

Scope of the COVID-19 Inquiry

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A public inquiry into the handling of the Covid-19 pandemic has been scheduled to commence in 2022. Below, I offer some preliminary thoughts on the scope of this forthcoming public inquiry to be encapsulated at some point in the terms of reference.

Terms of reference are usually set at a ministerial level at the point of setting up an inquiry: Section 1 of the Inquiries Act 2005 allows for anything of public concern to be the subject of a public inquiry:

- (1) A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that–
 - (a) particular events have caused, or are capable of causing, public concern, or
 - (b) there is public concern that particular events may have occurred.

Section 1 allows the ministers of devolved administrations to establish inquiries of their own.

Sections 4 and 5 of the Inquiries Act 2005 then provide for the Minister to appoint a chair of the inquiry, and that before doing so, the Minister must set the terms of reference. The terms of reference are therefore an early decision – one taken before the inquiry is instituted.

If a person or organisation wishes to influence the terms of reference, then now is the time to do it.

There are potentially minimum legal requirements which a public inquiry must cover. That is because under the European Convention on Human Rights, where certain substantive human rights appear to have been breached there is a parasitic procedural investigative obligation that arises.

Article 2(1) ECHR provides:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”

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Article 3 ECHR provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

In ***R (Middleton) v HM Coroner for Western Somerset*** [2004] 2 A.C. 182, Lord Bingham explained:

2. The European Court of Human Rights has repeatedly interpreted article 2 of the European Convention as imposing on member states substantive obligations not to take life without justification and also to establish a framework of laws, precautions, procedures and means of enforcement which will, to the greatest extent reasonably practicable, protect life...

3. The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of the foregoing substantive obligations has been, or may have been, violated and it appears that agents of the state are, or may be, in some way implicated.

In ***R (Amin) v Secretary of State for the Home Department*** [2004] 1 AC 653, Lord Bingham explained at [31]:

“The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and 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”

In short, establish what happened and what we can learn.

In ***R (MA and BB) v SSHD*** [2019] EWHC 1524 (Admin) May J, in finding that there was a duty pursuant to article 3 to hold an inquiry into abuse in Brook House Immigration Removal Centre, held at [38] that article 3 ECHR imposes a similar obligation to that under article 2 ECHR (and see [42]):

“ECHR Article 3 imposes a negative duty on the state to prevent individuals from being subjected to inhumane or degrading treatment. There is a corresponding positive obligation to investigate when the substantive prohibition has arguably been breached.”

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I would add here that an important component of the ECHR investigatory duty is **promptness**. That raises an issue of pragmatism in terms of scope and scale of the inquiry. Something like the Bloody Sunday Inquiry that took 12 years, or even the current Brook House Inquiry that is yet to hear evidence four years after the period of detention with which it is concerned is not going to properly fulfil the functions of an inquiry.

Given the scale of death and of human suffering, and given that a public inquiry is being held, issues relevant to article 2 and article 3 mistreatment seem likely to be among the priorities for that inquiry, the terms of reference therefore likely include:

- Deaths; particularly deaths of state employees; and
- Inhuman and degrading treatment:
 - o The treatment of care home residents: large numbers of infected people being moved out of hospital and into care homes without a proper regime for testing or safeguarding. It is well established that there does not have to be an intentional element in article 3 mistreatment: see *R (Limbuella) v SSHD* [2006] 1 A.C. 396 which was concerned with the inhuman effects of street homelessness on vulnerable people. Absent the enormity of the pandemic, that policy alone would be seen as a disaster justifying a public inquiry, just as the infected blood scandal did.
 - o Care home residents have endured the most coercive measures in being denied contact with their friends and family and many have been held effectively in detention for most of the duration of the pandemic.

Securing public transparency and fact finding is clearly an important function of the inquiry. One can see the importance of this already in that Dr Qureshi, who has been seeking disclosure of the government's "Operation Cygnus" documents concerning pandemic planning in 2016, has recently won his appeal before the Information Commissioner, the ICO finding that there was a "very strong public interest" in understanding how effectively the government prepared for and handled the pandemic.

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Other means of discharging the duty

It is well established that ECHR investigative duties do not need to be discharged *per se* by a public inquiry: other investigative measures may be sufficient. For example, in individual cases, an inquest, or a civil damages claim, or a criminal prosecution can discharge the duty. Similarly there are a number of institutions conducting inquiries: the National Audit Office has undertaken multiple separate investigations into issues ranging from financial support for charities to the extension of free school meals. Similarly, parliament has been actively scrutinising the government's work throughout the crisis. The House of Lords has a dedicated Covid-19 select committee, In the House of Commons has many committees running targeted inquiries.

Conclusion

While I have given some indication of what seem, as a matter of legal obligation, to be matters which must be included, there is a wide discretion to include a whole range of matters. Some of the issues on which people have sought an inquiry include:

- Deaths: causes, culpability; preparedness;
- Care Homes: deaths; moving patients from hospitals; detention; visitation restrictions
- Detention environments: immigration detention centres; mental hospitals.
- Education- schools, children's learning, school meals, what happened, what lessons
- NHS: resilience; staff deaths; lessons for the future
- Test, track and trace system
- International arrivals and quarantine measures
- Learning lessons from other countries' response
- More positive aspects: housing homeless; environmental improvements?
- Fiscal and social measures such as the furlough scheme, 'Eat Out to Help Out'; suspension of evictions;
- Government messaging;
- Lockdown: the principles; local and national; proportionality of measures;
- The vaccine programme;
- Economic impacts – aviation; hospitality; the arts etc.

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- Procurement decisions: lawfulness; effectiveness, value for money.

At this point one can see that the scope of inquiry could become unwieldy. Ultimately, the fact-finding element is intended to be pragmatic, open, cathartic and useful. So too is the lesson-learning component. For an inquiry to find out what happened, and to learn lessons from what happened, it needs to be prompt, and for it to be prompt it needs to be focused. One can therefore see a number of parallel inquiries on different components might be a sensible means of setting it up.

The terms of reference and the structure of the inquiry will be under consideration by civil servants and ministers, and now is a time at which those representing likely participants in the inquiry should be advocating on the terms of reference.

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