UK COVID 19 INQUIRY: MODULE 4

SUBMISSIONS ON BEHALF OF
THE MIGRANT PRIMARY CARE ACCESS GROUP ('MPCAG')
FOR THE SECOND PRELIMINARY HEARING ON 22 MAY 2024

Introduction

1. In advance of the Second Preliminary Hearing in Module 4 listed on 22 May 2024, MPCAG rely on the following submissions made in response to issues raised in the CTI Note dated 2 May 2024.

Parliamentary Privilege

2. MPCAG is grateful to the CTI for its note of 2 May 2024 and for inviting wider engagement and submissions from other Core Participants on the issue of Parliamentary Privilege ('PP').

3. MPCAG maintains their primary submissions that PP does not attach to the proceedings of the Inquiry and that it is in the interest of procedural fairness, consistency, and legal certainty for the Chair to make a ruling to this effect.

4. Moreover, excluding Select Committee evidence has an impact on other CPs and the Inquiry's work as a whole. As the Inquiry is aware, several non state CPs submitted evidence to Select Committees during the pandemic with a view to influencing and changing the government's response. The Parliamentary Select Committee was *the* key forum for non-state actors to try to impact government decision making about the pandemic response. The extent to which government engaged with and considered such evidence cannot be omitted from the Inquiry's consideration if the Terms of Reference are to be met.

5. MPCAG maintains that the Inquiry's proposed workaround would undermine their evidence and deprive it of important context. For example:

    (i) Being able to say as a matter of fact that MPCAG provided evidence to a Parliamentary Select Committee on Covid Preparedness on X date, without more, does not allow MPCAG to establish the nature of the evidence given that unequivocally brought to the Government's attention why the steps taken to allow access to the Covid-19 vaccine were inadequate to overcome the persisting Hostile Environment immigration laws and policies that continued to act as forceful barriers to uptake. Examination of government witnesses will be undermined if the direct documentary evidence showing what information was before, or available to, the government and when, cannot be referred to.

(ii) Similarly, if MPCAG were to then produce the evidence submitted as "fresh evidence", but without the ability to reference and link this to the context of it having been brought directly to the Government's attention on a specific date, the "fresh evidence" risks being effectively floating without context and deprived of its relevance.

5. The context lies at the heart of the relevance of MPCAG's evidence to establish the Government's knowledge and awareness of the barriers facing migrants when accessing vaccines and therapeutics. Scrutiny of what evidence was in the Government's possession at key points in their decision making is fundamental to this Inquiry's purpose.

Summary of CTI's approach

6. CTI in his note in summary:

(i) Acknowledges that there has been no ruling as to whether Parliamentary Privilege applies to statutory inquiries under the Inquiry Act 2005 [§31]
(ii) Maintains that Parliamentary Privilege applies to *inter alia* Parliamentary Select Committee reports and National Audit Office [§29]
(iii) Concludes that the issue is not required to be resolved [§32]

7. CTI [§39] submits that MCPAG were not requested to give their evidence in the Rule 9 request but rather a summary of their evidence including that given to Parliamentary Select Committees.

8. CTI [§42] contends that there has been no procedural unfairness by previous inconsistency of approach set out in [§41], nor can this give rise to any legitimate expectation. [*It is of note that MPCAG did not couch their submissions in terms of legitimate expectation, but rather procedural unfairness*.]

9. CTI contends [§42] that is for MCPAG to adopt a practical solution and commends that set out in [§34].

10. CTI contends that MCPAG's concerns about the proposed workaround are "over-stated" [§44].

<u>MPCAG's proposal</u>

11. If the Chair is not minded to rule on the application of PP in an inquiry setting at this time, consistent with the position set out at CTI [§§32 -33] and the invitation at [§42] MPCAG wishes to propose an alternative 'workaround' that better preserves the important context of MPCAG's evidence which is feasible and practical, namely to admit this evidence for the moment on a *de bene esse* basis without ruling on its admissibility at this time. This would allow those whom the Inquiry might wish to invite evidence from to be aware of the draft evidence and make their statements accordingly.

'De bene esse' approach

7. Evidence admitted on a *"de bene esse*"[1] basis is done so on a provisional basis, without determining its admissibility. The Courts have adopted this approach when the admissibility of evidence is disputed. This approach allows the court to exercise caution in ensuring that relevant evidence is not lost or overlooked and to initially consider its relevance and value whilst reserving the right to determine the question of admissibility (whether on grounds of PP, or otherwise) at a later stage.

8. MPCAG invite the Chair to the Inquiry to admit their Rule 9 evidence, without redactions, on a *de bene esse* basis. Once further Rule 9 witness statements from the Government have been reviewed, the Inquiry can then, at a later stage, better determine whether there is an issue in dispute regarding the date and scope of the Government's knowledge of on-going barriers and inequalities deterring migrants from accessing vaccines and therapeutics. If there is no dispute, redactions can be made of MPCAG's evidence without any cross examination or reference having been made of the contentious evidence and without breaching PP. In any event, if the matter is deemed to be uncontroversial the evidence would fall within the permissible exception to PP.

9. If there is a dispute, the Chair will then be best placed to determine (i) how far MPCAG's unredacted evidence would be of value in resolving that dispute, and therefore (ii) whether it is necessary, in accordance with the overriding requirements of fairness and avoiding unnecessary cost, to then resolve, by making a ruling on, the issue of PP.

10. MPCAG's submission is that it is not possible *at this stage* of Module 4 for the Inquiry to judge how far MPCAG's (and potentially other witness') unredacted evidence may be of significance in both identifying, and then resolving, factual issues. The nature of the Inquiry's proposed workaround, by way of summary and redaction, is that the Inquiry will not know what information of potential relevance is then being excluded from its knowledge. Adopting the *de bene esse* approach we suggest will enable the Inquiry to make an informed decision whether there are any relevant factual disputes, if so, whether relevant material will be lost by making redactions to evidence, and hence whether it is avoidable to make a ruling on the issue of PP.

11. The *de bene esse* approach does not itself involve the Inquiry in any questioning of proceedings in Parliament, and hence a possible breach of PP. MPCAG are aware of the Courts and Tribunals in a number of cases admitting material on a *de bene esse* basis, where one party objects to the admission of that material as contrary to PP with a view to determining that issue subsequently, once it has been possible to judge the materiality of the disputed evidence and hence the necessity (or otherwise) of deciding the issue of PP.

12. We would in this respect draw the Inquiry's attention in particular to Fordham J's decision in *BA v SSHD & Ors* [2021] EWHC 3493 (Admin) at §§32-33, admitting material disputed as contrary to Parliamentary privilege on a *de bene esse* basis at the permission stage; the Upper Tribunal's decision in *Christianuyi & Ors v HMRC* [2018] UKUT 10 (TCC) at §30 (noting that Parliamentary material was admitted *de bene esse*,

[1] *'De bene esse'* is translated from Latin as "for what it's worth".

though ultimately considered inadmissible); *R (Federation of Tour Operators) v HM Treasury* [2007] EWHC 2062 (Admin), [2008] Env LR 22 at §§7 and 25 (Stanley Burton J); and *R v Desmond Garcia Deegan* [1998] 2 Cr App R 121 at 123G-124C.

13. These authorities demonstrate that the scope of PP is not so broad as to prevent evidence disputed as potentially contrary to PP from being admitted on a *de bene esse* basis, the question of privilege being resolved later only if it is considered that the evidence is otherwise important and useful. That is the approach we would invite the Inquiry to adopt here and is consistent in any event with achieving the intended outcome as set out in CTI note [§49].

MCPAG's concerns

14. As part of this proposed alternative workaround, MPCAG submits that the Inquiry could significantly limit the scope for factual dispute based on Parliamentary material in the Rule 9 editing process. MPCAG propose that, where a risk of PP breach arises, the Inquiry pose specific additional Rule 9 questions to the relevant state witness, designed to get around the need for the Core Participant seeking to refer directly to Parliamentary material.

15. The Inquiry will be aware that a significant concern for MPCAG is for it to be established when the Government was aware of general trends, specific issues in access to healthcare, specific evidence demonstrating the existence of those issues, and proposals to resolve the issues. It is out of concern to ensure that this topic is properly and fully addressed that MPCAG has pursued its proposals regarding PP and the proposed redaction/editing of its evidence at this time.

16. MPACG submit that they would be greatly assisted in achieving this essential aim by:

    a. The Inquiry posing specific Rule 9 questions to the Home Office designed to elicit reference to their receipt and consideration of MPCAG's Select Committee evidence.

    b. Delaying finalisation of MPCAG's Rule 9 statement until the Home Office's statement has been finalised and disclosed, allowing them to respond to the Home Office's relevant comments.

17. It is MPCAG's understanding that the Home Office's witness statement for Module 4 has already been finalised. In this event, we ask that a brief supplementary Rule 9 statement is requested of the Department as well as a Rule 9 statement from the then Home Secretary, Priti Patel. Indeed, this is consistent with CTI [§34a] save that this will serve as an aide memoire and/or focus the attention of the statement-maker as to the concern of the Rule 9 statement to be addressed.

18. MPCAG consider this approach will facilitate the efficient preparation of evidence by all parties, by identifying how far there is any factual dispute between participants about these matters and, to the extent there is any dispute, allowing it to be addressed by MPCAG with reference to the Home Office's Rule 9 statement as opposed to referencing Parliamentary proceedings for the fact and date of what was said there. Alternatively, should it transpire that dispute is limited, it may be that MPCAG's

concerns which have prompted its efforts to ensure that Parliamentary committee material is admitted will be allayed.

19. MPCAG acknowledge this proposed approach, **if** applied more widely in the Inquiry, would create additional considerations for the busy Inquiry team in the Rule 9 editing process and have been mindful of practical considerations in making this proposal. If a ruling is to be avoided at this time, then it is submitted that the additional resource directed to editing of Rule 9 statements is justified in assisting to strike a balance between the Inquiry's equally important need to prevent any possible breach of PP while pursuing robust accountability. It is MPCAG's submission that the Inquiry's current proposed work-around risks prioritising the former over the later.

Expert evidence in Module 4

20. MPCAG notes the update from the Inquiry [at §53 CTI Note] on steps being taken to obtain expert evidence on:

    i. **Vaccine safety** (*Prof Dani Prieto-Alhambra, Professor of Pharmaco- and Device Epidemiology at the Botnar Research Centre at University of Oxford)*.
    ii. **Vaccine roll out and vaccine hesitancy** (*Prof Ben Kasstan-Dabush, Assistant Professor of Medical Anthropology at the LSHTM, and Dr Tracey Chantler, Associate Professor of Public Health Evaluation at the LSHTM and co-director of its Vaccine Centre (VaC))*.
    iii. **Vaccine hesitancy and misinformation** (*Prof Heidi Larson, Professor of Anthropology, Risk and Decision Science, Infectious Disease Epidemiology & Dynamics and Director of The Vaccine Confidence Project (VCP) at LSHTM, assisted by Dr Alexandre de Figueiredo (Research Fellow and Statistics Lead at the Vaccine Confidence Project), Rachel Eagan (Research Assistant) and Caitlin Jarret (Research Fellow)).*
    iv. **Therapeutics** (*expert TBC*).

21. MPCAG consider that the scope of these expert reports does not cover the situation of migrants in the UK who faced unique barriers and entrenched inequalities in accessing vaccines and therapeutics that cannot properly be described as or considered under the umbrella of 'vaccine hesitancy'. MPCAG consider it crucial that the Inquiry receives wider expert evidence on this issue from an impartial expert able to identify healthcare barriers rooted in immigration laws and policies from a general standpoint.

22. MPCAG are aware that expert reports on structural and institutional racism have been obtained in other modules [Becares & Nazroo's institutional racism and Bambra & Marmot's health inequalities]. Although some elements of these reports may be relevant as migrants also experienced racism as a barrier, this was not the primary barrier to them accessing vaccines and healthcare services. MPCAG make the following submissions on why the racism expert reports do not go far enough in relation to the specific situation of migrants:

i. Both reports consider ethnicity rather than migration status. Therefore, the impact of immigration status on access to healthcare services is not considered.
ii. Becares & Nazroo's institutional racism report looks narrowly at how ethnic minorities are more likely to have issues with delays to treatment, poor communication from providers, worse outcomes, and greater compulsory detentions for mental health (see page 10). It does not consider the barriers in entitlement to accessing healthcare, charging for healthcare services and information sharing issues arising from immigration laws and policies.
iii. Bambra & Marmot's health inequalities report is similar in the narrow focus on ethnic inequalities in healthcare. The only reference to migration, that is not relevant, relates to the health of migrants compared to others in that ethnic group (see page 10). There is no consideration of the difficulties and obstacles to accessing healthcare services tied to immigration status.

23. MPCAG wishes to propose the following two experts are jointly instructed in this regard. Both are well suited to assist the Inquiry in understanding this unique and niche set of barriers migrants faced in accessing vaccines and therapeutics:

    i. **Dr Sally Hargreaves** is an Associate Professor in Global Health leading a multi-disciplinary team with an interest in migrant health and infection, with a particular focus on vaccination, tuberculosis, and COVID-19. Her work explores the barriers and facilitators to mainstream health care experienced by migrants, using participatory research methods. She is involved in global and regional dialogue around the promotion of Universal Health Coverage and tackling health inequalities in migrant populations, and a Consultant for the World Health Organization and the European Centre for Disease Prevention and Control (ECDC). She is Chair of the European Society of Clinical Microbiology and Infectious Diseases (ESCMID) Study Group for Infections in Travellers and Migrants (ESGITM).
    ii. **Professor Nadine El-Enany** teaches and researches in the field of migration law. Her current research projects focus on race and the role of law in addressing health inequalities. She has researched and written extensively on the history of immigration and nationality law in the United Kingdom. In particular she has traced the history of 'Hostile Environment' policies and their forerunners and the impact such policies have had on access to social and economic networks for migrant communities in the United Kingdom.

24. Jointly instructing two experts is consistent with the approach previously taken by the Inquiry in commissioning the reports on structural racism and health inequalities. In this instance, instructing these experts jointly would assist the Inquiry by ensuring they are thoroughly addressed on the legal policy context as well as the health perspective on barriers to migrants' access to vaccines. Professor El-Enany will be able to map the development and implementation of Home Office Hostile Environment policies, and Dr Hargreaves will be able to address consequent migrant health inequalities and barriers to vaccines in the UK and, if deemed of assistance, comparative global policy

assessment in this regard, thereby providing a holistic and comprehensive overview for the Inquiry on this complex and niche issue.

25. MPCAG have made initial inquiries with these experts who have both confirmed their availability and willingness to assist the Inquiry.

Timetable for the substantive hearing

26. MPCAG notes that the substantive hearings in Module 4 are now scheduled between 14 and 30 January 2025 (for 13 days). We understood the original hearings to have been allocated 4 weeks in July (20 days), prior to the rescheduling for reasons of ensuring that module hearings in 2024 are effective and that the Inquiry's work including preparation of reports in Modules 1 and 2 are deliverable. As far as MPCAG are aware no additional reason has been provided for the truncated listing period.

27. We wish to raise concern at this stage that in our view 13 days is unlikely to be sufficient for the Inquiry to ensure all evidence within the scope of Module 4 is heard. We would therefore invite the Inquiry to consider extending the listing period for Module 4.

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14 May 2024