

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

**Advice on Memorials and the ‘Listening Project’
Covid 19 Bereaved Families For Justice and Bereaved Families**

1. This advice addresses how the Inquiry should consider evidence directly relating to those who have lost their lives to Covid:
 - a. Evidence of who they were in life – referred to variously as ‘pen portraits’, ‘memorials’ or ‘commemorations’, and
 - b. Evidence regarding the circumstances of their deaths (including the experiences of their loved ones).
2. The Chair and her team have already made reference to a ‘listening project’ but it is unclear as to what is meant to be included within that process or what it is proposed to entail.
3. In our view, we should present a proposal from the bereaved families as to how the Inquiry should deal with both the above issues. We should do so relatively soon, before the Inquiry team forms their own view, which may be harder to influence at that stage. In order to form the proposal, we seek the views of the families, and no doubt the campaign team will assist in that endeavour.
4. Below we set out the current position of the law and how both matters have been dealt with in other inquests and inquiries into multiple deaths. No two circumstances or processes are the same and any Inquiry must be tailored to its own particular facts and issues. In the Covid Inquiry, the massive loss of life necessitates an effective process of memorial, commemoration and examination of the experiences of the deceased and their loved ones. But the extent of the loss of life also presents significant practical hurdles and we must find a way around these to ensure that all families are included so far as they want to be involved, and in as fair a way as is possible, in a process that achieves what they consider necessary.

A. Memorials

5. ‘Pen portraits’, ‘memorials’ or ‘commemorations’ are a relatively modern development at inquests and inquiries which investigate deaths, but they are already well established. In summary, pen portraits or memorials are statements and other material (videos for example) heard by the Coroner or Chair, relating to the *life* of the person who has died.

Concept and Purpose

6. The Chair has emphasised that the Inquiry will put those who have suffered most from the pandemic at the front and centre of its process. The bereaved families are undoubtedly at the top of that category. Historically, inquests and inquiries into controversial deaths treated the bereaved as observers of the process rather than participants. Often the deceased were referred to impersonally, and occasionally, in mass fatality cases, by numbers. Since the coming into force of the Human Rights Act, enabling the *effective participation* of the bereaved has become a legal requirement, because of the international obligations on the UK provided by Article 2 of the European Convention on Human Rights (the right to life). Concurrently with that progressive change, the hearing of testimony concerning the *lives* of those who have died has gone from an innovation to a recognised best practice¹.
7. The hearing of material regarding the lives and achievements of the deceased is very obviously important to the bereaved. However, the experience of inquests and inquiries, which have commenced with modules dedicated to hearing about the lives of the deceased, has been extremely positive for all involved, turning names into real people, and concentrating the minds of all involved – from the Inquiry Chair and Inquiry Legal Team (ILT), to other core participants – on the importance of remembering those who have been lost, respecting those who are bereaved, and recognising why accountability, lesson-learning and meaningful preventative change really matter.
8. The legal status of this material is open to discussion: whether it is ‘evidence’ or material which sits outside the formal process. In the context of an inquest, it is evidence relevant to the question ‘who’ the deceased was², and it has been considered as evidence in other public inquiries³. The statutory regime for a Public Inquiry under the Inquiries Act 2005 (‘the 2005 Act’) gives the Chair considerable discretion as to what material she receives and considers, and how it is adduced. Given that material heard in a memorial section is unlikely to be controversial or questioned by the Inquiry or any core participant, or directly material to specific questions raised by the terms of reference, discussion concerning the status of this evidence or material is of little real significance. In our view, we should make clear to the Chair the importance of this material or evidence and that it should be treated with appropriate respect and placed at the centre of the process. Its precise legal status is immaterial.

History

¹ Chief Coroner’s Guidance No. 41: <https://www.judiciary.uk/wp-content/uploads/2021/07/Chief-Coroners-Guidance-No-41-Use-of-Pen-Portrait-material.pdf>

² §3 of the Chief Coroner’s Guidance No. 41, although note §4iv, which suggests that it is not evidence relevant to the conclusion in jury inquests

³ The ‘Protocol on Pen portrait Evidence’: Manchester Arena Inquiry: <https://files.manchesterarenainquiry.org.uk/live/uploads/2020/03/07204228/Protocol-on-pen-portrait-evidence-revised-12.3.20.pdf>

9. The hearing of memorial evidence by the Canadian Commission of Inquiry into the 1985 Air India Flight 182 bombing is the earliest example of an official inquiry hearing evidence of the lives of those who died due to the incident under investigation. The Commission published a preliminary report into the outrage 25 years after the bombing which contained memorials to some of those who died, apparently prompted by the “callous attitude” displayed by the Government to the bereaved families. The report noted that the families had been dealt with as “adversaries”. Having heard the memorials of the families, the Commission published an initial report entitled: ‘*The Families Remember*’⁴.
10. In our jurisdiction, notable examples of ‘pen portraits’ or ‘commemorations’ include the 2014-16 Hillsborough inquests, the Grenfell Tower Inquiry⁵, the Grainger Inquiry, and the Manchester Arena Inquiry⁶, all of which had dedicated sections at the outset of the hearings where family members read statements and spoke about their loved ones, and displayed photographs, video and other materials illustrating their lives. Photos and montages of those who died have often been displayed throughout the inquest or inquiry hearings.
11. The Chief Coroner (CC) has endorsed the practice of adducing material regarding the life of the deceased at inquests: Chief Coroner Guidance No. 41 ‘Use of Pen Portrait Material’⁷. The CC has noted that the process should be voluntary for the families, and the guidance asserts: “A number of recent inquests of national importance have used pen portraits to humanise the process and give dignity to the bereaved”⁸. The CC has also observed that the ambit of such material is a matter of judgment for the coroner, but that “a relaxed and flexible approach” to the admission of such material should be adopted where there is no jury⁹. Although the present process is not an inquest, the CC’s guidance is plainly pertinent and helpful.
12. However, although the hearing of pen portrait evidence is widespread, it is not universal. The Infected Blood Inquiry (IBI) had a short generic memorial event, and has a physical memorial at the hearing venue where the bereaved may place a written commemoration of their loved ones. That Inquiry concerns another public health catastrophe, and very significant loss of life, and it is possible that it will be relied upon as an analogy here.

B. Evidence relating to the circumstances of the death

13. Where there has been an unnatural or violent death, the cause is unknown, or the death occurred whilst the person was in state detention, there must be an investigation by a Coroner at an inquest¹⁰. Where Article 2 is applicable – that is, where there may have been a breach by the state of its obligations to safeguard life – the official investigation must be capable of determining the circumstances of the death, and not just the narrow

⁴ <https://secretlaw.omeka.net/items/show/72> Volume 1 at p35-44

⁵ <https://www.grenfelltowerinquiry.org.uk/hearings/commemoration-hearing>

⁶ The protocol cited at fn 3 provides an important discussion regarding pen portraits

⁷ <https://www.judiciary.uk/wp-content/uploads/2021/07/Chief-Coroners-Guidance-No-41-Use-of-Pen-Portrait-material.pdf>

⁸ §3

⁹ §4iii

¹⁰ Section 1 and 6, Coroners and Justice Act 2009

mechanism of death. In order to do so, the Coroner must call sufficient evidence to determine the issues: evidence of fact and often expert evidence, including pathology.

14. In some cases, a public inquiry takes the place of an inquest and takes on such requirements, whereby it must consider the circumstances of each death individually. In this case, guidance by the CC has made clear that there is no obligation to hold inquests in many Covid cases, on the basis that the death occurred from a naturally occurring virus, and thereby does not meet the statutory criteria. Although that position is questionable in a large number of cases, because of the systemic failures which contributed to the deaths and/or because of the unnatural nature of the deaths (because they were contributed to by “culpable human failure”), it is certainly true that it is more appropriate to consider generic and systemic issues through the public inquiry rather than by individual inquests. It is also correct to note that it would be practically impossible for the Inquiry to consider the individual circumstances of 200,000 deaths.
15. The ‘terms of reference’ do not require the Chair to investigate the circumstances of each death individually, no doubt for the above two reasons. However, the circumstances of individual deaths are paramount for each family, and it will be necessary for the Inquiry to consider some individual cases in order to fulfil its terms of reference. It will be impossible for the Chair to consider, for example, the working of the 111 system or the application of DNR, without hearing from families regarding what happened to their loved ones.
16. Analogous issues have arisen in other inquiry processes. The Independent Inquiry into Child Sexual Abuse (IICSA) has had a ‘Truth Project’ to listen to victims and survivors, primarily relating to their experiences of abuse and its affects upon them. In part, this material has informed the recommendations made by the Inquiry. The Post Office Horizon IT Inquiry has heard ‘Human Impact Testimony’ from about 150 witnesses from England and Wales whose lives were affected, and 200 written statements, and is due to hear more witnesses from Scotland and Northern Ireland¹¹. Although this Inquiry may gain some assistance from these processes, they are to be distinguished by the concentration on the human impact of the problem subject to investigation, rather than the circumstances of a death (although sadly, this was the impact in some individual cases in both of those inquiries).

Discussion

17. In our view the Inquiry should address evidence relating to those who died, the bereaved, and others affected by the pandemic in at least three ways. It should hear evidence relating to:
 - a. The lives of those who died: pen portraits;
 - b. The circumstances leading to the death of those who died, and the experiences of their loved ones;
 - c. The consequence of the pandemic on the bereaved, and on others who have been affected in different ways, for example: those who suffer from ‘long Covid’, and; those whose mental health has been adversely affected by the pandemic or the response to it.

¹¹ <https://www.postofficehorizoninquiry.org.uk/participation>

18. The necessity for the Chair to hear pen portraits comes from the now-established practice in mass-casualty inquiries, and the CC guidance referred to above. It also derives from the Chair's assertion that she intends to put those most affected by the pandemic at the centre of the Inquiry. The requirements of the second and third categories derive from the ToR themselves and the need for a sufficiency of evidence to determine the issues.
19. If the above is right in principle, the Inquiry must find a way for all families who wish to provide pen portraits regarding their loved ones, and all families who wish to provide statements concerning the circumstances of their deaths, to do so. In our view, this will take significant organisation and collaboration between the ILT and the families' legal teams, however, there is no reason why it cannot be done. The resulting pen portraits, and statements can be published on dedicated pages of the Inquiry website, can feature (perhaps in summary form) in the Inquiry's report(s), and can form part of the Inquiry record.
20. It is unrealistic however, to expect the Inquiry to hear the pen portraits, or all the statements in the traditional way because of the sheer volume. From experience of other inquiries, it is possible to hear only about five pen portraits in a hearing day and that indicates the practical difficulties here.
21. How then can we craft a proposal which does not defeat the object of such evidence by removing it from the Inquiry process to a less meaningful parallel? In our view, we should ask the Chair to facilitate both pen portraits and statements relating to circumstances of the deaths as above, and to publish all of them on the website (or a separate dedicated website). We should ask her to set aside a number of weeks at the outset of the Inquiry to hear a representative number of pen portraits (alternatively, or preferably, a period at the start and possibly at the end of each module), interspersed with agreed read summaries of others, with the families taking a leading role in the organisation of the process.
22. In terms of which pen portraits are heard and which are summarised, the families will have to agree a fair process. The Inquiry will be highly reluctant to engage in a selection process and if they consider one is needed that is likely to undermine the call for detailed pen portrait evidence altogether. In adopting a fair and practical approach, the pen portraits could be grouped according to particular criteria to achieve a diverse and representative number of memorials to be heard publicly or summarised.
23. With respect to statements regarding the circumstances of death, the position is different. Whereas there is every reason for all such statements to be published (as stated on the Inquiry website) where that is the wish of the family, the evidence to be heard in the Inquiry will be that which is most relevant to the ToR and must be chosen to achieve a sufficiency of evidence on each issue, but proportionate to an effective and efficient Inquiry. We should invite the Chair to direct that her team and the family teams should liaise regarding which family witnesses should be called for these purposes.
24. We reiterate, as stated above (paras 17 and 18), that there is a clear distinction between Pen Portrait evidence, and statements concerning the circumstances which led to death. Both are of huge importance but they can be dealt with in different ways. Pen portraits

are generally unchallenged and can be heard in the same way as other evidence or in a different venue and forum (as was the case at the Grenfell Inquiry). Ultimately these are issues to be determined by the Chair, but in order to maximise the outcome for the families, we need to reach a collective view in the coming weeks.

25. Once families have had time to consider the above, we will hold a zoom conference to discuss and answer questions to clarify and agree a proposal to the chair.

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