



IN THE UK COVID-19 INQUIRY

MODULE 2A

CLOSING SUBMISSIONS ON BEHALF OF THE SCOTTISH COVID BEREAVED

1. In Module 2A, the Inquiry turned its gaze northwards, examining the political response to the pandemic in the period between January 2020 and April 2022. As the Scottish Covid Bereaved noted in our oral submissions, Counsel to the Inquiry set out in stark terms the devastating impact of the pandemic on the people of Scotland at this time, with the total number of Covid deaths reported in Scotland up to 1 March 2022 being 14,130. Many more, of course, are suffering from the effects of Long Covid.
2. While the evidence in Module 2 revealed a dysfunctional Downing Street machine, led by the wrong Prime Minister for the crisis, the Scottish Covid Bereaved, like many in Scotland, noted that the same behaviours were not evident in the Scottish Government's response. The evidence led in Module 2A has revealed to the Scottish Covid Bereaved that, while personalities and behaviours may have been different, the Scottish Government shared a great many of the UK Government's failings and added a number of their own failings into the mix. This resulted in a pandemic response which, despite the length and severity of the restrictions imposed, failed the people of Scotland, with the most vulnerable being particularly badly affected.
3. The Scottish Covid Bereaved are grateful to the Inquiry for sitting in Edinburgh for the course of the hearing. This brought the Inquiry closer to the people of Scotland, with many more members of the Scottish Covid Bereaved being able to attend the evidence sessions than has been the case when the Inquiry has been sitting in London. The Scottish Covid Bereaved were able to witness first-hand the politicians, civil servants, and advisors giving their evidence, which was of great benefit not only in relation to Module 2A but in providing a greater understanding of the work and nature of the Inquiry more generally. Members of the Scottish Covid Bereaved have written directly to the Inquiry expressing their gratitude for the manner in which they were treated.

Preliminary comments

4. Before turning to its substantive submissions, there are a number of preliminary comments which the Scottish Covid Bereaved wish to make. The first of these relates to the slowness of the disclosure process. It is noted that this was, to a large extent, caused by the shifting position of the Scottish Government in relation to what documentation it, and its past and present ministers, had in its possession. The issue of the Scottish Government's secrecy and failure to retain documentation will be addressed elsewhere in these submissions. The Scottish Covid Bereaved appreciate that the Inquiry will no doubt have been as frustrated as they were by some of the positions taken by the Scottish Government. The slow nature and indeed lateness of some of the disclosure materially impacted upon the Scottish Covid Bereaved's preparations for this Module. The Scottish Covid Bereaved were greatly assisted by the evidence proposals prepared by Counsel to the Inquiry and his team. We are grateful for the positive and engaging manner of the Inquiry's legal team, who were willing to consider issues raised even if they were outwith the relevant timescales. The patience, forbearance and assistance of Counsel to the Inquiry, and all his team, was welcome.
5. In Module 2, it became clear that contemporaneous notes, emails, and messages from civil servants, advisors, and politicians were critical in establishing how core political and administrative decisions were made and the reasons for those decisions being taken. The disclosure of WhatsApp, social media, and diary entries were crucial in building a picture of the state of preparation, or lack thereof, for the pandemic. They showed, in black and white, the attitudes and approaches of those in power and the conflicts that existed both within the UK Government and between the UK Government and the Devolved Administrations. The Scottish Covid Bereaved were shocked to find that, despite the promises made to them and the people of Scotland, the Scottish Government were routinely putting important evidence of their handling of the pandemic beyond the reaches of this Inquiry and Freedom of Information legislation.
6. The Scottish Covid Bereaved are concerned, however, by the time taken in Module 2A exploring issues around the deletion of WhatsApp messages and the failure to minute meetings. While these are, of course, of importance to the Inquiry's assessment to the core political decision making in Scotland during the pandemic's darkest days, the Scottish Covid Bereaved are concerned that a disproportionate amount of time was spent exploring issues around the deletion of WhatsApp messages. As we noted in our

oral submissions, while it was proper for the Inquiry to explore these issues, every minute spent by the Inquiry examining the deletion of messages was a minute that was not spent exploring substantive matters. The Scottish Covid Bereaved are concerned that the detail in which decision making was examined in Module 2 was not replicated in Module 2A. It is hoped that the Inquiry can further examine the Scottish Government's decision making in the forthcoming Modules.

7. This was not, however, the only way in which the Inquiry's work in relation to Module 2A was hampered. The Scottish Covid Bereaved find it difficult to accept that the most senior politicians in Scotland, making crucial decisions affecting the lives of everyone in the country, were able to attend numerous meetings, have sight of scientific and medical papers, and take the most difficult decisions, without taking personal notes to assist them in their decision making processes. The lack of minutes from Gold Group meetings, the lack of rigour around who was invited to those meetings and who was not does nothing to allay the Scottish Covid Bereaved's concerns.
8. It is submitted that these factors had a limiting effect on the information the Inquiry was able to glean during the course of Module 2A. These factors were, however, significantly compounded by the lack of evidence from the former Chief Medical Officer, Catherine Calderwood. Dr Calderwood was described by the former First Minister Nicola Sturgeon MSP as the main conduit of clinical advice to her¹. The absence of Dr Calderwood has left a very significant gap in the Inquiry's understanding of the decision making processes during the early days of the pandemic. Scottish Covid Bereaved respectfully request that every effort is made to have Dr Calderwood give evidence before the Inquiry. It is respectfully submitted that the Inquiry will not be able to properly consider the matters raised in Module 2A in the absence of Dr Calderwood's evidence.
9. The Scottish Covid Bereaved campaigned for a public inquiry into the pandemic not to play politics or to engage in constitutional debates. Rather, they sought answers about what happened in Scotland, why the decisions which impacted on the people in Scotland were made in the way in which they were, and why so many of their loved ones lost their lives. They seek the truth, for lessons to be learned for when the next pandemic strikes, and for proper accountability. These submissions do not seek to make political points but rather assist the Inquiry in making recommendations to ensure that when the next pandemic strikes the people of Scotland and the rest of the United

¹ Transcript 11/118/13-14

Kingdom will be better placed to face the challenges of that pandemic than they were in facing the challenges of the Covid-19 pandemic.

10. The Scottish Covid Bereaved note that, despite whatever personal, political, and constitutional differences there may have been, the Scottish and UK Governments were, with some exceptions, in lockstep during the deadly days of dither and delay leading up to the 'stay at home' order on 23 March 2020. In the early days of 2020 the Scottish Government's approach was too centralised and they were happy to follow in the slipstream of the UK Government. However much the Scottish Government may seek to differentiate itself from the UK Government, it seems to the Scottish Covid Bereaved that many of the same mistakes were made in Edinburgh as were made in London:

- A failure to learn the lessons from previous outbreaks;
- A failure to have a proper pandemic plan in place;
- A failure to have a proper testing regime in place;
- A failure to lock down on time;
- A failure to recognise the specific impact of the pandemic on the health and social care sector;
- A failure to protect the most vulnerable in care homes, hospitals, prisons and other settings.

11. Having considered the disclosed materials and the evidence led during Module 2A, the Scottish Covid Bereaved consider that a number of themes have arisen in relation to which the Chair may wish to make a number of recommendations. While there is understandably a degree of overlap between these areas, the Scottish Covid Bereaved hope that these submissions will assist the Chair in coming to her conclusions and making her recommendations.

The use and retention of informal messages

12. While the Scottish Covid Bereaved did not campaign for this Inquiry to discuss WhatsApp and the minutiae of Scottish Government guidance on retention of informal messages, those issues became, through no fault of the Inquiry, a dominant theme of Module 2A. The Scottish Covid Bereaved do not intend to rehearse here the shifting positions of the Scottish Government and politicians in relation to the documentation

they held. It will be for them to justify their positions. Rather, these submissions seek to outline the broad issues raised under this heading.

13. It is noted that WhatsApp² was used during the course of the pandemic by Scottish Government politicians, special advisers, advisers, and civil servants. While the messages which the Inquiry was able to recover were of a different nature to some of the toxic messages recovered in Module 2, there were a number of messages which caused the Scottish Covid Bereaved great concern. It is noted that Liz Lloyd, a special adviser to Nicola Sturgeon MSP, told Ms Sturgeon that she wanted a good old fashioned rammy so she could think about something other than sick people³. This message, in the context of a disagreement with the UK Government in relation to furlough, showed that Ms Lloyd enjoyed a luxury not available to the bereaved, who are left with only the thoughts and memories of their loved ones.
14. The Scottish Covid Bereaved note that Ms Sturgeon stated that she had since 2007 operated a policy that messages and business relating to government should not be kept on a phone that could be lost or stolen and insecure but that it should be properly recorded through the system⁴. A similar explanation was given by John Swinney MSP, who gave evidence that he had been advised that he had deleted material once he had made sure any relevant information was placed on the official record of the government and that the Scottish Government's record management policy was clear that information that is held in ungoverned sources should be placed on the official record⁵. The world has, of course, changed dramatically since 2007 and there have been a great many technological advancements. The Scottish Government of which Ms Sturgeon first became a minister came to power in May 2007. It is understood that the first iPhone did not launch in the United Kingdom until November 2007. Since then, smartphones have transformed our lives in a number of ways, not least with the availability of messaging services such as WhatsApp. Group chats have become, for better or worse, ubiquitous and the manner in which individuals communicate both personally and professionally has significantly changed.

² These submissions take the approach used by the Inquiry in using 'WhatsApp' as shorthand for informal electronic messaging.

³ INQ000287766/21

⁴ Transcript 11/21/11-18

⁵ Transcript 10/103/15-10/104/15

15. Ms Sturgeon of course used a personal phone for the conduct of government business while First Minister⁶. The reason given for this was that she did not want to have multiple devices and on a government phone she would not have been able to do constituency business, party business, or personal matters⁷. Ms Sturgeon gave evidence that it had never been suggested to her that this approach was inappropriate and that any phone, whether personal, parliamentary or governmental, is vulnerable to being left on a train or lost somehow⁸.
16. The Scottish Covid Bereaved firstly note that the precise advice given to Ms Sturgeon and Mr Swinney in 2007 has never been clarified. We look forward to seeing evidence of this guidance from the Scottish Government. Secondly, there appears to the Scottish Covid Bereaved to be a fundamental contradiction at the heart of the position advanced by Ms Sturgeon and Mr Swinney. If the mobile phones used by them were so vulnerable that they required data to be deleted from them, how could they be sufficiently secure devices on which to conduct parliamentary or governmental business in the first place? It is to be hoped that Scottish Government ministers encrypt their devices, something that is open to the user of any smartphone.
17. It was, of course, not only politicians who sought to delete WhatsApp messages from their devices. In the 'Covid Outbreak Group' group chat, which included Professor Gregor Smith, Professor Jason Leitch and Jim McMenamin, Kenneth Thomson, Director-General Constitution and External Affairs, messaged participants, telling them: "*Just to remind you (seriously), this is discoverable under FOI. Know where the "clear chat" button is...*"⁹. Mr Thomson further stated that "*plausible deniability*" were his middle names before imploring participants to clear the chat again¹⁰. In the 'Group B1617.2' group chat, Mr Thomson stated that "*I feel moved at this point to remind you that this channel is FOI-recoverable.* ". Mr Thomson's messaged prompted Professor Jason Leitch to state that WhatsApp deletion was a "*pre-bed ritual*."¹¹
18. From the evidence before the Inquiry, it is clear to the Scottish Covid Bereaved that politicians, civil servants, and special advisers were using WhatsApp to discuss and conduct government business. Even were it not for this Inquiry, and its Scottish counterpart, these messages ought to have been recoverable under the terms of the

⁶ Transcript 11/53/12-14

⁷ Transcript 11/53/25-11/54/5

⁸ Transcript 11/53/25-11/54/1-12

⁹ INQ000268017/10

¹⁰ INQ000268017/10

¹¹ INQ000268025/6

Freedom of Information (Scotland) Act 2002. The Scottish Covid Bereaved note that Ms Sturgeon gave evidence that she operated on the basis that she would ensure that anything in WhatsApp communications that covered salient points of substance they would be recorded in the corporate record¹². While Scottish Government employees were required to enter salient information into the corporate record, Ministers did not have the responsibility directly to write information onto the corporate record, that being the responsibility of civil servants¹³. Ministers were instead bound by the terms of the Ministerial Code¹⁴.

19. While it appears that the facts that certain decisions were made was properly entered into the Scottish Government's corporate record, the Scottish Covid Bereaved are concerned that the discussions surrounding the decision making process have been lost to auto-delete policies. These contemporaneous messages would have been the best evidence to explain why decisions were taken. This Inquiry must proceed without those messages. It is poorer for it.

20. The Scottish Covid Bereaved respectfully suggest that the Inquiry may wish to consider the following recommendations under this heading:

- (i) Ministers, special advisers and civil servants should be precluded from conducting Government business on personal mobile telephones;
- (ii) Where Government business is discussed on informal messaging systems such as WhatsApp, there should be a requirement that those messages are retained in the Scottish Government's record management system;
- (iii) Ministers should be required to proactively ensure that salient information is entered into the corporate record;
- (iv) The Scottish Information Commissioner should undertake an urgent review of the Scottish Government's Freedom of Information system, with a particular focus on the Scottish Government's corporate attitude towards Freedom of Information requests.

The initial response to Covid-19

21. In her evidence to the Inquiry, Nicola Sturgeon MSP described receiving the first briefing about Covid-19 around 17 January 2020 before convening the first meeting of

¹² Transcript 11/6/20-11/8/8

¹³ Transcript 4/56/2-8

¹⁴ Transcript 4/24/7-4/25/14

the Scottish Government's Resilience Committee towards the end of that month¹⁵. By the time of that first meeting of the Resilience Committee, however, efforts had already been made by Mark Woolhouse, Professor of Infectious Disease Epidemiology at the University of Edinburgh, to express his concerns about the new virus emerging in China.

22. The Scottish Covid Bereaved note that, according to Professor Gregor Smith, what was contained in Professor Woolhouse's emails was straight out of the health protection playbook¹⁶. Nonetheless, the playbook still required to be put into action¹⁷. Instead, Professor Woolhouse perceived there to be a lack of action and that Dr Calderwood was not listening to him. He resorted to contacting Dame Sally Davies, former Chief Medical Officer to the UK Government, so that Dame Sally could make contact with Dr Calderwood¹⁸. Professor Woolhouse hoped that Dame Sally's intervention¹⁹ would suggest to Dr Calderwood that it might perhaps be wise to revisit his advice and take action accordingly²⁰.

23. Professor Woolhouse and Dr Calderwood were, of course, eventually in contact. Professor Woolhouse prepared a briefing for Dr Calderwood dated 27 February 2020. In this briefing, Professor Woolhouse advised Dr Calderwood that components of the containment strategy such as contact tracing and mass quarantine would have to be abandoned in the event of a full pandemic. The main strategies to try and prevent a UK pandemic overwhelming the health system involved social distancing²¹. The Scottish Covid Bereaved note that even at that relatively early stage, Professor Woolhouse was clear that no social distancing measures should be introduced without a clear exit strategy, that is to say that there were pre-determined triggers for stopping both in the event that the policy is apparently successful and in the event that it appears to fail²². Professor Woolhouse gave evidence that up to the Scottish Government ultimately went into lockdown without the faintest idea of how long the country would be in it for²³.

¹⁵ Transcript 11/93/19-23

¹⁶ Transcript 5/112/12-14

¹⁷ Transcript 7/12/2

¹⁸ Transcript 7/30/19-25

¹⁹ INQ000103215/4

²⁰ Transcript 7/31/17-23

²¹ INQ000103216/1

²² INQ000103216/2

²³ Transcript 7/43/22-7/44/3

24. The Scottish Covid Bereaved contrast Professor Woolhouse's sense of urgency with the situation within the Scottish Government. On 26 February 2020 Derek Grieve, the Deputy Director of Health Protection within the Directorate of Population Health noted that, having attended a COBR(M) meeting, the UK Government was fully engaged and mobilised in a way that the Scottish Government simply wasn't²⁴. On 27 February 2020, Mr Grieve noted that at a Scottish Government Directors Meeting there was still no real engagement and those present at the meeting spent twenty minutes discussing internal Scottish Government communications²⁵. At another Directors Meeting on 5 March 2020, Mr Grieve noted that he laid it out thickly but few believed it was going to be serious²⁶. Mr Grieve's contemporaneous notes appear to be at odds with Professor Smith's evidence that Health and Social Care Directors were incredibly worried about the potential threat from the virus and were very focussed upon it²⁷.
25. The adequacy of the Scottish Government's initial response to the pandemic is further called in to question by the response to the Nike conference. The Scottish Government were aware of a link between the Nike conference of 25-27 February 2020 and a number of Covid-19 cases in Scotland. Dr Calderwood gave advice not to say anything as specifically naming the conference risked breaching patient confidentiality, as a delegate list would be available²⁸. The Scottish Covid Bereaved struggle to understand the rationale for this advice and it may be a matter which the Inquiry can address in due course with Dr Calderwood.
26. The Scottish Covid Bereaved can only wonder how many lives could have been saved if the Scottish Government had acted with more haste during the early days of the pandemic. Had Dr Calderwood heeded the warnings given by Professor Woolhouse, the public health playbook may have been put into action. The Scottish Covid Bereaved note that Professor David Crossman, Chief Scientist Health within the Health and Social Care Directorate of the Scottish Government became aware that by the middle of March 2020, other nations were developing strategies for testing for SARS-CoV-2 infection. His position was that there was no strategy for such testing in Scotland while there was one in England and Wales²⁹. Professor Smith gave evidence that Professor Crossman and his colleagues took what was a rather informal approach and

²⁴ INQ000346137/14

²⁵ INQ000346137/14

²⁶ INQ000346137/18

²⁷ Transcript 5/118/2-9

²⁸ INQ000225995/1

²⁹ INQ000273976/4

formalised it with a written strategy so that people could be very clear as to how testing was going to be developed and prioritised for different purposes³⁰. The Scottish Covid Bereaved have some difficulty in understanding how such a strategy could have existed yet not have been written down.

27. The Scottish Covid Bereaved consider that, had Professor Woolhouse's urgent advice been acted upon, the story of the pandemic in Scotland would have been very different. Earlier action may have avoided more severe measures further down the line. It may have saved lives.

28. The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations under this heading:

- (i) The Scottish Government should have its own contact tracing system in place, maintained and ready to deal with scaling up in the event of a pandemic.**
- (ii) The Scottish Government should have its own testing facility, maintained and ready to deal with scaling up in the event of a pandemic.**
- (iii) The Scottish Government should maintain a draft written strategy on testing which can be adapted to meet the needs of any particular outbreak.**

The Scottish Government's decision making process

29. The centrality of Nicola Sturgeon MSP to the Scottish Government's Covid-19 response was clear to all of us in Scotland. Her daily press briefings became a routine part of pandemic life in Scotland. In his expert report, Professor Paul Cairney noted that the communications strategies of the UK and Scottish Governments related to an alleged 'crisis in public communication, that prompted leaders of elected governments to personalise their power and engage in permanent campaigning to influence or control media messaging³¹. Professor Cairney noted that this form of campaigning combined with the temporarily high concentration of power in central governments to address Covid-19 to produce a more presidential style of policymaking and communication³².

³⁰ Transcript 5/135/9-17

³¹ INQ000274154/73

³² INQ000274154/73

30. Professor Cairney gave evidence that a presidential style of leadership was a feature of the Scottish Government's communications strategy, in particular with Ms Sturgeon fronting much of the communication operation³³. His report noted that the Scottish Government tells a romanticised story of its own processes, usually with reference to less impressive UK Government policymaking³⁴. Professor Cairney noted that the story which the Scottish Government tells was contradicted by stakeholders who felt that, while ministers and civil servants described that they consulted far and wide, and received routine and sufficient challenge to their policies, those stakeholders were more likely to describe needless centralisation and a culture that is not conducive to stress-testing policies during their design³⁵.
31. The Scottish Covid Bereaved consider that this presidential style of leadership and centralisation was found in the so-called 'Gold Group' meetings. This group, which would meet in advance of a Cabinet meeting on a Tuesday³⁶ was described by Ms Sturgeon as an opportunity for her and other ministers as appropriate to interrogate the data, to ask questions of advisers and, before they had even got to the point of shaping the proposals that would go to Cabinet for decision, to start to firm up the direction they thought they were going in. Ms Sturgeon was clear in her evidence that the Gold Group was not a decision-making or a formal governance body. The Gold Group would not reach a decision and, if it wanted to propose a decision, that would have to go through a proper Cabinet process³⁷.
32. The Scottish Covid Bereaved would, however, contrast Ms Sturgeon's evidence with the minutes of the Cabinet meeting held on 22 June 2021. Those minutes recorded that it was agreed by Cabinet that:

"For the purposes of COVID-19 decision-making during the summer recess, to delegate to the First Minister decisions that were broadly consistent with the Strategic Framework and timetable, noting that the First Minister would be supported as required by the Gold Group structure of key Ministers, including Mr Swinney, Mr Yousaf, Ms Forbes and any other Ministers with an interest..."

³³ Transcript 3/101/12-22

³⁴ INQ000274154/103

³⁵ INQ000274154/103

³⁶ Transcript 11/65/24-11/66/12

³⁷ Transcript 11/66/13-11/63/5

*In the event that the First Minister and Gold Group were to reach a decision that differed materially from the Strategic Framework, that Cabinet should be advised through correspondence and, if the First Minister requested it, at a meeting of the Cabinet (which she could convene at any time should circumstances require)."*³⁸

33. The Scottish Covid Bereaved note that these minutes appear to record that Ms Sturgeon and the Gold Group had a wide latitude in making decisions during the pandemic, as long as they were 'broadly consistent' with the Strategic Framework. It is further noted that the Gold Group did not appear to be widely known even amongst Cabinet members, with Ms Kate Forbes MSP, the Cabinet Secretary for Finance not attending Gold Group meetings and being unaware of its existence until later on in the pandemic³⁹. The closed nature of Scottish Government decision making during the pandemic is, it is submitted, evidenced by the contemporaneous WhatsApp messages from Professor Jason Leitch. Scottish Covid Bereaved note that on 24 June 2020, Professor Leitch messaged Ms Forbes MSP in relation to a media appearance, stating that *"It's actually not easy to get. It's not very well organised. Basically Liz L and FM decide."*⁴⁰ On 20 May 2021, Professor Leitch messaged Mr Humza Yousaf MSP, then then Cabinet Secretary for Health and Social Care, stating *"There was some FM 'keep it small' shenanigans as always. She actually wants none of us."*⁴¹.

34. The Inquiry is, of course, at a disadvantage in attempting to establish the precise nature of discussions and decisions taken at Gold Group meetings. The Scottish Covid Bereaved note that no minutes were taken of those meetings, nor indeed at the SGoRR group meetings. It is submitted that two major issues arise from the Scottish Government's wilful failure to minute these vital meetings. The first is of basic democratic accountability. The Scottish Covid Bereaved consider that deliberate attempts to keep crucial discussions secret flies in the face not only of Freedom of Information legislation but also the basic democratic norms of the Scottish Parliament and Scotland's devolved system of governance. The second issue relates to the future: the Scottish Covid Bereaved consider that it is impossible for a future government to learn lessons from the Gold Group structure in the absence of those minutes.

³⁸ INQ000214735/6-7

³⁹ Transcript 10/20/1-22

⁴⁰ INQ000334574/1

⁴¹ INQ000334792/3

35. The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations under this heading:

- (i) Civil servants should be required to take minutes of all meetings at which they are present;
- (ii) Where decision making has been devolved from the Cabinet to a sub-committee, the reasons for such a decision should be properly recorded;
- (iii) The terms of reference for any such sub-Committee should be properly recorded;
- (iv) The composition of any such sub-Committee should be clearly defined;
- (v) Cabinet should remain the primary decision making body.

Use of powers

36. The pandemic quite properly required a governmental response which was without precedent in peacetime. Restrictions on freedoms which would have been unthinkable mere weeks before were passed largely without controversy. The public quickly became used to draconian legislation being passed by the UK and Scottish Parliaments using emergency powers. The Scottish Covid Bereaved agree with Dr Pablo Grez Hidalgo, lecturer in public law at Strathclyde University, that the Covid-19 pandemic was a textbook example of the legitimate use of emergency powers, including the delegation of emergency law-making powers to the executive⁴². As Dr Grez pointed out, however, a framework of emergency powers must strike a balance between the need for an effective response to the emergency and the demands of constitutional principle, including the requirement to secure parliamentary scrutiny of the government response⁴³.

37. In his evidence, Dr Grez noted that the core of the Scottish Government's response to the pandemic, in terms of public health measures and international travel restrictions, was enacted through secondary legislation⁴⁴. The Scottish Covid Bereaved note that the Scottish Government made use of the 'made affirmative' procedure during the course of the pandemic, whereby Ministers were able to make legislation that entered

⁴² INQ000369759/3

⁴³ INQ000369759/3

⁴⁴ Transcript 7/133/25-7/134/20

force even before Parliament approved it, but where the legislation would lapse unless it was approved by Parliament within 28 sitting days⁴⁵. This was described as an extremely light touch procedure, where by the time Parliament would have a say on a set of regulations, the regulations would have been in force and followed for days, weeks and, in cases months, before Parliament was able to have a say on the regulations⁴⁶.

38. The Scottish Covid Bereaved note that, during the pandemic, the Scottish Ministers were able to introduce legislation which cut across fundamental rights without any input or oversight from Parliament. Parliament was in some cases prevented from debating the legislation as it became subject of rolling replacements. That led, in a case of which the Scottish Covid Bereaved are aware⁴⁷, to the Scottish Government acting incompatibly with a Convention right and therefore unlawfully as it was acting outwith its competence. While there is no suggestion that the Scottish Government acted in bad faith, the Scottish Covid Bereaved submit that it highlights how the made affirmative procedure could be abused in the future. It is submitted that the procedure is one which should only be used sparingly, and with caution.
39. The Scottish Covid Bereaved are also aware of the need for any legislation passed by the Scottish Government which imposed criminal sanctions to be compliant with Article 7 of the European Convention on Human Rights. It is fundamental that any laws passed are sufficiently clear to allow those subject to them to understand them.
40. There is one other aspect of the Scottish Government's use of powers which the Scottish Covid Bereaved wish to comment upon. This relates to the pre-existing powers under the Public Health etc. (Scotland) Act 2008. The Scottish Covid Bereaved note that section 94 of that Act gives the Scottish Ministers to make regulations imposing border controls where such controls were being imposed for the control of public health rather than matters such as immigration and nationality⁴⁸. It is submitted that it would have been open to the Scottish Government to take steps to control entry into the country in order to protect public health. While the Scottish Government have often been accused of taking different decisions from the UK Government simply for the sake of being different, the Scottish Covid Bereaved note that, at least in relation to border controls, they were in lock step. If the Scottish Government truly wished to

⁴⁵ Transcript 7/135/20-7/136/10

⁴⁶ Transcript 7/137/15-7/138/24

⁴⁷ *Philip v Scottish Ministers* [2021] CSOH 32

⁴⁸ Transcript 4/128/23-4/130/20

make a totemic decision which would have benefited the health of the people of Scotland, they should have used their powers to at least delay the import of Covid-19 into Scotland.

41. The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations under this heading:

- (i) A review should be carried out in relation to the Scottish Parliament, and Scottish Ministers', powers to pass secondary legislation;**
- (ii) A review should be carried out in relation to the 'made affirmative' procedure;**
- (iii) The 'made affirmative' procedure should be used only sparingly and with caution. It should not be capable of being 'rolled over' to avoid Parliamentary oversight;**
- (iv) All secondary legislation should be sufficiently clear to allow the public and police to understand the law, as opposed to what is simply guidance;**
- (v) The Scottish Government should be prepared to use its powers under the Public Health (Scotland) Act 2008 to impose border controls to protect public health. Discussions should be carried out with the relevant authorities to ensure these can be properly enforced.**

Fiscal issues

42. The Scottish Covid Bereaved appreciate that the question of the levels of funding for the Scottish Government is a political one which is outwith the scope of the Inquiry's Terms of Reference. The level of block grant, the Scottish Government's own tax and borrowing powers, and the Barnett formula are issues which cannot be resolved by this Inquiry. The Scottish Covid Bereave submit, however, that consideration ought to be given to how the Scottish Government can properly finance public health decisions which fall within its devolved competence.

43. Ms Forbes gave evidence of the funding pressures faced by the Scottish Government during the pandemic, stating that the Barnett formula was the only mechanism considered by the UK Government for allocating funding to Scotland. While there were discussions about looking at alternative means of allocating such funding, there was

no effort to develop those alternatives⁴⁹. Ms Forbes gave evidence of the benefit of the Barnett guarantee, agreed in the summer of 2020, where the Scottish Government were given certainty that they would not have to give money back to the UK Government in the event of negative consequential⁵⁰.

44. The Scottish Covid Bereaved are aware of the disagreements between the UK and Scottish Governments in relation to the continuation or otherwise of lockdowns, and the continuation or otherwise of furlough schemes. We do not intend to rehearse that evidence here. It does appear to the Scottish Covid Bereaved, however, to make sense that, should the Scottish Government have the powers to impose a lockdown for public health reasons, it should have the power to provide financial compensation to the people subject to those lockdowns. That would allow for financial losses to be mitigated and would help ensure compliance with the public health measures.

45. The fiscal issues relative to the Scottish Government are not solely confined to their interactions with the UK Government. The Scottish Covid Bereaved note that in his report, Professor Cairney stated that it was difficult to know how the UK and devolved governments allocated funding in relation to Covid-19⁵¹. He states that further investigation is essential as there is a considerable lack of clarity regarding how much money was spent in the name of Covid-19, where it was spent, and who benefited from the spending⁵². Professor Cairney gave evidence to the Inquiry that Audit Scotland were very dissatisfied with the lack of clarity on how the money was spent⁵³.

46. **The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations under this heading:**

- (i) A review group to be set up with representation from both the Scottish and UK Governments to consider an alternative fiscal structure which can be used in a future pandemic which would provide sufficient fiscal flexibility for the Scottish Government to discharge its devolved duties on health and to consider, inter alia, whether the Scottish Government should have borrowing powers to allow it to fund public health measures;**

⁴⁹ Transcript 10/30/17-25

⁵⁰ Transcript 10/32/8-10/33/2

⁵¹ INQ000274154/92

⁵² INQ000274154/101

⁵³ Transcript 3/89/13-18

- (ii) **A requirement be made of the UK and Scottish Government to keep records to specifically allow for auditing to ensure money spent can be subject to scrutiny.**
- (iii) **The Scottish Government be required to carry out an assessment as to what investment needs to take place in building pandemic ready structures, to avoid using existing structures not fit for purpose as per the evidence of Kate Forbes.**

The vulnerable and care home residents

47. From the evidence led in Module 2A, it appears to the Scottish Covid Bereaved that it took some time for the most vulnerable amongst us, such as those suffering from a disability or in care homes, to be placed front and centre of the decision making process. The Scottish Covid Bereaved were struck by the powerful evidence of Dr Jim Elder-Woodward OBE, who spoke of the impact the pandemic had upon those suffering from disabilities.
48. Issues surrounding care home residents, and in particular the discharge of Covid positive patients from hospital settings are of the utmost importance to the Scottish Covid Bereaved. We are aware that these matters will be considered in more detail in a future Module but the Scottish Covid Bereaved wish to make certain submissions at this stage.
49. As Counsel to the Inquiry set out in his questioning of Dr Donald Macaskill from Scottish Care, the Inquiry is aware that in the early part of the pandemic a large number of patients were transferred from hospital to care homes without being tested for Covid-19. It was not until 21 April 2020 that it became mandatory for hospital patients to have two negative Covid-19 tests before being discharged and for all new care home admissions to be isolated for a period of 14 days. Data shows that between 1 March and 21 April 2020, 82% of the 3595 patients discharged from hospital to care homes were not tested, and 752 care homes took in untested patients between 1 March and 21 April 2020⁵⁴.

⁵⁴ Transcript 3/110/8-24

50. Nicola Sturgeon MSP was aware of the possibility of asymptomatic transmission of Covid-19 by 25 January 2020, when she received a briefing from Public Health Scotland⁵⁵. Jeanne Freeman gave evidence that the concern about care homes and those in care started within the Scottish Government in and around February 2020⁵⁶. No guidance, however, was given to the care sector until 13 March 2020. Half of the deaths in Scotland in the first wave of the pandemic occurred in care homes⁵⁷.
51. The Scottish Covid Bereaved will make further submissions in relation to the Scottish Government's decisions in relation to care homes in due course. Module 2A has highlighted issues surrounding not only the discharge of patients into care home settings but also issues relating to visiting vulnerable patients and the provision of PPE to staff members. It is hoped that these matters can be explored in further detail in due course.
52. **The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations under this heading:**
- (i) **The appointment of a Minister for Disabilities with a cross-government remit to ensure the rights of disabled people are put at the front of decision making processes;**
 - (ii) **The appointment of a Minister for Adults in Care, with a cross-government remit to ensure the rights of Adults in Care are properly considered in the decision making process;**
 - (iii) **The care sector be properly funded by central government.**

Data

53. The Scottish Covid Bereaved note that the pandemic galvanised the ingathering and dissemination of data in a manner which assisted the pandemic decision making process in Scotland. Unfortunately, the Inquiry learned that the data systems were not originally ready to integrate with the data systems in the other nations of the UK.
54. **The Scottish Covid Bereaved respectfully submit that the Inquiry may wish to consider the following recommendations :**

⁵⁵ INQ000292534

⁵⁶ Transcript 9/190/16-23

⁵⁷ Transcript 9/191/22-9/192/5

- (i) **A cross UK Health Data Group with experts from all 4 countries working to ensure that health data is harmonised across the UK.**

Conclusions

55. The evidence led in Module 2A has shown that in the early stages of the pandemic, the Scottish Government were in lock step with the UK Government. If anything, the evidence of Professor Woolhouse, and the contemporaneous notes of Derek Grieve, show that the Scottish Government was less prepared than the UK Government, and failed to treat the impending pandemic with the level of seriousness it deserved. While there were some differences between the administrations during this stage, such as in relation to mass gatherings, those were ultimately of no great substance.
56. The Scottish Covid Bereaved feel let down by the Scottish Government's desire for secrecy, where WhatsApp was set to auto-delete and important meetings went without being minuted. Not only have those actions robbed the Scottish Covid Bereaved of the answers they so desperately seek, they may prevent important lessons from being learned in the future.
57. There are a number of matters which, due to the constraints on the length of submissions, the Scottish Covid Bereaved have not covered in the course of these submissions. It may be that the Inquiry will consider whether Professors Smith and Leitch, and Dr Calderwood, had sufficient expertise to properly advise Ministers in relation to the pandemic. The Chair may wish to consider the nature of the messages between Professor Leitch and Mr Yousaf. Not only did Professor Leitch offer Mr Yousaf a 'how to' guide to avoid restrictions on mask wearing, there were a number of comments that were unbecoming of the National Clinical Director. Professor Leitch's relationship with Mr Yousaf perhaps is symptomatic of a deeper issue in the Scottish Government's civil service, where civil servants are too close to Ministers and bring themselves into the political sphere, such as considering whether Scottish Government policies will have an impact on Scottish independence and the prospective entry to the EU.

58. While the Covid Bereaved have not been able to address every issue which they would have wished, they have every faith in the ongoing work of the Inquiry and look forward to receiving the Chair's report in due course.

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