or 2C; and
 - c. 15 questionnaire responses from members of the SGCAG.
27. Within the materials disclosed to CPs to date are: all substantive questionnaire responses received from impact organisations with supporting documents and footnoted materials, all questionnaire responses received from SGCAG participants with supporting documents and footnoted material, expert reports, and materials from Public Health Scotland, NHS National Services Scotland, National Police Chiefs' Council, the Children and Young People's Commissioner Scotland, the Scottish Trades Union Congress, Audit Scotland, Scottish Courts and Tribunal Service, Scottish Care, and the Scottish Government.
28. Module 2A will continue to make disclosure to Core Participants on a regular basis. In addition to general disclosure across a number of providers, Module 2A hopes to

disclose key statements and exhibits from Nicola Sturgeon, Humza Yousaf, John Swinney, Jeane Freeman, Kate Forbes and Leslie Evans before or shortly after the preliminary hearing.

29. The Inquiry has agreed extensions for witness statements where this was considered necessary and appropriate, across all categories of Rule 9 requests issued. However, we wish to raise particular concern as regards the Rule 9 response from Alister Jack, the Secretary of State for Scotland. The initial Rule 9 request to Mr Jack was issued on 7 July 2023 with a deadline of 18 August. Module 2A has engaged with the Office of the Secretary of State for Scotland's ("OSSS") legal representatives in relation to completing the Rule 9 response and an extension was agreed to 1 September 2023. However, this statement remains overdue.
30. Many of the deadlines set for the draft statements in the Inquiry's Rule 9 requests fall in October and November 2023. As far as it is possible to do so, further information about the outstanding statements will be provided at the preliminary hearing. However, save for exceptional circumstances and provided that witnesses comply with the deadlines set, Module 2A expects to have received all draft witness statements in sufficient time to enable disclosure of the vast majority of signed statements by December 2023.
31. Whilst 5,929 documents have been disclosed across 7 tranches of material, Module 2A has a significant volume of documents left to review, assess for relevance and work through before they can be released to Core Participants. The largest of these providers are the Scottish Government and Public Health Scotland.
32. Save for the materials which it knows to be outstanding, and anything which results from further requests for disclosure issued, Module 2A expects that it has now received the majority of the disclosure relevant to it. The legal team is working swiftly to review this material and we wish to put on record our thanks to those Material Providers who are assisting with this important process, and doing so at pace. There remains much to be done and materials will continue to be made available to Core Participants as quickly as possible.

Module 2 Cross-Modular disclosure

33. The Inquiry is aware that some evidence received by Module 2 and some oral evidence provided at the Module 2 public hearings is likely to be relevant to Module 2A.
34. In order to ensure that Core Participants have access to Module 2 material that is relevant to Module 2A, the Inquiry is conducting a cross-modular review to identify material relevant to Module 2A.
35. The Inquiry intends to disclose any material considered relevant to Module 2A to Core Participants, and indeed has already started to do so. This will include witness statements, exhibits and aspects of general disclosure that has been received by Module 2. However, the Inquiry will be limiting the disclosure of material to those

documents that are strictly relevant i.e. where a witness statement discusses issues relevant to Module 2A, it will be disclosed to Core Participants. It follows that not all of the exhibits to such witness statements will be disclosed in Module 2A; they will only be disclosed if those exhibits are also considered relevant to Module 2A.

List of Issues, plans for the hearings in January 2024, and provisional list of witnesses

List of Issues

36. A list of the proposed issues was circulated to Core Participants on 12 May 2023. Core Participants were asked to provide their comments on that list. We are grateful for the comments provided. Following consideration by the Module 2A team and the Chair, a revised List of Issues is provided to Core Participants accompanying this note.

Provisional witnesses

37. The Module 2A team has written to potential witnesses to give them notice of the dates of the public hearing, and to ask them to provide any dates to avoid. In many cases, this notification will be provided to the witness through their legal representative.

38. The Inquiry has not made any final decisions about which witnesses will ultimately be required to give evidence at the Module 2A public hearings. The list of witnesses to whom we have written is provisional only. The Inquiry is still awaiting receipt of further statements and no final decisions will be made until the Inquiry has received all of the witness statements and considered representations from Core Participants. It is possible that not all of those individuals who have been given advance notice will be called. It is also possible that some additional individuals may be notified of the Inquiry's intention to call them as witnesses.

39. The Module 2A team proposes to send out a provisional list of witnesses in November 2023 setting out the names of those who may be called to give oral evidence at the public hearing commencing on 16 January 2024. Core Participants will be invited to make observations at that time.

Hearing preparation

40. As previously announced, the hearings in Module 2A will take place in Edinburgh and commence on 16 January 2024. The venue will be the Edinburgh International Conference Centre.

41. Ahead of the hearings, Module 2A intends to share key documents which it has prepared with Core Participants relating to the key thematic areas and which are proposed as being uncontroversial background to the matters being covered in Module 2A. It is likely that this will include a chronology of key decisions and events. In addition, Core Participants will be invited to suggest potential lines of questioning for witnesses in connection with evidence proposals which will be sent to them in advance of the hearings.

42. Further information and updates in this regard will be set out by Counsel to the Inquiry at the preliminary hearing, and will continue to be provided in the Core Participant monthly update notes issued in due course.

Expert witnesses

43. As set out in the previous monthly update notes, Module 2A (in conjunction with Modules 2, 2B and 2C) has issued instructions to the following experts who have agreed to provide evidence to the Inquiry on matters relating to Scotland which will be covered by Module 2A as well:

- a. Professor Thomas Hale from the Blavatnik School of Government, University of Oxford, has reported on international data relating to the Covid-19 pandemic, in particular in analysing the effectiveness of the decision-making of the UK and each devolved administration to the Covid-19 pandemic in comparison to other countries. This report has been disclosed to Core Participants in final form and was presented at Module 2's public hearing on 11 October 2023.
- b. Professor Ailsa Henderson from the University of Edinburgh has reported on the political structures for devolution within the UK and mechanisms for inter-governmental decision-making between the UK Government and the devolved administrations during the Covid-19 pandemic. This report has been disclosed to Core Participants in final form and was presented at Module 2's public hearing on 9 October 2023.

44. An expert report relating to political decision making in the management of the pandemic in Scotland has also been commissioned by Module 2A from Professor Paul Cairney, Professor of Politics and Public Policy at the University of Stirling. The report is currently in draft form. A draft will be circulated to Core Participants for their comment in due course, following a similar process to the finalisation of other expert reports which have been commissioned by the Inquiry.

45. Expert reports of indirect relevance to the matters for consideration in Module 2A were also commissioned from Alex Thomas and Gavin Freeguard. Alex Thomas from the Institute for Government has been instructed to report on the decision-making structures of the UK Government in an emergency, in particular the Cabinet Office, Cabinet Committees and the Office of the Prime Minister. Gavin Freeguard, former Programme Director and Head of Data and Transparency at the Institute for Government, has been instructed to report on the access to and use of data by the UK Government during the Covid-19 pandemic. Reports from these two experts have been disclosed to Core Participants in final form. Gavin Freeguard's report was presented at the Module 2 public hearing on 10 October 2023 and Alex Thomas will present his report on 13 October 2023.

46. In her [Ruling](#) of 9 March 2023, the Chair directed that the Inquiry should obtain

evidence from an expert, or experts, on "*the nature and degree of pre-pandemic structural racism*" (paragraph 32). The Ruling also makes clear, at paragraphs 36-37, that expert evidence should be obtained regarding pre-existing structural discrimination on other grounds. The following experts have been instructed, including in relation to the matters within the Module 2A scope relating to Scotland. Evidence from these experts has been adduced and led in Module 2:

- a. Professor James Nazroo, Professor of Sociology at the University of Manchester and Deputy Director of the ESRC Centre of Dynamics of Ethnicity, and Professor Laia Becares, Professor of Social Science and Health at King's College London, are contributing expertise on pre-pandemic inequalities by race and ageing, including expertise on the role of structural racism. This report has been disclosed to Core Participants in final form and was presented at the Module 2 public hearing on 5 October 2023.
- b. Professor James Nazroo is also contributing expertise on later life. This report has been disclosed to Core Participants in final form. Both of Professor Nazroo's reports were presented at Module 2's public hearing on 5 October 2023.
- c. Professor Thomas Shakespeare, Professor of Disability Research at the London School of Hygiene and Tropical Medicine, and Professor Nicholas Watson, Associate Professor at the School of Health and Wellbeing at the University of Glasgow, are contributing expertise on pre-pandemic inequalities associated with disabilities. This report has been disclosed to Core Participants in final form and was presented at the Module 2 public hearing on 9 October 2023.
- d. Professor Laia Becares is providing expertise on pre-pandemic inequalities for members of the LGBTQ+ community. This report has been disclosed to Core Participants in final form and was presented at the Module 2 public hearing on 9 October 2023.
- e. Dr Clare Wenham, Associate Professor of Global Health Policy at the London School of Economics and Political Science, is providing expertise on pre-pandemic gender inequalities. This report has been disclosed to Core Participants in final form and was presented at the Module 2 public hearing on 6 October 2023.
- f. Professor David Taylor-Robinson, Professor of Public Health and Policy at the University of Liverpool, is providing expertise on pre-pandemic childhood inequalities. This report has been disclosed to Core Participants in final form and was presented at the Module 2 public hearing on 6 October 2023.

47. A further expert report has been disclosed to Core Participants prepared by Professor Chris Brightling (Professor of Respiratory Medicine at the University of Leicester and Chair of the NIHR Respiratory Translational Research Collaboration) and Dr Rachael Evans in relation to Long Covid. This will be presented at the Module 2 public hearing on 13 October 2023.

The Listening Exercise (“Every Story Matters”), Commemoration and Impact Films

48. On 28 July 2023, the Inquiry provided a further update on the ways in which an individual can share their experiences with the Inquiry.
49. Every Story Matters (“ESM”) was formally launched on 13 June 2023. The experiences and stories shared are helping the Inquiry to build a comprehensive picture of how the pandemic affected people’s lives across the UK. An updated webform was made available in late May, and to date, thousands of responses have been submitted. The public information campaign to make people aware of ESM has been running on radio, billboards, in the press and digital advertising. The Inquiry has been working with charities and other organisations to promote ESM to seldom heard voices. Campaign activity aimed at raising awareness of ESM will take place in Scotland from the beginning of January 2024 and will run until the end of the Module 2A hearings. A new contract has been awarded to M&C Saatchi to support the advertising of ESM, and a new research contract has been awarded to Ipsos to help the Inquiry deliver the next phase of ESM.
50. We have recently launched our programme of UK-wide ESM events, which will enable people across the UK to speak to Inquiry staff in person about their experiences of the pandemic. We will be holding events in Scotland in the New Year. A new contract will soon be announced to help the Inquiry deliver further community events.
51. An impact film will be shown on the first day of public hearings for Module 2A to set the tone for subsequent proceedings, grounding them in the lived experience of individuals living in Scotland who suffered, and continue to suffer, hardship and loss as a result of the pandemic. The video will be played publicly at the substantive hearings of the module in January 2024.

Scottish Covid Inquiry (“SCI”)

52. The SCI has seen some personnel changes in recent months in both the Secretariat and the legal teams. Introductory meetings have taken place to enable the relevant team members to get to know each other and to ensure that the inquiries continue to enjoy a positive working relationship. Regular meetings take place between both the Secretariat teams and the legal teams, during which various topics of mutual interest are discussed, in particular the efforts being made to minimise duplication and avoid clashes of hearings.
53. As part of the continued cooperation between the two inquiries, a joint Core Participants meeting took place in-person on 7 June 2023 in Edinburgh. Core

Participants from both inquiries were invited and the event was well-attended. At the meeting Core Participants were able to raise any questions they had in light of the Memorandum of Understanding and discuss the practical realities of the two inquiries running simultaneously.

54. The inquiries continue to communicate to avoid hearing clashes, and recently successfully agreed an approach to avoid a clash between this preliminary hearing and the Impact Hearings now being conducted by the SCI. It should be noted that, although the inquiries will endeavour to do so, it may not always be possible to avoid all clashes over the duration of two such significant inquiries.
55. Most recently, the inquiries have agreed an approach to help reduce the work required by common Material Providers in producing suggested redactions to both inquiries and to ensure, where appropriate, consistency of redactions. By the provision of a limited waiver of confidentiality, both inquiries will permit Material Providers to share copies of redacted documents provided to the other Inquiry (in addition to the clean copies required) so as to demonstrate the redactions sought. It is hoped that this will help reduce the work required by both the Material Providers and the Inquiry in processing redactions. Communications implementing this initiative will be sent shortly.

Meetings with Core Participants

56. Meetings have continued to take place between the Module 2A Core Participants and/or their representatives and members of the Module 2A solicitor team to supplement the information made available to them in the regular monthly updates issued by the Inquiry. In order to promote Core Participant engagement in the preparation for the Module 2A hearings, meetings have been offered to the Core Participants which have been or will be attended by Senior Counsel instructed for Module 2A. These meetings are designed to allow information to be disseminated about the plans for the Module 2A hearings and continue the process of Core Participant engagement in the Module.

12 October 2023

Counsel to the Inquiry

Jamie Dawson KC

Usman Tariq

Bethany Condron

Stephanie Painter

Heather Arlidge

Andrew McWhirter