



SCOTTISH HOSPITALS INQUIRY

Procedural Hearing
QEUH Glasgow

30 July 2024

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10:03

THE CHAIR: Good morning, ladies and gentlemen, both to those who are here at the Inquiry hearing room in Edinburgh, and those who are following proceedings through our remote broadcast. Now, the Inquiry has received a document from the legal advisors of Greater Glasgow Health Board, and the purpose of this hearing is to allow me to hear, first of all, what is proposed on behalf of Greater Glasgow and, secondly, the views first of counsel to the Inquiry and, secondly, from those legal representatives of core participants who wish to address the hearing.

Now, the order in which I propose to proceed will be to call on Mr Peter Gray KC on behalf of Greater Glasgow, in order to confirm with him what he would propose. I will then invite counsel to the Inquiry, Mr Fred Mackintosh KC to make his response. Now, I will then invite the legal representatives of core participants who wish to address the Inquiry to do so.

Now, my understanding, and I am open to correction if I get any of this wrong, is that the legal representatives of Multiplex Construction Europe, Currie & Brown, and IBI Group have intimated to the Inquiry that they do not

wish to say anything on the matter, although I take them to be represented in the room. Now, if I have got anything wrong so far, I would invite those in attendance to correct me. I will take it that we will not hear from the representatives of those parties.

Now, my understanding is that Ms Connelly, advocate, would wish to address the inquiry on behalf of John and Molly Cuddihy and Lisa and Eilidh Mackay and after we have heard from counsel to the Inquiry, I propose to call on Ms Connelly first. I understand that Ms Helen Watts KC who represents Doctors Peters, Redding and Inkster would wish to address the Inquiry and I will invite her to do that then. I understand that Ms Una Doherty KC who represents NSS Scotland, would wish to address the Inquiry and I will invite her to do that after Ms Watts.

I understand that Ms Jennifer Jack would wish to state a position on behalf of the Scottish ministers, and I will invite her to address the Inquiry then. I understand that Mr Steve Love KC who represents patients and families would wish to address the Inquiry, and I will call upon him in that order. I will then return to Mr Gray and ask him to say whatever he wishes in response to what has been previously said. I will conclude by asking counsel

to the Inquiry whether he has anything to add. Now, have I made myself clear, and have I properly understood those who wish to address the Inquiry?

MR MACKINTOSH: My Lord, I think Scottish ministers are not actually represented here today.

THE CHAIR: Sorry?

MR MACKINTOSH: Scottish ministers are not actually represented here today, unless I am completely missing them.

THE CHAIR: Scottish ministers are not---

MR MACKINTOSH: No.

THE CHAIR: -- represented?

MR MACKINTOSH: No.

THE CHAIR: Right. When counsel come forward to address the Inquiry, I would invite them to sit at the-- immediately opposite me and to bear in mind the importance, particularly from my perspective, of being audible. As I have said on a number of occasions, my hearing is not what it was.

So, with these by way of introductory remarks on my part, I will first of all call on Mr Gray to explain what is proposed on behalf of Greater Glasgow.

MR GRAY: Yes, good morning, my Lord. On behalf of NHS GGC, the formal motion, essentially, which I

make this morning, is to invite my Lord to determine that the expert report which has been provided should be considered as part of the evidence to be led at the Glasgow III hearing due to commence on 20 August 2024, and that its authors be called to give evidence.

THE CHAIR: If I determine the expert report be considered as---

MR GRAY: Part of the evidence to be led at the Glasgow III Inquiry, my Lord, and that its authors be called to give evidence.

THE CHAIR: And that evidence would be led by counsel to the Inquiry?

MR GRAY: Yes, my Lord, that would be my motion.

THE CHAIR: Now, you referred to the hearing which is fixed for August. I think you gave it a start date of 20 August.

MR GRAY: Yes, my Lord.

THE CHAIR: In my understanding, it is Monday the 19th.

MR GRAY: Ah. My apologies, my Lord.

THE CHAIR: Well, thank you, Mr Gray. As I say, I will call upon you again once we have heard from the other core participants.

MR GRAY: Thank you, my Lord.

THE CHAIR: Now, Mr Mackintosh.

Submissions by Mr Mackintosh

MR MACKINTOSH: Thank you, My Lord. My Lord, I produced a written submission, which was circulated to core participants on Friday evening, and I do not propose simply to read through it but I want to draw out from it a number of key elements for the benefits of not only persons here and my Lord but also those who might be watching as interested parties on the YouTube feed. I am also able to provide a little more information on information I have received from Dr Mumford and Mr Mukherjee about the likely workload they consider necessary to take account of this report, and also some observations I have had from my third reading of it over the weekend.

THE CHAIR: Mr Mackintosh, entirely my fault, the written note that you provided has been circulated among the legal representatives.

MR MACKINTOSH: It has, yes.

THE CHAIR: I have had the opportunity to read it. I do not immediately see it in front of me.

MR MACKINTOSH: It should be item 1. I have given you a folder, my Lord. It is the first tab in the folder.

THE CHAIR: Yes. All right.

Right.

MR MACKINTOSH: Just for the benefit of those core participants and legal advisors in the room, this folder that you have, my Lord, contains documents that, I think, are all in the hands of everybody in the room. It contains a copy of the report itself; a copy of the letters of instruction provided to the Inquiry by the central legal office on behalf of NHSGGC; a copy of Ms Connelly's written submission; a copy of an NHS core brief from 22 March 2021, which I no longer need to refer to because I will use a document attached to Ms Connelly's submission; a copy of the remit of the Inquiry; a copy of direction 5, which was issued in December of last year, setting out the nature of the hearing to come; a copy of the NHSGGC positioning paper on infection link from 5 April 2023 to which I will refer; and a copy of the overview report from the case notes review from March 2021.

As my Lord knows, just earlier this month, the Inquiry team received a draft copy of this report from the CLO, and a final version last Wednesday. Now, I propose to address the issues raised by Mr Gray and, in a sense, his motion, to the extent that really works in an inquiry, through four heads: the

nature of the Inquiry; the Inquiry's planned approach to its terms of reference; the potential impact of the report on the Inquiry hearing due to start on 19 August; and five potential courses of action with my comments on them. I think it would be fair to say I am not intending to select a proposed course of action from those five as, ultimately, I consider that to be a matter for my Lord as Chair.

The purpose of my submissions is to set out background and to assist and, if I can assist in any way further, I will do so. In respect to the nature of the Inquiry, it is trite that the procedure of a public inquiry is such as the Chair may direct, subject to an obligation to act fairly and with regard to the need to avoid unnecessary cost, whether to public funds or to witnesses or others, as set out in section 17 of the Inquiries Act 2005. I proceeded, in the written submissions, on the basis that fairness, in this context, will substantially include the requirement for procedural fairness to those who may be adversely affected by any decision my Lord makes, and that includes an opportunity to make informed representations on their behalf before a decision is taken.

However, it is important, in my submission, to note that this

requirement to act fairly does not convert the work of a public inquiry into an adversarial hearing such as found in litigation. A public inquiry is fundamentally an inquisitorial exercise as directed by its Chair. It is for the Chair, my Lord, to decide what to investigate, what witnesses to hear and, ultimately, what is relevant in order to fulfil the remit and discharge the terms of reference. In my submission, it is important that it is for the Chair to decide what evidence that is being heard requires the application of opinion evidence or expert evidence, and then to decide from whom the Chair will receive that expert evidence. The Inquiry is not an adversarial process, and importing practices from adversarial proceedings will undermine the essential character of the Inquiry and, in my submission, may well cause delay and excessive cost.

Now, it is worth saying something about the Inquiry's planned approach to its remit in terms of reference. This procedural hearing comes four days short of the fourth anniversary of the launch of this Inquiry. Eight months after the Inquiry was launched the case notes review overview report was published. My Lord can find a copy at tab 9 in the folder I have given to him.

A few observations seem relevant.

The environmental bacteria selected for inclusion by the CNR were, in fact, selected by the Oversight Board, and that can be seen on page 33 of the overview report, where it is reported, at 3.2, that the selection criteria for cases included in the review were drafted and agreed by the Core Project Team after also inviting parents and children and young people in the Board to comment on the proposals. They were approved by the Oversight Board and set out in a protocol document, and this defined that the study population should include all patients cared for in the paediatric haematology oncology service at the Royal Hospital for Children, NHSGGC, who met one of two criteria between May 2015 and December 2019.

Those two criteria were that there be at least one blood culture of a gram-negative bacteria associated with the environment and at least one positive culture of a typical mycobacterium SPP acid-fast environmental bacteria. Now, I consulted with the authors of the case notes review in the last week, as part of the preparation for the hearing, for the opportunity of asking Gaynor Evans, one of the members, if she can

recollect the involvement of NHSGGC in the setting of this definition, and she informs me that, on 20 February 2020, a meeting took place in Glasgow, in the weeks before lockdown, in which this was discussed, with GGC personnel involved.

Now, since that happened, the Inquiry has held five evidential hearings, and four are relevant to the issues raised in this report. The first hearing heard from families and patients in the context where most had received a report from the Case Note Review team setting out its conclusion about whether there was, in the review team's eyes, a link between their child's infection and the environment. A second hearing took place last year, where treating clinicians gave evidence of their experience of unusual numbers and types of infections in the children being treated in the Schiehallion Unit.

There was also an initial Edinburgh hearing that heard substantial evidence from experts, including Professor Humphreys and Mr Andrew Poplett, about the principles and practices of hospital ventilation and, finally, only recently, there was a recent Edinburgh hearing which heard further evidence about the merits of compliance with ventilation guidance,

and which was followed by detailed closing submissions from core participants.

The Inquiry team received, in April 2023, a positioning paper from NHS Greater Glasgow and Clyde that addressed questions that had then been identified by The Inquiry team that are now key questions 1 to 4, and this can be found at 8 in the folder, my Lord. It takes the form of a submission from Mr Gray, and it is attached to it as an appendix, or series of appendices, of papers produced by GGC staff and others on the subject of whether there is or is not a link between those infections and the hospital environment. The Inquiry team has taken this as a most important statement for NHSGGC about the key questions, and have relied upon it in order to ensure that we are investigating the full range of opinions that includes those expressed by the Board here.

Alongside this information, we have taken account of positions taken by other organisations, including NHSNSS, the case notes review and many individuals, including people represented as core participants in this Inquiry. It is fair, however, to say that that paper, at paragraph 54, does state, on page 15-- Sorry, that paper

does not state that. Another paper, produced in December of the previous year, states that a joint expert opinion will be produced in due course on behalf of the board by Dr Agrawal and Professor Hawkey to demonstrate that there is no increase of risk of infection from water or ventilation at the Queen Elizabeth Hospital. So we have known, it is fair to say, that these two academics were working on some form of paper since the early part of 2023.

Now, we now know from the letters of instruction that have been produced by NHSGGC for these academics that they were instructed first by the Health Board in November 2022. The positioning paper that I have just discussed was produced as an addendum to the Health Board's written submissions from the Glasgow II hearing, and is available on the Inquiry website.

Now, my Lord is charged with delivering his remit and addressing the terms of reference, and it strikes me, and I have operated on the basis that, the heart of the remit and the first term of reference is the building and the extent to which key building systems might well have been defective, and what impact that then had. This has caused the Inquiry team to focus on

the water and ventilation systems of the hospital to try to understand them and what impact any flaws in them may have had, this as required by the remit and term of reference. This is why we have produced four provisional position papers that focus on the potentially deficient features of these systems, and also how those might be related to the contract that was used to build the hospital.

Last summer, my Lord, I understand, consulted with the experts appointed by the Inquiry and set a clear scope of the sort of expert evidence that you wished to hear. You decided to obtain, one, an epidemiological report on how the rates of gram-negative infections in paediatric haemato-oncology patients compared between the Schiehallion Unit and comparable units in England. This became Mr Mukherjee's report, known to the Inquiry team as "The Quantitative Report," and he is now producing a supplementary report. I received his draft yesterday.

Secondly, you decided to understand what building systems were defective, and that process, over a considerable amount of months, became PPPs 11, 12 and 14. 14 was published last week. You decided to obtain a report from Dr Walker on the

microbiology of the particular water system at the hospital and a report from Mr Bennett on the microbiology of the particular ventilation system. Both experts were well-informed, or substantially informed, about the nature of the system. You also decided to obtain reports from Mr Andrew Poplett on engineering issues around both reports. All three experts had site visits, access to drawings, documents and a wide range of reports produced by others.

You also decided to obtain a joint report from Dr Mumford and Ms Dempster into the question of whether there is a link between these systems and the infections that did take place. That is known by the Inquiry team as "The Qualitative Report," and was produced some months ago to core participants. You also decided to take account of the conclusions of the Case Note Review expert panel, which was published in March 2021, and it is notable, at the time it was published, NHSGGC did not publicly challenge its methodology let alone its scope of work.

The Inquiry team has been planning and preparing for the Glasgow III hearing to conclude with the evidence of these six independent experts on the basis that they would

meet the requirement if this was a civil action, which of course it is not, of being independent expert witnesses as defined by the Supreme Court in *Kennedy v Cordia (Services) LLP 2016 SC (UKSC) 59* from 48. However, in addition to those independent expert witnesses, the Inquiry will also hear evidence from a wide range of skilled or expert persons who were involved in the events that are subject to the Inquiry. These include doctors and nurses with experience in training of infection prevention and control, microbiologists, medical doctors and other specialties, epidemiologists, engineers and persons trained in the aspects of management of water and ventilation systems.

It has always been intended that my Lord would hear this opinion evidence and then take what you can from it but, ultimately, as my understanding is, that the choice of the Inquiry has been to only receive independent evidence from the group of six experts appointed some years ago, in some cases by the Inquiry team and already named. Those independent experts have all received and considered the April 2023 NHSGGC positioning paper, along with these other reports from other people including the case notes review

overview report. And we made clear there, that this has happened in direction 5 which was issued in December 2023 and it is in your bundle at 7. The document identifies the scope of the Glasgow III hearing, describes the expert reports that were instructed, and sets out a procedure to enable core participants to ask questions of those expert reports.

It is fair to say that the production of the report has been slower than perhaps the Inquiry team has wished, but we are grateful to the questions being asked by core participants meeting the various deadlines in the past few months. Indeed, at this very moment-- well, not this very moment because we're working here today, but at the moment, questions are being written for Mr Poplett and Mr Bennett in response to their reports, so they can answer those before the start of the hearing.

Despite making it clear to all core participants how you intended to address the remit through this method, it is unfortunate that whilst NHSGGC have talked about the possibility of reports from Dr Agarwal and Professor Hawkey for more than a year, no reports have been produced. Also, at no time and in none of the regular meetings between the Inquiry team

and the legal team for NHSGGC, or in any direction 5 response, has ever been made of Dr Drumright or the major epidemiological study that is found in chapter 7 of the report that we are now faced with. It is my submission that the approach to that particular aspect is a breach at best of the frequent solemn declarations of cooperation that have been made by the Health Board and those representing them, because we did not know about the work being done. The data has never been supplied to us, even though members of the team have had repeated meetings and discussions with NHSGGC about data.

My third heading is to address the potential impact of this report if it is to be brought on board, as my learned friend suggests. The report appears to reach the conclusion that there is no excess infections in the hospital compared to other hospitals in Glasgow. This is a big conclusion. It appears to contradict a number of views taken by others that there were unusual infections in patients, as seemingly conceded by the Health Board when the CNR was published in March 2021: the clinicians described in the Glasgow II hearing, how they saw unusual numbers of infections in patients in the Schiehallion Unit, how

the Inquiry team has collated together a growing history of infection concern in PPP 5, and the experience of patients and families, informed by the case notes review, in their evidence largely in the Glasgow I hearing but also in the Glasgow II hearing. I cannot detect that the authors of this report have addressed this material.

Now, the Inquiry team has not been given any information about the specific instruction that caused these authors to write this report, and I am therefore left in the position of trying to understand it from its own terms. It appears to be structured as a critique of the case notes review and seeks to carry out a comparative exercise that compares certain infection rates at the Queen Elizabeth University Hospital, Royal Hospital for Children with other hospitals in Glasgow. It does not appear to contain any material that could not have been produced some months or even years ago. It reaches a significant conclusion, that there are no excess infections in the hospital after 2015 compared to other hospitals in Glasgow and appears to suggest amongst the paediatric haemato-oncology patients in the children's hospital in 2015 that the trend of infection was downwards.

The authors do not address

whether there are any issues with the key building systems from knowledge of the systems, and they do not consider what those issues might have been. They do not address the potentially deficient features identified in PPPs 11 and 12. This is remarkable, at least in respect of Dr Agarwal, as he previously produced a report on the specifics of the ventilation in Ward 4C in 2019 in response to health and safety enforcement actions in a report that we have.

Furthermore, all three authors appear from the letters of instruction, three in the bundle folder, to be instructed for the purpose:

“Instruction is requested in order for the CLO to provide legal advice to NHSGGC in respect of the police investigation for the Inquiry and NHSGGC’s defence of the civil claims.”

If I am to present the evidence of these three authors as independent expert witnesses, I will need to find out whether they are independent expert witnesses and to understand all the information given to them by NHSGGC at any time about the state of the water and ventilation systems, what steps were taken to manage those systems, and what steps were taken to remedy

them, and to find out why these weren’t addressed in this report. The hearing is three weeks away. To take account of this report in this hearing and to answer the four key questions by the end of it, I will have to carry out with the Inquiry team a large amount of work. We will need to give the members of the case notes review expert panel an opportunity to consider it, particularly chapters 3 and 4.

As I mentioned, I consulted with them as part of preparation for the hearing. They are currently scheduled to give evidence on 29 and 30 October, and their statements are finished. In fact, I think two of them, or at least one of them, was issued to core participants yesterday. They no longer have access to the data they used to carry out their work in 2020/‘21. This may well impair their ability to now respond to this report. I note that we would need to reopen the topic covered in chapter 6 of the new report, of the principles and practices of hospital ventilation in respects of HEPA filters and the need to comply with guidance, on which concluding submissions have already been made at the most recent Edinburgh hearing. We will have to use section 21 powers to obtain the data that the authors used to produce chapters 7 and 8. We

will have to process that data and pass it on to Dr Mumford and Mr Mukherjee.

The data could have been supplied to the Inquiry team at the same time as it was supplied to Dr Drumright, but that was not done so. It must have taken a considerable amount of effort and time for the Health Board to produce this information, and we will now have to write and construct section 21 notices to obtain it ourselves.

We will have to seek additional reports from Mr Mukherjee and Dr Mumford on whether the epidemiological approach taken in the paper as a whole and chapters 7 and 8 is valid. They briefly looked at the report over this weekend, and I am told that if they had access to all the data used by the authors of this report, they feel there is around 70 hours of work for them. But, in addition to that, they would want to obtain comparative data from hospitals across the UK of a similar size and vintage to the Queen Elizabeth University Hospital, and this would be done by freedom of information requests. We made 26 FOIs to children's cancer units across the UK to support Mr Mukherjee's quantitative report.

It took at least three months to get responses, and we only got

complete and usable data from four hospitals. It tends to suggest that exercise is probably impossible and will have to restrict any work done by Dr Mumford and Mr Mukherjee to an analysis of the paper and a replication of its results, rather than the wider comparative exercise they appear at first glance to consider necessary. They are currently scheduled to give evidence in the first two weeks of November.

Now, there has been a lot of work done by the Inquiry team, and we have issued this year, in addition to direction 5, 4 PPPs, 6 expert reports, CP responses to those reports, 10 hearing document bundles, and a themes and topics paper, and an opening note is in draft, and statements are being prepared at a rapid rate, albeit we could be preparing them faster. Part of the anticipated structure of the Glasgow III hearing is to seek the opinions of any qualified witnesses involved in the events on the key questions, and that will extend from people who take positions at one extreme to the other, and all the way through the middle. We will ask them all what their opinion is about any key questions they have skills to answer.

They have had the opportunity to read the PPPs. They have had the

opportunity to read the reports of the Inquiry experts. This new report creates a substantial additional piece of reading for those witnesses, in circumstances where around half of them are working, often full time. It seems unfair for those witnesses to not have access to the views of the Inquiry's own expert panel, and I worry that it will reduce the value of their evidence to the Inquiry on this important point.

It also creates real practical problems for the Inquiry team, as this report has now been produced addressing scientific and epidemiological issues which have yet to be considered by the Inquiry's experts and which, although I read this report three times, I am still not entirely convinced I fully understand both its good points and the questions I want answers for. Of course, the opportunity has been lost, but the main conclusion of this report to Professor Gibson and all the other witnesses from Glasgow II, and the families and patients who gave evidence at Glasgow I and Glasgow II.

So, in the written submission, I identified four options, and I think there might be a fifth. None of them are particularly palatable. I propose simply to walk through them in summary. The

first option is to refuse to receive the report. The hearing is three weeks away. Statements and expert reports have been obtained in response in part to the position of NHSGGC and the infection link set out by them in April '23, and the shape of the hearing is now set. The choice as to how to investigate the issues in the remit and address the terms of reference is for my Lord. It is submitted it is not unfair to NHSGGC to refuse to receive a report produced at the last minute by authors instructed for other purposes, months before GGC replied it and months after it supplied its own position on infection link.

Now, of course, it might be observed that an anticipated response to such a course of action would be to say that this involves excluding relevant evidence. To some extent that is the case, but an Inquiry is not an open-ended process. It is also by its nature an inquisitorial process, and those who consider themselves to be harmed, criticised, or the public interest all require that the Inquiry reaches conclusions within reasonable time and are not to expect that delay will be caused by the production of large pieces of material by core participants at the last minute. That it is late, is entirely a responsibility of

NHSGGC. Refusing to receive the report would remove the risk of unfairness to other core participants, would be simple in procedural terms, and minimises any risk to delay the end of the Glasgow III hearing that would have a knock-on effect to the Glasgow IV hearing in April/May next year and the Inquiry team's intention to produce a final report by the end of March 2026.

The second option would be to receive the report but to delay the hearing to address all the issues I have discussed. Now, one way to do that would be entirely fair to all the parties procedurally but would ensure not only that the Inquiry conclusions were delayed dramatically but also would prevent any real practical work being done this year, as counsel and solicitors have other diary commitments in December and we would be finding it very hard to achieve a final report in 2026.

The third option is to receive the report and just to proceed as planned and do our best. Now, my primary concern is this will reduce the effectiveness of witnesses who are speaking about issues impacted on by the report, and it is likely to be unfair to other core participants and present real practical challenges that I have

already raised with the Inquiry's counsel team and our legal team.

We could receive the GGC report in a fourth option but restructure the hearing. Now, there are a number of different ways of doing this. They are all slightly convoluted but the one that probably works best, if that is the right word, would be to call the authors of this report in two days in early November that are currently slack and spare in the timetable. Now, it should be possible, based on what I've discovered from Mr Mukherjee and Dr Mumford and the CNR authors, to hear their responses in written material by then, but it would not be possible to give the benefit of those responses to other witnesses. So we would be left with the position of finding out what to do with other witnesses during the balance of the hearing who might want to discuss what is in this report.

The only way that I can see that would fit with the timetabling is to only permit them to do so by written supplementary statement. We would not have big discussions in the hearing about this report. The alternative approach would be to recall those witnesses in the two days in November and not actually call the authors of this report but rely on their written material. It all seems most unsatisfactory.

The fifth option would be to excise part of the report. This, at one level, seems a superficially attractive solution and has the benefit of reducing the workload to the Inquiry team. One could, one thought initially, have removed chapter 7 from the report, on the basis that the workload to consider it is excessive and cannot be accommodated in the time we have before 19 August. However, having read the report again for the third time on Sunday, it is clear that it is a complete project. It may have taken a very long time to produce, but the logical structure of the report is clear that chapter 7 is an essential part of the conclusions. It would not make sense if you excluded it. It is, unfortunately, all or nothing.

Ultimately, this matter is for my Lord. The Inquiry team will implement the solution my Lord concludes. If I can assist in any way, I am happy to do so.

THE CHAIR: Thank you, Mr Mackintosh. Now, Ms Connelly.

Submissions by Ms Connelly

MS CONNELLY: My Lord, I represent the Cuddihy and Mackay families and on their behalf I invite your Lordship to refuse the application

by Greater Glasgow and Clyde to receive this report as part of the evidence to be led at Glasgow III. My Lord, in support of my submission, I adopt my written submissions to the Inquiry, I adopt those of counsel to the Inquiry and his oral submissions, my Lord.

My Lord, in summary, our objection to receipt of the report relates to the data upon which the report is based and the impact on the Inquiry, both in terms of procedure and also in terms of fairness. My Lord, all core participants have an obligation to assist the Inquiry in discharging the terms of reference. Counsel to the Inquiry has advised that the data upon which the Greater Glasgow and Clyde expert report is based includes information that GGC has not made available to the Inquiry. Your Lordship will be aware from previous written submissions that there have been concerns throughout the Inquiry of the extent to which GGC were fulfilling their obligation to assist and their duty of candour in respect of sharing information. An example, perhaps, of the selective approach by GGC can be found in the fact that even in their own expert report there is no reference to gram-positive infections, including mycobacterium chelonae, despite

GGC having accepted that such infections occurred and were environmentally linked as long ago as 2019.

The question of why now is at the forefront of the minds of those that I represent. Why now has an expert report been produced when experts were instructed report on 21 November 2022? Why now do GGC produce, via their report, data which has not been made available to this Inquiry? This calls into question both the conduct of GGC and their motivation behind instructing and producing the report. Some insight to that is given in the letters of instruction which state that the report will be relied upon in civil and criminal proceedings, and the public inquiry potentially, and that the authors may be called to give evidence.

My Lord, to have instructed such a report to be used in both adversarial and inquisitorial processes immediately rings alarm bells to those who are familiar and work within the court system and the wider legal system. The essential nature of this public inquiry, and indeed all public inquiries that have proceeded within the United Kingdom to date, has been inquisitorial. It is at best naive, at worst dishonest, to suggest that the

same report is a suitable source of evidence in both forums. My Lord, the only conclusion in my submission that can be drawn is that the purpose of this report is to undermine the evidence already before the Inquiry and also to undermine the findings of the Case Note Review, despite the fact that Greater Glasgow and Clyde have failed until this point to take issue with that review, as is evidenced in the papers appended to my written submission.

My Lord, my final point is in relation to the question of fairness. Patients and families, and particularly those whom I represent, had a difficult journey in the course of the public inquiry and this has led to some loss of confidence due to changes of personnel, etc. However, my Lord, perhaps the greatest challenge to their confidence is the actions by bodies like Greater Glasgow and Clyde and their current application to have their report included in the evidence in Glasgow III, which appears to be for no other purpose but to undermine the expert reports that are already before the Inquiry. Similarly, concern has been expressed by the request made by the Scottish Government for additional witnesses to now be called to speak to communication with patients.

Why is it that these large institutions wait until evidence critical of their conduct is before the Inquiry before they then seek to introduce evidence to challenge or undermine? My Lord, in my respectful submission, that is not the spirit of a public inquiry and it's not the action of core participants who are seeking to assist the Inquiry. My Lord, I respectfully invite you to refuse the application by GGC and to avoid the necessary delays and additional costs that will be incurred, and ultimately the undermining – in the eyes of patients and families – of the Inquiry, the conduct of the Inquiry and potentially the outcome. If I can be of any further assistance, my Lord?

THE CHAIR: Really just to confirm some points which emerge from your written submission now. You began by saying you adopted the written submission and, quite reasonably, you did not just read it. So I will have regard to everything that you have said there, but just to confirm that I understand your argument, what I think you are saying is, should I accede to what Greater Glasgow are proposing? The nature of the Inquiry, which has previously been of an inquisitorial nature-- in other words, the Inquiry is directing an investigation and

deciding what is relevant, but what is also proportionate in carrying that out, I think you make the point that that has been the approach up to now.

Your submission is that if one-- or if I was to admit from one core participant a commissioned report, a commissioned study, two consequences at least would arise. First of all, it would change the nature of the Inquiry from something that has been inquisitorial to something that at least is approaching adversarial, an adversarial proceeding, in other words, the various parties are contending for their various positions. I think the other point you raise is, well, if one party is permitted to do this, why should other parties not be permitted to do this? Have I understood the focus of what you're saying?

MS CONNELLY: You have, my Lord.

THE CHAIR: Right. Is there anything else you want to say before---

MS CONNELLY: No, thank you, my Lord.

THE CHAIR: Thank you very much, Ms Connelly. Ms Watts?

Submissions by Ms Watts

MS WATTS: Good morning, my

Lord. My client's position is that the provision of what is an expansive new report, first circulated after close of business on Thursday and now being discussed at a procedural hearing just three weeks before the Inquiry is due to start, is fundamentally at odds with the manner in which any legal proceedings ought to be conducted but in particular is unacceptable in the context of a public inquiry, in which a candid and collaborative approach is critical, and therefore that the Inquiry should not allow the report to be received and included in the hearing bundles or allow its authors to be called to give evidence.

My clients and I are surprised to note that what appears to be in contemplation now is an attack on the Case Note Review, coming many years after it was completed and in a manner that is at least arguably at odds with GGC's previously stated positions on that piece of work. My Lord, I agree with – and I associate myself with – what is said in the written submission prepared by counsel to the Inquiry and what he has said today and I will endeavour to simply-- I will endeavour to avoid simply repeating points that he has already made for the sake of brevity, but I would wish to specifically highlight a few matters.

My Lord will have seen at paragraph 7 of the written submission prepared by counsel to the Inquiry that he highlights the need for the Inquiry to be “concluded within a reasonable time.” No doubt we all agree with this. It is, my Lord, clear that admitting this report at this stage will involve a degree of delay, although the nature and the timing of that is uncertain. That uncertainty itself is highly undesirable. This Inquiry is already looking at events from many years ago, and avoiding further delay is extremely important. Justice delayed is, after all, justice denied.

There is also the question of cost, my Lord. If GGC are to be allowed to lead these three experts at this stage, then my clients will, in the interest of basic procedural fairness, have to apply for their own funding to allow them to instruct expert witnesses to allow them to properly respond to and challenge the report that has now been prepared. So, receiving this report, in addition to delaying matters, would inevitably significantly increase the overall cost of the Inquiry.

Even if one sets aside the crucial issues of delay and expense, there are further problems, my Lord. I am sure I do not to tell anybody here that the volume of work involved in this Inquiry

is enormous. We are receiving a steady stream of expansive and complex documents totalling many thousands of pages with more arriving regularly. My Lord will be aware that yesterday core participants received 3,500 pages of documentation in a single day which we have not even been able to begin to look at because of the distractions of this report and the need to prepare for this hearing, and with that in mind, counsel to the Inquiry is absolutely right to note at paragraph 43 of his submission that this new report:

“Adds substantially to an already considerable burden on witnesses who are doing their best to assist the Inquiry whilst also working on a full-time basis.”

This is particularly true, my Lord, for my clients. Dr Inkster is in full-time employment with Antimicrobial Resistance and Healthcare Acquired Infection Scotland. She holds a national role there and a number of her colleagues at ARHAI are also involved in this Inquiry. So she cannot simply take time off to respond to this new material because of the need to maintain appropriate clinical cover and even if she could, there are only three weeks left. So she is in the position of having to process and deal with the

enormous volume of material that has already come, together with the very significant further material which is inevitably still to come in the following three weeks whilst working full time in a job that involves significant professional responsibility and commitment. She cannot possibly be expected to also undertake the task of preparing a detailed response and critique to this report in the next three weeks. It is simply not fair or reasonable to expect her to do so.

The same is true, my Lord, of Dr Peters, who has just finished a four-week block on the rota in her capacity as a full-time doctor working at QEUH. She now has some time off the rota to deal with Inquiry matters but still has her on-call commitment and, again, has to deal with the enormous volume of material that has already come, together with the remainder of material that will inevitably follow over the next three weeks even before the challenges of this report are considered.

My third client, Dr Redding, has retired from clinical practice but has family commitments and her health to consider and it is similarly unfair and unreasonable for this to be imposed on her at this point.

So, to conclude, my Lord, it is my

submission that the approach which GGC seeks to take can fairly be characterised as lacking in both candor and courtesy to the Inquiry and to all of those who participate in it and for whom its outcome is so desperately important and, in the whole circumstances, I would therefore move my Lord to refuse the motion, to refuse to allow the report and to refuse to allow its authors to be called as witnesses.

THE CHAIR: Ms Watts, because, entirely of my own fault, I was checking something earlier, could you just repeat essentially your final paragraph so I can note it verbatim?

MS WATTS: My Lord, I am very happy to email a speaking note to the Inquiry if that would assist.

THE CHAIR: That would assist.

MS WATTS: I am obviously happy to repeat it as well now, if my Lord wishes, but I am equally happy to provide a note.

THE CHAIR: I will take the speaking note. If you wish to repeat what you have just said, please do.

MS WATTS: I will do so. Thank you, my Lord. Essentially, our position is that the approach which GGC now seeks to take is fundamentally lacking in candor and in courtesy, both to the Inquiry and to all of those who

participate in it and for whom its outcome is desperately important, and for those reasons, my Lord, it is my submission that GGC's motion this morning should be refused.

THE CHAIR: Thank you, Ms Watts.

MS WATTS: Thank you.

THE CHAIR: Ms Doherty?

Submissions by Ms Doherty

MS DOHERTY: My Lord, I appear on behalf of NHS National Services Scotland and the first issue today is whether this expert report should be allowed to be received and included in the bundles of documents for the Glasgow III hearings. NSS's position on this is neutral, my Lord. It does not actively oppose or support receipt of this report.

However, we observe that the Inquiry's own expert reports have been met with substantial criticism. Some core participants' responses to expert reports are now contained in bundles. In relation to Mr Mukherjee, it is in bundle 21, volume 3, to Dr Walker, it is in bundle 21, volume 2, and to Dr Mumford and Linda Dempster, in bundle 21, volume 4. We are told that a supplementary report from Mr Mukherjee is in preparation, and that a

further report from Mr Bennett has been instructed and is expected soon.

Currently, therefore, it is unclear the extent to which the Inquiry's experts will fully address the criticisms made of their reports and it may be that the further expert report now produced by GGC would be of assistance to the Inquiry's experts and to my Lord as Chair of this Inquiry in properly answering the key questions posed for the Glasgow III hearings and, if so, this could assist my Lord in reaching conclusions about the relevant terms of reference. In the event that the expert report is allowed to be received into evidence for the Glasgow III hearings, the issue then is how best to deal with it, given the short----

THE CHAIR: Ms Doherty, I wonder if you just-- It is difficult and it is largely my fault, although I am detecting maybe a little bit of difficulty in hearing you in the room, if I am reading the body language correctly. You have made the point that the opportunity has been given to comment on the reports which have been issued by the Inquiry's instructed experts. There has been criticism, and I think I got from you that, "The new reports might..." and then I think my note ran out.

MS DOHERTY: Right. I am

sorry, my Lord. Well, I think I would refer to the fact that some responses to the expert reports by the core participants are contained in bundles, and we have been told that there is a supplementary report from Mr Mukherjee in preparation and that there is-- a further report from Mr Bennett has been instructed and is expected, but it is unclear the extent to which the Inquiry's experts will address the criticisms made of their reports. It may be that this expert report now produced by GGC will be of assistance to the Inquiry's experts and to my Lord as Chair in properly answering the key questions posed for the Glasgow III hearings, and, if so, this could assist my Lord in reaching conclusions about the relevant terms of reference.

Now, in the event that the expert report is allowed to be received into evidence for the Glasgow III hearings, the issue then is how best to deal with it given the short time scale before the scheduled start of the hearings. From NSS's perspective, although an initial review of the expert report has been undertaken for the purposes of today's hearing, if the expert report is admitted into evidence, a comprehensive review of it will be required. This will involve review by five members of the ARHAI team within NSS and by other

departments of NSS. My Lord's direction 5, appendix B provides the protocol for raising questions and issues with the Inquiry's expert reports and allows five weeks for doing so and we suggest that similarly a five-week period as a minimum should be allowed for review of this expert report.

We say this in the context of NSS witnesses not reviewing this expert report in isolation. NSS staff are currently providing witness statements to the Inquiry in advance of giving evidence at the Glasgow III Hearings and preparing to give evidence. They are also dealing with bundles from the Inquiry which continue to be disclosed, and we would also point out that, unlike some other core participants, NSS is involved as a core participant in the UK COVID-19 Inquiry Module 3, which focuses on healthcare. Module 3 hearings will commence in London on 9 September and some of the same NSS staff involved in this Inquiry are responding to requests from and preparing to give evidence in that UK COVID-19 Inquiry Module 3. So there is significant pressure and stress on these staff members.

In his written submission, counsel to the Inquiry set out four suggested options how to deal with this report. We submit that suggested option two,

which was to receive the expert report and delay the hearing start, does have merit. In that option two, in his written submission, counsel to the Inquiry suggested a postponement until the start of November and then he dismissed that as impracticable and unacceptable. Now, NSS does not have sufficient information to enable it to comment usefully on the likely impact of that period of delay to the start of the hearing or otherwise on the exact period by which the hearing start should be delayed. Today, counsel to the Inquiry has said that if there is a delay, there cannot be hearings this year due to commitments of counsel and obviously I cannot comment on that. However, from NSS's perspective, a postponement of at least five weeks would be required to allow time for review of the expert report by NSS and other core participants.

THE CHAIR: All right. Just, again, making sure I have got these points, Ms Doherty. You fairly say you cannot comment on other counsel's diaries, but the proposition that counsel are committed in advance seems a reasonable proposition.

MS DOHERTY: It does, my Lord, and I perfectly understand if that is the issue.

THE CHAIR: And just to make sure from the NSS perspective, if there is to be any delay, it would have to be a minimum of five weeks.

MS DOHERTY: Yes, my Lord.

THE CHAIR: Right. Thank you. Sorry I interrupted you, but just to confirm these points.

MS DOHERTY: And just as I have already said, my Lord, we are unclear, from what counsel to the Inquiry has said, when the Inquiry's experts will be able to respond fully not only to the comments made by the core participants to their reports but would be able to respond fully to the Greater Glasgow report which is sought to be received today. Counsel to the Inquiry's written submission set out option three which was receiving the report and proceeding as planned in the week of 19 August and we agree with his submission that really that does seem to be practical or fair.

In relation to counsel to the Inquiry's suggested option four, which is receiving the report and restructuring the hearing, we are hindered by the fact that we do not know the proposed witness running order or how long it will take the Inquiry's experts to properly respond to this new report. We anticipate that if my Lord is minded to delay the start of

the hearing by at least five weeks, it may still be necessary to have some restructuring of the hearing along the lines counsel to the Inquiry has suggested and as a matter of fairness to witnesses with relevant experience, it is essential that they are given an opportunity to comment on and respond to the Greater Glasgow report. That they may require to do so by means of supplementary written statements after giving their oral evidence is not attractive, but I appreciate that neither is the recalling of such witnesses.

Finally, although not in his written submission today, counsel to the Inquiry has mentioned a possible fifth option, which would be to excise part of the report and allow the reduced expert report to be received. He has explained that that is not really an appropriate option given the structure of the report. This was not an option I had considered before today, but I think counsel to the Inquiry is correct in his assessment that this would not be an appropriate way forward. So, my Lord, unless I can assist further, that is all I wish to say at this time on behalf of NSS.

THE CHAIR: Thank you very much, Ms Doherty. Mr Love?

MR MACKINTOSH: Well, Mr

Love's provided a speaking note

THE CHAIR: Oh.

Submissions by Mr Love

MR LOVE: Thank you. Good morning, my Lord. Yes, I have provided a speaking note in the hope that it will assist your Lordship. As your Lordship is aware, I am instructed to represent the interests of patients and families of patients who were or are still being treated at the Queen Elizabeth Hospital in Glasgow. It has been said by your Lordship's counsel in previous hearings that this Inquiry is about them, about people, about patients and families, and we invite your Lordship to refuse the application by NHS GGC to have their expert report received at this very late stage and considered as part of the evidence to be led at Glasgow III.

We are in the same position as other core participants. We were advised about the existence of the GGC report last Wednesday and a copy became available in the course of Thursday, 25 July. Since then, we have received feedback from those that we represent, expressing their distress, upset and anger about the production, by GGC, of an expert report at this very late stage. They

ask, I think with some justification, "Why is this happening now, three weeks before the commencement of the scheduled hearings? Why did a report of this nature not materialise years ago when patients and families were being affected by the ongoing problems and infection issues at the hospital? Where was this report when the medical practitioners were giving evidence at the last hearings about the Queen Elizabeth, when they were highlighting what they considered to be high and unusual infection rates? Why did it not materialise after the 2021 Case Note Review? Why was the Case Note Review not challenged at the time, or certainly long before now?"

Those we represent say that GGC has done nothing except continually deny everything, making the patients and families feel bullied and ignored. The feedback from those we represent is that they feel as though they and their legal advisors are being put on the backfoot with late moves, and they still feel they are being forgotten. They are concerned about the delay to the publication of your Lordship's final report that would be likely to result if the report is to be received in evidence.

Your Lordship was aware that patients and families have been

waiting years for answers and they still have concerns about whether the hospital is safe. We have been asked by those we represent about who has paid for this report and, specifically, have been asked whether or not it was funded by the Inquiry. It is assumed that it was not.

THE CHAIR: I think you can take it that it, as the letters of instruction suggest, has been commissioned by Greater Glasgow Health Board. This is certainly not an Inquiry document.

MR LOVE: And it is therefore paid for by the NSS and, effectively, the taxpayers of Scotland, therefore. If your Lordship would bear with me. In any event, my Lord, the issues that require to be addressed today, to be determined at this hearing, as to whether or not the report should be received by the Inquiry, be included in Inquiry bundles, and the authors called by the Inquiry team to give evidence and, as I have already said, we invite your Lordship to refuse the application today.

I adopt what counsel to the Inquiry says in his written submission, circulated last Friday, about your Lordship's discretionary powers under the 2005 Act, the need to avoid unnecessary cost and a requirement to avoid delay, that is concluding the

Inquiry within a reasonable time. Whether the report is to be received or not is a matter, ultimately, for your Lordship's discretion. I am not aware of any other public inquiry in the United Kingdom where a core participant has been allowed to lodge such an expert report or, for that matter, where the Chair has even considered the content of such a report. In the setting of a public inquiry, the application by GGC is an unusual one.

I also adopt what Mr Mackintosh said in his written submission about the process of this Inquiry being inquisitorial and not adversarial in nature. That is a matter that your Lordship picked up with Ms Connelly about as well, and that is so with all public inquiries, and that important practices from adversarial proceedings or procedures runs the risk of undermining the essential character of a public inquiry, will likely result in delay and will likely result in increased cost, and that is something that I will come on to deal with in due course.

THE CHAIR: I do not want to interrupt you unnecessarily. I mean, do you adopt or, I mean-- I am assuming, and correct me if I am wrong, that you would associate yourself with the argument that Ms Connelly put forward?

MR LOVE: Absolutely, my Lord, yes.

THE CHAIR: Yes. Sorry, Mr Love.

MR LOVE: Certainly. Not at all, my Lord. In opposing receipt, it is opposed under four grounds. Firstly, it comes far too late, coming, as it does, a mere three weeks prior to the commencement of evidential hearings. It is entirely wrong and unacceptable for this document to have been produced now, without any explanation or apology being offered for its timing and its remarkable lateness. Secondly, it appears, from Mr Mackintosh's submission, that the expert report, prepared, it seems, from what Ms Connelly has observed as well, for the purposes of including resisting civil claims against GGC and assisting in connection with criminal investigations, that it seeks to revisit and challenge, for the first time, the findings of the 2021 Case Note Review, it is my submission that this public inquiry is not the appropriate forum or method for making such a challenge. I have to say that I do not know what the appropriate forum or method is but what I do submit to your Lordship is that it is certainly not this Inquiry.

THE CHAIR: Sorry, and again

my fault, could you just repeat the-- You were referring to----

MR LOVE: It is in paragraph 12--

THE CHAIR: -- the (inaudible) report and, after that, you said----

MR LOVE: Yes, it is in paragraph 12 of my speaking note, my Lord, that what I am saying is that it is my submission that this public inquiry is not the appropriate forum or method for making a challenge to the content of the Case Note Review, and what I said was that I have got no idea what the appropriate method or forum is but it is certainly not this Inquiry, my Lord.

THE CHAIR: All right.

MR LOVE: Thirdly, allowing the expert report to be received into evidence at this very late stage would run the risk of undermining the essential character of this Inquiry, and that, in my submission, is both extraordinary and unacceptable. It is for your Lordship, as Chair to this Inquiry, to investigate its subjects as identified by the terms of reference, and there is, of course, no specific provision, in either the Inquiries Act or, indeed, in the Inquiries Scotland rules, that allows or permits a core participant to seek to lodge reports and, effectively, lead their own evidence. If your Lordship exercises

his discretion and allows the report to be received, that would, in my submission, signal the Inquiry's departure from an inquisitorial process and the inappropriate adoption of something that has the look of an adversarial approach. That, in my submission, would have significant ramifications for the further conduct of this Inquiry, both in terms of timing and in terms of cost.

That takes me onto my final point, my Lord, which arises out of the recognised requirement for procedural fairness and equality of arms. In other words, a fair balance between the opportunities afforded to each of the core participants to this Inquiry. Your Lordship will be aware of the struggle that those instructing me faced in securing funding for the engagement of expert witnesses to assist with consideration of, and understanding the reports submitted by the Inquiry's suite of experts.

THE CHAIR: Although I think the position is, if I understand it correctly, Mr Love, and you will correct me if I am wrong, that the Inquiry has provided funding for that purpose.

MR LOVE: Yes, my Lord, but the first that we heard about that was last Wednesday, with a hearing three and a half weeks away, and it is something

that has been ongoing for some time now.

THE CHAIR: When was the application made?

MR LOVE: I do not have the date immediately available but it is something that, certainly, has been discussed with your Lordship's team for certainly more than two months. Yes, for certainly longer than two months, my Lord, and the confirmation was provided last Wednesday that funding was going to be provided for a restricted application of expert evidence in this case. In any event, with----

THE CHAIR: The details may not be important. My understanding is that there was a response looking for details from those instructing you as to what was proposed and that, once that was clarified, that was agreed, but your point, in principle, I think, remains.

MR LOVE: This, perhaps, does not merit scrutiny at this point in time, my Lord, but I think the point is that it is only last Wednesday that we have had funding for engagement of expert input granted by this Inquiry and, with the volume of documents already produced and still to come, and other restrictions placed on the funding of time, full preparation for the hearings is

already, as others have suggested, proving to be challenging to say the least, and receipt of this report into evidence at this late stage would add significantly to that burden.

The issues of procedural fairness and equality of arms would likely prompt an application on behalf of the core participants we represent, seeking funding for the instruction of their own expert reports, not just expert assistance, as has been funded to date, the leading of their own evidence about the key issues of infection risk arising out of the built environment at Queen Elizabeth and cross-examination, in due course, of witnesses of all and any expert reports instructed by and produced on behalf of other core participants.

If your Lordship allows the expert report to be received at this very late stage, the consequence will likely be further delay in the progress of this Inquiry and increased expense. It would, in my submission, be implausible for the work to be done on behalf of the core participants that I represent to be dealt with in a short period of five weeks, the period mentioned by Ms Doherty. Far more time would be required, and it would, of course, require an application to be submitted for funding.

In his submission, Mr Mackintosh identified the option of postponing the hearing scheduled to commence in about three weeks' time until November. From a telephone discussion with Mr Mackintosh last week, I had understood that the Inquiry's own suite of experts would not be in a position to consider and respond to this report until October at the earliest. Your Lordship will appreciate that postponement is an extremely unattractive proposition for those that we represent but, if your Lordship is minded to receive the report late into evidence, postponement to allow core participants the opportunity to address the content of the report properly may be an unavoidable consequence of doing so.

The final observation that I would make, my Lord, and it is the concluding aspect at paragraph 16 of the note, is that, if your Lordship is minded to allow the report to be received into evidence, then all versions of the report and all communications between the authors and GGC and representatives should also be included in the evidence. Information and base material that Mr Mackintosh has confirmed has not yet been provided to this Inquiry. It would

be, in my submission, inappropriate to look at the report in a vacuum. I think that is a point that Mr Mackintosh himself raised----

THE CHAIR: Yes, I am just----

MR LOVE: -- that it is extremely important to look at the base information.

THE CHAIR: Just reflecting on that, I mean, the letters of instruction indicate that the authors of the report are being asked to advise in relation to various-- police investigation, the civil claims against GGC. There may be a question of claims by GGC. I do not know if that is expressly stated, and----

MR LOVE: Well, we certainly know that there is a claim----

THE CHAIR: Mm-hmm.

MR LOVE: -- by GGC that is the subject of litigation in the Court of Session, yes, my Lord.

THE CHAIR: So you are pointing at the moment the need to, as it were, discover what information has been provided to the authors----

MR LOVE: Absolutely, my Lord.

THE CHAIR: -- in relation to these various proceedings.

MR LOVE: Yes.

THE CHAIR: Right. Sorry, Mr Love, I may have interrupted you.

MR LOVE: Not at all. I do not have anything to add, unless I can

assist your Lordship at all further.

THE CHAIR: Right, thank you.

MR LOVE: Thank you.

THE CHAIR: Mr Gray. Thank you.

Submissions by Mr Gray

MR GRAY: My Lord, I have prepared an outline submission, and I understand my Lord may have just received a copy of that.

THE CHAIR: It has just been put in my hand.

MR GRAY: Thank you, my Lord. My Lord, by way of introduction, on 26 July 2024, the expert report of Professor Hawkey, Dr Agarwal and Dr Drumright, entitled "Expert Report for the Scottish Hospitals Inquiry on the evidence of risk of infection from the water and ventilation systems at the Queen Elizabeth University Hospital and Royal Hospital for Children Glasgow" was submitted to the Inquiry on behalf of NHS GGC. My Lord, the purpose of this submission is twofold. As I indicated to my Lord earlier this morning, to invite the Inquiry to determine that the expert report should be considered as part of the evidence to be led at the Glasgow III hearing to commence on 19 August 2024 and that its authors be called to give

evidence, and secondly to respond to the criticisms which have been made in the written submission by counsel to the Inquiry regarding the circumstances in which the report has been submitted.

My Lord, insofar as the criticisms made by counsel to the Inquiry are concerned, in support of his position that the Inquiry should refuse to receive the expert report, counsel to the Inquiry makes a number of criticisms, each of which I shall address in turn. The first criticism, my Lord, is that there has been a lack of candour and cooperation. In his written submission, counsel to the Inquiry submitted that in relation to the submission of the expert report:

“The approach of NHSGGC to the GGC expert report is a breach at best of the frequent solemn declarations of cooperation and collaboration made by NHSGGC and those representing them to the Inquiry. NHSGGC has breached the standard of candour and cooperation it sought to persuade the Inquiry it intended to meet.”

My Lord, it is submitted that such criticism is without any proper evidential basis and is entirely refuted. My Lord, in my submission, since the

inception of the Inquiry, NHSGGC and those acting on its behalf have cooperated with the Inquiry to the fullest extent at all times and have adopted a wholly collaborative approach, a matter, my Lord, which has been acknowledged by counsel to the Inquiry, and I refer specifically to previous counsel to the Inquiry and members of the Inquiry team, both verbally and in writing at various stages of the Inquiry. My Lord, such a collaborative and constructive approach is perhaps best seen when one has regard to the two positioning papers submitted on behalf of NHSGGC, dated 14 December 2022 and 5 April 2023 respectively, and to which reference has been made by counsel to the Inquiry in his written submission.

These positioning papers were provided on a wholly voluntary basis on behalf of NHSGGC and were done so with the exclusive intention of assisting the Inquiry in its investigations. The papers were comprehensive in their terms, not only setting out NHSGGC’s position in relation to many of the issues with which the Inquiry was concerned, but also identifying witnesses from whom the Inquiry may wish to take statements, as well as providing

copies of expert reports and other documentary material which may have been relevant. Those papers, my Lord, were provided with an offer to discuss and, if necessary, clarify any matters which may have arisen, following consideration by the Inquiry of the terms of those papers. I have set out, my Lord, in the footnote and don't propose to read but would simply invite my Lord to have regard to what's set out in the footnote, of the extent of the issues that were considered and addressed in those positioning papers.

My Lord, criticism is also made in relation to the instruction of the expert report. My Lord, in the context of consideration of the circumstances and background against which the expert report came to be submitted to the Inquiry, it is important to note, in my submission, that, consistent with the collaborative approach adopted by NHSGGC and acting on its behalf, the instruction of the expert report was made known to the inquiry at a very early stage. In his written submission, counsel to the Inquiry stated that the Inquiry was first made aware that an expert report had been instructed in April 2023. In fact, as appears to have been acknowledged by counsel to the Inquiry this morning, the information was provided in the first positioning

paper on 14 December 2022, just three weeks after the formal instruction of Dr Agarwal and Professor Hawkey.

THE CHAIR: Mr Gray, I do not wish to, sort of, deflect your flow if it is inconvenient. I think just a question as to point of-- We can look at your second positioning paper if necessary. There is a reading available, or at least I think there's a reading available, of the second positioning paper. By that time, you had a report from Professor Hawkey and Dr Agarwal.

MR GRAY: No, my Lord. The second positioning paper was provided in April of 2023.

THE CHAIR: Yes.

MR GRAY: The instruction of Dr Agarwal and Professor Hawkey was made clear in the positioning paper of 14 December 2022. The formal instruction of Dr Agarwal and Professor Hawkey occurred just three weeks before that, therefore in November of 2022. So when the second positioning paper was produced on behalf of NHSGGC in April 2023, the preparation of that report was at a very early stage. Of course, as my Lord is aware, the report in fact was only completed in June of this year.

THE CHAIR: Well, that is information of note. I mean, I note that

the date of the draft report, which was the first indication of it that the Inquiry had was 26 June.

MR GRAY: Yes, my Lord.

THE CHAIR: Now, are you saying it was only completed on 26 June, or----

MR GRAY: That----

THE CHAIR: -- shortly there----

MR GRAY: Yes, my Lord. So as at the date of the second positioning paper in April 2023, my Lord, there was no report either in draft or any other form.

THE CHAIR: Right.

MR GRAY: The importance, my Lord, of this point, in my submission, is that this was not a report which was instructed secretly. The instruction of the report was made known to the Inquiry at a very early stage in the first positioning paper of 14 December 2022, just three weeks after the formal instruction of Dr Agarwal and Professor Hawkey.

THE CHAIR: Thank you. I am sorry for-- There is a question which is in my mind, but I can come back to that if I manage to formulate it, but, as I say, my apologies for interrupting.

MR GRAY: Not at all, my Lord. My Lord, returning to the submission, not only was it made known that an expert report had been instructed in

relation to risk of infection from water or ventilation, NHSGGC's position in relation to that issue had also been made clear in general terms in both positioning papers which had been provided. My Lord, against that background which I have described, there is no basis, in my submission, for the submission made by counsel to the Inquiry that the instruction of the expert report was done in anything other than a transparent and entirely collaborative manner. Indeed, in circumstances where there was absolutely no requirement for NHSGGC to have produced any positioning papers, and I understand that NHSGGC is the only core participant to have taken this course, it is somewhat ironic that at various points of his submission, counsel to the Inquiry criticises NHSGGC for failing to provide more information than it in fact did.

My Lord, turning then to the next criticism made by counsel to the Inquiry as a basis for refusing the acceptance of the expert report, that is engagement with the Inquiry following the instruction of the expert report. My Lord in relation to that criticism, following the instruction of the expert report, it was made clear to those acting on behalf of NHSGGC that the Inquiry was extremely interested in the

report which had been instructed and were equally interested to see it upon its completion. My Lord, consistent with the cooperative and transparent approach which it took to all matters, those acting on behalf of NHSGGC kept the Inquiry abreast regularly of progress being made in relation to the completion of the report.

My Lord, insofar as the issues being explored in the report were concerned, they had, as I say, in broad terms been described in the positioning papers with an invitation at any time to discuss any aspects of those papers, which of course included the instruction of the expert report. My Lord, thereafter on any occasion that further information regarding the instruction was sought, it was provided. By way of example, as noted by counsel to the Inquiry in his written submission in January of this year, further detail of the instruction of Dr Agarwal and Professor Hawkey was sought by counsel to the Inquiry and, consistent with the cooperative approach shown at all times, was provided by junior counsel in a series of emails.

THE CHAIR: Mr Gray, in your paragraph 10, you say those acting on behalf of GGC kept the Inquiry abreast regularly of progress being made in

relation to completion of the report. Now, if you say that, I am sure you have a basis for saying that. I just do not have any basis for knowing that or otherwise.

MR GRAY: My Lord, what I am in a position to say is that in discussions which I had with counsel to the Inquiry, from time to time, the issue would arise and I would provide such update as I was able to, and in the regular meetings which those instructing me had with the Inquiry team, then on, as and when necessary, updates were provided or if requests for updates were made, then they were given.

My Lord, the next criticism relates to the circumstances in which Dr Drumwright came to be instructed. My Lord, at paragraph 21 of his written submission, however, in apparent support, it is to be assumed, of his argument that those acting on behalf of NHSGGC did not display candour at all times, counsel to the Inquiry notes that in her email replies of January 2024 junior counsel failed to mention--make mention of Dr Drumwright or the scope of her work. If it is implied, my Lord, that such an omission displayed a lack of candour on the part of junior counsel, it is entirely refuted. Dr Drumwright was not instructed to

participate in the provision of the expert report until 8 February 2024, some time after the exchange of emails to which I have referred.

My Lord, furthermore, it is entirely refuted that in relation to Dr Drumwright the Inquiry team was kept in the dark about both the data and the piece of work she was instructed to carry out, as submitted by counsel to the Inquiry in his written submission. My Lord, at no time was the fact that statistical analysis was being undertaken ever deliberately concealed from the Inquiry, quite the contrary. Indeed, the fact that statistical analysis was being undertaken as part of the expert report was specifically referred to by solicitors instructed by NHSGGC at a meeting of counsel and agents with counsel to the Inquiry and members of the Inquiry team on 10 June 2024 as being the principal cause of delay in the completion of the expert report.

THE CHAIR: On the basis of your instructions, Mr Gray, are you able to say whether or not the Inquiry was advised that GGC had instructed an epidemiological study prior to 10 June?

MR GRAY: No, I am not in a position to say that, my Lord, but it is not something which was ever

deliberately concealed.

THE CHAIR: Well, deliberate concealment is-- Well, there is deliberate concealment and there is offering information.

MR GRAY: Yes, my Lord. From my own perspective, I am in a position to say that I was aware that a statistician had been instructed. The significance of that was not something which dawned on me or indeed, having discussed the matter with junior counsel, on her either, and indeed the importance of the work undertaken by the epidemiologist is only something which truly became apparent to me on seeing the report.

THE CHAIR: And I take it you saw the report in June?

MR GRAY: Yes, my Lord. My Lord, insofar as the criticism is made in relation to the fact that included in the expert report are matters regarding the Case Note Review, I would comment as follows. My Lord, at paragraph 37 of his written submission, counsel to the Inquiry has stated that the critique of the Case Note Review set out at sections 3 and 4 of the expert report is based on issues which could and should have been raised by NHSGGC in 2020 when the Case Note Review was established and that, accordingly, NHSGGC should not be entitled to

raise these matters now. My Lord, in my submission, counsel to the Inquiry proceeds on an inaccurate factual basis. NHSGGC was not involved in setting up the Case Note Review, nor was it in a position to influence the framework of the review as stated.

THE CHAIR: Again, if you prefer me not to interrupt your flow, Mr Gray, please say so, but if one looks at the report of the Case Note Review, one sees explicitly that the Oversight Board, which was then in place in respect of the Health Board, approved the selection criteria for the cohort that were being considered, or were being considered by the CNR. Now, point one, do you say that GGC had no part in that approval?

MR GRAY: As I understand, my Lord.

THE CHAIR: I mean, it does seem just a little unusual. The Case Note Reviews say, in terms, that the body having, then, oversight of Greater Glasgow Health Board approved these criteria. Just looking at it on an uninformed basis, it does seem rather curious that the relevant persons in GGC had nothing to do with that.

MR GRAY: My Lord, as I understand, that is the position and they were not in a position, as submitted by counsel to the Inquiry, to

influence the framework of the review. Now it's a matter, my Lord, which of course – if my Lord considers it to be of importance – that I would undertake to have further inquiries made. But, my Lord, even if it were right that NHSGGC had or was in a position to influence the set of-- that should be considered as part of the-- by the Case Note Review, if it was not the appropriate data that should have been considered, then it remains of considerable importance for the-- this Inquiry to consider whether in any respect the approach taken by the Case Note Review was deficient in any way.

And it was suggested this morning that it was open to NHSGGC to make those criticisms of the Case Note Review when the Case Note Review was published, or when it was provided in draft form but, as counsel to the Inquiry is aware, when the draft of the Case Note Review was produced and comment was invited from NHSGGC, it was stated explicitly that any such comment should be restricted to factual inaccuracies in the report only. In other words, that there should be no criticism made of the approach taken by the Case Note Review or of the material to which it had regard. And----

THE CHAIR: Just so I understand that point, just so we are clear of what we are talking about, we have talked-- you have used the expression “data” which is entirely appropriate, but what we are also talking about is selection of particular patients.

MR GRAY: Yes, my Lord.

THE CHAIR: Now, according to counsel to the Inquiry, and this is not something that appears on the face of the CNR report, in consulting with Ms Dempster----

MR MACKINTOSH: Ms Evans, my Lord.

THE CHAIR: Sorry?

MR MACKINTOSH: Ms Evans, my Lord.

THE CHAIR: Ms Evans. She gave him an account of meetings with GGC personnel which, if I followed what counsel to the Inquiry was saying, did not give rise to any challenge or questioning or-- other than agreement about the selection of which patients were to be considered.

MR GRAY: My Lord, as I understood what counsel to the Inquiry said, it was that there was a meeting at which a decision was taken, at which representatives of NHSGGC were involved or were present at the meeting. My Lord, my understanding--

And as I say, my Lord, I am very happy to have the Inquiry made to be absolutely clear about the position because I do not wish my Lord to be misled in any way, but my understanding is that insofar as the NHSGGC’s involvement with the Oversight Board is concerned, it was not in a position to influence the framework of the review.

But, my Lord, even if it was and if it erred in agreeing what data should be considered by the Case Note Review, it remains – in my submission – of considerable importance for this Inquiry to be aware if there is independent expert opinion which suggests that the data to which the Case Note Review had regard was not appropriate and that, as a consequence, the findings of the Case Note Review were deficient in any respect. That is important, in my submission, in the context of this Inquiry because, as my Lord is aware, a number of the experts instructed by the Inquiry place considerable reliance upon the findings of the Case Note Review.

Now, my Lord, I might then move on to the next criticism which is made by counsel to the Inquiry in his written submission and that is an apparent failure on the part of NHSGGC to have

provided the expert report in tranches to assist the Inquiry. My Lord, at paragraph 36 of his written submission, by reference to section 3 of the report, counsel to the Inquiry is critical of NHSGGC for having failed to supply its report in stages. It is submitted that it would not have been reasonably practicable to have adopted such an approach where there were so many overlapping issues to be considered and reviewed. My Lord, in my submission, the normal approach and that adopted by all experts in the Inquiry, has been only to produce a report once finalised and completed in its entirety. In that regard, the expert report submitted on behalf of NHSGGC is no different.

Furthermore, my Lord, counsel to the Inquiry made clear that his preference was only to receive the report once completed, rather than in tranches. My Lord, that indication was made when there was a suggestion made by the board of NHSGGC that Professor Hawkey-- the part of his report which contained the critique of the Case Note Review could be passed over, and it was a matter which I discussed with counsel to the Inquiry. It was said that it was preferable that the report be provided as a whole rather than in tranches. That was

communicated to those instructing me, who in turn communicated that to the Board.

THE CHAIR: When was this offer of providing Professor----

MR GRAY: My Lord----

THE CHAIR: -- Hawkey's critique of the CNR made?

MR GRAY: If my Lord would allow me just one moment, please. My Lord, I believe that was in February 2024 but it is-- the precise date, my Lord, is a matter which I can have confirmed.

THE CHAIR: Thank you.

MR GRAY: My Lord, if I then may move on to the next criticism made by counsel to the Inquiry and that is that the expert report was produced, and quoting from his submission, "at the last minute." My Lord, it is of course unfortunate that the expert report has only now become available. My Lord, that fact, however, is not, in my submission, a reason to refuse the invitation which I make, that the report be considered as part of the evidence to be led at the forthcoming hearing and that the authors of the expert report be called to give evidence.

My Lord, the report has been produced as soon as was reasonably practicable. The authors of the expert

report have exceptionally busy professional lives and the issues which have required to have been considered are of complexity. Furthermore, a considerable volume of material required to be obtained from NHS GGC in order that the experts were in a position to provide an opinion in relation to the questions asked of them. My Lord, such information, including data, required to be provided by employees of an organisation which too is extremely busy and has many competing professional commitments to be met.

My Lord, it is against this background that the expert report took a substantial time to be completed. Challenges which were no doubt also experienced by the authors of the expert reports instructed by the Inquiry, thereby providing a regrettable but wholly understandable explanation for the delays in all expert reports being produced to the Inquiry.

My Lord, further in my submission, whilst the conduct of the Inquiry is of course a matter for the Chair, in terms of section 18 of the Inquiries Act 2005, the Chair has a continuing duty to ensure public access to Inquiry proceedings and information provided to the Inquiry, including documents given, produced

or provided to the Inquiry, my Lord, such as this expert report, subject to the considerations regarding restriction in certain defined circumstances in section 19. My Lord, in essence, the expert report on behalf of NHSGGC having been given, produced or provided to the Inquiry, in my submission the Chair has a duty to ensure public access to that unless a basis upon section 19 is established and accepted.

THE CHAIR: Could we perhaps just reflect on that point? At present, the GGC report has been, in a physical sense-- well, not in a physical sense, no doubt in a digital sense, been received by the Inquiry. It has not been given any formal status by the Inquiry and that is the purpose of your present application. Are you saying that any document, in fact all documents, which one way or the other irrespective of source, are in some way delivered to the Inquiry, give rise to a duty to publish them?

MR GRAY: My Lord, I-- it may be that that is the way in which the Inquiry has proceeded thus far. For example----

THE CHAIR: We are not talking about that. We are talking about the obligation which you say is imposed by sections 18 and 19.

MR GRAY: My Lord, yes, and My Lord, when one takes the two positioning papers which were provided on behalf of NHS GGC, they were provided on a confidential basis. A decision was taken in due course that they would be put on the Inquiry's website, and I assume, and I stand to be corrected, but I assume, my Lord, that that was done because it was considered that in accordance with section 18, such documentation having been provided should be shared with core participants.

THE CHAIR: Well, the GGC provisioning paper was referred to in your written submissions in respect of the-- was it the previous Glasgow hearing? Can I just press you on this point? Your position is that anything that comes into-- from whatever the source, whatever the quality, the Inquiry has an obligation to publish it because that has not been the practice. The Inquiry has received thousands of documents. I am aware of its statutory obligations to inform the public. It would not be informing the public if every single document was published on the website. I may have misunderstood you, Mr Gray, but what you seem to be saying is that once anything, irrespective of quality, source, relevance, comes into the

hands of a public inquiry in the UK, that has to be-- the Inquiry has to ensure public access to it. I mean, is that your submission?

MR GRAY: No, I think my Lord's observations are ones which I would respectfully adopt, and I think that it must depend on the document in question, and I entirely accept that, my Lord.

THE CHAIR: Now, I have again been guilty of interrupting you.

MR GRAY: No, not at all, my Lord. It has been extremely helpful. My Lord, if I might then just turn to my concluding submissions. My Lord, that is that whilst the Inquiry process is plainly not an adversarial process, and I accept that entirely, obviously, that is not to say, my Lord, that a core participant is precluded from producing material in support of its position as regards the terms of reference.

My Lord, as regards the report produced on behalf of NHS GGC is concerned, this is particularly so, given that firstly the Inquiry's expert reports have variously criticised NHS GGC and have the clear potential to undermine public confidence in both hospitals. Secondly, those criticisms have been challenged by NHS GGC and thirdly, in my submission, the report from NHS GGC is wholly relevant and, in my

submission, pivotal to the Inquiry's terms of reference. Fourthly, the terms of the NHSGGC report that may allay public concern as to the safety of both hospitals and thus restore some degree of balance to consideration of the terms of reference.

My Lord, in my submission, central to the Inquiry's terms of reference are the questions of water and ventilation and their impact upon patient safety, and in particular, whether the QEUH and the RHC buildings provide a suitable environment for delivery of safe healthcare for their patients. My Lord, in my submission, the NHSGGC report offers useful and significant contribution to those considerations.

My Lord, for the Inquiry to proceed without the report from NHSGGC being properly placed in evidence, there is, in my submission, a material risk that public confidence in both hospitals will be damaged irreparably and needlessly. My Lord, I say that because it may well be the case that if the report were provided to the experts currently instructed, that on consideration of the expert opinions contained in that expert report, that it may cause one or more of the experts to either revise their opinion or indeed to adopt in whole or in part the

opinions expressed in the expert report. My Lord, it is in all these circumstances, in my submission, that the responsible course for the Inquiry to take is for the NHSGGC report to be led in evidence together with parol evidence from its authors.

My Lord, insofar as the oral submissions which have been made today, I would adopt the observations made on behalf of NSS and insofar as the criticism that is made on behalf of the families, that the report which has been instructed may be used in more than one set of proceedings, I do not understand it to be suggested that by virtue of that, the impartiality of any of the experts is called into question in any respect. My Lord, unless there are any other particular matters upon which I can assist my Lord, those are my submissions.

THE CHAIR: I do not wish anything that I am about to say to reflect in any way on the competence distinction of the authors of the report but would it be fair to say, Mr Gray, that if we look at the letters of instruction, the experts are being instructed for a purpose, or perhaps different purposes, but in respect of these different purposes, they are with a view to supporting the GGC position in respect of police proceedings, civil

claims against GGC, the position in the Inquiry? Now, what I do not know is whether I should add to that list the GGC position in relation to its claim, which we understand it to have made in the Court of Session. Now, the point being, would it be fair to say that the authors of the report have been asked for their advice with a purpose, and that is to assist, support the GGC position or positions in relation to various proceedings?

MR GRAY: Well, my Lord, as is very helpfully noted by counsel to the Inquiry in his written submission at paragraph 31, where he quotes the relevant paragraph of the instruction, it states that this instruction is requested in order for the CLO to provide legal advice to NHSGGC in respect of the police investigation for the Inquiry and NHSGGC's defence to the civil claims. So that is simply informing the experts as to the purpose of which the report produced by the experts will be used namely to assist CLO in providing legal advice to its clients in relation to a range of proceedings. It is not inviting the experts to express any view at all about any of those proceedings or to have an interest in what NHSGGC's position may be in relation to any of those proceedings. The remainder of the letter of instruction sets out the

questions that are asked of the experts for them to consider, to consider in broad terms the issue of risk and whether, in their professional opinion, there is objective evidence and data that would support the proposition that, since 2015, patients were exposed to a greater risk of infection than would be expected due to water and ventilation at those hospitals.

So, that was their instruction, with various questions, as my Lord has seen, for them to apply and to consider and to give professional opinion about. From the perspective of the experts, the identification of the proceedings, in respect of which CLO may wish to have regard to the terms of the expert report when providing advice, is a matter, in my submission, which would be of no significance at all to those experts.

THE CHAIR: Mr Love, in what he had to say, suggested that what you are proposing is, I think he would go the distance of saying, unique in the practice of UK public inquiries, if I understood his point correctly. Do you have any comment to make on that?

MR GRAY: I have no knowledge, my Lord, whether Mr Love is correct in the point that he makes or not. I am not in a position to assist, my Lord.

THE CHAIR: What you are proposing is that a piece of work that has been commissioned by one core participant should be adopted by the Inquiry. I mean by that that it would become an Inquiry document, with all the obligations that follow from that, that counsel to the Inquiry would lead it, therefore they would be taking responsibility for understanding it, for assessing its quality, and I am not suggesting that it does not have quality but there would be a responsibility not only to understand what it says but to come to a view as to its relevancy and a weight, and that there would arise the various duties to core participants to make sure that the conduct of the Inquiry, in respect of this particular commissioned piece of work, were met. I mean, is that a fair way of describing what you are proposing?

MR GRAY: Yes, my Lord, and the report is provided to assist the Inquiry, and, in my submission, when one has regard to the terms of that report, then consideration of it and the leading, by way of evidence, of its authors would be of assistance to the Inquiry when considering the issue of risk as a whole.

THE CHAIR: And that is because the position taken by the report is that there is just not the

evidence to conclude that there is or was an enhanced risk associated with the buildings?

MR GRAY: That, my Lord, is the conclusion that is reached but the report is also, in my submission, of assistance in that it provides, as I have already indicated, an informed critique of the approach taken by the Case Note Review and, as I indicated to my Lord, the findings of the Case Note Review are relied upon to significant extent by the experts instructed by the Inquiry. It is also a report which is of considerable assistance because, in assessing whether there was an increased risk it – set out at chapter 7 – undertakes a substantial comparative exercise, one which was not undertaken, and I make no criticism, but not the same exercise as that which was considered appropriate by the experts instructed by the Inquiry, and the findings of that comparative exercise, or the conclusions of that exercise, raise legitimate concerns as to the reliability of the findings which have been made of the experts.

Insofar as the chapters in relation to water and ventilation issues are concerned, it raises issues which have, perhaps, not been considered fully by the experts instructed by the

Inquiry. My Lord, in short, it is a report, comprehensive in its terms, which addresses the question of whether enhanced risk existed in a different way, in some respects, to that taken by the experts to the Inquiry and also provides constructive criticism of certain aspects of the conclusions reached by those experts and, in those circumstances, my Lord, would, in my submission, be of considerable assistance to my Lord as the Chair of this Inquiry in addressing the terms of reference.

My Lord, of course, without a report, it is open for questions to be put through my Lord by way of cross-examination of experts. That, my Lord, is a poor substitute when there is the possibility of my Lord hearing from independent experts who are extremely well-qualified to speak to the issues that they have been instructed to consider, which are essentially those which have been considered by the Inquiry's experts but, in respect of which, for the reasons set out in their comprehensive report, they have reached different conclusions.

My Lord, in those circumstances, without repeating myself, in my submission, it would clearly be of assistance to the Inquiry to have the report admitted and the evidence

considered.

THE CHAIR: You described the report as "comprehensive," and I have noted that down. The report does not actually deal with the specifics of the ventilation and water systems in the hospital.

MR GRAY: No, but it deals, my Lord, importantly, with what-- both in relation to ventilation and water, what issues may be of concern, what issues may not be of concern, what inferences can be properly drawn or not from the presence or absence of contamination.

THE CHAIR: But in general terms, nothing specific to the actual building. Now, I have heard from Ms Connelly, Ms Watts and Mr Love on the topic of fairness and how the receipt of this report would impact on the core participants whom they represent. Do you have anything to say on that topic?

MR GRAY: No, my Lord. That is entirely a matter for my Lord, in my submission.

THE CHAIR: And when I use the word "fairness," I include in that anything that they may legitimately wish to do in response.

MR GRAY: Yes, Lord, I have no submission to make.

THE CHAIR: Thank you very

much, Mr Gray. The note is of great assistance with my noting.

MR GRAY: Thank you, my Lord.

THE CHAIR: Thank you. Mr Mackintosh.

Submissions by Mr Mackintosh

MR MACKINTOSH: So, my Lord, what I propose to do is to deal with two short issues and the substantial point made by my learned friend. In respect of the point made by my learned friend about section 18 and section 19 seemingly imposing an obligation on the Inquiry to make available all documents it received, I do not think I can go further than the questions my Lord asked. I am not going to address that unless I can assist.

In respect to the Case Notes Review, might I invite my Lord to look at the overview report from the Case Notes Review published in March 2021, page 29? This is in chapter 2 of that document. The chapter is headed, "Terms of reference and membership of the expert panel," and, at 2.6 on page 29, there is a section headed, "Key responsibilities" and, if I am wrong, I am sure we can pick it up in evidence in the hearing, but I have been fortified in my understanding by

this paragraph:

"As Executive Lead for Infection Prevention and Control within NHS GGC, as appointed by Professor McQueen, Professor Bain will have oversight of the project as a whole. She'll be responsible for its progress and reporting to Professor McQueen, including advice by the expert panel and other members of the team below any necessary change to the key elements of these terms of reference."

And so, whilst it is correct the Oversight Board are the, as it were, the other party to the protocol, I had been proceeding on the basis that NHS GGC had a real and practical influence on this paper, and I will ensure that, when we get to the evidence of the three expert panels, I ask them questions about that.

I do feel I should respond to my learned friend's discussion of my critique of what I have said is the lack of candor, and I suppose it actually boils down to this: whilst I appreciate that NHS GGC take the view that this report is provided to assist the Inquiry, I suppose the problem, from the point of view of the Inquiry team three weeks from hearing is its timing is not particularly helpful because we are so

close to the hearing, and also, although we have been provided with letters of instruction from December 2022 and February '24 from the two authors, I still am not able to reach a concluded view about whether the authors are, if it is relevant, and I appreciate there is an argument it is not, independent experts in the terms discussed in *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 or the *Ikarian Reefer* case.

I do need to ask them questions if this report is to be received, and I would anticipate, if it is to be received, submitting a detailed questionnaire about how they came to prepare the work that they have done, but the main observation I make is that it is correct that, since I was instructed as counsel to the Inquiry last summer, my leaned friend and his junior have met me and have repeatedly mentioned the existence of the work carried out by Professor Hawkey and Dr Agarwal. I have always asked for the reports, and it is entirely possible, I think, actually, in reflection, it probably is correct that I was offered a partial report in February. I might well have said no but, at that point, I did not know the scale of the project, and that is, perhaps, the important thing because, in February 2024, Dr Drumwright had

just been instructed, presumably there were people in GGC working hard to collect this data and provide it to her, and it may well be some of it has already been provided earlier, but I have to say that I have not been aware of the substantial and comprehensive scale of this exercise, and that has not included an understanding of the epidemiological study in chapter 7 or, indeed, the criticism of the Case Note Review cohort selection.

It is those two particular elements of the report that cause, and I will not revisit my submissions, the greatest issues for the proper presentation of evidence and, if it is to be received, there is a lot of work to be done to understand it, to understand whether it is indeed a legitimate approach in epidemiological terms and what it shows. I have to say that the Inquiry team has benefited from the responses from core participants under direction 5 to our expert reports and, whilst I am not able to produce Mr Mukherjee's supplementary report, it does contain slightly different conclusions from his first report, and that change will be of assistance to the Inquiry and, no doubt, that level of critique and discussion and understanding would illuminate further any questions I may have about the

details of this report.

But, ultimately, it is not for me to choose the course of action the Inquiry is to take but I would simply observe, as I did before, that the obstacles to delivering a hearing starting on 19 August and concluding on 15 November, covering everything we need to cover to answer the four key questions and conclude term of reference 8, would be substantial if we also had to deal with this report but, beyond that, I do not think there is anything, usefully, I can do to go over old ground unless I can assist my Lord in any particular aspect.

THE CHAIR: No. Thank you, Mr Mackintosh. Can I thank those representing core participants for their submissions, and thank counsel to the Inquiry? It seems to me this is-- I have an important decision to make. My ambition is to notify core participants as to what that decision is later in the week, with reasons, but I must first consider what has been said to me by not only counsel to the Inquiry but all the core participants whose legal representatives have made submissions, as I say, for which I am grateful.

So what I propose is I will now adjourn this hearing and core participants will be advised of my

decision, as I say, the ambition is, in the course of the week. Thank you.

(Session ends)

12:28