

Welcome to Landmark Chambers'

**'The Looming Public Inquiry on COVID-19: Tips on Preparation for the
NHS and Other Public Bodies' webinar**

The recording may be accessed [here](#).

Your speakers today are...



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The Potential Covid Public Inquiry: Structure, and Terms of Reference



Fiona Scolding QC

Public Inquiries

- Brief Introduction to public inquiries
- Possible shape of any COVID public inquiries
- Possible terms of reference
- Basics for anyone likely to become involved in the public inquiry

The Covid Public Inquiry

- Prime Minister in answer to a question at PMQ's on 15 July 2020 committed to holding an "independent inquiry". No further details have been indicated as to when this would take place, and in what form.
- Sir Ed Davey (now leader of the Liberal Democrats) sought to secure a speedy public inquiry including terms of reference chaired by Martin Forde QC to seek to examine matters before winter 2020 on 27 July 2020.
- Various petitions are being presented seeking a public inquiry and various of the groups representing bereaved families are also asking for such (some having written pre action correspondence).
- A public inquiry ranges from a departmental inquiry through to an Inquiry under the Public Inquiries Act 2005.

What are public inquiries meant to do?

Inquiries are meant to fulfil a wide range of functions: various public inquiries include some or all of the following :

- (a) Establishing the facts – where they are not clear or disputed
- (b) Learning from events – by distilling lessons to change practice
- (c) Catharsis or therapeutic exposure – to seek reconciliation: or restorative justice.
- (d) Reassurance – to restore public confidence
- (e) Accountability blame and retribution – holding people and organisations to account.
- (f) Political considerations – show that something is being done, or providing the evidence for change.

What is a non statutory inquiry?

- Anything which is not a statutory inquiry
- Cabinet Office has guidance which does not say that an inquiry has to be statutory: it can be ad hoc and held in either private or public (or a mixture).
- Or could be an inquiry by a Committee of Privy Counsellors : enables greater security information to be provided – so that recent inquiries into decision to go to War have been such (the Franks and Chilcot Inquiry).
- Or a Royal Commission : were used in the past to explore issues of general social policy rather than particular events (for example Long Term Care or Reform of the House of Lords). Seem to have fallen out of fashion in the 21st century.
- Or a Departmental Inquiry.

What are the potential differences between a statutory or non-statutory inquiry?

- More flexibility over procedure
- Does not need to be held in public
- Do not require the appointment of core participants
- Can hear evidence in secret and so can be advantageous where there are security issues.
- Can gather evidence in a range of ways
- Cannot compel witnesses to attend
- Cannot compel documents to be handed over.
- May or may not have a judicial chair, and may or may not use Counsel to the Inquiry.

What are the basic requirements of a public inquiry

- Established by a Government Minister (s1 of the Act) who takes advice from the Cabinet Office.
- The Minister appoints the Chair and Panel
- The Minister presents Parliament with the terms of reference (which are written usually by the Chair/Panel in consultation with relevant groups).
- Once established they are wholly independent, and are staffed by civil servants but are separate to any Department from which they come.
- Must have a Chair, Counsel to the Inquiry, Solicitor to the Inquiry and Secretary to the Inquiry (these are statutory posts).
- The Inquiry report is published and presented to the House of Commons

Basics of a statutory public inquiry (2)

- A public inquiry can adopt any procedures that it sees fit
- It has statutory powers to take evidence under oath and to compel the production of documents.
- Non compliance with an Inquiry can lead to sanctions including imprisonment.
- There is a presumption that the inquiry will be held in public with members of the public being able to watch: recent public inquiries have all been broadcast live (or with a short broadcast delay).
- The record of proceedings and documents given should also be made public.
- There is a right to anonymise witnesses and to prevent publication of documents if such would cause harm or damage.

Basics of a statutory inquiry (3)

- S2 of the Act prevents an inquiry from making a finding of criminal or civil liability.
- The inquiry can make an aware of costs and expenses to core participants and witnesses.
- It can sit with assessor to provide technical advice to an inquiry: alternatives to this is to have technical experts appointed to the Panel
- The Inquiry can commission its own expert evidence
- Some Inquiries also commission independent research and/or use different ways to engage with those affected by the issues (such as the Truth Project used by IICSA which enables individuals to give their account of sexual abuse).

Issues to take into account in any COVID public inquiry

- Size and nature of core participants (could be huge, depending on the terms of reference) : a core participant is someone who has or may have played a significant role or has a significant interest in the matters under investigation, or may be the subject of criticism – in a wide ranging Covid inquiry this could be enormous.
- Costs: Those without substantial financial means obtain awards of costs from the Chair, and the class of those in a wide ranging inquiry could be very large indeed. The sheer amount of documentation is likely to be large and so would require a large numbers of paralegals/analysts.
- Time: Could take several years.

Jurisdiction and devolution

- If the matter is something which is the sole responsibility of the UK Parliament, then the Inquiry can be UK wide (to give two examples relating to COVID, some aspects of Treasury decision making are UK wide)
- But decisions which concern matters which are devolved to Scotland, Wales or Northern Ireland, then they cannot be set up by the UK Government without the express permission of those administrations, and can be subject to qualifications or conditions as may be specified.
- Public health, the administration of health care, social care and education are all devolved matters: there may therefore be four separate public inquiries related to this issue.

Issues to be taken into account in any statutory inquiry consideration

- The prohibition on the finding of civil or criminal liability may lead to those who wish for it to shadow or replace litigation to be disappointed.
- Evidence can be withheld if it would cause a risk of damage to the economy: doubtless some aspects of the government's handling of the pandemic may involve revealing such information.
- The number and nature of the Chair or Panel and potentially the need for different panels for different areas of expertise.
- The need for a number of investigations into different areas.

An alternative , hybrid model

- Committees of independent experts to provide rapid evidence review and/or responses to the health aspects of the crisis – for example like the Parliamentary Commission on Banking Standards which were devised to seek to provide workable solutions.
- A a series of inquiries which look at discrete aspects of the issue with an overarching analysis after the separate inquiries have reported to draw together the issues.
- A Royal Commission on public health.
- What does the public want or need: a rapid inquiry focussed upon solutions to the present problems: or a more detailed review of what happened and when – and which is most politically expedient?

Potential terms of reference

- Public health preparedness
- (a) Was the Public Health system ready to deal with a respiratory pandemic?
- (b) Had sufficient resources (both money and people with adequate skills) been allocated to those responsible for managing the pandemic to deal quickly with any pandemic?
- © Was the governance of the public health system appropriate to deal with the pandemic?

Public Health Preparedness (2)

- (d) Were the organisations which were charged with taking decisions on preparedness the right ones?
- (e) Was appropriate expert advice on hand, and if not, why was this?
- (f) Were public health experts listened to or their advice followed in running and managing a public health pandemic in the UK?
- (g) Were lessons learned from Sars and other respiratory pandemics elsewhere over the past thirty years?
- (h) What lessons can be learnt from this to improve the readiness of public health organisations to deal with any sort of pandemic?

The early response

- What did the UK government know when about what was happening in China and elsewhere?
- What scientific advice did it receive, from whom and was this advice appropriate and sufficient?
- What was it reasonable for experts to know, and should advice have been sought from outside the UK ?
- Did the WHO or other global public health bodies provide the UK with adequate information and were the lines of communication clear between the relevant agencies?
- How did it balance the scientific advice and the public health needs against the economic consequences of shutting down the economy?

The early response (2)

- What steps did it take to liaise with other countries or to track entry of those into the UK from areas where Covid had spread between December 2019 – March 2020?
- Did it adopt appropriate policies in respect of border control and testing between December 2019 and March 2020?
- Were its policies on isolation and testing within the UK adequate?
- What did those with power to make decisions know about the medical and statistical analysis undertaken, when and were they aware of the advantages and disadvantages of various forms of response?
- What information and reasoning informed the decisions made by the Government between December – March 2020 about the pandemic?

The early response (3)

- What information was provided to the public and to those working in health and social care (who were not experts) between December 2019 – March 2020 and was this information accurate, fair and adequate?
- Why was the decision taken to lockdown the country on 23 March 2020? Was that the right date? Should it have happened at all? Should it have happened earlier?
- What has been the impact of any delay upon:
 - (a) Deaths
 - (b) Significant ill health (both serious illness and chronic after effects)
 - (c) The economy
 - (d) Society

Central governance issues : March – June 2020

- What was the reasoning that led to the lockdown ordered on 23 March 2020?
- How did the government, manage, handle or deal with the lockdown including how it made decisions: who made decisions: the reasons for those decisions: and the adequacy of those decisions.
- Did the government ask the right questions to the right people during this time?
- Would or should there have been alternative forms of decision making put in place during the pandemic?
- Should the sources of evidence and basis of decision making have been published or been made transparent?

Decisions on lockdown

- The necessity of the decisions taken to close schools, universities, nurseries.
- The necessity of the decision to close places of worship
- The necessity of the decision to close community facilities for the vulnerable
- Whether adequate steps were taken to ensure that vulnerable people were provided with adequate support (including the monies given to local authorities: the relaxation of various statutory obligations: the provision of oversight of those who are vulnerable: and if this was properly organised)
- Decisions made about opening (i.e. why clothes shops were fully reopened before schools) of public and private facilities and if they could be justified scientifically
- If made on social or other bases, the information and evidence which fed into that and the chain of decision making.

Decisions on lockdown (2)

- The Coronavirus regulations: were they sufficient, or necessary.
- Was the mechanism for scrutinising legislation adequate, or should greater Parliamentary scrutiny have been permitted.
- Were the steps taken by the government too draconian and were these powers needed or required.

Public health messaging

- Was the communication with the public adequate to prevent further transmission
- Why were decisions made about how to present various facts (or not present facts)
- Did the messaging reflect the health advice given and if not, why not
- What contribution did high profile breaches of the regulation make to the approach and compliance of the public

Health service response

- The decision to close hospitals to the majority of non urgent care
- The decision and allocation of resources to the NHS and between NHS bodies.
- The relationship between PHE, the government and the NHS
- The Nightingale hospital scheme
- The provision of training for hospital staff
- PPE for hospital staff and its procurement .
- The decision to discharge as many patients as possible back into the community and the advice taken before that decision was made.
- Effectiveness of the response from GP's, public health bodies, hospitals and community trusts.

Health service response (2)

- Training and staffing of Covid wards
- Admission to hospital: whether rationing was in place and if so did it cause deaths unnecessarily.
- Treatment of patients once admitted to hospital and if adequate treatments were available and provided
- Decision making as to who got what treatment and if that was discriminatory in any way.
- The restrictions on visits by family members and dying alone: the risk of infection spread versus a "good death" .
- Dealing with staff burnout and staffing patterns and shifts: did we have sufficient staff working in hospitals?
- Adequacy of treatment options.

Social care response

- Examination of the workings of the social care system and how this may have contributed to the difficulties in having effective and speedy responses to the crisis.
- PPE in the social care system, obtaining and paying for it and who should have undertaken such procurement and planning.
- Managing Covid in care homes and the relationship between care homes and hospitals.
- Resourcing of the social care system.
- Visitors during the crisis : should people have had to die without their families?
- Relationship between local authorities, central government and individual care homes

Testing

- Testing to be examined throughout the period including
- The adequacy of testing before lockdown began and if there should have been greater testing prior to March 23rd of suspected cases.
- The adequacy of testing in the community (at all times until today)
- The decisions made about who was to get a test and on what basis and if those were correct: how were these decisions made?
- When should a Test and Trace scheme have been set up, and the decision which lead to the scheme set up on 28 May 2020
- Why did the contact tracing app fail and should it have been tried in the first place
- Have the iterations of the scheme to date been successful in testing and tracing , and if not, why not?

Statistics

- Were the statistics on death and illnesses collate adequately
- How were death rate statistics compiled
- What advice was given , by whom and was it followed
- Did they reflect deaths in the community particularly before care home deaths were excluded and should it have done
- What should be the way to record deaths in a pandemic situation.

Procurement

- Sourcing of PPE including:
 - (a) What PPE was already available
 - (b) The decision making process leading to each decision taken to procure PPE
 - © The decision not to join the EU procurement scheme.
 - (d) Due diligence before awards were made.
 - (e) Whether greater efforts could have been made to stop PPE being diverted/not arriving.
 - (f) Quality of PPE and what sorts of steps were taken to secure that it would be of adequate quality (and whether there were adequate terms in the contract for repayment of sums if it was not adequate)

Covid and BAME

- Knowledge of the likely disproportionate impact of Covid on BAME individuals before the pandemic hit (i.e. what was known from other countries, and for other forms of Coronavirus and respiratory disease).
- The reasons why BAME patients may be more vulnerable to the worst effects of the disease including:
 - (a) Pre –existing conditions
 - (b) Housing and composition of households
 - (c) Other socio economic factors (such as types of employment)
- Whether sufficient steps were taken in advance and during the pandemic to recognise this disproportionate impact .
- Whether and what more research, information and steps should be taken to avoid such a disproportionate impact in the future.

Covid and care homes

- What steps were taken to assess the likely spread of Covid in the residential care sector from December 2019 – February 2019
- How prepared was this sector for a pandemic
- How and who made decisions (or did not make decisions) about the management of Covid in care homes
- What resources, equipment and advice were given, from whom and was this adequate.
- Whether the nature of employment in the care home sector was adequately considered as a significant source of transmission of the virus
- The interrelationship between care homes, local authorities, NHS facilities and if this system materially contributed to the high number of deaths in these homes.

Covid and care homes

- Asymptomatic transmission and what was known about this in February – March 2020 and did planning for this feed into decision making about the management of Covid in care homes
- The decisions made to shut down care homes and the impact that this had upon the physical and mental health of the residents
- Whether adequate resourcing, people and equipment were given to care homes during the lockdown period.
- Whether adequate testing was available.

Covid and prisons (and potentially other institutions – eg secure hospitals)

- Steps taken in prisons to minimize the spread of COVID
- Steps taken to reduce visitors .
- Adequacy of healthcare provision in prisons
- Adequacy of equipment
- Levels of isolation
- Who made these decisions and were they made with properly informed advice.

Education and Children

- Learning from the Education Select Committee investigation into the impact of Covid on education and children including:
 - The scientific advice about closing schools and transmission
 - The decisions made to cancel examinations and the decisions made by OFQUAL
 - The psychological and physical impacts of lockdown on children
 - The reopening of schools and whether these decision were adequate
 - Dealing with those with SEN during the pandemic and organising specialist schooling
 - IT during lockdown for children
 - Children at risk of abuse and harm and the adequacy of the supervision and response during lockdown

Education and children

- Food hunger for children during lockdown
- The difference in educational provision between schools
- The impact of remote learning on long term attainment (if known)
- Resources given to local authorities to manage the needs of vulnerable children
- Resources given to schools to manage the needs of vulnerable children or those without adequate IT
- Universities, including the impact on students of remote learning and examinations, and the impact this has upon their psychological and physical welfare: should universities have been shut (or should students have remained at university whilst locked down)

The Economy

- The economic impact of the virus (and in particular in comparison to other economies of a similar size/make up in Western Europe)
- Whether the service based economy was particularly vulnerable
- The delay in imposing lockdown and the extent to which this impacted negatively in the position of the industrial, leisure, retail and cultural sector

Cultural sector

- Steps taken to assist the cultural sector
- Scientific thinking and views about transmission in cultural venues and events
- Adequacy of support by government, philanthropists

Death and bereavement

- Management of burial services during lockdown
- Whether adequate thought was given to religious and cultural issues around death when devising systems of burial and funeral arrangements
- Registration of deaths
- Funeral services – whether more steps could have been taken to avoid the remote funeral
- Availability of services to help the bereaved

Covid – the future

- The "long form" of Covid
- Impact this may have upon the health service
- Further research and/or steps to be taken to improve the outcomes of those who contract Covid
- Improving treatment options and developing new options
- New forms of pandemic management and planning
- Need for new legislation or new bodies to manage pandemic planning

The Potential Covid Inquiry: What Steps Can be Taken Now to Prepare?



Carine Patry

1. Document Retention: Disclosure Powers

- Why do I need to retain documents?
- A public inquiry is intended to “inquire” which means that it has powers of compulsion to secure access to information: it is inquisitorial
- Mostly the existence of these powers means that disclosure is on a voluntary basis
- But sometimes disclosure needs to be, and is, compelled
- Lots of reasons for this, including worries about consequences of disclosure
- So section 21 of the Inquiries Act 2005 contains the power to require disclosure (“any documents in his custody or control that relate to a matter in question at the Inquiry” or “any other thing in his custody”– section 21(2).)

1. Document Retention: What to Keep

- As such, the powers to require disclosure are wide: assume everything will come out!
- It is really important to retain all relevant documentation, whether by way of emails, documents or anything else
- And keep them organised in a way which will facilitate disclosure
- But there will no need to disclose privileged information
- Section 22 of the 2005 Act says that you do not have to provide any information which you would not have to provide if you would not be required to do so in civil proceedings
- So perhaps have a think in advance about what might be privileged/store it separately

1. Document Retention

- A word or two more about privileged information
- Section 22 means that you don't have to disclose privileged information
- But sometimes, information contained in privileged documents is the only way that you can establish that something was done, or something was considered or the only way to get your point across
- So it might be an idea to think now about whether you want to ensure that information is held or made clear in a form which is not privileged
- Or in due course you could waive privilege – in the Infected Blood Inquiry, all public bodies are waiving privilege

2. Capturing Experiences Now

- Although as Fiona has said, there is real pressure to have an Inquiry soon, this is far from sure
- As such, the best advice is to start capturing the experiences of working in the context of a pandemic now and this should be done at all levels
- Bear in mind that Inquiry staff will be able to research what is the public domain, so what is not in the public domain needs to be understood now so as to give the internal view
- Should you be preparing witness statements or self-reflective accounts now?
- Well, section 21 of the 2005 does not just require disclosure of documents
- It requires the preparation of witness statements as the primary source of evidence

2. Capturing Experiences Now

- The need for witness statements at an Inquiry is central
- Witness statements allow an Inquiry to build upon information contained in contemporaneous documents
- They also help the Inquiry decide who should be called as witnesses at the oral hearings
- There are two approaches: the Inquiry can ask for witness statements to be prepared by witnesses or it can arrange to meet with the witness and take the statement
- Certainly at Leveson we required witnesses to prepare their own statement (and there is no power to compel someone to attend an interview)
- So any preparation now is bound to be helpful

2: Capturing Experiences Now

- So are you advising me to write witness statements now?
- No – not least because an Inquiry may never happen
- But certainly if you know your organisation is likely to be in the eye of the storm
- Or you are a large NHS Trust or PHE
- Then it may make sense to have an internal review now, where everyone's experiences can be captured now – what it was like to work in these conditions
- This is useful for you now anyway, to learn from the process
- Bear in mind that much of the evidence isn't just factual, it is opinion evidence

3. Departure of Staff

- It is really important to anticipate the fact that staff may leave: either they may move to another job or they may burn out
- That means that all staff at all levels should be keeping documents, memos, minutes in an organised and easily accessible form
- And that any staff leaving should have an exit interview, at which all these issues can be identified
- It is also best to ensure that leavers can be kept in touch with.

The Potential Covid Inquiry: Practical Guidance on managing the politics



David Lock QC

The 5 Golden Rules

1. Assume everything will come out and nothing will remain hidden:

- Learning the lessons from Hillsborough, IBI and other Inquiries
- The problem of mountains of digital evidence to reconstruct the timeline
- The problem of everyone else knowing there is a mountain of digital evidence to reconstruct the timeline

2. Your job is to explain who did what in your organisation, when and why.

- If you do that, it will be fine.
- If you don't, it will be obvious.

The 5 Golden Rules (2)

3. Don't get sucked into defending or justifying the actions of others.

- Let others speak for themselves and explain their own decisions
- Don't defend a policy you did not write: implementing a policy and devising a policy are different. Let those responsible for devising a policy explain why it was written as it was.

4. Mitigation will get lost if there is denial.

- Denial and mitigation are mutually exclusive
- Work out in advance what you can defend and what you cannot defend.

The 5 Golden Rules (3)

5. Honesty is the only viable policy – any other approach is doomed.

- Getting found out is inevitable
- Beware that individuals in your organisation may not hold to your high standards of honesty
- If in doubt, fess up: It always pays dividends in the end.

Thank you for listening

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