

Scottish Government's Consultation on the Principles and Aims of a Covid-19 Public Inquiry
Evidence to the Scottish Government

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About Us

The **COVID-19 Review Observatory** is a UKRI-funded (AHRC) research initiative located at Birmingham Law School, University of Birmingham. It tracks, assesses, and engages with parliamentary reviews of responses to the COVID-19 pandemic with a view to ensuring effective consideration of rights protection, and to enhancing accountability and legitimacy by supporting parliamentary review. A key part of its work is improving engagement with human rights in COVID-19 review widely conceived.

Executive summary

- We welcome the Scottish Government's decision to consult on the aims and principles of a Covid-19 Public Inquiry. We note that the Scottish Government is under no statutory duty arising from the Inquiries Act 2005 to consult over the terms of references.
- While we welcome the decision to have a judge-led inquiry, the complexity and polycentricity of the COVID-19 pandemic and its effects, as well as the urgency and nature of government decision-making related to it, means that effective analysis of its management and impacts will best be achieved by multi-person, multi-disciplinary inquiry panel. We recommend appointment of a multi-person inquiry panel, composed with due regard to expertise, equality, diversity, and representation.
- We submit that, as a "human rights-based" inquiry, this inquiry ought to consider the wide range of rights-related matters arising. These go beyond those relevant to the Human Rights Act 1998 and the European Convention of Human Rights, to include human rights matters relating to unincorporated international treaties to which the United Kingdom is a contracting party.
- Along with the four harms that the Scottish Government has identified as arising from the Covid-19 pandemic, we identify a fifth significant impact on democratic governance. This harm is not fully reflected in the consultation factsheet, and we recommend the Inquiry consider the democratic governance harms of the pandemic as part of its work programme.
- We recognise that designing an Inquiry into Covid-19 that is wholly or primarily concerned with Scottish matters is challenging. As the central government and the other regions prepare for their own inquiries, we recommend that Scottish Ministers be prepared to exercise their powers under s.5(3) Public Inquiries Act to expand the terms of reference to address accountability gaps that may arise.

- We submit that gathering the experiences of vulnerable and marginalised persons and communities whom the pandemic has disproportionately impacted constitutes ‘essential evidence’ that the Inquiry Panel ought to solicit, consider and give appropriate weight.

1. Chair and Composition of the Inquiry Panel

1.1. We welcome the Scottish Government’s decision to have a ‘judge-led’ inquiry. As recognised by the Public Administration Select Committee, appointment of a judge to lead such an inquiry signifies an appropriate degree of independence, and brings to the inquiry judicial expertise in *inter alia* assessing evidence, hearing witnesses, and the management of complex processes and materials, thus enhancing credibility and legitimacy.¹ Furthermore, judicial expertise of this kind will enable the Inquiry Panel to decide, on a case by case basis, whether any issues or evidence should be considered or heard in closed sessions.

1.2. We submit, however, that the Government ought seriously to consider convening an Inquiry Panel composed of the chair together with other members, as per s. 3(1)(a) of the Inquiries Act 2005, and supported by appropriate assessors in accordance with s. 11. Section 8 of the Inquiries Act 2005 provides that, in appointing the inquiry panel, the Minister must have regard “to the need to ensure that the inquiry panel (considered as a whole) has the necessary expertise to undertake the inquiry”. We submit that the complexity and polycentricity of the COVID-19 pandemic and its effects, as well as the urgency and nature of government decision-making related to it, means that effective analysis of its management and impacts will best be achieved by a judge-led, multi-disciplinary inquiry panel. **We recommend appointment of a multi-person inquiry panel, composed with due regard to expertise, equality, diversity, and representation.** We note that such composition would not be without precedent and point, for example, to the Inquiry Panel serving the non-statutory inquiry into the emergence and identification of BSE and new variant CJE in the United Kingdom, and of the action taken in response to it (the so-called “mad cow disease”).² That Inquiry Panel was chaired by Lord Phillips of Worth Matravers, and also composed by former civil servant (Mrs June Bridgeman CB) and a pathologist (Professor Malcolm Ferguson-Smith FRS).

1.3. The scientific complexities of the pandemic suggest that the panel should include at least one person with appropriate scientific expertise. The importance of such expertise has already been acknowledged through government engagement with the COVID-19 Advisory Group,³ in Scotland, and the UK Scientific Advisory Group for Emergencies (SAGE) in Whitehall. **We thus recommend appointment of at least one appropriate scientific expert (i.e. with expertise on public health and/or virology) to the inquiry panel.**

1.4. Responding to the pandemic necessarily required governmental decision-making across multiple departments and, in some cases, in close collaboration with the UK government.

¹ Public Administration Select Committee, *Government by Inquiry*, (HC 2003-05, 51-I), at para 41-42.

² <https://webarchive.nationalarchives.gov.uk/ukgwa/20060802142310/http://www.bseinquiry.gov.uk/>

³ For the integration, see the following webpages:

At UK government level:

<https://www.gov.uk/government/publications/scientific-advisory-group-for-emergencies-sage-coronavirus-covid-19-response-membership/list-of-participants-of-sage-and-related-sub-groups>

At Scottish government level:

<https://www.gov.scot/groups/scottish-government-covid-19-advisory-group/>

Understanding the nature, process, ramifications, and internal review of such complex decision-making is likely to be an important part of the inquiry's work. Conscious of Lord Woolf's reflection to the Public Administration Select Committee that "today, judges do not often have any insight in the workings of the public service",⁴ we submit that the inquiry would benefit from a panel member with professional insight into government administration including, if possible, policy expertise on public health and NHS management. This is likely also to benefit the Inquiry in forming workable public policy recommendations. Justice Beatson has remarked that the skills that judges bring to public inquiries are compelling when "the task of the inquiry is solely to find facts. It is less compelling where issues of social or economic policy with political implications are involved".⁵ This underlines further the value of bringing government and policy expertise to the inquiry. **We thus recommend appointment of at least one member with expertise and insight in government decision-making to the inquiry panel.**

1.5. It is widely recognised that the pandemic and responses thereto have had disproportionate impacts across society, with particular attention to its unevenly distributed impact according to gender, ethnicity, age, sexual orientation, religion and disability. As the government's data on equality assessments points out, this was further exacerbated by the interaction of these characteristics with an individual's socio-economic circumstances.⁶ As the Equalities and Human Rights Committee put it, "[t]he consequences of pandemic and the necessary measures to mitigate its impact have, however, come at a price. Systemic inequalities have been made more visible. Those in the most vulnerable situations in our society have been impacted on a significant scale."⁷ Throughout the pandemic, Scottish political institutions have engaged productively with questions of human rights and equality, and attention to these has been evident in key documents produced by the Scottish Government, such as the policy memorandums on the two Scottish Coronavirus Acts, the two monthly reports on the exercise of emergency powers, the statements of reasons to extend the expiry date of the two Scottish Acts, and the government's general equality data on the effects of the pandemic. Bearing this in mind, it is critical that the inquiry panel would engage directly with experiences of the pandemic and their human rights effects. **We thus recommend appointment of at least one member with expertise in human rights and human rights-based engagement with vulnerable and marginalised persons and communities. We further recommend the integration of persons from marginalised and under-represented communities into the inquiry, either through inquiry panel membership or as assessors or both.**

⁴ Public Administration Committee, *Governing by Inquiries* (n 1), at para 46. Along similar lines, Lord Laming went on to say: "(...) there are few judges who have managed a big workforce, managed a public agency, managed big budgets in competing priorities, dealt with the party political machine, both locally and nationally, dealt with trade unions going about their perfectly legitimate business and dealt with the media day by day." (Ibid. at para 44).

⁵ Ibid. at para 44

⁶ <https://data.gov.scot/coronavirus-covid-19/equality.html>

⁷ Equalities and Human Rights Committee, *Report on the impact of the COVID-19 pandemic on equalities and human rights*, SP Paper 966, 1st Report. 2021 (Session 5), para 423 available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/EHRiC/2021/3/2/1283533c-8aed-4a8c-8034-1ab216baca73-1/EHRiCSO52021R5.pdf>

2. Scope

Securing a broad understanding of rights

2.1. We welcome the Scottish Government’s decision to have “human rights based” terms of reference for the Inquiry. We submit that designing person-centred, human rights-based approach to the inquiry work requires ensuring that ‘human rights’ are broadly understood as including but going beyond the rights protected by the European Convention on Human Rights (ECHR) and the Human Rights Act 1998.

2.2. We expect that the inquiry will consider human rights matters that arise under the ECHR and Human Rights Act, including questions of whether the state—including the Scottish Government—has acted in a manner that discharged effectively its positive obligations under Article 2 (right to life) and, in imposing and implementing public health restrictions, was compliant with its obligations under, for example, Articles 5, 6, 8, and 11. **We recommend that the inquiry consider all relevant matters arising in respect of the Human Rights Act 1998 and European Convention on Human Rights.**

2.3. However, a singular focus on the ECHR and Human Rights 1998 will be insufficient to ensure that full range of human rights implications are considered including, in particular, rights protected under the European Social Charter, the UN Convention on the Rights of the Child, the UN Convention on the Rights of People with Disabilities, and the International Covenant on Economic, Social and Cultural Rights. We welcome the Scottish Government and Parliament’s significant progress in incorporating social and economic rights and children’s rights into Scots Law, and the Government’s recently announced plans to introduce a new Human Rights Bill to incorporate into Scots Law rights arising under the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of Persons with Disabilities.⁸ Consistent with these commitments, and bearing in mind the nature, scale and complexity of rights-related implications of the pandemic and its management, **we recommend that the Inquiry consider the full scale of relevant human rights issues that arise including those relating to unincorporated international treaties to which the United Kingdom is a contracting party.**

Impact of the pandemic on good governance and democratic accountability in Scotland

2.4. The government’s consultation factsheet outlines a series of purposes and aims for the inquiry. While the aims include an analysis of both direct and indirect public health impacts, societal impacts (education, mental health, etc.) and economic impacts, the pandemic has also had significant impacts on democratic governance, which are not fully reflected in the consultation factsheet.⁹ These impacts emerge from, for example, the switch to hybrid and online parliamentary proceedings, and variations in electoral practice and law (in particular Scottish Parliament enacted the Scottish General Election (Coronavirus) Act 2021).

⁸ <https://www.gov.scot/news/new-human-rights-bill/>

⁹ Greene, Alan, *Emergency Powers in a Time of Pandemic*, Bristol University Press, 2020, Ch4.

2.5. Of particular importance has been the delegation of a wide range of extensive powers on ministers under the Coronavirus Act 2020 ('CVA') and the two Scottish Coronavirus Acts 2020. These Acts provided broad law-making powers on Scottish Ministers to make regulations to protect public health. Relevant regulations have, for example, introduced lockdowns, provided for the detention, isolation, and screening of potentially infectious persons; temporarily closed schools and registered childcare providers; prohibited or restricted events and gatherings; and restricted international travel. A significant number of the regulations made under the powers outlined above have been enacted under the so-called "made affirmative procedure". Under this procedure, Ministers can make regulations which enter into force before the Scottish Parliament has had a chance to consider and approve them. This gestures towards the impacts of the pandemic on democratic governance. Recently, the Scottish Government has announced its intention to make permanent the legislative powers that have supported its response to Covid. Its proposal, currently in consultation, includes keeping the most stringent emergency powers as part of a new suite of permanent powers to respond to future health emergencies and pandemics, other than Covid.¹⁰

2.6. Against this background there is an imperative to understand properly the effects of the pandemic on democratic governance, or what might be characterised as a fifth harm of the pandemic that requires consideration. We understand that the Bingham Centre for the Rule of Law has also recommend that the inquiry consider the impact of the pandemic on democratic governance. The inquiry offers an opportunity to explore whether a better balance between urgent public health measures and democratic and parliamentary governance and accountability might have been secured during the pandemic and, as a result might be secured in future. **We thus recommend the Inquiry consider the democratic governance harms of the pandemic as part of its work programme.**

3. Scottish and UK-wide matters: The need for cooperation in Inquiry Design

3.1. Section 28(2) of the Public Inquiries Act 2005 ('PIA') clearly prevents Scottish Ministers establishing up an inquiry that determines any fact or makes any recommendation that is not wholly or primarily concerned with a Scottish matter. Scottish matters are "matter[s] that relates to Scotland and is not a reserved matter (within the meaning of the Scotland Act 1998)" (s. 28(5) PIA).

3.2. This raises a clear challenge in designing this Public Inquiry. Significant aspects of the emergency response have indeed been crafted by the Scottish Parliament and Government, since matters such as health and social services, social welfare and education are devolved to Scotland. Furthermore, additional powers were given to Scottish Ministers by means of the Coronavirus Act 2020. This has resulted in Scotland managing its emergency response to the pandemic with a significant degree of autonomy. Nevertheless, the close relationship between the four constituent nations of the Union meant that a measure of cooperation and coordination in terms of the emergency response was sensible and efficient. Concordats and other soft law mechanisms such as the Joint Ministerial Committee have played a role. On the other hand, a

¹⁰ Scottish Government, Covid recovery: justice system, health and public services reform, August 2021, available at: <https://www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/>

relevant part of the support packages to deal with the economic consequences of the pandemic, including the furlough scheme, were crafted at the central level. This suggests that, while there was a degree of autonomy, the realities of cooperation and coordination mean that the division here between ‘Scottish matters’ and UK-wide matters may sometimes be unclear.

3.3. On Tuesday 3 August, the First Minister of Scotland (‘FMS’) gave a statement on Covid to the Scottish Parliament. She took questions by MSPs on matters related with her statement. In response to a question by Katy Clark MSP, the FMS went on to say that her government had been holding talks with the UK Government on the remit of potential inquiries, “so that we understand what issues it will look at and, therefore, what issues a separate Scottish public inquiry would look at and how all that would interact.”¹¹ Then, in giving a press statement on Coronavirus, the FMS said that her government would liaise closely with the UK and other devolved government. However, in her view, “the need for co-operation with other governments is not a reason to delay the establishment of our own inquiry.”¹²

3.4. Such cooperation in inquiry design between Scotland and the UK government is welcome, not least because without it accountability gaps may emerge with matters not being considered in any inquiry. Given the FMS’s political decision not to delay the Scottish Public Inquiry into Covid, which we welcome, there is a need to be alert to potential accountability gaps as and when they arise. **We this recommend that Scottish Ministers be prepared to exercise their powers under s.5(3) Public Inquiries Act to expand the terms of reference to address accountability gaps that arise.**

4. Essential evidence for the inquiry

4.1. We respectfully submit that the Inquiry Panel ought to put its best efforts to gather evidence from vulnerable and marginalised persons and communities. As noted above at para 1.5, the impact of the pandemic has been unevenly according to gender, ethnicity, age, sexual orientation, religion and disability. Under-represented communities have been vulnerable throughout the pandemic. In defining its approach to evidence on these groups, we recommend that the Inquiry ought to solicit, consider and give appropriate weight to qualitative evidence based on experience and other sociological sources. This will ensure the Inquiry achieves an appropriate balance between qualitative and quantitative data. We submit that this balance may enrich the Inquiry Panel understanding of the needs of these under-represented communities.

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¹¹ <https://www.parliament.scot/chamber-and-committees/what-was-said-and-official-reports/what-was-said-in-parliament/meeting-of-parliament-03-08-2021?meeting=13260&iob=120222>

¹² <https://www.gov.scot/publications/coronavirus-covid-19-update-first-ministers-statement-24-august-2021/>

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