



SCOTTISH HOSPITALS INQUIRY

PROCEDURAL HEARING

10:00

Monday, 6 March 2023

APPEARANCES

The Right Honourable Lord Brodie KC PC appeared as Chair to the Inquiry.

Mr J MacGregor KC appeared as Deputy Counsel to the Inquiry.

10:00

THE CHAIR: Good morning, everyone. Can I just, first of all, check those sitting at the back of the hearing room can hear me clearly? I am getting encouraging nods.

So, welcome both to those who are with us in the hearing room of the Scottish Hospitals Inquiry in Edinburgh, but also to those who are joining us using the remote link and viewing us on YouTube. Can I begin by introducing those who are around the table? Now, maybe those watching remotely may not be able to see this, but if I can do that. I am assisted on my left by Kirsten Macmillan, who is one of the Solicitors to the Inquiry. On my right in the centre is John MacGregor KC, who is Counsel to the Inquiry. He is appearing together with Ross McClelland, Advocate, and he is instructed by Kiera Dargie, who is another of the solicitors with the Inquiry.

This is, as you are all very familiar, a public inquiry. Accordingly – and I am perhaps addressing the wider audience at this point – we are anxious to be as accessible as we may be. Accordingly, there is the live stream, which I mentioned. Transcripts of our proceedings will be uploaded onto the

website shortly after the relative day.

Now, what I propose to do is run through certain administrative and housekeeping matters in relation to the oral hearings which we propose to have in the week beginning 24 April. Having done that, I will hand over to John MacGregor to deal with a number of matters which he would wish to bring to the attention of this procedural hearing. If there are any questions that arise out of that, the opportunity will be given after what John has to say, and I would invite legal representatives who wish to ask these questions perhaps to come forward.

As I have said, the evidential hearings are planned for the week beginning Monday 24 April. However, the Inquiry will not sit on the Monday for reasons to do with witness timetabling and will only begin on Tuesday 25 April. It will sit during the following week and into the third week. The Mondays of both the following week and the third week are both public holidays. The Inquiry will not sit on these days. Assuming that our witness timetabling goes as planned, we would anticipate finishing in the third week simply with the Tuesday, but clearly there is the possibility of a running over of the evidence.

As in previous oral hearings, we

will sit at 10, we will break at one o'clock for lunch, we will sit again between two and four in the afternoon with a brief coffee break in the morning.

I do not intend to invite opening statements. I will say something further about closing statements later in these remarks. Core participants were invited to submit applications for leave to appear at the oral hearing, and indeed I think almost all have made these applications. This was a departure, I accept, from the Inquiry's protocol on leave to appear, but it was done with the intention that the documents might be distributed at an earlier point than otherwise.

As a matter of general housekeeping, our concern about COVID, I suppose, has receded somewhat, but I would ask you to respect those who remain concerned about COVID infection and, within the admittedly limited space available to us, can we just bear in mind that COVID has not gone away?

The evidence that we will hear at the oral hearing will be taken from witnesses who will attend in person. At present, it is not intended to take any evidence remotely. Circumstances can, of course, change, but the plan at present is that all

witnesses who are giving evidence will do so in person.

A list of witnesses with timetabling relating to when they will be heard will be intimated by email after this hearing. If legal representatives have any observations on the list of witnesses, I would ask them to notify the legal team in writing within three weeks of today's hearing. Thereafter, any applications or anything arising out of or which would otherwise arise out of the witness list will not be considered, but if there are any questions, raise them in writing within the next three weeks.

Bundles of documents will be provided on the Inquiry website before the oral hearings, and at the oral hearings, it is proposed to bring relevant parts of documents onto the screen at the appropriate time in the witness' evidence.

Now, can I remind core participants that, as is provided by the Inquiry's Rules, the starting position is that questioning will be exclusively by Counsel to the Inquiry. However, if core participants wish to raise particular questions or topics with a particular witness, can I encourage legal representatives at first to contact Mr MacGregor and discuss proposed lines of questioning?

Now, if that does not bring about a satisfactory resolution, then legal representatives are able to make a written application in terms of Rule 9(4) of the 2007 regulations. Now, any such written application should be made not later than four days before the relevant witness is to give evidence. When I say four days, 96 hours might be more precise. Any such application should state that the matter has been discussed in advance, or if not, explain why not, and any application should address the matters which are set out in Rule 9(5) of the Rules which indicate that such an application must identify:

“The matters or issues in respect of which a witness is to be examined; whether the examination will raise new matters; or where no new matters or issues are likely to be raised, reasons why the examination should be permitted.”

I will consider such applications, first of all, on the papers – it may be necessary to have an oral hearing on that – and such hearings will take place as soon as possible after the application has been received. If such an application to ask questions is granted, then I would not anticipate allowing more than 15 minutes for

such additional questioning, although circumstances may have to be taken into account, which might lead to a longer period. But, as legal representatives will appreciate, the starting position is that it is Counsel to the Inquiry who asks the questions. In the event of a grant of an application to ask questions, Counsel to the Inquiry may be given an extra 15 minutes to respond.

Now, what I have just run through in relation to the procedure for Rule 9 applications is not at present either a protocol or direction. However, after this hearing, the Inquiry will distribute a statement which explains what I have just run through or, rather, it does not explain it, it sets out what I have just run through.

Now, as I said previously, I do not intend to ask for opening statements in respect of this oral hearing. I will invite core participants to provide closing statements. Now, these will be in writing, and I would look for them to address the evidence at the hearing beginning on 25 April, but also the evidence which was heard at the earlier hearing in relation to Edinburgh in 2022. As you will recollect, I did not invite closing statements after that hearing. The timetable we would propose is this: after the end of the

oral hearing beginning on 25 April, I will allow three weeks for Counsel to the Inquiry to lodge his written statement, which will be circulated among the legal representatives. So, that will happen by Friday 2 June. I will allow two weeks following that for core participants to exchange drafts among themselves so that each core participant is aware of the position being taken by fellow core participants, and that period would come to an end on Friday 16 June. Two weeks after that, I would look for the submission of written statements. As I say, I will deal with statements on the papers. I will not invite oral submissions.

Now, I think that covers the matters which I intended to deal with, and I would hand over to Counsel to the Inquiry to deal with the matters he wishes to raise. Mr MacGregor.

MR MACGREGOR: Thank you. There would be three issues to raise today: firstly, topics for the hearing, secondly, witnesses, and thirdly, the issue of documents. Dealing firstly with the issue of topics for the hearing, a list has been issued to core participants in advance of the procedural hearing and that will be published on the Inquiry website in due course. That essentially sets out the same themes that were provided in

draft to core participants in 2022. The broad themes to be covered at the oral hearing will be the development of the reference design and the environmental matrix, the procurement exercise and the contract. Those topics are not exhaustive or a prescriptive list, but that does cover the broad themes for the hearing.

In relation to the second issue of witnesses, witness statements have been finalised and issued to core participants with the exception of two witnesses, firstly, Jackie Sansbury, and secondly, Brian Currie, and I will address those further in a moment. Statements will be uploaded to the Inquiry website in advance of the hearing. As your Lordship has alluded to, in terms of timetabling, witness citations have been issued to the relevant witnesses that will provide oral evidence. A draft timetable has been produced and that will be circulated shortly to core participants. As your Lordship has indicated, it is unlikely that the full third week will be required for the evidence.

I should indicate at this stage that there are certain witnesses that I would not intend to call to give oral evidence, albeit that their statements will form part of the relevant evidence and may be relevant to submissions.

Those witnesses would be, firstly, Alan Morrison, secondly, Ian Storrar, thirdly, Peter Henderson, and then, fourthly, Susan Grant. If any core participant considers that there are issues within those statements or indeed additional issues they require to be put to those individuals, they should seek to raise that with the Inquiry team as soon as possible. Your Lordship has indicated within three weeks, however, in reality, to allow an opportunity for witness citations to be issued and for relevant issues to be put to the witnesses, it would be extremely helpful if any obvious issues were raised with the Inquiry team within one week of today's hearing.

In relation to Jackie Sansbury, I have not seen the final statement for Ms Sansbury at this stage. I anticipate that being available in mid-March, and obviously an update will be provided to core participants in terms of whether there is still an intention to call Ms Sansbury at that stage.

The second individual to provide an update on is Mr Brian Currie. Mr Currie is an important witness with knowledge of the relevant events that were covered at the hearing. The Inquiry team had significant engagement with Mr Currie to seek to obtain a written statement from him.

The update that I would provide today is that I do not anticipate a witness statement being finalised and approved by Mr Currie in advance of the hearing and, secondly, I do not anticipate Mr Currie attending the hearing as a witness.

In my submission, it would be inappropriate for me to go into further details at this stage. I would simply wish to highlight that the reasons for this are entirely outwith the control of the Inquiry, and the lack of a statement is in no way through any fault of Mr Currie, his agents, the NHS Central Legal Office or the Inquiry team. Mr McClelland and myself are reflecting on how we deal with this issue, and it may well be that there is a greater focus on contemporaneous documentation with a greater need for submissions in relation to the issues that Mr Currie may have covered in his written statement.

To cover off the issue of witnesses, the Inquiry team have endeavoured to raise all relevant issues with witnesses. However, the reality is there will be some witnesses that will require some last additional issues. The Inquiry team will endeavour to provide as much advance notice in relation to those additional issues as is possible.

However, it may be that issues emerge immediately before an individual gives evidence and that cannot be done. I simply wish to highlight that witnesses should be aware that they may well be asked about issues not covered within their statements.

In relation to the issue of expert evidence, it is not the intention of the Inquiry team to call any experts at this diet, although that may be required at a future hearing within the Inquiry.

The third issue then would be the issue of documents. An index setting out the documents included within the bundles have been provided to core participants and will be published on the Inquiry website in due course.

Document bundles for those documents have been produced and will be issued to core participants when applications for leave to appear have been resolved, and the documents will be published on the Inquiry website in due course.

In addition to the index that has been provided to core participants, there will be two further bundles that will be issued in advance of the hearing. The first additional bundle will cover the preliminary position papers that have been produced by the Inquiry and responses received from core participants.

Now, three preliminary position papers have been published on the website so far. Those are, firstly, for the reference design, secondly, for the environmental matrix, and then, thirdly, for the procurement exercise. There is a fourth preliminary position paper that is in production and has been issued to the relevant core participants for comments that covers the contract. The contract paper is not seeking to definitively answer the correct interpretation of the contract, but simply to try to set out what some of the relevant terms of the contract are, which will be necessary for your Lordship to address the terms of reference.

It would not be my intention to publish a further iteration of the preliminary position papers in advance of the oral hearings, and that is really for two reasons. Firstly, there are factual issues that have been raised within the helpful responses received from core participants and, in my submission, it is more appropriate for those issues to be raised with the relevant witnesses before any position is taken on behalf of the Inquiry and, secondly, the responses highlight that there are some irreconcilable differences between certain core participants on certain issues.

Therefore, in my submission, it would be both unfair and inappropriate to set out a further preliminary position in advance of the hearing itself. My intention would simply be to set out the Inquiry's position in the submissions, which may include turning certain of the preliminary position papers into position papers.

The second additional bundle that will be provided in advance of the oral hearing will take account of additional documents that have been submitted by core participants with the comments that they have provided on the preliminary position papers. Work on reviewing those documents is ongoing and a draft list will be circulated in due course. However, if any core participants have specific documents they have identified in addition to those set out in the index issued to them, it would be helpful if they could provide a list of those documents to the Inquiry team within three weeks.

The final issue that I would address today is simply next steps in the Inquiry. In addition to the work that goes into the oral hearings, there is a significant amount of additional work that is being undertaken by the Inquiry team on the remaining topics required to address the terms of reference. The

Inquiry team is working extremely hard to finish the limb of the Inquiry concerning the Royal Hospital for Children and Young People and the Department of Clinical Neurosciences as soon as is reasonably practicable. My aspiration would be for there to be a further substantial hearing, if possible, later this year, and any update in relation to such a hearing and what topics would be covered will be provided as soon as is reasonably practicable.

That would conclude my submission today, unless there is any further assistance I can provide on any point, Lord Brodie.

THE CHAIR: No, I do not think anything further occurs to me at this stage. Turning to the hearing room, are there any questions or matters which any of the legal representatives would wish to raise? Right, I do not think I am seeing anyone wishing to raise a question. I will just allow a moment for what may be a consultation. (After a pause) No, I see no questions. Needless to say, if there are any matters which legal representatives wish to raise with Counsel to the Inquiry on a more informal basis, I am confident that counsel will be happy to discuss them.

Can I just perhaps say three

further things? I very much welcome counsel's aspiration and, at the moment, it has to be an aspiration that the hearings in relation to the Royal Hospital for Children and Young Persons in Edinburgh and the Department of Clinical Neurosciences - the aspiration to conclude hearings by the end of this year is an aspiration which I welcome on his part and share.

As you will all be aware, oral hearings are simply part of the work of a public inquiry, as Mr MacGregor has reminded us, and finally a public inquiry, if it is to be successful, requires the cooperation and collaboration of those who are most concerned with the issues that the Inquiry deals with, and these are the people and institutions that are represented here. So, I appreciate the collaboration and cooperation that we have received so far and look to it to continue. If we are to finish earlier rather than later, that cooperation is essential.

If there is nothing further, and I do not think there is, can I thank everyone in the hearing for their attendance, and I look forward to see representatives on 25 April. Thank you very much.