

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

---

Note re Consultation draft 'Terms of Reference'

---

1. In our view the draft 'terms of reference' (ToR) published for the consultation are a reasonably good start. It appears that those who drafted them have had regard to the C19BFJ 'amended draft ToR', submitted in January 2022. The majority of issues that we submitted should be included, have been included, although there remain quite a number of omissions and there are significant uncertainties. The consultation ToR are also quite open-ended, and that will enable us to argue that some other matters that we have asked for are covered by implication.
2. As stated, the negatives are that the consultation draft is not as clear as our version, and there are issues, as identified below, which do appear to have been excluded by design or overlooked. It is important to note that this initial draft provides much that we have argued for, and we now have the opportunity to persuade the Prime Minister to add more.
3. Public Inquiries are statutory legal processes which are set up by Government Ministers, who appoint a Chair and set the scope and purpose. The scope means the extent of the issues upon which the Inquiry will investigate and report and is defined through 'terms of reference'. Once the Chair is appointed and the ToR are set, the Minister has little control of the process. In theory, he or she can amend the ToR at any point, or bring the Inquiry to a premature end, but these are very difficult to do in practice. The Minister can be required to give evidence, and on oath, which may be important here.
4. Inquiries are independent, official, quasi-judicial investigations to determine what happened and make recommendations to prevent or reduce the likelihood of recurrence in the future, or to mitigate its effect if it does. The necessary link between the facts and recommendations is accountability. Accountability requires the Chair to look for omissions or failures which contributed to the problem being looked into, and to determine who was responsible for them. The absence of any mention of accountability or consideration of failures or omissions in the draft is notable, but not fatal to a proper process. We will argue for their express addition to the final version and argue that they are implied if they are not added.
5. Sometimes ToR are limited or exclude issues which the Minister does not want to be looked into. In setting the ToR the Minister must consult with the Chair. It is important to remember that the Minister only has to consult and has the final say on what is included and what is not, and how it is termed. The looser and more ex-

pansive the ToR and the aims of the Inquiry, the easier it is for the Chair to determine her own process, and the easier it is for us to argue for what we want.

6. There is no obligation on either the Minister or the Chair to consult with anyone else, although it is plainly the right thing to do, and it is positive that there is an open consultation in this case. In the process underway, we have the opportunity to influence the Chair with respect to the ToR, and also to impress on her the centrality of the bereaved families to the whole process. You, the families, are in the driving seat for this as you will be meeting the Chair to speak about your own loss and what you want out of the process. In parallel, the legal team will consult with you and look at your feedback and draft a written submission which will go to the Chair and the consultation. This will be done during this process, to argue for amendments to the ToR. Below, we provide some initial comments.

### **Shortcomings of the consultation draft.**

7. There is no express reference to Government decision-making or policy in the draft, however, the term “central, devolved and local” in paragraph 1 is difficult to understand if it does not include these matters, as indeed is the third bullet point: “inter-governmental decision-making”.
8. In overview, we split the issues into (a) preparedness – what should have happened prior to the pandemic to ensure our countries were as prepared as reasonably possible to prevent its spread and mitigate its effects – and (b) the response to the pandemic once it struck our shores. Unfortunately, the consultation draft does not do this. Instead, it takes three themes – public health, the health and care sector, and the economy – and provides a general list of topics with respect to each, and a list of matters to be considered when those topics are investigated. Comparing the two drafts, we have no hesitation in saying that our approach is clearer and more thorough, and we should persist in getting as much of it included as possible.
9. Although ‘preparedness’ and ‘resilience’ are included in the first two themes, there is no definition of either. As can be seen from our draft ToR, we set out a substantial number of topics under preparedness. Although we have said that open-ended terms are generally helpful, the failure to particularise at all may lead to a more restrictive approach being taken. To take an example, at A3b we have particularise the investigation of responsibility for “Collaborating with international bodies and other states in identifying and preventing the transmission of emerging disease threats”. As drafted, the Inquiry might say this is out of scope. We will push back on this and the detail in general.
10. There is no express mention of investigating whether measures taken by Government or relevant public authorities, were sufficiently swift and effective: a crucial aspect of most inquiries.
11. The draft refers to a number of factors which should be considered in learning lessons, including any disparities evident from the impact of the pandemic and the

state's response relating to protected characteristics under the Equalities Act, and similar devolved legislation. This omits investigation of whether Government and relevant public authorities actually sought to identify communities which might be particularly vulnerable on a number of grounds, and whether they took appropriate, swift and sufficient action to mitigate those vulnerabilities. This should be an express ToR and not added as a supplementary concern or after thought.

12. In terms of the first consultation draft theme – public health decision-making: There is no mention of scientific knowledge, research or advice to Government, or the extent to which it was followed or disregarded.
- There is no mention of whether any action was taken consequent to lessons learned from other countries which were affected by the pandemic before the UK. Similarly, there is no reference to decisions regarding the supply of vaccines, or patent waivers to foreign countries, and whether these decisions were proportionate and appropriate.
  - Messaging, advice and guidance to the public and various sectors might be included in “how decisions were made, communicated and implicated”, but that term is uncertain. The extent to which messaging was undermined by inconsistent or late decisions, and by the actions of those in authority, or anti-vax campaigners, should also be expressly included.
  - Shielding is limited to the clinically vulnerable. That is too vague. It should include older persons generally, and persons who are vulnerable due to mental health problems, developmental disorders, learning disabilities, learning difficulties, and through conditions such as dementia.
  - Restrictions on attendance at places of education is included. This should be expanded to include protection of teachers and other staff and students.
  - Decisions relating to hospitality, retail, sports and leisure, and cultural institutions should include reference to the protection of staff, customers and visitors,
  - There is no mention of proactive identification of individuals and communities who were or might be particularly vulnerable to the pandemic or unable to mitigate its effect, and whether swift, appropriate and sufficient action was taken accordingly.
  - The inclusion of prisons “and other places of detention” presumably includes youth detention facilities, mental health hospitals and immigration centres. The extent to which decision-making relating to these facilities is to be addressed by the Inquiry is unclear. It should include similar issues as relate to hospitals and other care settings but tailored to the particular situation.
  - Although the experiences and impact of the pandemic on key workers is included in the catch-all references at the end of the draft, the vulnerability of key workers and their protection should have been a central part of the public health response and should be expressly included in this section. Not only should their protection have been paramount because of their obvious vulnerability, but it was essential to the continued functioning of society. Key workers included those working in the emergency services but also in transport, food supply and retail, and other sector workers.
  - Similarly, those on zero hours contracts and others in the grey economy were particularly vulnerable and should have been proactively protected. Decisionmaking on this topic should be included under this theme.

13. With respect to the health and care sector, the consultation draft:
- Expressly refers to hospitals and care homes but does not define whether a number of important settings are included in “other care settings”: for example, nursing homes, hospices, supported living accommodation, congregate facilities, and domiciliary care provision.
  - Refers to preparedness in terms of capacity but not equipment (PPE, oxygen, medicines, ventilators), or contingency planning,
  - Refers to restrictions on visiting care homes and other care settings, but fails to include this topic with regard to hospitals, in particular with regard to vulnerable patients and the dying, and with respect to visiting relatives and friends themselves,
  - Refers to the use of DNACPR and palliative care but does not refer to adherence to ‘End of Life’ protocols,
  - Fails to include GP and other healthcare settings other than hospitals (for example, dentists and opticians),
  - Fails to include 999, 111 and ambulance services,
  - There is no reference to attendance at funerals and support for the bereaved.
14. The third theme, economic response, does expressly refer to government interventions.
15. With respect to lessons to be learned, this should include preparedness to prevent and mitigate the next pandemic, including contingency plans for a response once it occurs.

## Action

16. As stated above, the ultimate decision on the ToR falls to the PM. In terms of improving his current draft, the consultation with Baroness Hallett is extremely important as he is required to take account of what she says. We therefore hope and trust that families taking part in the consultation meetings will concentrate on getting their stories across to Baroness Hallett and impressing on her what aspects of the Inquiry are most important to each family. We hope that our draft ToR and this document will assist in that endeavour.
17. For families who are meeting with the Chair, and those who are not, we ask that you provide feedback on the consultation draft as soon as you are able. We will then draft up a response to the consultation and circulate it for amendment and approval. As ever, please get in touch if anything is unclear.

Pete Weatherby QC  
Elkan Abrahamson

15 March 2022