
Departmental Solicitor's Office

Oifig Aturnae na Ranna

DSO preliminary guidance in advance of any
COVID-19 Public Inquiry

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This document has been prepared by DSO in conjunction with the TEO PMO Team as a high-level guidance note. An Inquiry has not yet been established. Once any Inquiry is established, it is likely to set up its own protocols explaining how witness evidence will be dealt with. This document is therefore intended as general guidance of a preliminary nature, and may be overtaken by guidance or protocols issued directly by the Inquiry in due course.

If you require any further information, please contact Eugene O'Loan.

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Introduction

This document has been prepared by DSO in conjunction with the TEO PMO Team as a high-level guidance note, to assist NI Departments with their initial preparations for any future inquiry relating to the COVID-19 pandemic.

If you require any further information please contact Eugene O'Loan.

(1) An Inquiry

1. In September 2020, UKG responded to a petition to hold a Public Inquiry into the handling of the COVID-19 pandemic, stating that “there will be an important moment to look back, analyse, and reflect and to learn lessons. As the Prime Minister has said, this will include an independent inquiry at the appropriate time.”
2. On 12 May 2021, the Prime Minister announced that he expects the Inquiry to commence in spring 2022. The Inquiry will “consider all key aspects of the UK response” and place the State’s actions “under the microscope” to identify the “key issues that will make a difference for the future”. The Public Inquiry will be on a statutory basis under the Inquiries Act 2005.
3. Establishing the Inquiry under the Inquiries Act 2005 means that this inquiry will have the highest degree of formality and legal powers possible, with the ability to compel individuals and organisations to provide documentation, witness statements and oral evidence.

Scope of Public Inquiry: devolved administrations

4. The terms of reference are yet to be finalised. The UKG proposal is however that the inquiry will scrutinise the responses of the Welsh, Scottish and Northern Irish administrations. Under section 27 of the 2005 Act there is an obligation to consult with the devolved administrations before terms of reference are finalised.
5. It is important to reiterate at this point that no Ministerial decisions have been taken in Northern Ireland in relation to the proposed UKG Inquiry or any Northern Ireland-established Inquiry.
6. This document seeks to outline on early steps which departments and civil servants should consider in order to prepare for any COVID Inquiry which applies in this jurisdiction. It supplements the earlier note[s] from HOCS of xxx date[s].
7. The UK Inquiry is expected to commence in spring 2022. This guidance outlines the preliminary steps that departments should consider taking ahead of any Inquiry's commencement.

(2) What are the Inquiry's Terms of reference?

An Inquiry's Terms of Reference define the Inquiry's remit and purpose. They are the foundation from which the Inquiry's Chair advances particular lines of investigation and will also set parameters on the Inquiry's scope. The Terms of Reference will therefore determine the issues that the Inquiry seeks to explore, the evidence it is likely to require and the parties that are likely to be involved.

At the time of drafting this note, the UK Inquiry's Terms of Reference have not been announced. It is anticipated that they will be subject to consultation with those affected by the issues which the Inquiry will consider.

(3) What role did your department play in the government's response to the COVID-19 pandemic?

Although the UK Inquiry's Terms of Reference are yet to be announced and no Executive decision has been taken about an Inquiry in NI, departments could start to consider the following matters in the context of the COVID-19 pandemic. These questions are only indicative guides.

(i) What happened?

- *Did the department contribute to the Executive's response to the COVID-19 pandemic?*
- *Which parts of the department contributed and what did they do?*
- *What were the impacts or outcomes of the department's contribution in its areas of operation and how did they feed into the wider response?*
- *Were there any potential shortcomings in the department's response?*

(ii) Why did it happen and who was involved?

- *Who was responsible for the decision-making within the relevant parts of the department?*
- *How were those decisions made?*
- *Where/how has the decision making process been recorded?*
- *Where are relevant records being stored?*

(iii) What can be done to ensure the department is better prepared in the future?

- *What changes, if any, have already been made to the department's organisation and decision making processes in connection with to the COVID-19 pandemic?*
- *What further changes could be made within the department now and in the future?*

Once any Inquiry's Terms of Reference have been announced, a department's thinking on the three questions set out above should enable the department to:

- a) Quickly and efficiently review the Inquiry's Terms of Reference and identify any aspects of the Terms of Reference that could be relevant to the department's work;
- b) If necessary and appropriate, to then seek further legal advice from the department's DSO lawyers on key issues or concerns; and
- c) If necessary and appropriate, promptly (if they have not already done so) create an internal working group to act as the first point of contact for the Inquiry and to provide ongoing instructions to the departmental legal representatives.

(4) What documents or records does the department currently hold that may be relevant to those Terms of Reference?

For each of the three questions above, the department should identify what evidence is available and should review, amend and circulate any document retention policies to ensure that no relevant documents are deleted, overwritten or destroyed.

This process should include contacting key individuals and teams (including Ministers and their Private Office) within the department and instructing them to preserve documents and records that may be relevant to the Inquiry's Terms of Reference. The department's information management and IT teams should also be informed, along with departmental security officers who are involved in destruction of document policies and are aware of locations of classified documents held by the department. Although the Terms of Reference are yet to be published, it is very likely all documents pertaining to COVID-19 may be relevant to the work of the Inquiry. This will include:

- Hardcopy documents (e.g. draft minutes, notebooks, internal forms, handwritten notes, diaries); and
- Electronic documents (e.g. email and other electronic communications such as text messages, WhatsApp messages and voicemail, word-processed documents and databases, and documents stored on portable devices such

as memory sticks and mobile phones).

This preparation will also be very useful in the event of the Inquiry seeking disclosure statements - i.e. witness statements detailing a department's approach to disclosure. These types of witness statement might require details of the information a department held during the relevant period, the information management systems and processes in place within the department during the relevant period, and the steps taken by departments to preserve relevant documents and to review / identify evidence for disclosure to the Inquiry. Experience suggests that it will be very useful at an early stage for departments to appoint an officer responsible for identifying all areas in which information could potentially be stored on behalf of the department.

If documents that are relevant to an Inquiry's work are destroyed, the Inquiry can publicly criticise the department, and may draw inferences from the fact that the department did not take appropriate steps to preserve the relevant documents at the earliest opportunity. It may also quite likely hinder the department's ability to prepare for and engage with the inquiry, or properly instruct DSO.

Witness Evidence

It would also be sensible for departments to create a provisional list of key departmental witnesses using the three questions identified above. Departments should consider whether it is likely to be required to set out a corporate position and who is best placed to provide a witness statement in that regard.

For all department staff, but particularly those included in the list of potential key witnesses, it will be very important to ensure that anyone leaving the department completes an exit questionnaire. This should include questions about their forwarding addresses and personal contact details so that they can, if necessary, be contacted in the future. Any information collected as part of exit interviews would need to be stored in accordance with the department's GDPR arrangements.

A single point of contact for potential witnesses within the department should be identified and consideration should be given at this stage as to whether potential witnesses may need pastoral care or any other support.

If departments have any questions about contractors, consultants, or seconded civil servant colleagues they should contact their HR or DSO advisors. Similarly, in instances where potential key witnesses have already left the department this should be brought to the attention of the department's legal advisors at the earliest opportunity.

(5) What other practical steps can be taken at this stage to prepare for a department's involvement with the Inquiry?

- a. **Create an internal working group** – Departments should consider forming internal working groups to act as the first point of contact for the Inquiry and to provide ongoing instructions to any departmental legal representatives. Initially, this may be limited to a skeleton team but should be prepared to rapidly expand once the Inquiry's Terms of Reference have been announced.
- b. **Legal Representation** – Departments should carefully consider the extent to which they are going to require legal representation, and discuss this with their DSO Advisory Director, in the first instance. This step should be undertaken before the Inquiry has announced its Terms of Reference. DSO will hard charge for this work and departments will need to commit the necessary resources. Government lawyers are a scarce skill resource and Departments may be serviced by DSO with a mix of internal and external lawyers depending on demand.
- c. **Counsel** – Once DSO has been instructed to act for your department, we will assist in quickly identifying and instructing appropriate Counsel.
- d. **Timelines** – When answering the questions in paragraph three above, experience suggests that it will be very useful to create and maintain a timeline of events. A timeline will help to contextualise relevant departmental decisions and evidence. It will also be a very useful aid for the department's legal advisors when they are preparing any disclosure and/or witness statements. A chronological organogram may also assist if there has significant change of personnel.
- e. **'Lessons learned' review** – Conducting a lessons learned review might enable your department to document the main events, what the department did, reflect on what could have been done better, and even implement necessary changes or reforms early on. Departments will need to consider both the immediate value of this (both for purposes of preparing for the Inquiry but also acting quickly to introduce remedial action) and the fact that such process might proceed on the basis of partial information; some conclusions might be premature, and that it would likely need to be disclosed to the Inquiry and so enter the public domain. A department should not hesitate to take necessary action, regardless of potential scrutiny. As such, we would strongly advise that it would be sensible for departments to discuss this option with their legal advisors prior to embarking on any review.
- f. **Witness Preparation** - We do not recommend at this stage obtaining draft witness statements or asking potential witnesses to share their experiences or views. This is because any draft statements may become disclosable to the Inquiry in due course. It is important to recognise that some witnesses may feel very concerned about the prospect of providing evidence. We recommend appointing a single point of contact within your department to deal with any queries from witnesses. Consideration should also be given to whether any

pastoral care is required for witnesses.

(6) What steps will need to be taken in the near future to prepare for your department's involvement with the Inquiry?

- a. **Terms of Reference** – Upon the announcement of the Inquiry's Terms of Reference all departments will need to quickly and carefully review the Terms of Reference. These should be considered in the context of the information captured by your department when answering the questions set out in paragraph three above.
- b. **Core Participant Status** – Once your department has completed a thorough review of the Inquiry's Terms of Reference, you will need to seek legal advice on whether or not your department should apply for Core Participant status.

A Core Participant is generally a person (or department) that played a significant role, or has a significant interest, or who may be subject to explicit or significant criticism in an important aspect of the matters to which the Inquiry relates.

Core Participant status will ensure, in summary, your department is:

- (1) Provided with disclosure of the Inquiry's evidence;
- (2) Able to make opening and closing statements at any Inquiry hearings;
- (3) Able to suggest lines of questioning to be pursued by Counsel to the Inquiry; and
- (4) Able to apply to the Inquiry Panel to ask questions of witnesses during a hearing.

It remains possible for persons or departments to be legally represented by DSO even if they are not a Core Participant.

(7) Duration of the Inquiry

The Inquiry's duration will be determined by a range of factors, including its Terms of Reference and the breadth of the issues that the Inquiry is asked to investigate. Without this information, at this stage it is not possible to give a meaningful prediction of the Inquiry's likely duration.

(8) Costs

It is not yet possible to provide a general estimate of the legal costs that departments are likely to incur as a result of the Inquiry, as this will depend upon (amongst other factors):

- i) The Inquiry's Terms of Reference;
- ii) Whether a department seeks / is granted Core Participant Status;
- iii) The level of any disclosure requested by the Inquiry from the department;
- iv) The overall duration of the Inquiry;
- v) Whether the department funds legal representation for individual witnesses.

It is very unlikely that departments will be eligible for funding awards under s.40 of the Inquiries Act 2005. Departments should therefore be prepared for the costs of preparing for and participating in the Inquiry (including DSO costs) being funded from their respective budgets.

Inquiries can take many years to complete and involve a number of different constituent costs for participating departments, including (but not limited to) DSO fees, Counsel fees, document reviewer fees and the costs managing documentation.

(9) Conclusion

If you require any further advice in respect of the forthcoming COVID-19 Public Inquiry DSO will be happy to assist.