

OPINION OF COUNSEL

for

SCOTTISH COVID-19 INQUIRY

REMIT OF THE INQUIRY RELATIVE TO
LONG COVID

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INTRODUCTION

1. Coronavirus disease (COVID-19) is an infectious disease caused by the SARS-CoV-2 virus. The virus was identified genetically in January 2020 as the cause of cases of viral pneumonia reported in late 2019 in Wuhan, People’s Republic of China. On 30 January 2020, the World Health Organisation (WHO) declared the virus outbreak a public health emergency of international concern (PHEIC), WHO's highest level of alarm. The first positive case of COVID-19 in Scotland was confirmed on 1 March 2020¹, with the WHO declaring a pandemic on 11 March 2020².
2. Individuals with a history of probable or confirmed SARS-CoV-2 infection have reported effects and symptoms which persist beyond or arise after the period during which they test positive for the virus. This post COVID-19 condition is often³ referred to as “long COVID” (or “post-COVID syndrome”⁴).
3. The Scottish COVID-19 Inquiry (the “Inquiry”) is a statutory public inquiry set up under the Inquiries Act 2005 to investigate the devolved strategic response to the

¹ <https://www.gov.scot/publications/novel-coronavirus-covid-19-update/>

² <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline>

³ There is currently no internationally agreed definition of long COVID

⁴ <https://www.england.nhs.uk/coronavirus/post-covid-syndrome-long-covid/>

pandemic in Scotland between 1 January 2020 and 31 December 2022. It is chaired by Lord Brailsford.

4. The scope of the Inquiry is defined⁵ by terms of reference set out by the Scottish Ministers on 14 December 2021, as amended in terms of statements of the then Deputy First Minister to the Scottish Parliament on 9 June and 27 October 2022⁶ (the “Terms of Reference”).
5. The Scottish Parliament COVID-19 Recovery Committee is undertaking a separate parliamentary committee inquiry⁷ into diagnosis, treatment and current support for long COVID.
6. Questions have arisen as to whether, and if so the extent to which, long COVID will be investigated in the Inquiry. This opinion is provided to assist Lord Brailsford in his consideration of the scope of the Terms of Reference relative to these issues.
7. My opinions are **summarised from paragraph 70 below.**

BRIEF HISTORY OF LONG COVID

Early Recognition

8. Early in the pandemic, it became apparent that some individuals with a history of probable or confirmed SARS-CoV-2 infection reported effects and symptoms which persisted longer than other infected persons⁸. The existence of emerging evidence of

⁵ 2005 Act, ss.1(2)(b); 5(1)(b)(i),(3),(5)&(6)

⁶ Effective from 28 October 2022, the date of Lord Brailsford’s appointment, Official Report (parliament.scot) Meeting of the Parliament (Hybrid), 27 October 2022 <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13942>

⁷ See Scottish Parliament Guidance on Committees, Part 6: <https://www.parliament.scot/-/media/files/parliamentary-guidance/guidance-on-committees.pdf>

⁸ For example, on 5 May 2020, the British Medical Journal published the account of Prof Paul Garner, professor of infectious diseases at Liverpool School of Tropical Medicine, of his seven weeks of COVID-19 symptoms: <https://blogs.bmj.com/bmj/2020/05/05/paul-garner-people-who-have-a-more-protracted-illness-need-help-to-understand-and-cope-with-the-constantly-shifting-bizarre-symptoms/>

long term effects of COVID-19 on patients was acknowledged by the Scottish Cabinet Secretary for Health and Sport, Jeane Freeman as early as 7 May 2020⁹.

9. By November 2020, there were calls on the Scottish Government for the introduction of a national support service for people with long COVID¹⁰.

SIGN/NICE/RCGP Guidelines

10. By 18 December 2020, guidelines had been produced developed jointly by the Scottish Intercollegiate Guidelines Network (SIGN), National Institute for Health and Care Excellence (NICE) and the Royal College of General Practitioners (RCGP) for identifying, assessing and managing long-term effects of COVID-19¹¹. The guidelines include clinical case definitions (a list of criteria by which cases can be identified clinically) for “acute COVID-19” (signs and symptoms for up to 4 weeks), “ongoing symptomatic COVID-19” (from 4 weeks up to 12 weeks), and “post-COVID-19 syndrome” (developing during or after an infection consistent with COVID-19, continuing for more than 12 weeks and not explained by an alternative diagnosis). The guidelines do not currently¹² define the term “long COVID” but indicate that term is used commonly to describe signs and symptoms that continue or develop after 4 weeks.

WHO Clinical Case Definition

11. On 6 October 2021, the WHO published its clinical case definition of “post COVID-19 condition”¹³. The WHO reports that condition is commonly referred to as long COVID¹⁴. The WHO clinical case definition states that:

⁹ Official Report (parliament.scot) Meeting of the Parliament (Virtual), 7 May 2020, p15:

<https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=12629>

¹⁰ Official Report (parliament.scot) Meeting of the Parliament (Hybrid), 12 November 2020, p16:

<https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=12933>

¹¹ <https://www.nice.org.uk/guidance/NG188>

¹² Last updated 3 November 2022 (version 1.2):

<https://www.nice.org.uk/guidance/ng188/resources/covid19-rapid-guideline-managing-the-longterm-effects-of-covid19-pdf-51035515742>

¹³ https://www.who.int/publications/i/item/WHO-2019-nCoV-Post_COVID-19_condition-Clinical_case_definition-2021.1

¹⁴ <https://www.who.int/europe/news-room/fact-sheets/item/post-covid-19-condition>

Post COVID-19 condition occurs in individuals with a history of probable or confirmed SARS-CoV-2 infection, usually 3 months from the onset of COVID-19 with symptoms and that last for at least 2 months and cannot be explained by an alternative diagnosis. Common symptoms include fatigue, shortness of breath, cognitive dysfunction but also others and generally have an impact on everyday functioning. Symptoms may be new onset following initial recovery from an acute COVID-19 episode or persist from the initial illness. Symptoms may also fluctuate or relapse over time.

12. On 16 February 2023, a separate clinical case definition for children and adolescents was published by the WHO¹⁵. It was formed through a process of expert consensus recognizing the unique health needs and challenges of this group of people.

Research and Estimated Impact

13. The National Institute for Health and Care Research (NIHR) has commissioned nineteen studies examining the underlying mechanisms of long COVID, investigating symptoms such as 'brain fog' and breathlessness, and testing possible treatments. Three NIHR studies published in summer 2021 showed that up to one in three people who have had COVID-19 report long COVID symptoms and up to one in seven children.¹⁶
14. The Office for National Statistics estimated that in the month to 5 March 2023 around 172,000 people living in private households in Scotland were experiencing long COVID.¹⁷

¹⁵ <https://www.who.int/publications/i/item/WHO-2019-nCoV-Post-COVID-19-condition-CA-Clinical-case-definition-2023-1>

¹⁶ <https://www.nihr.ac.uk/about-us/our-key-priorities/covid-19/researching-the-long-term-impact.htm>

¹⁷ <https://www.ons.gov.uk/peoplepopulationandcommunity/healthandsocialcare/conditionsanddiseases/datasets/alldatarelatingtoprevalenceofongoingsymptomsfollowingcoronaviruscovid19infectionintheuk> - 30 March 2023 edition of dataset

APPROACH TO INTERPRETATION

Remit of Inquiries

15. The scope of the Inquiry's remit is defined by its Terms of Reference.¹⁸

Devolved Competence

16. In accordance with section 28 of the 2005 Act, the Terms of Reference must not require the Inquiry to determine any fact or to make any recommendation that is not wholly or primarily concerned with a "Scottish matter"; that is one that relates to Scotland and is not a reserved matter within the meaning of the Scotland Act 1998. The Terms of Reference must be construed accordingly to exclude reserved matters.

Chair Determination

17. It has been stated that under the Inquiries Act 2005 it is for an inquiry itself to interpret its terms of reference (Graeme Cowie, *Statutory public inquiries: the Inquiries Act 2005* (House of Commons Library, 28 November 2022), para 2.2). This statement was reflected in responses given by the then Deputy First Minister, John Swinney, to questions in the Scottish Parliament. Mr Swinney was asked by Dr Sandesh Gulhane MSP "will [Mr Swinney] commit to the inclusion of long Covid in the [Inquiry]?"¹⁹. Mr Swinney expressed his view that "beyond setting the terms of reference, it would be wrong for me to prescribe what should be discussed in the inquiry. That is a matter for Lord Brailsford to determine within the scope of the remit". In response to similar questions from MSPs Jackie Baillie and Fulton MacGregor, Mr Swinney further stated²⁰ "we have set out the scope of the terms of reference and, in my judgment, long Covid issues are certainly within the scope of the terms of reference. Fundamentally, though, it is a matter for Lord Brailsford to determine as he leads the evidence in the inquiry."

¹⁸ 2005 Act, ss.1(2)(b); 5(1)(b)(i),(3),(5)&(6)

¹⁹ Official Report (parliament.scot) Meeting of the Parliament (Hybrid), 27 October 2022, p61: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13942>

²⁰ *Ibid*, p63.

18. In my view and as further explained below, these statements are correct but present an incomplete position²¹.

Proper Approach to Interpretation

19. The powers and functions of an inquiry are determined by the empowering Act of Parliament (the Inquiries Act 2005), and the associated rules and subordinate legislation.
20. Statutory provisions should be read in the context of the statute as a whole (*R (Quintavalle) v Secretary of State for Health* [2003] UKHL 13; [2003] 2 AC 687, para 8, Lord Bingham of Cornhill). A necessary implication may be drawn from such a holistic reading (*K v Craig*, 1999 S.C. (HL) 1 at 7, per Lord Hope of Craighead). As Lord Carloway described in *MacMillan v T Leith Developments Ltd* 2017 S.C. 642 at para [54], in reaching the proper construction “*The task ... was, and is, to seek the meaning of the words used; often described as ascertaining the intention of Parliament expressed in the statutory language in light of the particular context* (*R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd*[²²], Lord Nicholls, pp396, 397; citing *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG*[²³], Lord Reid, p613). *Although the courts may employ certain accepted canons of interpretation, ‘an appropriate starting point is that language is to be taken to bear its ordinary meaning in the general context of the statute.’ (Ibid Lord Nicholls, p 397.)*”. It is of central importance in interpreting any legislation to identify its purpose (*Hurstwood Properties (A) Ltd & Ors v Rossendale Borough Council & Anr* [2021] UKSC 16 (per Lord Briggs and Lord Leggatt [10]. As Lord Chancellor (Kilmuir) expressed in *Hynd’s Trustee v Hynd’s Trustees* 1955 S.C. (H.L.) 1 at p10 (citing Lord Shaw in *Shannon Realties v. Ville de St Michel* [1924] A.C. 185 at p192-193, “*Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system*”).

²¹ See in particular the limits on a chair’s powers to determine the scope at para 25 *et seq.* below.

²² [2001] 2 A.C. 349

²³ [1975] A.C. 591

21. These tenets of construction apply to the proper construction of an inquiry's substantive terms of reference. The terms of reference of an inquiry under the 2005 Act must be contained in the instrument appointing the chair under section 4 or a notice given to him within a reasonable time afterwards²⁴, and accordingly are a form of subordinate legislation²⁵.
22. Section 5(5) of the 2005 Act expressly limits a chair's²⁶ functions and powers to matters within the terms of reference. Section 14(1) provides that (unless otherwise terminated by the relevant Minister²⁷) an inquiry under the 2005 Act will end "*after the delivery of the report of the inquiry, on which the chairman notifies the Minister that the inquiry has fulfilled its terms of reference*" - that would include all of:
- (a) *the matters to which the inquiry relates;*
 - (b) *any particular matters as to which the inquiry panel is to determine the facts;*
 - (c) *whether the inquiry panel is to make recommendations;*
 - (d) *any other matters relating to the scope of the inquiry that the Minister may specify.*²⁸
23. I consider that the proper construction and necessary implication of these provisions is that the Inquiry chair is entitled to assess and reach a determination as to the scope of the Terms of Reference.
24. Such a construction accords with the purpose of the 2005 Act to empower an inquiry chair to investigate and report upon the relevant terms of reference and avoiding steps (such as requiring judicial determination by a court) which would interfere with the smooth operation of an inquiry. This would also accord with the wide autonomy

²⁴ 2005 Act, s.5

²⁵ The Interpretation Act 1978, s.21 defines "subordinate legislation" to mean among other things "*orders, rules, regulations, schemes, warrants, byelaws and other instruments made ...under any Act*".

²⁶ In terms of s.3 of the 2005 Act, an inquiry is to be undertaken either by a chairman alone or a chairman with one or more other members.

²⁷ In the case of the Inquiry, the Scottish Ministers in terms of 2005 Act, s.1(1)

²⁸ Per s.5(6)

afforded by section 17(1) that “the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct”²⁹.

25. However, there are limits to a chair’s ability to settle conclusively the scope of the remit.
26. Firstly, a chair’s determination of the scope of his powers is subject to judicial review (see e.g. *BBC v Chair of the Scottish Child Abuse Inquiry* 2022 S.C. 184). In particular, it would amount to a procedural irregularity (jurisdictional error) if a chair was to interpret terms of reference too widely and hear evidence that has no bearing on the issues to be resolved pursuant to those terms. Such an approach would be *ultra vires* section 5(5) of the 2005 Act. Nevertheless, given the nature of an inquiry, a court should be very slow to conclude that such an inquiry had erred or that its decision was irrational (*R. (on the application of Bates) v Langstaff* [2019] EWHC 3238 (Admin) at para 17). The public interest in a chair being able to pursue the terms of reference as widely and deeply as he considers necessary is of the utmost importance (*R. (on the application of Associated Newspapers Ltd) v Leveson* [2012] EWHC 57 (Admin) per Toulson LJ at para 56).
27. Secondly, terms of reference and in particular any doubts as to the scope thereof are subject to review and clarification by the Minister who caused the inquiry to be held, if the public interest so requires³⁰.
28. In light of these provisions, I consider that Lord Brailsford is entitled to reach a determination as to the scope of the matters which he is entitled to investigate and report upon in order to fulfil the Terms of Reference. Provided such a determination is within competence of a Scottish matter³¹ inquiry and accords with a rational

²⁹ This is subject to any other provision of the Act or rules under section 41; its importance as a factor influencing construction may be accordingly limited as the proper construction of the other provisions may take precedence but nonetheless the construction proposed is coherent with the statutory scheme as a whole.

³⁰ 2005 Act, s.5(3)

³¹ See para 16, above

construction of the terms (taking a purposive approach to their construction in the context of the relevant inquiry), it should only be interfered with by a ministerial amendment to the Terms of Reference.

Human Rights

29. So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the “Convention rights”³², meaning the rights and fundamental freedoms set out in (a) Articles 2 to 12 and 14 of the European Convention on Human Rights, (b) Articles 1 to 3 of the First Protocol, and (c) Article 1 of the Thirteenth Protocol, as read with Articles 16 to 18 of the Convention³³ (subject to any designated derogations or reservations³⁴).

PROPER CONSTRUCTION OF THE INQUIRY TERMS OF REFERENCE

The Terms of Reference

30. The Terms of Reference as amended to date³⁵ are contained at Annex 1 hereto.
31. The stated aim of the Inquiry is to establish the facts of, and learn lessons from, the strategic response to the COVID-19 pandemic in Scotland (Term of Reference (“ToR”) 1). No distinction is drawn between reactionary and recovery responses; both are potentially within scope.
32. This general aim is further specified by reference to: a temporal restriction to the period between 1 January 2020 and 31 December 2022 (ToR7(a)); the substantive scope of the Inquiry (ToR2); and reporting directions to:
- (a) To create a factual record of the key strategic elements of the handling of the pandemic (ToR3);
 - (b) To identify lessons and implications for the future, and provide recommendations (ToR4); and

³² Human Rights Act 1998, s.3

³³ *Ibid*, s.1(1)

³⁴ *Ibid*, s.1(2)

³⁵ See para 4

(c) To demonstrate how a human rights-based approach by the Inquiry has contributed to the Inquiry's findings in facts and recommendations (ToR5).

33. The Inquiry is to provide reports to the Scottish Ministers as soon as practicable (ToR6).

Purpose

34. Read as a whole, in my view the purpose of the Inquiry is to learn lessons and make recommendations which will assist in the handling of any future pandemic. Given that the timing of any subsequent pandemic is unknown, there is an imperative to report within a reasonably short time period.

Temporal Restriction

35. ToR7(a) states that *“in relation to points 2(b) to 2(l), investigations will cover the period between 1 January 2020 and 31 December 2022”*.

36. There are two separate matters for interpretation therein: (1) the meaning of “will cover” (i.e. how the period of time falls to be construed); and (2) whether this term relates to investigation of the handling of the pandemic within that period (regardless of when the evidence arose) or investigation of evidence arising solely from that period.

37. With respect to (1), it is possible on a literal reading to interpret the expression “will cover” as providing either a minimum or a specific (and maximum) term in respect of which the Inquiry must investigate the elements of ToR2(b) to 2(l) – i.e. covering either “at least” or alternatively “at least but no more than” the period 1 January 2020 and 31 December 2022. Given than the substantive events of the COVID-19 pandemic did not materially commence before 1 January 2020, the difference in these constructions is largely centred upon the end date of any relevant investigations. In light of my interpretation of purpose of the Inquiry³⁶ and the potentially time-sensitive nature of

³⁶ See para 34

that purpose, I consider that ToR7(a) is intended to specify and limit the period of investigations rather than specify any minimum period that the Inquiry is at liberty to go beyond. Were it otherwise, the Inquiry would simply be entitled to continue to investigate to some further arbitrary date to be determined by the chair. Whilst this alternative construction might be possible (on the basis that the Scottish Ministers wished to ensure a certain minimum period of time were investigated) it would appear contradictory to the requirement of ToR6 to report as soon as is practicable.

38. With respect to (2), the issue is whether matters arising outwith the specified period of ToR7(a) but bearing to inform upon the understanding of the handling of strategic elements within that period still fall to be investigated. A narrow interpretation of ToR7(a) might be seen as best promoting the purposes of the Inquiry to report quickly. However, I consider that such an approach fails to acknowledge the potential benefits and lessons that might be learned from understanding the impacts of the handling and from retrospective review of what else might have been possible. On balance, I consider that the primary purposes of the Inquiry to learn lessons and make recommendations should take precedence. The obligation to report only arises as soon as is practicable and is therefore in terms secondary to those primary purposes.
39. On this basis, I consider that the investigations in relation to ToR2(b) to 2(l) should be limited to the handling of the strategic elements of the pandemic in the period between 1 January 2020 and 31 December 2022. However, these would potentially include investigations into facts or knowledge arising outwith that period, where those might assist (retrospectively) a fuller consideration of the handling.
40. Whilst this construction has the potential to widen the scope of the Inquiry, I consider that it is impossible to consider properly the handling without understanding its impacts, which may naturally fall after the period of handling. Moreover, if the narrower construction were to be adopted, a known lesson or recommendation might require to be omitted by the Inquiry (as *ultra vires*) due to it being based upon evidence ingathered from outwith the stated period – this does not appear to accord with the

purpose of the Inquiry. Furthermore, any expansion is mitigated by the other substantive Terms of Reference delimiting the scope of the Inquiry, with a focus on the handling within the defined period.

Substantive Restrictions – Factual Record and Context

41. The Terms of Reference restrict the subject of the Inquiry to the strategic response to the pandemic (ToR1). In delivering upon its purpose, the Inquiry is required to report a factual record of the key strategic elements of the handling (ToR3).
42. Self-evidently, in order to understand and report upon the decisions taken in the strategic response, and the implementation thereof, it is necessary to consider these within their contemporaneous factual context – absent such, it is difficult or impossible to understand why decisions were taken and/or make recommendations for how matters might be handled in future (see ToR4).
43. However, matters which do not inform the factual context of (intra-scope) handling/decisions would not be within the remit of the Inquiry. It is outwith the scope of the Terms of Reference to compile a comprehensive factual record of *all* the strategic elements of the handling thereof, let alone of the whole events of the pandemic. Comprehensive investigation of such matters is not required to meet the purpose of the Inquiry or the specific Terms of Reference. Investigations of or reporting on wider matters (including forming any lessons or recommendations) may be *ultra vires* the substantive scope of the Inquiry.
44. Separately, the additional work required to undertake such wider investigations would:
 - (a) conflict with the requirements of ToR6 for the Inquiry to report as soon as is practicable; and
 - (b) assuming additional investigations and reporting would incur additional cost, place the chair in breach of his obligation in terms of section 17(3) to “act with...regard also to the need to avoid any unnecessary cost”.

Handling and Knowledge of COVID-19

45. The factual context will in the present case include the state of knowledge regarding the SARS-CoV-2 virus and COVID-19 at the relevant dates of the handling of the pandemic.
46. Such matters will include issues relating to epidemiology, transmission and clinical effects, both present and known future. It may include considering:
 - (a) the sources and scope of information that decision makers made use of (“what they knew”); and
 - (b) in light of the present state of knowledge, whether there were other sources that could have been considered at the time (“what they could³⁷ have known”).Questions relating to the steps that were taken at the relevant dates to potentially put relevant matters within the state of knowledge decision makers at the time would therefore potentially be within scope.
47. Conversely, fulfilling the Terms of Reference and meeting the purpose of the Inquiry does not appear to require the Inquiry to assess decisions and the handling of the pandemic in light of information which could not have been available (and would not therefore be available in any future handling of a pandemic) at the relevant time.
48. One consequence of this position is that developments in knowledge post 31 December 2022 regarding the source of the virus, its underlying causes and COVID-19 (including its clinical effects and future treatment) are likely to be outwith the scope of the Inquiry unless they inform lessons relative to earlier handling.

Impacts and Lessons to be Learned

49. The strategic elements of the handling of the pandemic had impacts. Ingathering and analysis of evidence of these impacts is necessary. In particular:

³⁷ And including potentially whether decision makers should have known

- (a) The impacts of earlier decisions and handling during the course of the pandemic provided the factual context for subsequent decisions and handling later in the progression of the pandemic – these impacts are therefore central to understanding and assessing the basis of the later decisions; and
- (b) The impacts (both positive and negative) provide factual bases from which lessons can be learned and recommendations formed.

50. As noted above³⁸, impacts occurring outwith the period of ToR7(a) but bearing upon or allowing proper consideration of the handling within the defined investigation period of the Inquiry may be within the scope of the Terms of Reference.

51. In light of these requirements, the impacts of strategic elements of the handling of the pandemic are in my view certainly within the scope of the Inquiry.

APPLICATION TO LONG COVID

Long COVID and Scope of Inquiry

52. Long COVID is a developing subject matter but by the clinical case definitions it is a matter relating to COVID-19 and therefore the pandemic. However, in order to be within scope of the Terms of Reference, issues relating to long COVID must be relevant to:
- (a) key strategic elements of the handling of the pandemic (ToR3); and/or
 - (b) to lessons and implications for the future, and the recommendations which the Inquiry might make (ToR4).

Long COVID and Handling of the Pandemic

53. In principle, long COVID is no different to any other state of fact that could at the relevant date have been taken into account by a decision maker. Those would include long-term effects of the pandemic, both medical and socio-economic. The strategic elements of the handling of the pandemic relating to healthcare services falls within the Terms of Reference (ToR2(h)). If long COVID affected or could have affected the

³⁸ Para 35 to 40

key strategic elements of the handling, I consider that it would fall within the scope of the Inquiry.

Long COVID and Epidemiology

54. Accordingly, I consider that the state of epidemiology (both what was known and what could have been known by decision makers) relative to long COVID is a matter which bears upon the factual context of the strategic response to the COVID-19 pandemic for the purposes of the Terms of Reference.

Impacts of Long COVID

55. In so far as the epidemiology and state of clinical knowledge relative to long COVID bears upon the key strategic elements of the handling of the pandemic, the impact of long COVID on persons affected will provide relevant factual context for the decisions relative to the handling. These have potentially two purposes:

- (a) To understand the state of knowledge at the relevant strategic decisions were taken; and
- (b) To understand and record the consequences of the handling of the pandemic to provide context and reasons for any potential lessons and recommendations to be reported by the Inquiry.

Prospective Treatment of Long COVID

56. Conversely, except in so far as affecting the strategic handling of the pandemic during the period 1 January 2020 to 31 December 2022, I do not consider that long COVID (including the causes and future treatment thereof) falls to be investigated by the Inquiry. Akin to advances in the state of knowledge of COVID-19 generally³⁹, or relating to the present treatment of any form of COVID-19 related condition, I do not consider that these will fall within the Terms of Reference.

³⁹ See para 48, above

57. Advancement of the contemporary state of knowledge relative to long COVID may be a desirable endeavour; it is not the purpose of the Inquiry. Undertaking this additional work may delay the Inquiry reporting as soon as is practicable. It would be *ultra vires*.

Application of Human Rights.

58. The Scottish Government may in certain circumstances be under a procedural duty to investigate deaths⁴⁰; torture, and inhuman and degrading treatment⁴¹; and slavery and forced labour⁴². ToR7(b) provides that “*the Inquiry will, as the chair deems appropriate and necessary, consider the impacts of the strategic elements of handling of the pandemic on the exercise of Convention rights (as defined in Section 1 of the Human Rights Act 1998)*”.

59. In addition, it is implicit within ToR5 (the requirement to so demonstrate) that the Inquiry will take a human rights based approach, placing people's rights at the centre of policies and practices.

60. However, in light of my conclusion on the basis of the ordinary rules of interpretation that long COVID falls to be investigated where relevant to the strategic response to the COVID-19 pandemic only, I do not consider the proper construction of the scope depends on Convention rights⁴³. Conversely, I do not consider that the Terms of Reference are sufficiently broad for other long COVID related matters (such as future investigation, and prospective treatment and support) to fall within the scope of the Inquiry.

INTERACTION OF LONG COVID WITH SUBSTANTIVE SCOPE

ToR2

61. The Terms of Reference in ToR2 set out twelve areas of investigation ToR2(a) to (l). Notwithstanding comments of the then Deputy First Minister that “*they are all*

⁴⁰ *Šilih v. Slovenia* (Application no. 71463/01) 9 April 2009 at para 156 (ECHR Article 2) “*In cases where the death was caused unintentionally and in which the procedural obligation is applicable, this obligation may come into play upon the institution of proceedings by the deceased’s relatives*”

⁴¹ ECHR, Article 3

⁴² ECHR, Article 4

⁴³ See para 29, above

*reasonably compartmentalised*⁴⁴, there are significant areas of overlap between these areas. The approach of the Inquiry to its investigations, hearings and reporting take account of this and is unlikely to follow rigidly the structure of ToR2 in many areas.

62. At this stage, it is difficult to assess in detail the type of evidence relative to long COVID that might be available or its relevance to the various elements of ToR2. For present purposes, I have been asked to consider which of the ToR *might* be engaged.

ToR2(a) pandemic planning and exercises carried out by the Scottish Government

63. Long COVID being by definition a virus-specific condition, its direct relevance to general pre-pandemic planning and exercises must be limited.

64. However, as an exemplar of long term effects of a pandemic (that should be considered), it may nonetheless provide a foundation for lessons to be learned.

ToR2(b) the decisions to lockdown and to apply other restrictions and the impact of those restrictions

ToR2(c) the delivery of a system of testing, outbreak management and self isolation

ToR2(d) the design and delivery of a vaccination strategy

ToR2(e) the supply, distribution and use of Personal Protective Equipment

ToR2(f) the requirement for shielding and associated assistance programmes, provided or supported by public agencies

ToR2(g) in care and nursing homes: the transfer of residents to or from homes, treatment and care of residents, restrictions on visiting, infection prevention and control, and inspections

ToR2(h) the provision of healthcare services and social care support, including the management and support of staff and the recognition, involvement and support of unpaid carers

ToR2(k) the delivery of education and certification

⁴⁴ Official Report (parliament.scot) Meeting of the Parliament (Hybrid), 27 October 2022 p66: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13942>

ToR2(l) financial support and guidance given to businesses and the self employed, including in relation to identification of keyworkers, by public agencies

65. Long COVID appears to be a potential consequence of contracting COVID-19. Accordingly, it appears to have the potential to be relevant to each of ToR where active transmission control was a material consideration (i.e. ToR2 excepting (a), (i) & (j)). The state of knowledge of long COVID will be relevant to handling of the pandemic in these areas. It is therefore likely that the following matters may require to be considered to varying degrees under the ToR above:

- (a) the epidemiology of long COVID;
- (b) whether and to what extent long COVID specifically was taken into account in the strategic elements of the handling of the pandemic;
- (c) whether and to what extent long term conditions in general (such as long COVID) were taken into account in the strategic elements of the handling of the pandemic; and
- (d) the impact of long COVID upon individuals' health; education and/or employment.

ToR2(i) the delivery of end-of-life care and the use of DNACPR (do not attempt cardiopulmonary resuscitation decisions)

66. There do not appear to be any direct impacts of long COVID (as distinct from COVID-19) on this ToR. It is possible that specific considerations relative to long COVID might arise but this is not an element relative to long COVID that has been raised currently as a particular area of concern by the core participants to the Inquiry or in the report setting out findings from public engagement into the aims of the Inquiry *Scottish COVID-19 Inquiry: Analysis of the public and stakeholders views on the approach to establishing the public inquiry*⁴⁵.

⁴⁵ <https://www.gov.scot/publications/scottish-covid-19-inquiry-analysis-public-stakeholders-views-approach-establishing-public-inquiry/documents/>

ToR2(j) welfare assistance programmes, for example those relating to benefits or the provision of food, provided or supported by public agencies

67. In addition to matters relevant to all COVID-19 sufferers, the provision of welfare and financial support for long COVID sufferers, and in particular whether consideration was given to support therefor, may require to be considered.

Other ToRs

68. So far as long COVID is an effect of COVID-19, it has the potential to raise issues that will engage each of the other ToRs. In particular and without limitation, it appears to be relevant to: the facts and lessons of the strategic response (ToR1); the factual record of the key strategic elements of the handling of the pandemic (ToR3); lessons and recommendations (ToR4); human rights-based approach by the Inquiry (ToR5); the speed at which the Inquiry can report (ToR6 and ToR7(b)); disparities and unequal impacts (ToR7(c)).

69. The Inquiry is under a duty to avoid duplication of investigation, evidence gathering and reporting with any other public inquiry established under the Inquiries Act 2005 (ToR7(f)). The UK Government has established a UK COVID-19 Inquiry, which might be entitled to investigate and report upon long COVID.

SUMMARY OF OPINIONS

Remit of the Inquiry

70. In my view, long COVID is within the remit of the Inquiry. As an impact of COVID-19, arising during the currency of the ToR7(a) period, I consider long COVID would fall within the Terms of Reference. Long COVID is potentially relevant to all parts of the Terms of Reference, with the potential exception of ToR2(i).

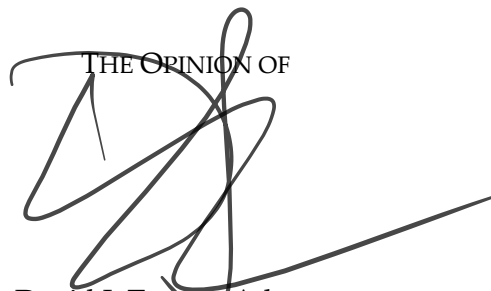
71. However, long COVID is incorporated by reference to its relevance to the strategic response to the pandemic during the investigation period of 1 January 2020 to 31 December 2022 only. That does not exclude evidence arising outwith that period where it reveals matters relative to the handling within that period. The remit does

not therefore permit of investigations into other periods for purposes other than relating to such *intra vires* handling.

Investigation of healthcare issues, such as long COVID, which originate from the period 1 January 2020 – 31 December 2022 but have ongoing implications

72. The Inquiry is entitled to consider healthcare issues, such as long COVID, as far as these relate to the strategic response to the pandemic within the ToR7(a) period. That may include issues with ongoing implications where these are relevant to the in-scope period.
73. If ongoing implications do not bear upon the in-scope pandemic handling period, I do not consider that these would fall within the remit of the Inquiry.

THE OPINION OF



David J. Turner, Advocate

Parliament House
Edinburgh
5 May 2023

Annex 1

The Terms of Reference for the Inquiry as amended with effect from 28 October 2022

AIM

1. The aim of this inquiry is to establish the facts of, and learn lessons from, the strategic response to the COVID-19 pandemic in Scotland.

SCOPE

2. **To investigate the strategic elements of the handling of the pandemic relating to:**
 - (a) pandemic planning and exercises carried out by the Scottish Government;
 - (b) the decisions to lockdown and to apply other restrictions and the impact of those restrictions;
 - (c) the delivery of a system of testing, outbreak management and self isolation;
 - (d) the design and delivery of a vaccination strategy;
 - (e) the supply, distribution and use of Personal Protective Equipment;
 - (f) the requirement for shielding and associated assistance programmes, provided or supported by public agencies;
 - (g) in care and nursing homes: the transfer of residents to or from homes, treatment and care of residents, restrictions on visiting, infection prevention and control, and inspections;
 - (h) the provision of healthcare services and social care support, including the management and support of staff and the recognition, involvement and support of unpaid carers;
 - (i) the delivery of end-of-life care and the use of DNACPR (do not attempt cardiopulmonary resuscitation decisions);
 - (j) welfare assistance programmes, for example those relating to benefits or the provision of food, provided or supported by public agencies;
 - (k) the delivery of education and certification; and
 - (l) financial support and guidance given to businesses and the self employed, including in relation to identification of keyworkers, by public agencies.

REPORTING

3. To create a factual record of the key strategic elements of the handling of the pandemic
4. To identify lessons and implications for the future, and provide recommendations
5. To demonstrate how a human rights-based approach by the inquiry has contributed to the inquiry's findings in facts and recommendations
6. To provide reports to the Scottish Ministers as soon as practicable

INTERPRETATION

7. **When interpreting and applying these terms of reference:**
- (a) in relation to points 2(b) to 2(l), investigations will cover the period between 1 January 2020 and 31 December 2022
 - (b) the inquiry will, as the chair deems appropriate and necessary, consider the impacts of the strategic elements of handling of the pandemic on the exercise of Convention rights (as defined in Section 1 of the Human Rights Act 1998)
 - (c) the inquiry will, as the chair deems appropriate and necessary, consider any disparities in the strategic elements of handling of the pandemic, including unequal impacts on people
 - (d) the inquiry can consider only “Scottish matters” as defined in section 28(5) of the Inquiries Act 2005
 - (e) the inquiry respects the independent role of the Lord Advocate in relation to the prosecution of crime and the investigation of deaths in Scotland
 - (f) the inquiry must make reasonable efforts to minimise duplication of investigation, evidence gathering and reporting with any other public inquiry established under the Inquiries Act 2005