

## **Response to UK Covid-19 Inquiry Terms of Reference Consultation**

**April 2022**

### **Introduction**

This response is filed on behalf of the Committee on the Administration of Justice (CAJ). CAJ is an independent human rights non-Governmental organisation with cross community membership in Northern Ireland and beyond. It was established in 1981, campaigns on a broad range of human rights issues and is a member of the International Federation of Human Rights (FIDH). CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its international human rights obligations.

We preface our response to this consultation into the Terms of Reference for a UK Covid-19 Inquiry by stating that it is our strong view that it is also necessary to hold a Northern Ireland specific independent and human rights compliant public inquiry into the handling of the Covid-19 pandemic. This is essential to address our particular experience and the response of the devolved Northern Ireland Government to the pandemic, to provide full public accountability, and to learn lessons to prevent recurrence, which can complement a wider UK inquiry.

We note in the Draft Terms of Reference that this Inquiry will consider both reserved and devolved matters but steps will be taken to minimise duplication of investigation, evidence gathering and reporting with devolved administration Public Inquiries.

CAJ together with UNISON Northern Ireland and Amnesty International have at the outset called for a public inquiry into the Northern Ireland devolved administration's handling of Covid-19 in care and nursing homes in Northern Ireland, with particular reference to the very high numbers of deaths of residents and to address the different approach to that of the UK Government.<sup>1</sup>

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<sup>1</sup> <https://caj.org.uk/2020/06/23/amnesty-caj-unison-call-for-public-inquiry-into-care-home-deaths/>

As a co-convenor of the Equality Coalition,<sup>2</sup> together with UNISON Northern Ireland, we have issued statements on the need to urgently address the inequalities exacerbated by Covid-19 and to prevent austerity becoming part of Northern Ireland's pandemic recovery.<sup>3</sup>

On 23 February 2022, we also corresponded with the Northern Ireland Health Minister Mr Robin Swann MLA seeking a firm commitment that an independent human rights compliant public inquiry will be held in Northern Ireland into the handling of the Covid-19 pandemic, notwithstanding the commitment to a UK-wide Public Inquiry. We submitted and repeat now that given the breadth of issues to be considered it is likely issues specific to the circumstances of Northern Ireland are likely to be marginal in a UK-wide inquiry. Therefore it is our view that a Northern Ireland specific inquiry will be necessary to address our particular experiences and can complement any wider UK inquiry, similar to the approach that has been taken with Scottish Public Inquiry.

The Northern Ireland Health Minister responded to our letter on 7 March 2022 stating that the Northern Ireland Executive had yet to decide whether Northern Ireland will solely participate in the UK Covid Inquiry or whether there will be a Northern Ireland Inquiry. He reaffirmed his public acknowledgment of the need for a thorough review of the entire Government response to Covid-19, including all parts of Government and across the Health and Social Care system as soon as practical and committed to the Department of Health playing its part to ensure lessons are learned and (importantly in CAJ's view) any necessary action taken.

### **1. Do the Inquiry's draft Terms of Reference cover all the areas that you think should be addressed by the Inquiry?**

#### **Limitations of the Inquiries Act 2005**

No. An Inquiry should establish the facts, provide public accountability, help learn lessons, restore public confidence, discharge investigative obligations and can be cathartic and assist in the development of policy and there are limitations in this draft Terms of Reference.<sup>4</sup> As we outlined in our correspondence to the Northern Ireland Health Minister a UK-wide Public Inquiry into the handling and management of the Covid-19 pandemic under the Inquiries

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<sup>2</sup> The Equality Coalition is a broad alliance of more than 100 civil society organisations and trade unions in Northern Ireland that collectively campaign to promote equality. The Coalition is jointly convened by UNISON and CAJ. The [member organisations](#) in the Equality Coalition work across all nine equality categories covered by Section 75 of the Northern Ireland Act 1998, as well as on other recognised protected equality grounds.

<sup>3</sup> <https://caj.org.uk/2020/04/21/civil-society-groups-call-for-action-to-ensure-inequalities-are-not-exacerbated-by-the-covid-19-crisis/>  
<https://caj.org.uk/wp-content/uploads/2021/07/Equality-Coalition-Statement-on-the-Pandemic-Recovery-July-21.pdf>

<sup>4</sup> Chapter 1, Introduction 'A. The Need for and Function of Public Inquiries', *Public Inquiries*, Beer, 2011

Act 2005 will raise particular concerns about independence and is unlikely to inspire public confidence unless clear undertakings are put in place to address the limitations of this Act.

CAJ has had long standing concerns about the human rights compliance of the Inquiries Act 2005 given that it empowers Government Ministers to decide whether there should be an inquiry; set the inquiry's terms of reference; amend its terms of reference; appoint its members; restrict public access to inquiries; prevent the publication of evidence placed before an inquiry; prevent the publication of the inquiry's report; suspend or terminate an inquiry; and withhold the costs of any part of an inquiry which strays beyond the terms of reference set by the Minister.

We submitted our concerns to the House of Lords Select Committee,<sup>5</sup> which recommended amendments to the legislation.<sup>6</sup> The Joint Committee on Human Rights has endorsed many of our concerns, noting that they risk violating the independence requirements arising under Article 2 of the European Convention on Human Rights (ECHR) (right to life), Article 3 ECHR (right to be free from torture or inhuman or degrading treatment or punishment) and Article 8 ECHR (right to private life).<sup>7</sup> Senior judges, including Lord Saville who chaired the Bloody Sunday Inquiry, have also expressed their concerns about the ability of these ministerial powers which made:

‘a very serious inroad into the independence of any inquiry and [was] likely to damage or destroy public confidence in the inquiry and its findings’ and he would not be prepared to preside over such an inquiry.<sup>8</sup>

The late Judge Cory, a retired Canadian judge who investigated 6 collusion cases in Northern Ireland also powerfully set out the limitations of the Act:

‘...it seems to me that the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation. There have been references in the press to an international judicial membership in the Inquiry. If the new Act were to become law, I would advise all Canadian judges to decline an appointment in light of the impossible situation they would be facing. In fact, I

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<sup>5</sup> <https://caj.org.uk/2013/09/04/s422-written-evidence-house-lords-select-committee-inquiries-act-2005/>

<sup>6</sup> <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/143.pdf>

<sup>7</sup> <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/14309.htm>

<sup>8</sup> Ibid.

cannot contemplate any self respecting Canadian judge accepting an appointment to an inquiry constituted under the new proposed act.<sup>9</sup>

To ensure both perceived and practical independence it is essential that binding undertakings be provided that ministerial powers under the Inquiries Act, which could fetter the independence of the inquiry, will not be used learning from the experience of the Baha Moussa Inquiry Protocol where the Chair made Restriction Orders rather than the Secretary of State issuing Restriction Notices.<sup>10</sup>

## **Human Rights Based Approach**

It is also notable that there is a lack of reference in the proposed Terms of Reference to the need to discharge human rights obligations and that the Inquiry be informed by a human rights based approach.<sup>11</sup> Section 6(1) of the Human Rights Act 1998 obligates Government to act in a manner compatible with the European Convention on Human Rights (ECHR).

It is our view that Article 2 of the European Convention on Human Rights (ECHR) which protects the right to life, Article 3 ECHR which protects the right to be free from inhuman and degrading treatment or punishment, Article 8 ECHR which protects the right to a private, home and family life and Article 14 ECHR the right to non-discrimination are engaged. There are particular investigative obligations arising under Article 2 ECHR and Article 3 ECHR.

The procedural requirements under Article 2 & 3 ECHR, which should inform this Public Inquiry can be summarised as follows:

- Authorities must **act of their own motion** once it has come to their attention;
- **Independent** of those implicated in the events – there must be no practical, hierarchical or institutional connection to those implicated; the Chair and Panel should be independent and have their own independent legal team. Under the Inquiries Act 2005, a Minister can withhold material from publication in the report, withdraw funding, end an inquiry before publication of the report and restrict disclosure or publication of evidence on national security or public interest grounds.

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<sup>9</sup> <https://www.patfinucanecentre.org/collusion-pat-finucane/canadian-judge-peter-cory-slams-finucane-inquiry-legislation>

<sup>10</sup> See British Irish Rights Watch's analysis of the Baha Moussa Inquiry and its Report for further detail: [https://www.rightsandsecurity.org/assets/cv\\_uploads/BahaMoussaReport\\_\(2\).pdf](https://www.rightsandsecurity.org/assets/cv_uploads/BahaMoussaReport_(2).pdf)

<sup>11</sup> See in particular research by the University of Strathclyde and the 'PANEL' approach: [https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/cshrl/CSHRL\\_Inquiry\\_Brief\\_3rd\\_September\\_2021.pdf](https://www.strath.ac.uk/media/1newwebsite/departmentsubject/law/cshrl/CSHRL_Inquiry_Brief_3rd_September_2021.pdf)

If an inquiry is held under this Act it is essential that lessons are learned and best practice replicated from the Baha Moussa Inquiry protocol;

- **Effective** – an investigation must be capable of leading to the identification and punishment of individuals responsible; this is an obligation not of results but of means. Authorities must take reasonable steps to collect evidence and elucidate the circumstances of the case. Investigative conclusions must be based on a thorough, objective and impartial analysis of all relevant elements;
- There must be a sufficient element of **public scrutiny** to provide accountability in practice as well as in theory;
- **The inquiry must involve victims or their next of kin** in the procedure to the extent necessary to safeguard their legitimate interests. Core participant status should be afforded to victims and survivors;
- **There is a duty of promptness** – the investigation must take place promptly and proceed with reasonable expedition. This is necessary to maintain public confidence in the rule of law.

### **International soft law standards**

When considering its obligations under the ECHR, authorities are also required to interpret their provisions in light of other relevant international standards and their authoritative interpretation by competent international treaty bodies. The Public Inquiry should also assess compliance with the following non-exhaustive list of international obligations:

- Article 6 of the International Covenant on Civil and Political Rights (ICCPR) protects the right to life
- Article 2 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination, and provides for the provision of an effective remedy for any violations
- Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the right to the enjoyment of the highest attainable standard of physical and mental health
- Article 7(b) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) protects the rights to safe and healthy working conditions
- International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)
- Convention on the Rights of the Child (CRC)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

- The Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OP-CAT)
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW)
- Article 11 of the European Social Charter which provides for the right to protection of health
- Article 3 of the European Social Charter which provides for the right to safe and healthy working conditions
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Universal Declaration on Human Rights
- Constitutional provisions of the World Health Organisation and World Health Assembly

### **Further omissions from the Terms of Reference**

- It is essential that allegations of misconduct in public office, corruption and lack of propriety in contracts including the use of ‘VIP lanes’<sup>12</sup> for suppliers of PPE is given particular focus. This is in particular to be addressed with a how it interfered with the positive human rights obligations to fulfil the right to health
- There is a lack of express focus on contextual issues; for example the impact of the casualisation of the workforce and the extent to which public health response duties can be or were placed on the private sector including care homes
- There is no reference to the treatment of care workers outside ‘care settings’
- The disproportionate effect of the pandemic on protected equality groups and characteristics under Section 75 of the Northern Ireland Act and Equality Act 2010 including particular on Black, Asian and minority ethnic workers and women
- The disproportionate impact of the pandemic on those from low socio-economic backgrounds
- Limited access to GPs and to hospitals
- The effects of a decade of austerity on the NHS and its resultant incapacity during the pandemic
- The impact of privatisation and outsourcing of the NHS
- The effect of Government policies which have widened health and social inequalities and the impact this had on the death toll
- Failure to follow expert advice both domestically and from the World Health Organisation
- The mental health impacts in particular on children and young people

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<sup>12</sup> <https://www.theguardian.com/politics/2022/jan/12/use-of-vip-lane-to-award-covid-ppe-contracts-unlawful-high-court-rules>

## **2. Which issues or topics do you think the Inquiry should look at first?**

As outlined above, the procedural matter of the serious limitations of the Inquiries Act 2005 need to be addressed at the outset through binding undertakings that ministerial powers, which could fetter the independence of the inquiry, will not be used.

There also needs to be at the beginning a full commitment to comply with human rights obligations and that the Inquiry be informed by a human rights based approach. The positive and negative obligations arising under Article 2 ECHR (right to life) and Article 3 ECHR (right to be free from torture, inhuman or degrading treatment or punishment) should be a priority consideration for the Inquiry given the claims of ongoing violations and the duty to investigate promptly.

Extensive research and evidence has been gathered by civil society such as that referenced in the People's Covid Inquiry and it is imperative that the UK Covid-19 Public Inquiry examine in detail the full report and recommendations arising from this valuable piece of work.<sup>13</sup> The Inquiry should engage in outreach with key groups and sectors as outlined above and seek their views on what topics should be prioritised.

## **3. Do you think the Inquiry should set a planned end-date for its public hearings, so as to help ensure timely findings and recommendations?**

The Inquiry must be able to make timely findings and recommendations promptly to provide guarantees of non-recurrence in relation to a range of issues including the treatment of care home residents, front line workers, educationalists, and that it assesses the causal factors of unequal impacts of the pandemic across protected equality characteristics. An inquiry should not be narrowed to a snapshot of decisions taken in the mouth of the pandemic but rather would encompass the broader circumstances of the health service, that impacted on pandemic preparedness that predate the current mandate. It is essential that the Inquiry findings and recommendations are not subject to lengthy delays and implementation is properly monitored to ensure that lessons are learned and to avoid recurrence of the human rights violations identified and to restore public confidence.

Research has shown that only 6 out of 68 public inquiries that have taken place in the last 22 years have been fully followed up by select committees to assess what steps Government has taken as a result of the inquiry. It also notes the lengthy delays in the publication of final reports and we endorse its recommendations for this Public Inquiry to effect real change there is a need for:

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<sup>13</sup> <https://www.peoplescovidinquiry.com/>

- ‘government to systematically explain how it is responding to inquiry recommendations
- select committees to examine annual progress updates from government on the state of implementation
- public inquiries to publish interim reports in the months, rather than years, after events
- expert witnesses to be involved in developing the recommendations of inquiries.’<sup>14</sup>

Its recommendation that parliament should take the lead on scrutiny is essential to ensure accountability and public confidence in this Public Inquiry across the large number of issues that will be addressed. We also agree with its recommendation that inquiries, including the UK Covid-19 Inquiry should report actionable findings sooner and recommendations should be developed using expert seminars and finally Government must provide better support when establishing inquiries such as this one.

#### **4. How should the Inquiry be designed to run to ensure that bereaved people or those who have suffered harm or hardship as a result of the pandemic have their voices heard?**

As outlined above, much information and evidence has been gathered by various organisations and civil society groups such as that identified in the People’s Covid Inquiry and this should be built upon by the Inquiry. Steps should be taken to ensure victims and survivors are not subject to further traumatisation as they engage in the UK Covid-19 Inquiry.

Core participant status should be given to representatives and representative groups of all sectors identified in the Terms of Reference to ensure their interests are properly protected during proceedings, as required in particular in accordance with Article 2 and 3 ECHR. While it would not be possible to grant core participant status to every affected individual, there should be proper outreach and engagement with representative groups and organisations to ascertain how those who have suffered harm or hardship or bereavement wish to have their voices heard.

**CAJ, April 2022**

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<sup>14</sup> [How public inquiries can lead to change | The Institute for Government](#)