

TOP TIPS FOR POTENTIAL PARTICIPANTS AHEAD OF ANY INQUIRY IN RELATION TO COVID-19



The Prime Minister confirmed on 12 May 2021 that there will be a full public inquiry into the government's response to the Covid-19 pandemic, likely to start in Spring 2022, so that lessons can be learned from the pandemic. Independence and scrutiny will be on the agenda, but the scope of this inquiry is still to be determined.

Public inquiries are convened by the government to investigate events which have or could cause public concern, often where people have suffered or lost lives. The inquiry will look at what happened; why; who may be to blame; and what can be done to prevent this happening again. We detail below our top tips for potential Core Participants ahead of any public inquiry.

1. PRESERVATION OF DOCUMENTS

A failure to preserve documents required during a public inquiry could mean material which is helpful is not available and could lead to criticisms and adverse inferences being drawn against individuals or organisations. Documents cover any item that contains information, no matter how it is maintained or stored.

Steps should be taken at the earliest opportunity to preserve potentially relevant documents and internal records should be kept detailing who has been asked to take action, when and confirmations received that actions have been taken. Actions that should be taken include:

Suspending any routine established document/record destruction policy and disabling, or ensuring that your IT department disable, any routine deletion or recycle programmes that apply to email or other electronic documents

- leaving copies of electronic documents where they are (so as not to alter their metadata)
- keep securely a separate physical file of original hard copy documents which may be relevant to the issues.

No steps should be taken to discard documents (including rough drafts); install or remove computers or software applications that might contain relevant information; run a disk defragmenter or other file elimination program on computers or allow others to do so; or permit IT to replace current computers for individuals with potentially relevant material without considering whether to forensically image computers first.

2. AVOID CREATING DAMAGING MATERIAL

As documentation may need to be provided to the inquiry in the future, positive action should be taken to avoid damaging material being created going forwards. For example, where possible, employees should be discouraged from exchanging emails admitting failures and criticising how matters have been handled. Be mindful of the fact that documents gathered as part of internal investigations may need to be disclosed in the future as well as the conclusions of such internal investigations.

Consideration should be given to involving lawyers and whether legal professional privilege can attach to certain correspondence. Where lawyers are providing advice, head such correspondence 'Privileged and Confidential' and ensure that it is not disseminated too widely to ensure it retains confidentiality and any privileged status.

3. WITNESS EVIDENCE

Certain individuals may wish to or be requested to provide evidence to any inquiry. The inevitable lapse of time before giving evidence will mean recollections are not fresh. Early consideration should be given to preparing witness evidence, whilst keeping point (2) above in mind about avoiding the creation of damaging material. Where key individuals are leaving an organisation, consider with your lawyer whether to take their witness evidence before they move on and if such evidence can attract privilege (doing so without your lawyer increases the risk that the documents created may not be privileged and so may need to be disclosed).

4. CORE PARTICIPANT STATUS

The Inquiries Rules 2006 provides the chairperson with the power to designate a person, a group, or an organisation who has a direct and significant involvement or interest in the subject of the inquiry as a core participant ("CP").

The CP will have wide rights to see evidence, attend hearings, make opening and closing submissions, and may be permitted to question witnesses. Consider at the outset whether an individual or organisation wants to seek CP status – it can become more difficult to get CP status once an inquiry is underway if that has not previously been applied for. If so, decide whether CP status is sought individually or collectively with others.

There are advantages and disadvantages of both CP status and sharing that status with others which will need to be carefully considered before deciding on an approach.

5. CONSIDER AIM OF PARTICIPATION IN AN INQUIRY

The output of a public inquiry will include lessons learnt and recommendations. A select committee may follow up to make sure the government acts on recommendations by the inquiry. There may be associated litigation, regulatory enforcement and criminal investigations alongside or arising from an inquiry, but not necessarily.

Individuals and organisations should consider at the outset what their concerns and wider objectives are so they can seek to ensure they are addressed by the inquiry.

6. INPUT INTO THE ESTABLISHMENT OF AN INQUIRY AND APPROACH

A public inquiry commences with its "terms of reference" ("TOR") being set out. These are the questions that the inquiry should address and shape the scope and direction of the inquiry. Early engagement in any public consultation around the TOR and any sequencing of the inquiry can help ensure the objectives of an individual or organisation are addressed by the inquiry.

In the case of the Covid-19 response, the terms of reference might focus on (but will not be limited to) planning and preparation for any pandemic; the scientific advice given; decisions taken to prevent the virus spreading, the communication of those, timing and how effective such measures were; requirements around and provision of PPE; managing the virus within hospitals and care homes including discharging hospital patients initially without being tested to care homes; deaths particularly of key workers; the disproportionate mortality rate within ethnic minority groups; support available to individuals, businesses and sectors through government schemes; approach to track and trace and vaccinations; economic implications of the response to the virus and other long-term implications – healthcare (including mental health) and impact on sectors and groups of society (e.g. children's education and wellbeing).

7. FUNDING TO SUPPORT PARTICIPATION

There may be existing insurance policies which can provide financial support to enable the participation in an inquiry or external funding available. If individuals or organisations with shared interests act collectively then that may increase their prospects of obtaining public funding to participate in an inquiry in certain circumstances. Generally, whether public funding is available depends on the financial resources of the applicant and considerations around public interest.

8. POTENTIAL CONSEQUENCES OF AN INQUIRY

A public inquiry can have far reaching and unanticipated consequences including litigation, regulatory enforcement and criminal investigations arising from an inquiry. Public inquiries are almost always high profile and heavily scrutinised by the media, they often create public debate and make headline news in the press which can have a damaging impact reputationally. The potential consequences of an inquiry should be kept in mind as it will inform the approach taken to decisions in connection with an inquiry, such as whether CP status is sought.

9. CONSIDER JOINT ACTION

There may be other individuals or organisations (often competitors) with similar experiences and objectives of participating in an inquiry as yours. Participation by them can ensure key consistent themes and messages are communicated to the inquiry. If you have existing contacts elsewhere with similar interests to your own, consider early engagement with them about the inquiry. Where interests are sufficiently aligned and no conflicts are foreseen you may want to consider jointly taking action – such as applying for CP status, funding and/or instructing lawyers collectively.

10. INTERNAL SUPPORT AND MANAGING EXPECTATIONS

Public inquiries can require individuals to recount distressing life experiences. Ensure adequate support is available throughout the inquiry for you and any participants such as the ability to confidentially receive counselling.

The participation in a public inquiry can require the investment of significant time, costs and effort with the output being non-financial and difficult to predict and measure. For this reason, it is important that expectations are managed from the outset internally including with key stakeholders of an organisation.

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