

SCOTTISH HOSPITALS INQUIRY

NOTE of REASONS

in

APPLICATION

on behalf of

THE SCOTTISH MINISTERS

for

RESTRICTION ORDER IN TERMS OF SEC 19 OF THE INQUIRIES ACT 2005

**Introduction**

1. On 21 October 2021 the Inquiry received a written application from a core participant, the Scottish Ministers, seeking imposition of a restriction on disclosure or publication of evidence or documents given, produced or provided to the Inquiry by two witnesses, Mrs Theresa Smith and Mr Matthew Smith. The application was made under section 19 of the Inquiries Act 2005. In particular, until further order of the Chair, an order was sought to restrict:
  - (i) reporting or publication of the two witness statements; (ii) making publicly available video recording or livestream (whether delayed or otherwise) on YouTube (or any other medium) of oral evidence given by these witnesses; and (iii) making available a transcript of the oral testimony of the witnesses to the press or public.
2. Mrs and Mr Smith are spouses. They are the parents of a child who died while being treated on the Queen Elizabeth University Hospital campus (“the QEUH”). It is proposed that they should give oral evidence to the Inquiry at a hearing on 2 November 2021. They have already provided written witness statements.
3. On 20 October 2021 the Inquiry had received a written application from another core participant, NHS Greater Glasgow and Clyde Health Board (“the Board”) seeking imposition of a restriction to similar effect.
4. I appointed parties to be heard on their respective applications. Intimation of the applications was made to Mrs and Mr Smith, who indicated their wish to be heard in response. Accordingly, on 25 October 2021 I convened with a view to hearing submissions from Mr Gray QC, who appeared together with Ms Toner, Advocate, on

behalf of the Board; from Ms Davie QC on behalf of Scottish Ministers; and from Mr Love QC, who appeared together with Mr Thornley, Advocate, on behalf of Mrs and Mr Smith and any observations from Counsel to the Inquiry, Mr Alastair Duncan QC, who appeared together with Ms Victoria Arnott, Advocate. In preparation for the hearing I read the applications and the two witness statements.

5. On convening the hearing it proved to be the case that there was a common position among the three core participants. Mr Gray confirmed that the order sought by the Board was in exactly the same terms as the order sought by the Scottish Ministers. Mr Love conceded that looking to the terms of the witness statements of Mrs and Mr Smith, the applications were merited and, accordingly they were not opposed. Mr Love reminded me of the power conferred on the chairman by section 20(4) of the 2005 Act to vary or revoke a restriction order, and the possibility which this gives rise to that a party or parties might make a further application with a view to the publication of the witness statements in redacted form. Ms Davie and Mr Gray moved their respective applications. Otherwise, counsel for the respective core participants did not elaborate on what appeared in the written applications.
6. Counsel to the Inquiry stated that his position was one of neutrality. He noted the positions taken by counsel for the core participants but it was important to remember that any restriction on the right of public and media access to the proceedings of the Inquiry and the evidence and documents provided to it, as conferred by section 18 of the Act, can only be imposed where there are good reasons to do so, regard being had to the terms of sections 19 and 20. It was not enough that serious allegations were made. However, there were two factors which were particular to the present applications and which were relevant to the question of whether the imposition of restrictions was appropriate. First, as had previously been stated by Counsel to the Inquiry, no challenge will be made to the evidence of patients and their families about their perceptions of their experience at the QEUH. This will not necessarily be the case with evidence led at or documents produced to, later hearings. Second, although the point is not made explicitly in the respective applications, there is a concern that some of the evidence that Mrs and Mr Smith will give will go to matters that are outwith the terms of reference of the Inquiry. Counsel to the Inquiry acknowledged that the

applications had identified a risk of harm as that expression was to be understood in sec 19(4) (b).

7. Having taken time to consider, I imposed restrictions as specified in Restriction Order 5, issued on 25 October 2021.
8. On 28 October 2021 the Inquiry received a written application on behalf of Mrs and Mr Smith for variation of Restriction Order 5. In summary, the application proposed that Restriction Order 5 be varied in order that, while there should be no live-streaming or reporting of the evidence of Mrs and Mr Smith, which would be heard at a hearing which was closed to the public, Mrs Smith should make a statement prior to the commencement of her evidence which would be live-streamed and that versions of the statements of Mrs and Mr Smith, as redacted in terms agreed on behalf of Scottish Ministers and the Board, would be published on the Inquiry website. It was stated that the application for variation was not opposed by the Board or by the Scottish Ministers (as was confirmed by email correspondence copied to the Inquiry). Appended to the application were copies of the witness statements as redacted in the terms agreed.
9. On 29 October 2021, having considered the application for variation and the email correspondence in the light of the original applications on behalf of the Scottish Ministers and the Board, but without a further hearing, I concluded that to impose restrictions in the terms proposed was both conducive to the Inquiry fulfilling its terms of reference, and necessary in the public interest. Accordingly, I made Restriction Order 6 which revoked Restriction Order 5 and re-imposed restrictions in terms such as to reflect the variation sought in the application.
10. I summarise the original applications on behalf of the Scottish Ministers and the Board and my reasons for imposing restrictions as follows.

### **The applications**

11. The applications on behalf of the Scottish Ministers and the Board can be summarised as follows.

#### *Application on behalf of the Scottish Ministers*

12. For the Scottish Ministers, it is submitted that the restrictions sought are conducive to the Inquiry fulfilling its terms of reference and are necessary in the public interest on the following bases. (i) The restrictions sought would allow the evidence to be led

in fulfilment of the terms of reference whilst preserving the ability to challenge controversial and potentially unfounded aspects of the evidence in due course, the restriction applied for would not inhibit the allaying of public concern but rather it would avoid creating public concern in absence of balanced information (sec 19(4)(a)). (ii) The statement of Mrs Smith contains allegations suggesting potential misconduct in public office, and criminal behaviour. Such allegations are strongly rejected and would, if made in another context, be defamatory (it being noted that this is the first occasion on which Mrs Smith has made such allegations). At this stage the Inquiry cannot properly ascertain or examine the factual basis for the allegations in the absence of further evidence. The public interest would not be served by publication of such allegations which are, by necessity at this stage of the inquiry, evidentially unchallenged (sec 19(4)(a)). (iii) Distinct from the position of the Scottish Ministers, there is a clear risk of harm to the personal and professional reputations to the individuals named in the allegations, who at present have no standing to contradict what is proposed to be said. Such risks could be avoided by the restrictions proposed (sec 19(4)(b)). (iv) There is a risk of harm to the work of the inquiry if allegations which may be unfounded or potentially irrelevant to the remit of the Inquiry are publicised, particularly if that is done before the Inquiry has had the opportunity to consider any contrary evidence. Such risk could be avoided by the restrictions proposed (sec 19(4)(b)). (v) The efficiency of the Inquiry would be likely to be impaired in the event that no restriction were imposed and the allegations were to prove to be unfounded. The inquiry would have provided a platform for public dissemination of allegations with wide-reaching harmful effect on both public and private interests. In so far as such damage could ever be rectified, it would require significant use of time and effort during the course of the inquiry, all of which could be avoided if the restriction order was granted at this stage (sec 19(4)(d)). (vi) Since they are no longer members of or employed by the Scottish Government, those individuals against whom allegations are made may, if such allegations become public, feel compelled to respond through the media (albeit the Scottish Ministers have no indication whether that is the case, and no way of knowing). It would be better if matters such as these, if they are to be raised, should be ventilated according to a fair and regulated procedure within the Inquiry (sec 19(4)(b) and (d)).

(vii) The allegations in question go significantly beyond the scope of this stage of the Inquiry (sec 19(4)(d)(i)).

13. The Scottish Ministers conclude by submitting that, on balance, to make the order sought would enable the Inquiry to address any matters arising at a subsequent stage of the proceedings, if so advised, once both the Scottish Ministers and, so far as applicable, the individuals concerned, have had a fair opportunity to investigate the relevant matters and to adduce any contradictory evidence that may be required; whereas if the order sought is not granted, serious allegations will be left hanging, without the opportunity of contradiction, shortly before an adjournment of several months.

*Application on behalf of the Board*

14. For the Board, it is submitted that it is both necessary and in the public interest that a restriction order in terms of sec 19(2)(b) should be imposed in relation to publication of the evidence to be given by Mrs and Mr Smith. The statement of Mrs Smith makes serious allegations in relation to medical and nursing staff. The allegations relate to a number of named professional individuals and claim a significant number of actions and failures amounting to professional negligence and professional misconduct on their part. The accuracy of the conduct as set forth in the statement, insofar as it relates to staff employed by NHS Greater Glasgow and Clyde, is disputed. In any other context, such statements being made publicly would constitute defamation.
15. If the position of Mrs Smith as reflected in the relevant statement is given publicly and in the absence of any restriction, any report on her evidence is highly likely to occasion serious reputational damage to the medical and nursing staff who are named. Further, if that evidence is to be given publicly and in the absence of any restriction, any reporting will have the effect of significantly undermining public confidence not only in the medical and nursing staff members who are named, but also in the QEUH as a public health facility. Such reporting would inevitably bring about fear, worry and concern on the part of the public. These harms: the damage to the reputation of medical and nursing professionals, and public anxiety and fear over the safety of the hospital facility and the staff employed there, can be avoided or reduced by the grant of a restriction order in terms of sec 19(2)(b).

16. Further, under reference to sec 19(4), publication of the evidence of Mrs Smith will inhibit the allaying of public concern as to the safety of the QEUH as a public health facility. In these circumstances, an order to restrict the publication of the evidence of Mrs and Mr Smith would be both conducive to the Inquiry fulfilling its terms of reference and necessary in the public interest.

### **Reasons for decisions**

17. The power conferred on the chairman of an inquiry, in terms of sec 19 of the 2005 Act, to impose restrictions on attendance at the inquiry or part of the inquiry or on disclosure or publication of any evidence or documents given, produced or provided to the inquiry, is set within a statutory context which includes secs 5(5), 17, 18, and 20 of the Act. Sec 5(5) provides that functions are only exercisable within the inquiry's terms of reference. In terms of sec 17, the procedure and conduct of an inquiry are such as the chairman may direct, but "[in] making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness ...". Sec 18 places a duty upon the chairman to "take such steps as he considers reasonable to secure that members of the public (including reporters) are able ... (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry ...". Sec 20(4) provides that the chairman may vary or revoke a restriction order by making a further order during the course of the inquiry. The effect of restrictions are therefore potentially merely temporary.

18. Sec 19(2)(b) provides that the means of a chairman imposing a restriction is by making a restriction order. Sec 19(3) points to the exceptional nature of such an order. The subsection provides that a restriction order must specify *only* such restrictions "(a) as are required by any statutory provision, enforceable EU obligation or rule of law, or (b) as the ... chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest, having regard in particular to the matters mentioned in subsection (4)." These matters include: "(a) the extent to which any restriction on... publication... might inhibit the allaying of public concern; (b) any risk of harm or damage that could be avoided or reduced by any such restriction; ...(d) the extent to which not imposing any particular restriction would be likely – (i) ... to impair the ...effectiveness of the inquiry."

19. However, having considered the submissions summarised above and the current stage of the Inquiry, and having regard in particular to the matters mentioned in section 19(4) of the 2005 Act, I concluded that to impose restrictions in terms of Restriction Order 5 and then varying these restrictions by revoking Restriction Order 5 and making Restriction Order 6 were both conducive to the Inquiry fulfilling its terms of reference, and necessary in the public interest. My reasons are as follows.
20. I begin by observing that what has been put in issue is immediate live transmission and publication. The order which I have made does not prevent the witnesses giving their evidence and its consideration as part of all the other evidence which will be put before the Inquiry. To the extent that their evidence is relevant to the Inquiry's terms of reference, matters raised by that evidence, including the allegations to which attention has been drawn in the above submissions, will be investigated and may be the subject of evidence given by other witnesses, including the individuals against whom the allegations are made. Moreover, the order is not intended to prevent the witnesses seeking legal advice and instructing their legal advisers, or pursuing a complaint with or providing information to the appropriate authorities, or proceeding with litigation. If, on the other hand, that is found not to be so or if the terms of the order are found to prevent or impede in some way the work of the Inquiry, as with any restriction order, it may be varied or revoked. Any order pronounced is potentially an interim or holding measure which can be reconsidered and adjusted at a later date. As is illustrated by what has occurred here, variation or revocation can be achieved quickly.
21. My further preliminary observation is that agreement among some or all of the core participants that a restriction order should be made in certain terms does not relieve me of my obligations under the Act. Notwithstanding such agreement, I can only make a restriction order (however temporary) if I am satisfied that, having regard to the provisions of the 2005 Act, it is appropriate to do so. While it is the case that the agreement here among Mrs and Mr Smith, Scottish Ministers and the Board on the terms of redacted statements which, on the one hand, contained sufficient of the substance of the evidence and, on the other, avoided the harm or damage feared as a consequence of the publication of that evidence, very considerably assisted me in determining where the balance lay, responsibility for imposing any restrictions and

therefore determining the precise terms of any restriction order remains mine. I am grateful for the assistance of parties but the decision is mine, not theirs.

22. Sec 18(1) introduces a presumption that an inquiry under the Act will be heard in public and that evidence led and documents produced will be available to the public and to the media. That points to unrestricted and active publication. The Inquiry has been conscious of this and, with a view to fulfilling the obligation imposed on the chairman by sec 18(1) it has made arrangements for live-streaming of oral evidence and the posting of witness statements and transcripts of evidence on the Inquiry's website. That is the starting point: the obligation on the chairman to make evidence and documents available to the public. However, the chairman has other obligations. As appears from the statutory provisions already cited, these include exercising his functions only within the inquiry's terms of reference, acting with fairness and so conducting its proceedings so as not to impair its efficiency, while maintaining its integrity as a process for allaying public concern.
23. In my opinion, in the present circumstances the question of what is conducive to the inquiry fulfilling its terms of reference or in the public interest, having regard in particular to the matters mentioned in sec 19(4), is very substantially informed by the obligation of the chairman when making any decision as to the procedure or conduct of an inquiry to act with fairness towards all those with an interest. By those with an interest I mean the individuals against whom the allegations are made but also the witnesses and all the core participants.
24. Here, very serious allegations are made against named individuals who are not core participants. They have either had no or only very recent notice of what they are said to have done. They have no current locus and will have no immediate procedural opportunity to challenge the allegations. Therefore, for the time being, the allegations, which may or may not be relevant to the Inquiry's terms of reference, and may or may not be well-founded, will go unanswered.
25. Now, as Counsel to the Inquiry reminded me, there can be no question of restricting the publication of evidence simply because it makes serious allegations or is likely to make serious allegations against individuals or organisations. Where they fall within the inquiry's terms of reference, it is the duty of the chairman to investigate such allegations and, having regard to sec 18 and indeed sec 19, the public has what



Robert Francis QC, the chairman of the Mid Staffordshire Inquiry, is quoted by Beer *Public Inquiries* at para 6.38, as describing as “the right to know what went on and who was responsible”. However, substantive and procedural fairness require there to be some control over the circumstances in which potentially damaging allegations can be made. Possible controls would include filtering for relevancy and the opportunity for more or less contemporaneous challenge and reply. What was originally proposed here was delay in publication until a procedural stage is reached when relevant criticisms can be answered, with a view to avoiding damage in the meantime. Publishing only redacted witness statements also achieves that object while allowing a greater degree of public access to the evidence.

26. The first of the specified matters to which regard in particular must be had in determining what is conducive to the inquiry fulfilling the inquiry’s terms of reference or to be necessary in the public interest, is the extent to which a restriction might inhibit the allaying of public concern (sec 19(4)(a)). What I understand to be the relevance of this matter arises from the purpose of public inquiry. A Minister may cause an inquiry to be held in terms of the 2005 Act, where it appears to the Minister that particular events have caused or are capable of causing public concern or that there is public concern that particular events may have occurred (sec 1(1)). Thus, the purpose of an inquiry is, through a process of investigation and consideration of the evidence, to allay the relevant concern or concerns in the sense of discovering and disclosing to the public the extent to which their concerns are well-founded or ill-founded. Concern is allayed by disclosure of the facts; it is not allayed by suppression or concealment of the facts, however uncomfortable these facts may be. However, that does not mean that any restriction on the publication of evidence of what may be the facts necessarily amounts to inhibiting the allaying of public concern. Evidence from one source, or even more than one source, as to what the facts may be, cannot necessarily be equated with the facts as they are found to be after proper consideration of all the evidence. Public concern can only be allayed through an inquiry process in which the public can have confidence. That requires the inquiry to comply with all the statutory provisions to which I have drawn attention, including the obligations on the chairman to exercise his functions within the inquiry’s terms of reference and to act with fairness. The

evidence of Mrs and Mr Smith contains serious allegations directed against named individuals. The relevance of all of that evidence to the terms of reference of the Inquiry will require to be considered, possibly in the light of other evidence which has yet to be heard. Its accuracy is challenged. Accurate or not, its immediate publication will be harmful to the reputations of the named individuals, who will be unable to contradict the allegations made against them or present their version of events for many months. I accept the submission on behalf of the Scottish Ministers that imposing restrictions on its immediate publication would allow the evidence of Mrs and Mr Smith to be led with a view to fulfilling (and not exceeding) the terms of reference whilst preserving the possibility of challenge to what may be said to be irrelevant or unfounded aspects of the evidence in due course. I see the force in the submission that the restriction applied for would not inhibit the allaying of public concern but rather would avoid creating public concern in absence of balanced information, but what I regard as particularly important under reference to sec 19(4)(a), is that a process which allows all the potentially controversial evidence to be led, while allowing for it to properly challenged and seeking to protect the legitimate interests of all those involved, is likely to be regarded as fair, and therefore deserving of public confidence and will therefore be less likely to inhibit the allaying of public concern.

27. I have already mentioned the likely harm to the reputation of individuals consequent upon unrestricted publication of the evidence of Mrs and Mr Smith . The risk of harm or damage that could be avoided or reduced by the relevant restriction is a matter to which regard must be had in particular, in terms of sec 19(4)(b). I agree, with Beer when he states, at para 6.39, under reference to a ruling by Robert Francis QC, the chairman of the Mid Staffordshire Inquiry, that “harm or damage” includes psychological as well as physical harm, but independent of that, damage to reputation consequent on what may be a defamatory statement, would in my opinion clearly amount to “damage” for the purposes of the sub-section. Accordingly, as I have already indicated, I agree that it is likely that the named individuals are at risk of harm or damage that can be avoided by the imposition of restrictions on live transmission and publication and appropriate redaction where

witness statements are published. The sec 19(4)(b) matter therefore points to a grant of the applications.

28. Turning to the matter mentioned at sec 19(4)(d)(i), I agree that the efficiency and effectiveness of the Inquiry would be likely to be impaired in the event that no restrictions were imposed. The Scottish Ministers point to the situation where the allegations prove to be unfounded. They submit that the inquiry would then have provided a platform for the public dissemination of allegations with wide-reaching harmful effect on both public and private interests. In so far as such damage could ever be rectified, it would require significant use of time and effort during the course of the inquiry, all of which could be avoided if the restriction order was granted at this stage. I agree with that. In addition, although this is perhaps to repeat a point made earlier under reference to sec 19(4)(a), I would see the efficiency and effectiveness of the Inquiry to be closely connected with the fairness of its procedures and processes and its rigour in adhering to its terms of reference.
29. For the avoidance of doubt, I made a single restriction order – Restriction Order 5, albeit in response to the two separate applications. In response to the application on behalf of Mrs and Mr Smith I determined that the restrictions imposed by that order should be varied. The mechanism that I adopted to in order to do so was to make Restriction Order 6 which revoked Restriction Order 5 but re-imposed some, but not all, of the restrictions which had appeared in Restriction Order 5.