

The Hon Lady Poole

By email

Date: 11.04.2022

Dear Lady Poole,

We, the undersigned organisations are writing following initial meetings between yourself as Chair of Scotland's public inquiry into the handling of COVID-19, and civil society. We thank you for taking the time to meet with many of us.

We understand that you are still in a period of reflection regarding the inquiry's Terms of Reference and want to underline the concerns we have regarding the TORs as they stand.

We appreciate that many of these points were discussed during meetings and have taken on board your analysis regarding the legal scope permitted by the Inquiries Act, and the limited time and resources available to the inquiry. We do however retain concerns about serious obstacles to this inquiry taking a truly human rights based approach.

### **Human Rights Framework**

The current interpretation of the TORs as set out by the Scottish Government will be to consider the impact of decision making on ECHR rights 'as the Chair deems necessary'. It is our view that this approach does not reflect the commitment to a human rights based approach in the SNP's 2021 Manifesto. While we appreciate the arguments you articulated relating to your professional experience in human rights and equalities, and personal commitment to look at rights breaches; we remain convinced that broad human rights considerations must be built into the inquiry's Terms of Reference.

We ask that the TORs formalise that the impact on rights will be investigated in line with the ECHR (Human Rights Act) and international human rights standards; and that evidence will be gathered and analysed in line with the disproportionate impacts of decision making on different groups and communities.

### **Devolved and Reserved Issues**

Some groups have had discussions with you regarding the scope of the inquiry and whether it will extend to examining rights breaches in areas relating to reserved law. For example, the treatment of those under immigration control. You have heard arguments from Refugees for Justice, the Scottish Refugee Council and Amnesty International about why there should be an investigation into how the rights of refugees and migrants in Scotland have been breached during the pandemic.

The approach described to us in meetings in relation to those under immigration control reflects a strict legal analysis of the scope permitted of this inquiry by the Inquiries Act. Refugees for Justice has obtained a legal opinion clarifying that the Inquiries Act 2005 does not prohibit the Chair from investigating issues of asylum seekers and others under immigration control and that there should be no express exclusion of asylum seekers resident or housed in Scotland from the Scottish Covid inquiry's remit. Those under immigration control must not be treated differently from other groups impacted by the Scottish Government and public bodies' handling of the pandemic and yet that is the direction the inquiry TORs currently take. We would urge you to address these concerns and revisit your position.

The treatment of those under immigration control is far from the only issue which will cut across reserved and devolved policy areas and service delivery. There are a multitude of areas, including those set out in the current TORs where law and policy set at both the UK and Scottish levels will have impacted rights holders. This raises important questions regarding how information is to be gathered and analysed. It also raises an important question regarding how the role of devolved authorities and services in the handling of the pandemic in areas where there is cross-over between devolved and reserved duties is investigated by the inquiry. How will the inquiry team determine whether evidence given relates to strictly devolved or reserved decision making? How will the inquiry investigate the role of Scottish authorities and services in relation to issues where there is cross-over between devolved and reserved issues? What will be done with evidence relating to reserved matters?

### **Terms of Reference and those disproportionately impacted**

Another common theme in our meetings has been the lack of reference in the inquiry framework to specific groups disproportionately impacted by the handling of the pandemic. From the beginning of the consultation process civil society has argued that enough evidence exists to identify many groups who suffered disproportionate rights breaches, and that to learn lessons, the experience of those groups should be centred. Your argument, as we understand it, is that by omitting reference to specific groups, the TORs are by definition broad and inclusive. We remain very concerned however that the experiences of many will fall through the cracks as the current TORs stand. Ensuring participation of those most impacted by decision making will require proactive measures. Many of those the inquiry should be hearing from will, for the same reasons they were disproportionately impacted, be less likely to proactively offer testimony. The choice not to identify and set out specific groups in the TORs further exacerbates this problem and will make it even more complex to communicate to the most marginalised that their experiences and views are valued and invited.

If the TORs are not adjusted to reflect this ask, then we would request that the inquiry team set out to us where they see the areas set out in the Appendix sitting within the current 12 strategic areas of investigation.

The importance of this inquiry taking a truly human rights based approach cannot be overstated. As things stand, we believe Scotland's inquiry actually risks lagging behind the UK inquiry in

terms of examining equalities and rights breaches. While still very much imperfect, the UK draft TORs can be objectively described as closer to taking a human rights and equalities approach when compared directly to the Scottish TORs given that they explicitly refer to protected characteristics and the Equality Act, and include social care.

The argument was made by many of us through our engagement with the consultation and the Scottish Government's COVID Inquiry Team that the findings of this inquiry would be vital not only for the purposes of accountability but for learning, and should be used as much as possible to inform the drafting and implementation of the proposed Human Rights Bill. Examining in detail the rights breaches suffered by some of the most impacted and marginalised people is, while resource intensive, the only approach which will ensure the work of the inquiry will have lasting and transformative impact. Failure to take a rights based approach to this inquiry will represent missed opportunities for learning and accountability to an extent which would be incompatible with the Scottish Government's stated ambition of becoming a human rights leader.

Yours Sincerely,

Agnes Tolmie chair of the Scottish Women's Convention

Anna Ritchie Allan, Executive Director, Close the Gap

Dylan Fotoohi, Director, Refugees for Justice

Fiona Collie, Head of Policy and Public Affairs, Scotland & Northern Ireland, Carers Scotland

Gary Christie, Head of Policy, Communities and Communications, Scottish Refugee Council

Jen Ang, Director, JustRight Scotland

Jill Wood, Policy Manager Engender

Laura Tomson and Rachel Adamson, Co-Directors of Zero Tolerance

Maggie Lennon, Director, Bridges Programmes

Mhairi Snowden, Director, Human Rights Consortium Scotland

Naomi McAuliffe, Scotland Programme Director, Amnesty International UK

Peter Kelly, Director, The Poverty Alliance

Sanchita Hosali, CEO, The British Institute of Human Rights

Sara Redmond, Chief Officer of Development - Health and Social Care Alliance Scotland (the ALLIANCE)

Scottish Independent Advocacy Alliance, Rhona Willder, Development Manager

CC: John Swinney MSP, Deputy First Minister, Cabinet Secretary for Covid Recovery

## Appendix

The inquiry should include, but not be limited to, investigation of the disproportionate impact of the pandemic and associated decision making had upon the groups set out below:

1. Whether the rights of those resident in Scotland's care homes were breached, notably their right to life, right to health and right to non-discrimination;
2. Did frontline workers experience rights breaches at work, including through a failure to provide adequate PPE;
3. Did schools closures, childcare restrictions and changes to social care provision have a discriminatory impact on women's access to paid work, participation and incomes;
4. Did COVID-19 restrictions on the movement of university students in Autumn 2020 breach their rights, notably under the UNCRC and ECHR;
5. Did those who were left without access to essential social care support (including care at home and community based services) experience interferences and non-compliance with rights, particularly those contained in the ECHR and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD);
6. In August, the UK National Preventive Mechanism issued a report regarding persistent issues in places of detention in Scotland, including overcrowding and detention in police custody for more than 24 hours. Did Coronavirus legislation (including the amended Prison Rules) comply with human rights standards, particularly the ECHR and UNCRC.
7. Was the decision to obligate a return to face to face teaching in schools compliant with the range of rights contained in the ECHR, the right to health, and the right to safe and healthy working conditions (Art. 7, ICESCR) particularly for teachers and other staff;
8. Was the right to adequate housing upheld for Scottish citizens, particularly those experiencing homelessness and those who have been subject to eviction orders;
9. Were the rights to life, health, and non-discrimination of Black, Asian and Minority Ethnic people in Scotland upheld;
10. Were the rights to life, health and non-discrimination of disabled people in Scotland upheld;
11. Were women's rights disproportionately breached. Did changes to screening and maternity care provision breach women's rights to health;
12. Was the use of emergency powers contained in the Coronavirus Acts adequately monitored, in particular the relaxation of local authority social care assessment duties;
13. What impact has COVID-19 had on unpaid care, and have unpaid carers received adequate support, funding and resources during the pandemic? What systems worked, what did not work, and why?
14. What are the recommendations and actions that must be taken to ensure we learn from people's experiences during the pandemic to mitigate against and prevent them in future?

