

IN THE UK COVID-19 PUBLIC INQUIRY

BEFORE BARONESS HEATHER HALLETT
IN THE MATTER OF:

THE PUBLIC INQUIRY TO EXAMINE THE COVID-19 PANDEMIC IN THE UK

Submission on the Consultation draft 'Terms of Reference' (ToR)
On behalf of the Covid 19 Bereaved Families For Justice and Bereaved Families

1. The CBFFJ and the bereaved families were grateful for the opportunities to meet with the Chair and discuss topics and questions which they consider should be addressed by the Inquiry, during the twelve ToR consultation meetings. These written submissions address the draft ToR and the questions raised by the consultation. Comprehensive draft ToR were provided to the Prime Minister and the Inquiry in January 2022, on behalf of the bereaved families¹.
2. Although most of the elements of the families' draft ToR are mentioned in the consultation draft to one extent or another, there are a number of relevant omissions which the families have raised in meetings with the Chair, which they consider would materially improve the Inquiry's ToR, and which we therefore reiterate below. This document attempts to incorporate as many of the issues raised by the families in the meetings and elsewhere as is possible, but it is not meant to replace the contributions made directly to the Chair and to the consultation. We are also mindful that the final ToR will be supplemented by a 'list of issues', which will provide more detail and may contain many of the points made below. However, we have not been provided with a draft of that list, and we note that it will have to remain within the ambit of the ToR.
3. A key concern of the families is the importance of approaching the various questions and topics from two distinct but vital perspectives: preparedness and response. In the families' draft, the ToR are drafted with regard to what was and what should have been in place before the virus struck the UK (Section A: Preparedness), and what happened once it became a threat to the UK (Section B: Response).

¹ https://www.jacksonlees.co.uk/sites/default/files/ckeditor-files/Covid_Inquiry_ToR_v2_2.pdf

Preparedness

4. The consultation draft references ‘preparedness’ twice, with respect to “public health decision-making” and “the response of the health and care sector”. It is entirely unclear which of the particularised topics included in Section A of the families’ draft will be investigated and which will not. In our submission preparedness is not simply a matter of whether public health leaders had contemplated a pandemic or whether hospitals had contingency plans to make more beds available, it is a wide-ranging topic and one which must be considered holistically.
5. Pursuant to domestic statute² and Article 2 of the Convention³, the UK had an obligation to identify threats to life in advance, have in place systems which would identify such threats and identify, in advance, contingencies for addressing them, and to take all reasonable and proportionate measures to prevent or mitigate their effect. Preparedness must include consideration of whether UK authorities did sufficiently identify the threat of a pandemic, and whether they did have sufficient systems, plans and facilities in place. Some threats and their nature evolve over time (for example terrorism) and accordingly, preparedness must keep step. However, the probability of a pandemic occurring was always a foreseeable threat, and the only question was when it would occur. The legal obligations referred to above, required the UK to have sufficient infrastructure and contingency planning to identify the nature of an emerging pandemic, and minimise its effects on the population.
6. Preparedness therefore covers whether relevant authorities paid sufficient heed to the probability of a pandemic, and developed and implemented appropriate plans and policies to meet the threat. This includes whether the UK had an infrastructure and sufficient contingency plans available to immediately swing into action, and whether any such plans had sufficient resilience to endure through the pandemic. The Inquiry should therefore investigate the risk assessment and management strategy of the UK and in particular:
 - a. Whether the legal, regulatory and policy frameworks to deal with an emerging pandemic were fit for purpose.
 - b. Was there provision to identify emerging threats elsewhere sufficiently early, and to rapidly learn from them and implement emergency measures in the UK before those threats reached our shores? Did this include arrangements for emergency collaboration and a joined-up approach with relevant international bodies and other countries?

² The Civil Contingencies Act 2004

³ The right to life, applied domestically by the Human Rights Act 1998

- c. Were there appropriate plans and provision for devising and implementing a testing regime, at borders and more generally?
- d. Were there sufficient laboratory and manufacturing facilities, or a contingency plan to commandeer resources to meet this need?
- e. Were there appropriate contingency plans to monitor and restrict travel, roll out test and trace, restrict mass gatherings, and implement lockdowns?
- f. Did the NHS and social care sectors, and other key areas, have readymade infection control measures and contingency plans and facilities, which could be in place before the pandemic took effect? Had the effects of austerity and privatisation and the use of agency workers been properly considered, and had they reduced resilience regarding threats such as a pandemic?
- g. Were there any or sufficient contingency plans for hospices, nursing and retirement homes, other congregate facilities, and domiciliary care provision?
- h. Were there sufficient contingency plans for places of detention?
- i. Were there appropriate stockpiles of PPE and other equipment and medicines, and contingency plans to facilitate the rapid increase in production and supply of the same? Had any or sufficient planning been undertaken to provide transparent and appropriate emergency procurement and requisitioning, to ensure its efficiency and prevent fraud?
- j. Had there been sufficient and appropriate multi-agency exercising relating to a pandemic and had lessons been learned and fully acted upon, in the years prior to the pandemic?
- k. Were there sufficient plans to identify those in our communities most vulnerable to the effects of a pandemic and protect them to the greatest extent reasonably possible? This would most obviously include the elderly and infirm, those with clinical vulnerabilities and physical disabilities, those with mental health issues, learning disabilities, dementia, those on the autism spectrum, and children.
- l. Had there been proper consideration that a pandemic would affect different communities disproportionately, for genetic, cultural or socio-economic reasons, and were there contingency plans to identify and address those issues? We know from statistics that some Black and Asian communities have been disproportionately affected, and those from disadvantaged communities suffered more than those from higher socio-economic groups; issues which were foreseeable and should have been foreseen.

- m. Had there been sufficient consideration of who would be key workers and how to protect them and their families from the outset and throughout the pandemic? Did any such plans recognise that protections needed to be in place to protect not only healthcare and social care workers, and emergency services, but also those employed in food and energy supply, education, social services, and the transport networks?
 - n. Had there been sufficient training and exercising across all relevant sectors regarding the emergence of a pandemic?
 - o. Was there sufficient and robust provision for scientific, medical and technical advice to government prior to and from the onset of the pandemic?
7. The matters referred to above relate to a UK context. They arise equally with respect to England, Wales, Scotland and Northern Ireland, and will have to be addressed in terms of a UK approach, and also to the devolved administrations with their separate institutions and decision-making responsible bodies. In addition, this UK Inquiry will also have to consider cross-administration preparedness (and response): were there any or sufficient plans between the UK Government and devolved administrations as to how to be jointly prepared for the threat of a pandemic, or to respond to it? This must include the effects of UK -wide and devolved decision-making and where the limits lay, and communications between the UK and devolved administrations. Given the current position, in the absence of further devolved inquiries, matters relating to devolved matters in Scotland will be dealt with by its own Inquiry, but devolved matters in Wales and Northern Ireland will have to be considered within this Inquiry. Separate submissions will be made in this respect (and regarding all other relevant issues, including the response to the pandemic) on behalf of the families in the devolved areas.
8. The above list is not intended to be exhaustive but we submit it does set out the wide-ranging nature of preparedness, and its vital importance as a topic within this Inquiry. This is insufficiently recognised by the two references in the current consultation draft. Furthermore, the inter-relationship of many of the above topics illustrates the need to view preparedness holistically. It is stating the obvious but it is nevertheless essential to note that a key part of this Inquiry is to ensure that the UK is as fully prepared for the next pandemic as is possible, because it will inevitably happen at some time in our collective future.

Response

9. The Inquiry must also consider what happened and the UK response once the virus emerged in China, and also when it spread to Europe, in particular to Italy. Did the UK learn lessons from elsewhere and react swiftly enough, and with appropriate and decisive action? In this regard, the Inquiry should determine a timeline of what was

known when, what happened, and what action was taken. Given that the pandemic is ongoing, the use of the past tense is intended to include current and future events up until investigated by the Inquiry. The Inquiry should investigate:

- a. What scientific, medical and technical knowledge, research and advice was available to and sought by the government, and what it accepted and rejected. This should include the extent to which ‘herd immunity’ or ‘living with the virus’ was a part of policy.
- b. Statutory and regulatory measures taken by Government and other responsible bodies to prevent the spread and mitigate the effects of the virus.
- c. Whether sufficient action was taken to identify people and communities which were particularly vulnerable to the virus or for whom it was more difficult to take preventative measures, and whether any or sufficient action was taken to address those vulnerabilities and disparities.
- d. Guidance and messaging to:
 - i. The general public;
 - ii. People with clinical vulnerabilities, the elderly and those who needed to be shielded;
 - iii. People with physical disabilities, mental health issues, learning disabilities, dementia, and people on the autism spectrum;
 - iv. Pregnant women;
 - v. Potentially vulnerable communities, and whether there was proper recognition that although a virus will affect the whole of society, it is unlikely to do so equally, due to genetic, cultural, discrimination, and socio-economic factors;
 - vi. The healthcare, social care and education sectors;
 - vii. Places of detention;
 - viii. Other key sectors including emergency services, social services, and food and energy suppliers.
- e. Whether guidance and messaging was undermined by actions and transgressions of those in Government or other responsible positions, or anti-vax campaigns.
- f. Whether measures including ‘test and trace’ (‘test and protect’ in Scotland, ‘test, trace, protect’ in Wales and Northern Ireland), reporting systems, border controls and travel restrictions, lockdowns, restrictions on mass gatherings and mask requirements were used appropriately, to optimum effect and at the right times. This should include decisions made and regulations regarding the protection of staff, customers and visitors relating to hospitality, retail, sports, leisure and cultural sectors.

- g. Whether Government and other responsible bodies acted optimally to ensure the development, procurement and provision of sufficient supplies of PPE, tests and laboratory capacity, medical equipment and medicines and oxygen supplies, and to ensure that such supplies got to the right people and sectors at the right time.
- h. Whether Government and other responsible bodies did everything possible to assist with the development and supply of vaccines and therapeutic medicines, and whether efforts and policies regarding domestic provision and international sharing (including the decision not to waive patents) were appropriate.
- i. Whether Government and other responsible bodies did everything reasonably possible to ensure sufficient medical and support staffing levels in hospitals and other healthcare, hospice and social care settings (including GP surgeries, health centres, opticians and dentists, care, residential and nursing homes, other congregate facilities and domiciliary care), sufficient hospital beds to deal with normal workload and the increased admissions caused by the pandemic, including sufficient ICU and isolation facilities, and sufficient infection control measures, testing facilities, and PPE to protect staff and patients.
- j. Whether Government and other responsible bodies had sufficient systems, policies and equipment in place to prevent and minimise institutional transmission and transmission on admission or discharge from all healthcare and social care facilities, including: measures relating to agency workers servicing a number of institutions or domiciliary settings; the lack of healthcare provision to institutions due to GPs not attending in person; the discharge of those known to be covid positive; the frequency of testing (in particular, of care home residents) and availability of results to Homes and GPs; .
- k. Whether Government and other responsible bodies took sufficient action to ensure that ambulance, 111 and 999 services had sufficient staffing, equipment (including PPE and regular testing for ambulance workers), systems, policies and training to deal with a pandemic, including by attendance of paramedics and proper telephone advice and guidance.
- l. Whether Government and other responsible bodies took sufficient action to ensure the dying and seriously ill, and their relatives and friends, were treated with dignity and respect, and whether ‘end of life’ (EoL) and DNR/DNACPR protocols were adhered to properly and without discrimination. This should include addressing deep concerns: about the lack of communication between hospitals and relatives; that assessment standards were lowered because of the number of patients requiring treatment; and that DNR was being equated with EoL care.

- m. Whether Government and responsible bodies took sufficient action to ensure maximum visiting and other contact for the dying, and those who were ill or otherwise vulnerable and their families and friends (in hospitals, care homes and all other relevant settings), consistent with infection control. This should include the sufficiency of regulation, guidance and policies. Was provision made for contact with shielding family members, and did provision take account of the link between isolation and physical and mental deterioration of particularly vulnerable people, for example those with dementia? It should also consider the related issue of policies regarding funerals.
- n. Whether Government or responsible bodies made any or sufficient provision for bereavement support, and for the mental health effects of the pandemic.
- o. Whether there were appropriate policies to record Covid on death certificates, and whether there was a consistent and proper approach to doing this.
- p. Whether Government and other responsible bodies took sufficient action to protect key workers and their families, and those in the workforce vulnerable through a lack of rights – in particular those in the gig economy.
- q. Whether Government and other responsible bodies took sufficient action to protect workers in non-key areas
- r. Whether Government and other responsible bodies took any or sufficient action to protect students, teachers and other staff in schools and educational facilities, and to maintain education and regulate qualifications within the restrictions necessitated by the pandemic.
- s. Whether Government and other responsible bodies sufficiently took into account and mitigated the impact of measures on the impairment of children’s health and development, the provision of safe and effective care, educational outcomes, and protection from physical and emotional harm.

Economy

- 10. We note that the draft includes looking at Government policy with respect to the economic response to the impact of the pandemic. In our submission, the Inquiry should investigate the transparency and propriety of procurements, and whether vital resources were misdirected or wasted, and whether resources were needlessly lost to

fraud. In our submission, this is an area where it is likely that the Inquiry could make a real impact through recommendations for the future.

11. The Inquiry should investigate what consideration there was of protecting workers in the gig economy by financial support.
12. The Inquiry should also look at whether any or sufficient financial support was provided to dependents of those who died, or those who suffered financial hardship as a result of bereavement. This should include the efficacy of the Life Assurance Scheme for health and social care workers.

General points

13. We note the recognition in the consultation draft that the Inquiry will place emphasis on the experiences of the bereaved families. The bereaved families and those representing them will do everything possible to actively assist the process and participate effectively, as evidenced during the consultation meetings.
14. We note that the draft also refers to consideration of disparities in the impact of the pandemic and the state's response, with reference to protected characteristics under the Equality Act 2010 and equality categories under the Northern Ireland Act 1998. Whilst we welcome this assertion, the known disparities of impact of the virus within some Black and Asian communities in particular, and deep concerns about the failure of response to those disparities, should merit a more prominent recognition of this issue with respect to both preparedness and response, as indicated above. In addition, we note evidence to the Home Affairs Select Committee has shown disproportionate criminalisation of young black men took place during the pandemic with increased use of stop and search⁴. These are substantive issues in their own right, and not simply matters to bear in mind when considering other topics.
15. There is a widespread concern from bereaved families that the word 'accountability' does not appear in the draft, although the overview document does refer to "What went wrong, and what went right" as a typical aim of an Inquiry. A public inquiry does not determine liability – it is not a trial – but it is not to be inhibited in its findings, conclusions or recommendations by any inference of liability which might be drawn⁵, and it can and very often must (as is the case here), make findings which strongly imply breach of law and matters of accountability⁶. Determining where various

⁴ <https://www.theguardian.com/law/2020/jul/08/one-in-10-of-londons-young-black-males-stopped-by-police-in-may>

⁵ s.2(2) of the Inquiries Act 2005.

⁶ For example, see: *R (Pounder) v HM Coroner for North and South Districts of Durham and Darlington* [2009] EWHC 76 (Admin), §§62, 70, 72, 73⁶, 78; *R (Pounder) v HM Coroner for North and South Districts of Durham*

responsibilities lay, and who or which body was accountable for failures is a vital part of any investigation into multiple deaths, and a vital link between determining what happened and how to prevent future deaths. In essence, it is the roadway between facts and recommendations.

Submissions

16. The above submissions relate to the first consultation question regarding whether the draft ToR covers all the areas which should be addressed by the Inquiry. To a substantial degree, these submissions mirror the draft ToR provided by the CBFFJ and the bereaved families in January 2022, and issues raised directly by many families during the consultation meetings.
17. With respect to the second question: where should the Inquiry start, we submit that there should be an initial section celebrating the lives of those who have been lost to the pandemic, sometimes referred to as Pen Portraits or commemorations⁷. We understand the term ‘listening project’ has been used in this instance. Given the number of deaths caused by the pandemic and the response to it, this is a topic which will have to be tailored to the particular circumstances. The matter is under consideration, we understand there will be discussion with the bereaved families and we intend to serve a proposal in due course. However, experience from other high profile, complex and mass-fatality inquests and inquiries has shown that it is appropriate to begin the process in this way. Doing so will place the victims at the heart of the Inquiry from the outset, and it will emphasise to all involved in the Inquiry that one of its fundamental purposes is to ensure, as Lord Bingham observed in *Amin*, “that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others” (§31).
18. In respect of the Inquiry’s commencement in investigating the matters within its ToR, there are a range of views as to where the Inquiry should begin. The predominant view amongst the families is that issues relating to preparedness are the logical place to start, although there is a consensus that recommendations should be made as early as possible in areas which may save lives in the near term, and that would favour hearing evidence relating to those matters first⁸. As submitted above, preparedness should be considered

and Darlington [2010] EWHC 328 (Admin), §§3, 6, 15, 53; and the approach to Article 2 adopted in the Grainger Inquiry, §§1.75 and 12.11.

⁷ This is a practice which has developed in inquests and public inquiries investigating deaths and has been welcomed by coroners and Inquiry Chairs, e.g. see the Manchester Arena Inquiry Protocol on Pen Portraits: <https://files.manchesterarenainquiry.org.uk/live/uploads/2020/03/07204228/Protocol-on-pen-portrait-evidence-revised-12.3.20.pdf>. It is now the subject of Chief Coroner’s guidance: <https://www.judiciary.uk/wp-content/uploads/2021/07/Chief-Coroners-Guidance-No-41-Use-of-Pen-Portrait-material.pdf>

⁸ Section 24, Inquiries Act 2005 provides that recommendations may be delivered as part of an interim or final report. The Chair has indicated that it is unlikely that she will be in a position to hear evidence on the ToR until

as a piece. It is important for the Inquiry to establish what policies, plans and structures were or should have been in place, and what state of readiness essential services were in before considering the response, subject to the urgency point referred to.

19. The CBFFJ and the bereaved families have been campaigning for this Inquiry to be set up since May 2020. There has been unconscionable delay by the Government in doing so. We note the intention of the Chair and her team to move the Inquiry forward with the minimum of further delay. We welcome that approach. To that end we submit that a timetable should be set as soon as is possible. This will inevitably be somewhat aspirational and often in such processes timetables may slip for good reason. However, the consequence of not having such a framework is drift and further delay. The third consultation question relates to timescale: should there be a planned end-date for the Inquiry. Again, this is a matter that the families have expressly raised with the Government from the outset. An aspirational end-date should assist in delivering answers to what happened and recommendations for making a difference in the future, with delay minimised as far as it can be. This Inquiry should take as long as necessary and be as short as possible to fulfil all matters that should be within its ToR. The Inquiry process is necessarily stressful for the families and they do not want it unnecessarily prolonged, and the Chair is of course under a statutory duty to conduct it with regard to the efficient use of public resources (s17(3)). We address below, in summary, how the Inquiry can be most efficient with regard to encouraging the assistance of institutional Core Participants (CPs).
20. In addition to having a timetable and aspirational timescale, we understand that the Inquiry already has in mind producing interim reports and recommendations where possible. Inquiries have long adopted this approach and for good reason: recommendations designed to promote change to avoid the recurrence of past failures and to prevent future needless loss of life, should not wait. Interim reports have been produced in recent years in the Grenfell Tower Inquiry and the Manchester Arena Inquiry.
21. The fourth consultation question asks how the Inquiry should be designed to ensure that bereaved people and others who have suffered as a result of the pandemic have their voices heard. There are a number of elements to this, but the starting point is to reframe the question. An inquiry into controversial deaths should not simply provide a forum for the bereaved to express their loss and experiences, it should involve them to the greatest extent reasonably possible: there must be effective participation. Such participation will assist the Inquiry, render its process, findings and recommendations more robust, and instil public confidence. It is a vital matter of substance, not merely a question of process.

early 2023, and it is therefore difficult to determine at this stage, what issues might arise for urgent consideration.

22. For an Inquiry to be as successful and efficient as possible it should be rigorous in pursuing all material and evidence potentially relevant to its task, and encourage collaboration from all who have had a part to play in the circumstances under consideration. This applies, in particular, to Government officials (including Ministers), public servants, public authorities, and those paid to undertake work on the public's behalf.
23. We will make further submissions on process in due course, but from the outset the Inquiry should use all tools at its disposal to require material and information from those who will be CPs as well as other material providers. With respect to public servants, public authorities, and private bodies conducting public functions (at least) there is a common law duty of candour. During the Manchester Arena Inquiry, the Chair set out issues and topics concerning which he expected narrative assistance from institutional CPs, not simply disclosure and witness statements. This took the duty to disclose all relevant material to the Inquiry to a further level: to explain the CPs position on various relevant matters. By taking such an approach, the Inquiry does not only gather the relevant material but also the position of the CP, including identifying where relevant and accepted failures occurred. This hones the areas for investigation and prevents the Inquiry having to seek needles in haystacks, or to expend resources investigating areas which are in fact uncontroversial.
24. The Inquiry should disclose all potentially relevant material to the bereaved families in accordance with the statutory regime, and any such narratives referred to above. Ensuring the participation of the bereaved, starts with transparency and openness.
25. The Inquiry has fully engaged with the bereaved families regarding the consultation, that is to be welcomed, and we submit that this approach should be continued through the Inquiry's ongoing process.
26. Disclosure of all potentially relevant material allows the bereaved to begin to access the evidence. With respect to evidential hearings we note the intention that the Inquiry will not be London-centric. As we understand this, there will be hearings at different venues across the four nations. We strongly support this approach. In addition, it is essential that the hearings should be publicly livestreamed and that there be provision for remote participation, as has occurred in a number of recent inquiries. Hearings must be fully accessible to those with physical, visual and hearing impairments. Provision must be made for those for whom English is a second language and for other UK languages including Welsh.
27. We anticipate that some of the bereaved will be called to give evidence regarding their experiences relevant to the ToR. The families' representatives will address the Inquiry in writing and orally as appropriate and again we have and will make further process representations in this regard to assist the Inquiry in its vital work.

7 April 2022

Pete Weatherby QC

Thalia Maragh

Oliver Lewis

Kate Stone

Jesse Nicholls

Elkan Abrahamson

Nicola Brook

Broudie Jackson Canter Solicitors

Ronan Lavery QC

Conan Fegan BL

Malachy McGowan BL

Conal McGarrity

Enda McGarrity

PA Duffy & Company

Solicitors