

UK Covid-19 Inquiry Before Baroness Heather Hallett

Module 2 Hearings: October – December 2023

OPENING STATEMENT

On behalf of

THE SCOTTISH GOVERNMENT

Introduction

1. The Scottish Government wish to acknowledge the scale of the loss and suffering of those in Scotland and the rest of the United Kingdom during the pandemic and recognise the central importance of the bereaved and all those affected by the pandemic to the Inquiry process. In this context, the Scottish Government wish to emphasise their full commitment to and cooperation with the Inquiry to ensure that the Scottish Government response to the pandemic is properly scrutinised. The Scottish Government wish to assist the Chair in identifying recommendations to support appropriate and effective decision-making in the event of a future pandemic and to answer questions for all those who suffered loss and hardship during the pandemic. The Scottish Government wish to participate fully in Module 2, to listen to the evidence and to learn lessons for the future.
2. The Scottish Government wish to address the Chair on five key themes in Module 2 which are devolution, intergovernmental relations, data, public health communications and inequalities.

Devolution

3. The Scottish Government's decisions and actions in relation to its devolved responsibilities will be examined in Module 2A. However, devolution forms the context for the strategies, decision-making and relationships of governments in the UK during the pandemic and is therefore relevant to Module 2.

4. Devolution does not necessarily imply difference, nor does reserved or centralised decision-making necessarily imply uniformity. Each of the four UK administrations takes decisions having regard to the facts and circumstances within its areas of responsibility. Each has the option to align or combine with others, or to pursue different policies if it considers those best meet the needs of the people they serve. Each starts from a distinct position, in terms of its responsibilities and the characteristics of the areas, populations, legislation, institutions and services within its jurisdiction.
5. The Scottish Government's strategic objective in responding to the pandemic was to contain and suppress the virus to minimise the overall harm it could do taking into consideration the available scientific, clinical and public health advice. The Scottish Government's engagement with the UK Government (UKG) was undertaken with that objective. The Scottish Government considered the views and intentions of the other administrations, as discussed in the various intergovernmental fora.
6. The Scottish Government recognised the harms caused by the impact of the pandemic and the government response. The Scottish Government published a "Framework for Decision Making" in April 2020. A key part of that was consideration of four interrelated harms which were direct Covid-19 health harm, other health harm caused by the pandemic, societal harm and economic harm. The four harms approach was central to the Scottish Government's decision-making. With increasing vaccination, the Scottish Government's approach adapted to reflect the evolving nature of the pandemic.
7. Devolved control of the public health response was crucial to the effective handling of the pandemic in Scotland. The Scottish Government respectfully submits that the Chair should exercise caution in considering the merits of devolution as a political concept which is a constitutional settlement reflecting the will of the Scottish people in the referendum of 1997 and enshrined in the Scotland Act 1998 and affirmed and further developed through, for example, the Scotland Acts of 2012 and 2016. The Scottish Government submits that the issue of the operation of devolution is relevant, indeed

central, to the pandemic and response, but the merits of devolution are an issue that is collateral to the pandemic.

8. Devolution allows the people of Scotland to choose political representatives and leadership that reflect their views and priorities. The Scottish Ministers are accountable to the Scottish Parliament rather than to the UK Ministers or the UK Parliament. This is the established constitutional position. Many of the areas in which core decisions were being taken by the UKG during the pandemic were areas in which the Scottish Government has devolved powers such as health and social care. There is a close connection in Scotland between the devolved powers and administrative benefits to a cohesive and efficient system. The close connection ensures clear lines of democratic accountability and scrutiny that are essential to good government. That is achieved through the accountability of Scottish Government, for the efficient working of the constituent parts of the system, to the Scottish Parliament. To give proper effect to its devolved powers, it is important that the Scottish Government can tailor its approach and the decisions that it makes to its specific geographic, demographic and administrative circumstances. Devolution is an important mechanism that facilitates subsidiarity where decisions are taken at the lowest possible level, to better reflect variations in need, priorities and preferences.
9. It was for the devolved governments, rather than for the UK Government, to take decisions about devolved matters, including Non-Pharmaceutical Interventions (NPIs), such as lockdown, and to be accountable to their respective legislatures and electorates. That of course did not preclude the governments from taking forward common approaches where they agreed that was appropriate. Use of public health powers was the correct approach, given the close connection between the pandemic and devolved responsibilities for health, justice, local government and so on, and the necessity for geographical variation if NPIs are to be proportionate. Given the Scottish Government and Parliament are responsible for public health, the NHS, policing, the justice system, local government, economic development and most public services in Scotland it was essential to an effective response to the pandemic that the Scottish Government was responsible for that using public health powers. Given the widely varying geographical and epidemiological circumstances across

Scotland, and conscious of the need to balance the impact on social and economic activity of measures necessary to suppress virus transmission, the Scottish Government - like its counterparts in Wales and in England - took the approach of tailoring restrictions to local circumstances.

10. It should therefore be expected that devolved decision-making in Scotland, by a distinct government in relation to distinct services and institutions, for a distinct demographic and over a distinct geographic area, would result in decisions different from those taken by the UKG; and that there would be differences within Scotland as well as between Scotland and other UK administrations.
11. The Scottish Government therefore submits that it is not useful to attempt to trace the point at which the approaches of the UKG and devolved administrations 'diverged'. Their approaches had different starting points in terms of powers and responsibilities, geography, demography and institutions, including specifically in relation to health and healthcare systems, and can be better understood in terms of degrees of alignment and difference, and the reasons for those.
12. The Scottish Government took decisions at all times based on its best assessment, combining evidence and judgement of what were the most appropriate actions to minimise the harm of the pandemic to the Scottish population. In areas not devolved to the Scottish Government (such as in relation to the job retention scheme), decisions taken by the UKG had a direct impact on the people of Scotland and had a direct bearing on the options and choices available to the Scottish Government.
13. Naturally, the Scottish Government recognises that devolution must be accompanied by effective arrangements for cooperation between the four nations of the UK. The Scottish Government took part in intergovernmental meetings with the UKG throughout the period covered by the Inquiry to understand and where appropriate influence relevant UKG decision-making, to share relevant information about the pandemic in Scotland and the Scottish Government's decisions and actions in response. It also required to consider

the impact of UKG decision-making on the people of Scotland and required actions following UKG decisions.

14. Inter-governmental relations took place in a range of different settings including meetings at official and ministerial level. Two of many examples of generally good cooperation between the Scottish and UK Governments are on the procurement and deployment of vaccines and the sharing of epidemiological data and research.
15. The Scottish Government's objective in engagement with the UKG and the other devolved governments was not uniformity of approach which would not have been appropriate or proportionate, but rather co-operation on matters of mutual interest, such as testing, and on seeking an approach by the UK Government on reserved matters, such as funding of furlough, where there was an interface with devolved decisions such as restrictions on economic activity.
16. The Scottish Government had no control over the UKG policies on matters such as the job retention scheme. UKG measures to support businesses had a material impact on devolved decisions in Scotland affecting employers and employees. These decisions were taken by the UKG in isolation and little prior notice was given to the devolved governments of them. Similarly the Scottish Government was not able to prevent financial assistance under the furlough scheme from being withdrawn.
17. Cooperation ought not to be confused with co-ordination or uniformity. The Scottish Government considers that there was a significant amount of effective co-operation and communication between itself and the UKG. There was wide-ranging coordination on certain areas between the UKG and the devolved administrations. The Scottish Government recognises that the intergovernmental liaison generally worked well but is committed to building stronger intergovernmental relations and improving on existing strengths.

18. Overall the Scottish Government considers that there were benefits of devolution in the context of the pandemic response due to subsidiarity with decisions taken at the lowest possible level, reflecting regional variations and promoting trust and compliance with restrictions by the local population.

Intergovernmental relations

19. Where devolution allows all four UK administrations to take decisions having regard to the facts and circumstances within their areas of responsibility, effective intergovernmental relations allow each to align or combine with others to the extent each considers necessary to meet the needs of the people it serves. Devolution requires effective intergovernmental relations, both routinely and in exceptional circumstances such as those created by a pandemic.
20. Some expert commentary on intergovernmental relations produced for the Inquiry focuses on the arrangements first set out at the time of devolution for various formats of a Joint Ministerial Committee (JMC), replaced towards the end of the pandemic by a Council involving the Prime Minister and the heads of the devolved governments, Inter-ministerial Standing Committee and portfolio liaison arrangements.
21. In practice much more of the intergovernmental relationship is conducted through extensive day-to-day contact between policy teams and portfolio Ministers. This was the case in relation to the pandemic. By way of comparison, though the Joint Ministerial Committee on EU Negotiations continued to meet during the pandemic, there was no 'heads of government' meeting of the JMC in that time; nor would one have been necessary or useful, given the availability of COBR and other channels specifically designed to support intergovernmental working on Covid-19.
22. Generally, it is the view of the Scottish Government that these arrangements worked effectively to share information, inform decision-making, and identify and address issues. COBR is a well-tested emergency mechanism enabling effective intergovernmental relations when necessary, as for example happened following the terrorist attack on

Glasgow Airport in 2007. A range of Covid-specific groups evolved to meet the needs of intergovernmental relations in the pandemic period. As in more normal times, much the greater proportion of intergovernmental working was conducted through direct contact between governments, at both ministerial and official level.

23. As the pandemic developed, the four nations took different decisions particularly in relation to NPIs that differed in timing and nature. This reflected various factors including varying epidemiological conditions as well as different demographic, institutional and geographic factors. For example, the Scottish population has more comorbidities than the UK population generally and a lower life expectancy which may have led Scottish politicians to follow a more precautionary approach.
24. An effective response requires the ability to tailor approaches - especially NPIs - to geographical circumstances. It would be incorrect to consider that the approach followed by the UKG for England was the orthodox approach from which other UK nations “diverged”. Across the UK there is a wide range of geographical and social circumstances, from remote islands to densely populated cities, and during the pandemic there were widely varying patterns of virus prevalence. Patterns of employment and travel also vary, and the Scottish school calendar is different from that south of the border. Some of the NPIs necessitated by the pandemic involved significant restrictions on individuals, businesses and organisations. Ministers were under a duty not to impose them unnecessarily. NPIs also depend for their effectiveness on public acceptance to promote compliance. It was therefore appropriate for governments to be able to tailor their approaches to the circumstances in each country. A uniform approach would not have been able to take account of such variations.
25. The Scottish Government took the approach of tailoring measures to geographical and epidemiological circumstances within different parts of Scotland. Scotland’s population and geography are distinctive within the UK with Scotland being less densely populated, including more island and remote rural communities. The Scottish levels system was designed to limit transmission of the virus while avoiding unnecessary restrictions on

social and economic activity in areas of relatively low virus prevalence. Variations to restrictions based on geography were also imposed in England and Wales. The Scottish Government considered different Scottish circumstances and its own responsibilities to the Scottish population.

26. Some differences were strategic. A degree of judgement was required in decision making where competing harms were at issue. These were difficult decisions based on careful analysis of the issues. Where a distinctive approach in Scotland appeared necessary, justified, and proportionate in all the circumstances, that approach was taken even if it differed from that of the UKG for England. The Scottish Government invites the Chair to recognise that where circumstances were justified a geographically tailored approach was appropriate. Devolved control and geographical variation were essential for successful management of the pandemic.

27. The arrangements for intergovernmental liaison evolved during the pandemic from an initial focus on emergency mechanisms such as COBR to a range of Covid-specific groups and meetings reflecting the main strands of activity to respond to the pandemic were well-established with arrangements for intergovernmental liaison. There was also a wide range of informal engagement. That is not to say that communication could not have been better at times. However, throughout the pandemic, there were mechanisms for regular and frequent communication across the pandemic response and development of strong working relationships. Generally the mechanisms worked well for enabling communication across a vast swathe of activity.

28. It has been suggested by some – see for example the witness statement of Boris Johnson - that the Civil Contingencies Act 2004 should have been used rather than public health legislation to bind the UK together due to the risk of divergence. The implication is that in a future pandemic the UK Government should lead and co-ordinate the response using its emergency powers under the 2004 Act. The Scottish Government submits that this should remain as devolved decision-making, rather than using emergency legislation, that the 2004 Act was not an appropriate vehicle for the government response to the pandemic and would not be if a similar pandemic occurred in the future. The 2004 Act can only be

used legitimately in circumstances where the UK Parliament is unable to sit, circumstances which are unlikely to arise in the event of a pandemic. Emergency powers are inappropriate over a prolonged period and the available alternative of public health powers reflects the fact that emergency powers are not required and that health is a devolved matter.

29. There is a Concordat in place between the Scottish Government and UKG to regulate the use of powers under the 2004 Act. The Concordat is non-legally binding but, importantly, it establishes a framework for cooperation and is designed to work within the existing framework for inter-governmental relations. It makes clear that emergency regulations under the Act should reflect normal legislative and administrative responsibilities within Scotland and be compatible with devolution. It foresees the Scottish and UK Governments ultimately replacing any emergency regulations with primary legislation in the Scottish Parliament. It is the position of the Scottish Government that divergence is legitimate to reflect different circumstances within the four nations. Other countries had different restrictions in different states and there is no evidence that a uniform approach across the UK would have been better.
30. The Scottish Government refutes any suggestion that its decisions were at times politically motivated or different for the sake of being different. Justification of divergence was set out contemporaneously and the Scottish Government's shared intention with the UKG was to save lives and minimise the harm from the pandemic.

Data use and sharing

31. The Scottish Government recognises the importance of efficient communication between the UK Government and the other devolved governments about data collection, documentation, and analysis. The Scottish Government took all steps it reasonably could to do this. It worked collaboratively with the other governments of the United Kingdom. The core structures at UKG level were COBR, SAGE and its sub-committees. The Scottish Government participated constructively in these to the extent that it was invited to do so. It also participated in various four nations meetings and liaised extensively with four

nations counterparts such as the Chief Medical Officers. This is consistent with long-standing arrangements for inter-governmental liaison and joint working, although at an unprecedented level of intensity and scale. Generally speaking these arrangements worked well.

32. The Scottish Government was able to access and share scientific evidence and advice that was available to the UK Government through participation of Scottish Government scientific and clinical advisers in meetings of the Scientific Advisory Group for Emergencies (SAGE) and the New and Emerging Respiratory Virus Threats Advisory Group (NERVTAG) and their subgroups, sharing materials. Information was also shared in the context of a wide range of formal and informal engagement between the UK Government and the devolved governments at both official and ministerial level including on liaison on mass testing programmes, vaccines, the 'Test and Protect' system and international travel controls.

33. Overall, the Scottish Government was impressed by quality of the advisers and advice that emerged from the four nations processes but there was often an English focus and a lack of opportunity for the Scottish Government to ask questions directly meaning that its applicability in Scotland was less direct. This prompted the establishment of a new advisory group, the C-19 Advisory Group in Scotland.

Public Health Communications

34. Communicating information about the government response and the actions of the population was a critical lever to keep people safe, protect Scotland's health service and save lives. Therefore a priority for the Scottish Government from the outset of the pandemic was to ensure the most effective public communication possible. Essential to this approach was messaging that reached all audiences in Scotland, as many times as possible in the most cost-effective way, with accessible information that could be easily understood, and would motivate and prompt the adoption of protective behaviours.

35. At the start of the pandemic the approach of UKG assets being rebranded with websites and information relevant to audiences in Scotland, e.g. NHSInform, was the preferred historical approach. Unfortunately the UKG did not do so in the early stages of the pandemic and was not always able to provide advance notice of their campaigns and key messages. Generally communication and information sharing between the UK and Scottish governments about the public communications enabled both governments to plan, to fill any information gaps and to reduce the risk of conflicting messaging.
36. From the end of July 2020, the Scottish Government undertook research to measure public attitudes and behaviours to inform public communications. Trust in the two governments was also measured. Trust in the Scottish Government was consistently higher than trust in the UKG throughout the pandemic. This is possibly a reflection on the effect of devolution and its relevance to communication. Given the relatively higher degree of trust in the Scottish Government, it was also important that, in addition to people in Scotland being directed to the correct information sites, they were also provided with Scottish Government communications to ensure appropriate levels of engagement for example using Scotland's own Chief Medical Officer.
37. As the public health advice and response to the pandemic between England and Scotland started to differ, advertising activity had to differ to ensure that Scotland's population had the correct and most up-to-date information. Reluctance on the part of the UKG to explain that the decisions it was taking in relation to public health applied only to England led to some confusion. The Scottish Government submits that UKG public health communications could have been clearer as to their territorial scope. The Scottish Government made considerable communication efforts to address this. The later stages of the pandemic saw the UKG sharing information on public health messaging at earlier stages.

38. Inequalities

The Scottish Government welcomes the Inquiry's commitment to learning the detailed lessons on inequalities. The pandemic has highlighted every disparity in our culture and

how the most vulnerable in our society have been treated. Accordingly, the Scottish Government welcomes expert evidence on the effect that existing structural inequalities in society had on vulnerable groups during the pandemic. It recognises that some people (individuals and groups) were particularly vulnerable to the pandemic and that the pandemic affected marginalised groups in different ways. There is much we can learn from the work that was undertaken to support people and the steps that were taken to develop a package of practical support. The pandemic has exposed and highlighted deep-rooted health and socio-economic inequalities and the systemic failures to address these issues. The Scottish Government recognises that we have an opportunity to make fundamental and lasting changes to address these issues.

39. The Scottish Government has been committed to the eradication of inequalities in health and social care for years. A task force to address health inequalities was formed in 2008, it has consistently commissioned reviews and reformed public health e.g. by the Public Bodies (Joint Working) (Scotland) Act 2014 and in 2018 in partnership with COSLA it set six public health priorities including addressing poverty and inequality. The reduction of health inequalities is the central aim of Public Health Scotland. During the pandemic, consideration of inequalities and the principle of fairness were integral parts of the Four Harms decision-making approach and the Framework for Decision-Making.
40. When taking strategic decisions in the pandemic, the Scottish Government were mindful of the “Fairer Scotland Duty” under Section 1 of the Equality Act 2010, to have due regard to reducing inequalities of outcome resulting from socio-economic disadvantage. The duty came into force in Scotland in April 2018, but is not yet in force in England.
41. The Scottish Government commits to listening carefully to the evidence of witnesses in respect of structural inequalities, and to understanding how the pandemic, and the government response, particularly affected the most vulnerable groups in Scotland and to learning lessons for the future.

Conclusion

42. The Scottish Government will examine and consider closely the recommendations that the Inquiry makes in relation to Module 2. It understands that the most important way to recognise the loss and suffering of the people of Scotland, and of the wider UK population during the pandemic, is to learn from the evidence, to identify what could have been done better and to improve government decision-making in a pandemic to save lives and prevent suffering in the future.

Fiona Drysdale, KC

Kenneth McGuire

Julie McKinlay

Michael Way

Counsel for the Scottish Government

(Instructed by Caroline Beattie, Scottish Government Legal Directorate)