



Law Society  
of Scotland

# Written Views

## A COVID-19 Inquiry for Scotland

September 2021



## Introduction

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The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our we welcome the opportunity to consider and respond to the Scottish Government call for views: *A COVID-19 Inquiry for Scotland*.<sup>1</sup> We have the following comments to put forward for consideration.

## General Comments

We welcome steps to establish a public inquiry (“the inquiry”) to investigate the handling of the COVID-19 pandemic in Scotland.

## Comments on the draft aims and principles<sup>2</sup>

### Overview

We have no comments.

### What the inquiry will do

We note that a Scottish inquiry can only look into devolved matters in relation to Scotland. Many aspects of the handling of the pandemic relate to reserved matters, and will therefore fall outwith the scope of the inquiry. However, we also note that the Public Administration and Constitutional Affairs Committee of the House of Commons has recommended that each of the Governments of the UK should establish their own public inquiries, in order that proper attention is granted to each of their responses.<sup>3</sup> Consideration should be given to how matters of inter-government co-operation can be included within the terms of reference for the inquiry.

<sup>1</sup> <https://www.gov.scot/news/a-covid-19-inquiry-for-scotland/>

<sup>2</sup> <https://www.gov.scot/publications/covid-19-inquiry/>

<sup>3</sup> <https://publications.parliament.uk/pa/cm5801/cmselect/cmpubadm/541/54103.htm>

## Aims

We note that the draft aims of Ministers for the inquiry will be developed into terms of reference for a public inquiry established under the Inquiries Act 2005 (“the 2005 Act”).

The 2005 Act makes provision about the holding of inquiries, and extends to the whole of the United Kingdom. The Act contains provisions for United Kingdom inquiries, and inquiries for which the devolved administrations are responsible. A UK inquiry must not be required to determine facts or compel evidence “wholly or primarily” concerned with a Scottish matter, unless there has been consultation with the relevant administration.<sup>4</sup> Conversely, an inquiry by Scottish Ministers may not determine a fact or compel evidence that is not “wholly or primarily concerned” with a Scottish matter (a matter that relates to Scotland and is not a reserved matter).<sup>5</sup> Care is required to ensure that the scope of the inquiry, and any recommendations resulting from the inquiry, remain within the *vires* of the Scottish Ministers.

We further note that the inquiry:

*“[S]hould examine the actions taken in response to the pandemic and should give particular consideration to the four harms of the pandemic in relation to Scotland:*

- *direct health impacts of COVID-19, including cases and deaths in care homes*
- *other health impacts*
- *societal impacts, including education*
- *economic impacts*

The draft aims indicate that “While all relevant matters will be in scope, consideration will be given to how duplication of investigations between the Scottish and UK wide inquiries can be avoided.” We recognise that this will present practical challenges until such time as further information about the scope of any UK wide inquiry is confirmed. Many of the issues raised by COVID-19 affect all the jurisdictions in the UK. The UK government’s response to COVID affected not only reserved areas but also matters within the legislative competence of the devolved legislatures and administrations (for example, health, education and emergency services); procurement of PPE and vaccination have been broadly reserved to the UK Government. Policy alignment between the UK Government and the devolved administrations has changed since the Four Nations Action Plan<sup>6</sup> in March 2020, and devolved administrations are now adopting diverse policy positions on matters such as vaccine status certification. This changing policy context may present challenges in delineating the scope of Scottish and UK wide inquiries.

The draft aims also state that “The interplay with the Lord Advocate’s functions also need to be carefully considered.” The Lord Advocate is the head of the system of criminal prosecution and investigation of deaths in Scotland. The Lord Advocate’s functions include the holding of public inquiries in respect of certain deaths under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (“the 2016 Act”). Such inquiries are known as Fatal Accident Inquiries (“FAIs”). An FAI is mandatory in certain

<sup>4</sup> Inquiries Act 2005, s 27(2), (3)

<sup>5</sup> Inquiries Act 2005, ss 28, Sections 29 and 30 cover the situation for Wales and NI.

<sup>6</sup> <https://www.gov.uk/government/publications/coronavirus-action-plan>

circumstances, including the death of a person acting in the course of their employment or occupation or in legal custody, subject to limited exceptions. In other circumstances, an FAI is at the discretion of the Lord Advocate. We have previously called for reform to the FAI system to reduce delays and increase transparency and effectiveness.<sup>7</sup>

We welcome the inclusion of deaths in care homes within the scope of the inquiry. The terms of reference suggested by the draft aims are wider than those of an FAI that is held under the 2016 Act. A decision to hold an FAI in relation to deaths in care homes- assuming that it was restricted to the residents- would have been discretionary under that Act.

A public inquiry under the 2005 Act provides that much greater scope to scrutinise decisions taken in the course of the pandemic regarding care homes, and for lessons to be learned for future pandemics.

We would, however welcome clarification as to what is meant by deaths in care homes. It is not clear whether this would include only those residents who died with confirmed COVID-19, or also those who may have died from other causes during the pandemic but who may have experienced adverse health or societal impacts as a result of the pandemic.

It is also not clear whether the deaths of care home staff will be included within the scope of the inquiry. Whilst deaths occurring in the course of employment are subject to mandatory FAIs under the 2016 Act, their inclusion in the inquiry may provide a more comprehensive picture of the impact and effect of the pandemic in care homes.

We suggest that consideration should also be given to extending the scope of the proposed COVID-19 Inquiry to include deaths in legal custody and consider the wider impact of COVID-19 in prisons. It is not clear at present how many prisoners may have died during the pandemic, and in how many cases COVID-19 was confirmed as a cause of death. Whilst such deaths will be subject in any event to mandatory FAIs being held under the 2016 Act, we believe that the inquiry provides an excellent opportunity to consider the adverse health and societal impacts of COVID-19 on the prison population, which has been particularly vulnerable during the pandemic. This would be consistent with the aim of the inquiry in scrutinising decisions taken in the course of the pandemic so far, and learning lessons for the future. It would not negate the need for FAIs to be held in relation to deaths in custody. As above, consideration should also be given to including the deaths of prison staff within the scope of the inquiry to give a more comprehensive picture of the impact of the pandemic in prisons.

In the context of considering the impact of the pandemic on the prison population, particular consideration should be given to whether key decisions- including those on extending periods on remand and limiting family visits- complied with human rights requirements.

We have previously raised concerns over whether the rights of individuals have been upheld in decisions to discharge vulnerable people from hospital to care homes during the pandemic.<sup>8</sup> Such decisions, and

<sup>7</sup> <https://www.lawscot.org.uk/media/370355/our-priorities-for-the-2021-scottish-parliament-elections-v3.pdf>

<sup>8</sup> <https://www.lawscot.org.uk/news-and-events/law-society-news/new-report-confirms-alarm-of-scottish-solicitors-over-discharges-to-care-homes/>

particularly whether they complied with human rights and the requirements for due legal process, should be included within the scope of the inquiry.

The inquiry should have particular regard to the impact of the handling of the pandemic on vulnerable and marginalised groups, including children and young people, minority ethnic communities and disabled people. The inquiry should consider any disproportionate impact on any groups within Scotland across all of the four identified harms, for example the economic impact of Covid related unemployment has had a disproportionate effect on women, particularly those in low income roles.<sup>9</sup> The Inquiry should also pay particular attention to how the competing needs of different groups were handled, for example the impact of Spaces for People and measures to maintain social distancing to minimise transmission of the virus particularly impacted the ability of disabled people to access areas and to move around freely, while moving to a more digital environment disproportionately excluded people who were unable to access digital equipment either due to low income, lack of internet access or lack of digital skills but arguably improved inclusion for other groups.

#### How the inquiry will work

We welcome the indication that Scottish Ministers will expect the inquiry to adopt a human rights based approach. The response to the pandemic in Scotland has engaged, and in many cases restricted, the human rights of individuals. The inquiry should consider the proportionality of such restrictions to ensure that decision-making in future pandemics protects and promotes human rights.

We further welcome the indication that Scottish Ministers expect the inquiry to be outcome focused, with timely reporting including recommendations. We recognise that timescales for completion and costs will be central issues for Scottish Ministers in establishing the inquiry. Recommendations must be produced timeously in order that lessons can be implemented. The resource implications of an inquiry on organisations such as COPFS must be recognised and addressed. The inquiry must be appropriately resourced to fulfil its terms of reference.

#### Next steps

We have no comments on this section of the draft aims and principles.

Regarding next steps more generally, we have previously suggested<sup>10</sup> a quadripartite parliamentary group, bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Inter-Parliamentary Group formed to consider Brexit.

We have also recommended a review of the law relating to health emergencies.

<sup>9</sup> <https://www.closethegap.org.uk/news/blog/one-year-on-new-close-the-gap-research-highlights-the-impact-of-covid-19-on-womens-employ/>

<sup>10</sup> The Law Society of Scotland submission to the House of Lords Constitution Committee Inquiry into the Constitutional Implications of Covid-19, July 2020, available at: <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/constitutional-law/>

Legislation already exists to deal with circumstances related to pandemic disease.

The Civil Contingencies Act 2004 can apply to emergencies and creates a framework for civil protection in the UK. The Act provides for local arrangements for civil protection and the employment of emergency powers under Orders in Council.

The emergency powers in the Act allow for temporary regulations to deal with serious emergencies. Emergency powers under the Act are subject to rigorous safeguards and can only be used in exceptional circumstances.

The Public Health (Control of Disease) Act 1984 (amended by the Health and Social Care Act 2008) as respects England and Wales and the Public Health (Scotland) Act 2008 include quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

The preference of Government to employ either the Coronavirus specific legislation or Public Health Acts rather than Civil Contingencies legislation raises questions about the legislative framework which applies across the UK and its fitness to deal with future Public Health crises.

Once there is sufficient scope for a parliamentary inquiry into the fitness of the legislative (and policy) framework we can envisage this being a priority for all the UK Administrations and Legislatures.

In this connection we recommend that the Four Governments consider collaboration on the creation of a Standing Advisory Committee on Pandemics which, under an independent Chair would comprise medical, scientific, educational, research, and other experts drawn from the Four Nations and Ministerial Members from the Four Governments to keep under review developments in virology and epidemiology, oversee preparation for viral events including supply chains, stockpiling of medicines, vaccines, medical equipment and PPE, training of medical and nursing staff and preparation of educational tools to inform the public and general preparedness for future pandemics.



**For further information, please contact:**

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