

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

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

1. These submissions make proposals on behalf of the bereaved families as to how the Inquiry should consider evidence directly relating to those who have lost their lives to Covid:
 - a. Evidence or material relating to 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. From an early stage, the Chair has made reference to a ‘listening project’ and in recent weeks the Inquiry team has asked the CBFFJ to put forward a number of families to take part in a pilot project. The families are anxious to assist the Inquiry, however, despite a number of requests for information, it remains unclear as to what is meant to be included within that process or what it is proposed to entail. We repeat our previous requests as clearly as is possible: all these matters should be subject to discussion between the Inquiry team and those representing the families at the earliest opportunity.
3. We address these submissions in three parts:
 - a. in principle: what material and evidence the Inquiry should consider,
 - b. the practicalities, given the scale of loss of life from the pandemic, and
 - c. a discussion of the law and how other inquiries and processes have dealt with these issues.

What evidence and material the Inquiry should seek, consider, and publish

4. In summary, the families submit that all bereaved family members should be invited to provide the Inquiry with two distinct areas of evidence. Firstly, pen portraits as to who their loved one was in life, and secondly, testimony as to the circumstances relating to their death and the effect those circumstances and the loss have had on the bereaved.
5. With respect to both areas, provision of statements and other material should be **purely voluntary**, and the Inquiry should provide sufficient resourcing to assist families in providing such material, in line with the approach of other processes (referred to below).

6. All of the statements and material should be published **where the family wish that to be the case**. Where a family does not want the material to be published, it should be held confidentially by the Inquiry subject to the same disclosure processes as applicable to all other material produced to the Inquiry.
7. A significant number of pen portraits should be heard, read, or played to the Inquiry in open sessions. A sufficiency of the bereaved families' evidence of circumstances surrounding the deaths of their loved ones, and their own experiences, should be heard by the Inquiry in fulfilling the terms of reference. We address the practicalities below.

The practicalities

8. The huge number of deaths resulting from the pandemic provide practical difficulties as to how the Inquiry should gather and consider this evidence and material. Those difficulties are not insurmountable, and, as stated above, should be subject to discussion between the Inquiry team and those representing the families. A solution should be sought to meet the importance of this evidence and material for both the families and the Inquiry, and it should be reached having regard to the need to progress the Inquiry as swiftly as possible, and at proportionate cost. We hope that agreement can be reached and then put before the Chair for her consideration.
9. Experience shows that bringing this material together is an emotional and difficult exercise for the families, but one of great importance. It is often a cathartic process. Pen portraits have generally involved the production of statements from family members with supporting material, and/or short videos. In other Inquiries and similar processes this has been done with the assistance of their lawyers, and sometimes, film companies have been engaged to assist with the production and editing of videos. In our submission, this is the only realistic way of undertaking this work, and those acting for the bereaved have considerable experience in this regard. Given the numbers involved, we envisage working to a checklist and having a proportionate guideline length to statements or videos, but recognising that each one will have unique and bespoke elements.
10. For those families who choose to provide a Pen portrait and want it published, we submit that the Inquiry should post the statement and/or video to its website or a separate dedicated memorial website. However, it is vital that Pen Portraits are a part of the Inquiry itself and they should not be a parallel process, and a significant number should be heard orally in the open sessions. Until the shape of the Inquiry becomes apparent, we cannot make firm submissions as to how many PPs should be heard or how they might be selected, however, in outline, we envisage a period being set aside for hearing PPs at the outset of the Inquiry, or at the beginning of each module, or both.
11. With respect to evidence from family members regarding the circumstances of death and their own experiences, we submit that witness statements should be invited from any family member who wishes to provide one. Again, those statements should be drafted with the assistance of their lawyers, and produced to the Inquiry in the usual way. Where family members wish their statements to be published, they should be posted to the website. Once again, these statements should not be part of a parallel

process. A significant number of the statements will be relevant to the ToR and the Inquiry should hear a sufficient number of them for that purpose, in the course of the hearings. In the normal way, there can be discussions as to how many and which family witnesses should be called, or their statements read.

Discussion of the legal basis and practice of inquiries considering this type of material

12. 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. We recognise others have suffered from the effects of covid: from long covid, to associated mental health issues, from increased levels of domestic violence to economic harm. Others will no doubt make submissions as to how best evidence can be gathered and adduced from those affected in different ways, and these submissions on behalf of the bereaved are not in any way designed to undermine those legitimate interests.

a. Pen Portraits

13. ‘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

14. 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. We do not know if or when the proposed Bill of Rights will repeal and replace the HRA, however, we see nothing in its content or approach which suggests this part of the process should change.

15. 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

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>

people, and concentrating the minds of all involved – from the Inquiry Chair, Panel 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.

16. The legal status of this material is open to discussion. 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, as long as the importance of this material or evidence is recognised, and that it should be treated with appropriate respect, fully considered within the inquiry, and placed at the centre of the process, its precise legal status is immaterial.

- *History*

17. 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, of which we are aware. 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.
18. 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.
19. 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

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>

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

Material⁷. 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.

20. 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 effects upon them. In part, this material has informed the recommendations made by the Inquiry¹⁰. 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 fatal consequences and the circumstances of a death (although sadly, this was the impact in some individual cases in both of those inquiries). We have no doubt those arrangements may have been appropriate to such inquiries. However, there is a clear and obvious distinction.

b. Evidence relating to the circumstances of the death

21. 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 inquest¹². 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 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.
22. 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, the Inquiry will not be required to do so, and it would be practically impossible for the Inquiry to consider the individual circumstances of 200,000 deaths. Where it is necessary and appropriate to determine the individual circumstances, a separate inquest will have to be heard. The corollary is that individual inquests will be as unable to consider generic and systemic issues and failures as a public inquiry will be to look at the full facts of individual deaths. The Inquiry is the forum best equipped to consider generic issues, policy, and systemic failures relating to preparedness and

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 <https://www.iicsa.org.uk/victims-and-survivors/truth-project>

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

¹² Section 1 and 6, Coroners and Justice Act 2009

response, as well as individual policy and resourcing decisions which may have contributed to deaths.

23. Although the Inquiry will not determine them, the circumstances of individual deaths are paramount for each family, and it will be necessary for the Inquiry to consider evidence relating to some individuals 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. Indeed, on virtually all of the issues relating to circumstances of death – including hospital infections and discharges to care homes – family members will have relevant evidence.
24. The legal basis for the gathering, consideration and publication of family evidence regarding circumstances of death, and the effect on the bereaved, is therefore straightforward. It is to allow for the selection of sufficient evidence to properly consider the terms of reference, and allow for the fulfilment of the Article 2 requirement on the UK.

Conclusions

25. In summary we therefore propose that the Inquiry work with representatives of the families to:
 - a. Provide (on a voluntary basis) Pen Portraits relating to the lives of their loved ones,
 - b. Provide separate statements relating to the circumstances of death and the effect of the loss on the bereaved (again on a voluntary basis),
 - c. Publish the PPs and the circumstance of death statements on the Inquiry website, subject to the wishes and consent of each family. Where publication is not appropriate, the PPs and statements to be treated confidentially, and according to the usual disclosure regime,
 - d. Agree for a proportionate number of PPs to be heard, read or played to the Inquiry in open hearings, as appropriate at dedicated sessions at the outset of the Inquiry, prior to the first module, or at the start of each module,
 - e. Agree for a sufficiency of statements of circumstances of death to be heard during each module as related to ToR.
26. It is imperative that the Inquiry treats both of these categories of evidence as a part of the Inquiry, and not as a parallel process. The Inquiry should properly recognise both the PPs and the evidence of circumstances of death and effect of their loss on the bereaved, in its reports.
27. In terms of which PPs are heard or summarised, the families will strive to agree a fair process amongst themselves and then with the Inquiry.
28. With respect to statements regarding the circumstances of death, the position is different: 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, proportionate to an effective and efficient Inquiry. With respect to both categories of evidence representatives of the families will endeavour to assist the Inquiry achieve an appropriate solution.

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