

COVID 19:
WHAT WOULD A PUBLIC INQUIRY LOOK LIKE?

Introduction

With the UK still in the grips of the Covid 19 pandemic, calls for a public inquiry into the government's handling of the response to the crisis have been widespread¹. On 15 July 2020 the Prime Minister committed to holding an "independent inquiry" but would not be drawn on details as to when and in what form this would take place². This article considers what a public inquiry into the Covid 19 response might look like. It considers why and when public inquiries are appropriate and the function they serve, what issues a Covid 19 inquiry would likely consider, the form it could take, who could participate in it, how long it might last and at what expense. It also discusses how an inquiry might interface with the legion of litigation that will inevitably follow the pandemic. It concludes with a consideration of whether a "traditional" public inquiry under the Inquiries Act 2005 can meet the need for a rapid and focussed response to mitigate any future public health disaster.

A background to public inquiries

Public inquiries have traditionally been held in order to investigate catastrophic events which have arisen as a result of, or been aggravated by, multiple systemic failings. The "catastrophe" may be limited to the events of a single day (Bloody Sunday; Hillsborough) or can stretch over decades (Shipman; care failings in Jersey). They are often ordered to assuage public outcry at how a particular situation can have arisen, deflecting political heat with the promise of a full and independent investigation at a later date. At their best, they allow catharsis for the "victim group" and may provide communities the opportunity to move on from traumatic events. They should serve to hold public bodies to account in a way that is inclusive and transparent, identifying lessons for the future to prevent similar disasters³. Sceptics point to the huge legal

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costs of inquiries, and the inconsistency with which their recommendations are implemented.

The Bloody Sunday Inquiry is often identified as the low point for public inquiries. Announced by Tony Blair in 1998, it was set up to establish a definitive version of the events of Sunday 30 January 1972, following pressure from the families of those killed, who branded the previous investigation by Lord Widgery as a whitewash. Its structure and procedure were governed by Tribunals of Inquiry (Evidence) Act 1921, one of the many possible statutory bases for inquiries at that time⁴. Lord Saville reported in 2010, twelve years after the inquiry was set up and five and a half years after the last evidence was heard. Accounts of its cost have varied considerably. Reports on publication suggested that it cost £195m⁵, whilst three years earlier, in 2007, Tessa Jowell quoted the then current costs at £400m, citing this as a reason why an inquiry into the bombings of July 2005 should not take place⁶.

The Inquiries Act 2005

It was partly in response to the length and cost of the Bloody Sunday Inquiry that the government enacted the Inquiries Act 2005⁷, to provide “*a framework under which future inquiries, set up by Ministers into events that have caused or have potential to cause public concern, can operate effectively to deliver valuable and practicable recommendations in reasonable time and at a reasonable cost.*”⁸ This Act (along with The Inquiry Rules 2006⁹) provides a comprehensive framework for the constitution and operation of public inquiries in the UK, although ministers retain the discretion to set up an inquiry on an alternative, non-statutory, basis¹⁰.

Representation at an inquiry under the 2005 Act is largely determined by “*core participant*” status¹¹. A person may be designated as a core participant if they have played, or may have played, a significant role in relation to the matters under investigation, if they have a significant interest in an important aspect of the matters to which the inquiry relates or if they may be the subject of criticism¹². The scope of those

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who would be eligible for core participant status in any Covid 19 inquiry is likely to be huge. It would likely include government departments, the NHS, the social care sector, scientific and research institutions, representatives from employer organisations and unions, trade bodies, the education sector, and groups representing those particularly hard hit by the virus, including BAME groups, the disabled and the elderly.

Awards for the reasonable costs of legal representation are at the discretion of the chair, with eligibility depending on the person providing evidence to the inquiry or having a particular interest in the proceedings or the outcome of the inquiry¹³. With almost no sector of society untouched by the pandemic, in any Covid 19 inquiry the class of core participants and those eligible for an award of the costs of legal representation is likely to be unprecedented. Costs for a thorough inquiry into all of the issues discussed below, with paid legal representation, would likely run to several hundred million pounds, and the proceedings would take years. Whether the government would be willing or able to fund such an inquiry at a time of almost inevitable recession remains to be seen.

A particular feature of the 2005 Act is that the UK is siloed, so that inquiries taking place in each country are only empowered to investigate matters that are wholly or primarily concerned with that country¹⁴. This has obvious limitations for any investigation into the Coronavirus pandemic, where legitimate issues for analysis would include how responsibility for the response has been shared between Westminster and the devolved administrations, and how those responses have differed. Another crucial feature of the 2005 Act is the prohibition on any finding of criminal or civil liability, albeit with the caveat that “*an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes*”¹⁵. Also of potential application to a Covid 19 inquiry is the prohibition on revealing information which risks damaging the economy, unless the Panel is satisfied that “*the public interest in the information being revealed outweighs the public interest in avoiding a risk of damage to the economy*”

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under s23 of the Act¹⁶. Conducting a fearless investigation – potentially exposing the government to a barrage of legal claims - in the face of an inevitable economic downturn, may provide for difficult decisions to be made under s23.

A non-statutory inquiry?

Although the Inquiries Act 2005 was designed to simplify the potential bases for any inquiry¹⁷, there must be doubt as to whether those drafting and enacting the legislation could have envisaged an inquiry on the likely scale of any single Covid 19 inquiry. The acting Lib Dem leader, Sir Ed Davey, has called for confirmation from the government that any inquiry would be held under the Act¹⁸. In practice, a single inquiry convened under the 2005 Act is likely to prove so large, lengthy and expensive that it would cripple the government and would fail to make recommendations in time to avert any future public crisis. This is particularly so if the government is also attempting to hold a public inquiry into Brexit which, prior to the pandemic, it was under pressure to do¹⁹.

An alternative model is likely to be sought. Leading figures in public health have already called for a swift inquiry to take place before any second wave of infection, focussing on the important weaknesses to date, to allow “*measures to be put in place to mitigate the worst aspects of what has proved to be a deeply dysfunctional system of governance and administration.*”²⁰ They propose the use of a series of specialist panels to investigate discrete areas and to find workable solutions that do not require primary legislation or major organisational change, drawing on the model used by the Parliamentary Commission on Banking Standards, which was set up in light of the LIBOR scandal²¹. Whilst such a model may prove flexible and responsive, an obvious drawback of a fragmented investigation is the lack of overview of the totality of the government’s response to the crisis.

Another possibility is the structure is used for Independent Inquiry into Child Sex Abuse, where the Panel conducted 15 separate investigations into institutional and organisational failures to protect children from sexual abuse²².

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The precise form of any public inquiry will depend ultimately on the purpose for which it is being convened. Here there is likely to be a tension between desires for a timely inquiry focussed on prevention of future deaths and a more detailed review of all aspects of the government's handling of the crisis, hearing from all groups adversely affected. It may prove politically expedient to hold a swift non-statutory inquiry, charged with learning lessons and shaping the government's response to the current pandemic and any future large-scale infections. However, it is doubtful whether such an "inquiry-lite" would satisfy the expectations of the various "victim groups" to have their concerns aired and determined, and judicial review of a decision to hold such an inquiry may be inevitable. Of particular importance in any judicial review proceedings will be the status of human rights legislation in force in the UK following Brexit²³, at present an uncertainty. The prospect of eroded human rights legislation legitimising a watered-down public inquiry would be highly unattractive to those vulnerable groups hit hardest by the pandemic.

Another factor is timing. The crisis is still evolving and the true implications of it – social and economic - are not yet known. The science is still in a state of evolution. Data and statistics have not yet been reconciled to any significant degree, and comparison between the UK's response and that of other countries remains difficult. Those uncertainties and evidential gaps may make an early inquiry more attractive to the government.

The answer may come down to money, and what the government can afford – in all senses – at the time any inquiry is set up.

Issues to be considered

The scope of issues to be considered by any Covid 19 inquiry is likely to be extensive. The following discussion attempts to highlight the sorts of issues that might be considered, recognising that a full analysis is outside the remit of a single article.

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Pre-epidemic

Whatever its form, the panel or panels would likely consider the UK's state of preparedness prior to the epidemic. As explained by Clare Wenham, Assistant Professor of Global Health Policy at the LSE, until recently the UK was at the forefront in preparing for pandemics²⁴, following the launch of the UK's Global Health Strategy in 2008²⁵. This involved the deployment of the UK Public Health Rapid Support Team across the globe to respond to disease outbreaks before they developed into health emergencies²⁶, as well as the deployment of epidemiologists to advise on the Ebola crisis in West Africa in 2014²⁷.

Any inquiry would likely consider whether the UK maintained its expertise and state of preparedness up to 2020, including whether there was complacency in view of the lack of a UK-based epidemic since foot and mouth in 2001, the effect of NHS cuts²⁸ and austerity more generally²⁹, as well as the alleged deferral of pandemic training for key workers whilst contingency planning was diverted to deal with a possible no-deal Brexit³⁰. More generally, the inquiry might consider the impact of the UK's focus on Brexit in the months and years prior to the pandemic, considering whether the imperative to "get Brexit done" meant that the government did not "stay alert" to the impending crisis.

The early response

A likely focus of investigation will be the government's response in the earliest days of the pandemic: what information was provided by its scientific advisers, how scientific guidance was balanced with economic concerns, how the government engaged with the crisis more generally, how seriously it was taken and whether key players, including the Prime Minister, were sufficiently cognisant of the threats. Investigations will no doubt focus on the events of late January 2020, including the first Cobra meeting on 22 January, when it is alleged that Professor Neil Ferguson's modelling was discussed. The inquiry would likely consider whether Professor Ferguson's alleged conclusion - that a 60% reduction in the R rate was required - meant that

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lockdown was inevitable and should have been put in place immediately³¹. The 24th of January 2020 will be of particular interest: the day Chinese research published in the *Lancet*³² likened the threat of Coronavirus to that of the Spanish flu, which killed 50 million people, but also the day that Matt Hancock told reporters that the risk was “low”. And coincidentally the day that the withdrawal treaty from the European Union was being signed³³. The impact of Boris Johnson’s absence from the ensuing 5 weeks of Cobra meetings, until 2 March, will also no doubt be scrutinised.

The inquiry is likely to consider the events up to and including the 23 March – the date that lockdown started – in forensic detail, comparing what the government knew with what was being communicated in public health messages. An unusual feature of any investigation would be the unprecedented levels of information available publicly about the government’s state of knowledge on any particular day, barring unpublished evidence presented to SAGE (which may well become disclosable at an inquiry). The scope for obfuscation should therefore be reduced.

Of crucial importance would be the assessment of the impact of any delay in announcing a lockdown, both in terms of unnecessary deaths but also on the duration of the lockdown and its consequences socially and economically.

Lockdown from 23 March 2020

The focus of the inquiry would then turn to the lockdown and how the government managed the crisis at that stage. It would likely consider the impact of Boris Johnson’s diagnosis with the disease on 27 March 2020³⁴, including the effect of his absence from government during his illness, and the competence of those left running the country. Broader questions are also likely to be arise about the transparency and accountability of decision-making, including the constitution and operation of SAGE, at a time when full parliamentary scrutiny was not possible. A particular focus is likely to be the consistency of the messages in public health briefings with The Health Protection (Coronavirus, Restrictions) Regulations 2020³⁵, and why the discrepancy

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in the policing of those regulations was so wide as to require publication of guidance by the College of Policing, with input from the CPS³⁶. The inquiry would also likely consider the impact of alleged breaches in the Regulations by senior figures, including Dominic Cummings and Professor Neil Ferguson, on public compliance and confidence.

In this period, the inquiry would likely consider the adequacy of testing regimes. The reliability of governmental presentation of statistics would doubtless come under scrutiny, following repeated challenges from head of the UK Statistics Authority³⁷. Broader questions are also likely to arise about how death rate statistics were compiled and whether they represented the full picture of Covid-related deaths in the community, notably before 29 April 2020, when care home deaths were excluded from the statistics³⁸.

The Test and Trace scheme³⁹, launched on 28 May 2020, is also likely to fall under scrutiny. Issues include the adequacy of staff training⁴⁰, the collapse of the contact tracing app⁴¹, whether the scheme has been effective in identifying all contacts of infected people⁴², whether its activities have been reported accurately and whether major data breaches have occurred, as alleged by the Open Rights Group⁴³. Comparisons with equivalent schemes in other countries seems inevitable.

PPE and workplace safety

One of the key issues for investigation will be the adequacy in the provision of PPE, notably for NHS, social care and key workers. This is an obvious area where the findings of an inquiry could impact on legal claims for breach of workplace regulations. Areas for investigation would include the impact of the government's decision not to join the EU's procurement scheme⁴⁴ and whether that was politically motivated.⁴⁵ In reviewing how PPE was then sourced, the Turkish PPE debacle is bound to be considered⁴⁶, along with wider investigations into whether adequate tendering processes were put in place. The latter is already the subject of an intended crowd-

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funded judicial review⁴⁷, contesting the decision to award a £108m contract to supply PPE from Pestfix (aka Crisp Websites Ltd)⁴⁸, a small pest control company⁴⁹ selling PPE related to its pest control products⁵⁰, without any formal tendering process⁵¹. The inquiry will no doubt wish to consider whether suitable PPE has been obtained in a timely and cost-effective manner and, if not, what impact that has had on the spread of the disease and the psychological toil on those working in unsafe environments⁵².

The impact on vulnerable groups

The impact of Covid 19 on vulnerable groups has been widely documented. These include those in care homes⁵³, BAME groups⁵⁴, the disabled⁵⁵, the mentally ill and those already facing hardship through poverty and over-crowded housing. This is a huge topic and one that could occupy a traditional inquiry under the 2005 Act for many years. A full analysis of the issues is too wide for an article of this scope, but would cover what measures were taken to protect the most vulnerable groups in society and whether these were adequate. In broader terms, the work of the inquiry may not be so much about investigating the impact of Covid 19 on disadvantaged groups, but on revealing how inequality and social deprivation exposes to the worst effects of the disease and its socio-economic consequences. The model of inquiry chosen will be of particular importance when considering disadvantaged groups, and there is likely to be significant pressure for a thorough and wide-ranging investigation (most likely under the 2005 Act) with full, publicly funded, representation for those groups.

Young people and education

Although young people have been less prone to become seriously ill with Covid 19, the consequences of the lockdown and social distancing have had a profound effect on education. As well as the disruption to schools and universities, young people may face a disproportionate burden of the longer-term economic consequences of the pandemic. Here, the government has already acted, with the Education Committee establishing an inquiry into the impact of Covid 19 on education and children's services, taking evidence between 1 and 21 July 2020⁵⁶. The terms of reference are

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wide-ranging⁵⁷ with interested groups able to submit evidence⁵⁸ and “oral evidence” being taken from several witnesses in short group Zoom discussions⁵⁹. A similar inquiry has been set up in Wales.⁶⁰ There is likely to be debate about the adequacy and timing of hastily-convened Select Committee inquiries - in particular, whether they allow for sufficient public involvement (being conducted by Zoom rather than in traditional open session⁶¹), and whether it is appropriate to explore the issues whilst the pandemic continues, and before its effects are properly evidenced or known⁶².

It may be that the Education Committee’s inquiry will set a template for other governmental investigations into the impact of Covid 19. What reliance the government will place on Select Committee inquiries when faced with calls for a wider public inquiry remains to be seen.

Economic impacts

Again, this is a topic that could occupy an Inquiries Act investigation for many months. Here, the inquiry would consider the economic impact of the virus⁶³, and whether the UK’s service-based economy was particularly vulnerable. The main issue for consideration is likely to be the effect, if any, of the delay in imposing a lockdown and the extent to which retail, industrial, leisure and cultural closures were prolonged as a result. The impact of any additional failings in managing the pandemic would also be analysed. Comparisons with responses in other countries is inevitable.

The inquiry would likely take evidence from economists on the adequacy and efficacy of the unprecedented fiscal measures introduced by the government, including the furlough schemes and those for the self-employed, and the extent to which they protected the economy.

Whilst many thousands of UK workers have already been made redundant⁶⁴, the true economic impact of the disease, and more importantly the UK’s response to it, is unlikely to be known for months, if not years. The evolving nature of the fiscal

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consequences will make it challenging to measure the financial impact of any failings, unless the inquiry is deferred for many years. Of particular interest then will be the interplay between Brexit and Coronavirus, and whether the challenges of operating in a post-Brexit economy will be aggravated by the economic impacts of the government's alleged mismanagement of the pandemic. These factors may well encourage the government to instigate an inquiry sooner rather than later.

Alongside the gloomier investigations of economic detriment, the inquiry would probably also consider the more positive and unexpected outcomes of the major shift in working patterns. Here the inquiry would look at the cost savings and lifestyle benefits of home and virtual working, and the possible environmental benefits of a global reduction in work travel⁶⁵.

Interface with litigation

How any public inquiry would interface with Covid 19-related litigation is likely to be of real interest to lawyers and parties alike. Civil litigation arising from the handling of the pandemic seems inevitable. This could include class actions on behalf of NHS and social care workers in relation to alleged breaches of PPE and other health and safety at work regulations, to the extent that such claims survive the introduction of S. 69 Enterprise and Regulatory Reform Act 2013. Other claims could include those involving workplace stress as a result of working in allegedly unsafe work conditions.

Other forms of legal hearing may also be impacted, including inquests - notably those involving allegations that the death was caused or contributed to by a failure to provide adequate PPE, or where it is claimed that basic medical services were withheld. Criminal proceedings also remain a possibility, including prosecutions for workplace health and safety breaches or, less likely, for corporate manslaughter⁶⁶.

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How would such proceedings dovetail with a public inquiry? Which would or should come first? And could litigants rely on findings in a public inquiry in order to support their case?

If an inquiry is convened under the Inquiries Act 2005, it may be suspended at any time to allow for the determination of civil or criminal proceedings relating to any matters under review in the inquiry⁶⁷. Whilst this power is discretionary, it seems likely that government lawyers would press for it to be exercised in circumstances where the inquiry findings might prove detrimental to the prospects of successfully defending civil claims. However, with a multitude of litigation anticipated from the handling of the pandemic, it seems unlikely that an inquiry could be deferred until all related litigation had taken place. A non-statutory inquiry could be designed to allow more flexibility in this regard, although it is doubtful whether the government – the effective Defendant in most of these cases – would find this desirable.

To consider how these issues might play out in practice, it is helpful to consider an example of a potential case - say a claim arising from an alleged failure to provide PPE, resulting in the death of an NHS nurse. In stand-alone civil litigation, the Defendant could argue that inadequate resourcing arose from the emergency conditions of the pandemic, such that there was a reasonable excuse for any failure to comply with its statutory duties. Such resource arguments, little used traditionally in such litigation, could well come to the fore and find favour with Judges. However, if an inquiry had already found that there were culpable failures in the UK's lack of PPE and that there would have been adequate provision but for those failures, such a resource argument would be much less persuasive. This would be a cogent reason for deferring such an action until the inquiry had reported, although the delays would probably be prohibitive. Conversely, if every individual claim became embroiled in arguments about resource provision, the courts would struggle to manage, and the costs would be huge. More likely is a series of test cases, or otherwise group litigation, where broader issues about the non-availability of PPE could be considered and determined

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at proportionate expense. Law firms are no doubt gearing up for the potential for such litigation.

Inquests are another form of proceedings where families may wish to establish whether their loved one's death from Covid 19 was avoidable. The Chief Coroner's Guidance Number 37 of 28 April 2020 makes it clear that a death due to Covid 19 may require a coronial investigation if there is reason to suspect that some culpable human failure contributed to the deceased contracting the disease (para 12⁶⁸). It notes that the Courts have repeatedly held that a Coroner's court is not the appropriate forum for addressing and determining concerns about high-level government or public policy and indicates that *"an inquest would not be a satisfactory means of deciding whether adequate general policies and arrangements were in place for provision of personal protective equipment (PPE) to healthcare workers in the country or a part of it."* (para 13). The Guidance goes on to suggest that a Coroner may choose to suspend the investigation until it becomes clear how such enquiries should be pursued (para 14).

This rather inconclusive guidance is likely to lead to inconsistent practice between Coroners, with some adjourning inquests and some not. It also raises the spectre of Coroners making findings about the lack of PPE at individual hospitals, without considering any higher-level systemic failings leading to a lack of PPE more generally. Such findings could impact on any subsequent civil claims.

Careful thought will be required to advise on how Covid 19 related claims should be litigated with a public inquiry in prospect.

Conclusion

Any inquiry into the Covid 19 pandemic is likely to be the most high profile public inquiry in decades. What form it will take, what issues it will cover and who will be allowed to participate are questions that remain unanswered. A quickly convened inquiry focussing on the prevention of future deaths in this and other pandemics is

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superficially attractive, allowing for lessons to be learned and applied quickly, at proportionate public expense and within a reasonable timeframe. However, the pandemic is the UK's most devastating public health disaster in living memory, and there are legitimate calls for the closest scrutiny of the government's response, with the full involvement of those adversely affected. Such an inquiry would take years, would probably cost hundreds of millions of pounds, and may well report too late to be of practical application to any future pandemic. The pragmatic solution may be a hybrid of the two, with a short non-statutory inquiry reporting first on practical solutions to managing the pandemic and a later Inquiries Act investigation considering the full impact of the government's response to the crisis. What is certain is that any inquiry will have unprecedented levels of public engagement, given that every one of us has been affected by the crisis.

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¹ E.g. <https://www.bmj.com/content/369/bmj.m2052>; <https://www.bbc.co.uk/news/uk-53221435>; <https://archive.is/20200418182037/>; <https://www.thetimes.co.uk/edition/news/coronavirus-38-days-when-britain-sleepwalked-into-disaster-hq3b9tlgh>

² <https://www.bbc.co.uk/news/uk-politics-53419544>

³ <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/143.pdf>

⁴ <https://publications.parliament.uk/pa/ld201314/ldselect/ldinquiries/143/143.pdf>

⁵ <https://www.bbc.co.uk/news/10292828>

⁶ <https://www.telegraph.co.uk/news/uknews/1523111/Bloody-Sunday-Full-inquiry-cost-400m.-July-7-bombs-No-inquiry-too-expensive.html>

⁷ <http://www.legislation.gov.uk/ukpga/2005/12/contents>

⁸ https://en.wikipedia.org/wiki/Inquiries_Act_2005#cite_note-4

⁹ <http://www.legislation.gov.uk/uksi/2006/1838/contents/made>

¹⁰ <http://www.legislation.gov.uk/ukpga/2005/12/section/1>;

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

¹¹ <http://www.legislation.gov.uk/uksi/2006/1838/article/6/made>

¹² <http://www.legislation.gov.uk/uksi/2006/1838/article/5/made>

¹³ <http://www.legislation.gov.uk/ukpga/2005/12/section/40>

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- ¹⁴ <http://www.legislation.gov.uk/ukpga/2005/12/section/27>
- ¹⁵ <http://www.legislation.gov.uk/ukpga/2005/12/section/2>
- ¹⁶ <http://www.legislation.gov.uk/ukpga/2005/12/section/23>
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