WRITTEN EVIDENCE FROM PETE WEATHERBY KC (HBL0002)

Further evidence to the Joint Committee on Human Rights, following 19 July 2023 session on Duty of Candour and the Public Authority (Accountability) Bill 2017

1. Following the evidence session, I promised to provide some further detail which may be helpful to the Committee. I am aware that Elkan Abrahamson, Anna Morris KC and the charity INQUEST are collating material to assist the Committee on representation and a level playing field for victims of disasters and mass fatality events. Therefore, I address the following topics:
    a. How a practical and enforceable duty of candour would expedite A2 and A3 processes.
    b. Judicial and Inquiry Chair support for a statutory duty of candour.

Expedition

2. Expedition is a requirement of the Article 2 and 3 investigative obligation. It is the investigative obligation which makes the right to life, and the prohibition on inhuman and degrading treatment "practical and effective"[1]. Justice delayed is justice denied.

3. Lord Saville's Inquiry into 'Bloody Sunday' took 12 years. The Hillsborough inquests were the longest jury proceedings in UK legal history, the Undercover Policing Inquiry commenced in 2015, and has just published its first interim report. The Manchester Arena Inquiry into the 2017 bombing which killed 22 innocent people has just ended, the Grenfell Tower Inquiry is due to report next year, 7 years after the fire.

4. The complexity of mass fatality events is often used as a justification for why these investigations take so long. This is plainly a factor but a substantial part of the problem lies in the fact that the current legal frameworks facilitate institutional defensiveness and a culture of denial. Inquests and Public Inquiries are meant to be inquisitorial searches for (1) the truth, (2) justice through accountability, and following from the product of those two aims; (3) recommendations for change to prevent future deaths[2]. However, almost always, controversial investigations and inquiries are processes where the Chair, and those most affected, are pitted against those responsible, who seek to avoid accountability for failures.

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[1] McCann v UK (1996) 21 EHRR 97, at [146] and [161]

[2] The trend to ensure inquests lead to substantive and procedural change is rooted in the leading domestic A2 cases. The power to affect the future goes to the very heart of the inquest process: R (on the application of Middleton) v West Somerset Coroner and another [2004] 2 AC 182, [5], Lord Bingham stressed the importance of ensuring that the inquest regime "will not only expose any past violation of the state's substantive obligations already referred to but also, within the bounds of what is practicable, promote measures to prevent or minimise the risk of future violations".
In: R (on the application of Amin) v Secretary of State for the Home Department [2004] 1 AC 653, [31], Lord Bingham included within the key purposes of an inquest "... that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others".

5. Without *requirements* of openness and candour, it is no surprise that processes become adversarial in this fashion. Lawyers will advise their clients to avoid admissions, officials will try to avoid censure, managers will try to protect the reputation of the institution, and unscrupulous people will lie. As night follows day, this massively prolongs the process, retraumatises those most affected, prevents timely change to protect life and limb, and wastes substantial amounts of public money.

6. Whereas it is axiomatic that constitutional personal protections must be preserved – the privilege against self-incrimination (included within Article 6), privacy and data rights (Article 8) – as must other public interests including national security and some commercial sensitivities, it is quite clear that this can be done within an inquisitorial system which requires candour. As a starting point, it is of note that even the most adversarial legal processes provide a balance in this regard. In civil claims the defendant must answer the claim, admit or deny the claimant's allegations, and provide proper disclosure. In criminal trials the defendant must provide the court with a defence statement to allow those involved in the process to understand what is and is not in issue. Even those obligations are absent from inquests and inquiries.

7. A statutory duty of candour would not only require public authorities and corporations responsible for public safety to tell the truth, it would require them to proactively assist the process, from the outset, even where against interest, save where so to do would contravene the said constitutional protections.

8. The concept of a duty of candour is rooted in both domestic common law[3] and the Convention[4]: and so its application to official investigations would not involve

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[3] The case law is specific to judicial review proceedings: R v Lancashire County Council, ex p Huddleston [1986] 2 All ER 941, at pg945; R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363, at [68]; R (Hoareau and Bancoult) v SoS for the FCO [2018] EWHC 1508 (Admin), at [13-23] in which Singh LJ asserted at [20]:
"*The duty of candour and co-operation which falls on public authorities, in particular on HM Government, is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. It would not, therefore, be appropriate, for example, for a defendant simply to off-load a huge amount of documentation on the claimant and ask it, as it were, to find the "needle in the haystack". It is the function of the public authority itself to draw the court's attention to relevant matters; as Mr Beal put it at the hearing before us, to identify "the good, the bad and the ugly". This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.*
Recently, the public law principles and cases have been comprehensively reviewed in: R (Police Superintendents' Association) v Police Remuneration Review Body and Secretary of State for the Home Department [2023] EWHC 1838 (Admin), at [14-15]

[4]The Strasbourg case law is clear that in A2 and A3 cases, where the events involve the state, the burden of proof shifts to the authorities where information is within their exclusive knowledge; Ireland v UK (1979-80) 2 EHRR 25 at [161]; Çakıcı v Turkey (2001) 31 E.H.R.R. 5 at [85]; Salman v Turkey (2002) 34 E.H.R.R. 17 at [100]; Amin (above cited) at [20]; Rupa v Romania (2010) 50 E.H.R.R. 12 at [97]; and El Masri v Macedonia (2013) 57 EHRR 25 at [152]. The context of the El Masri case was the "extraordinary rendition" of a German national to Afghanistan. At [191] the Grand Chamber explained the obligation further, referring to the "right to the truth" and the "right to know", not only for the applicant but for other such victims and the general public. The GC added: "…an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful

reinventing the wheel. However, persistent candour failures and outright cover-ups in some cases, show that outside of judicial review claims, the common law and Convention duty of candour obligations are simply not applied. The duty of candour on public authorities in the context of judicial review is based upon the "underlying principle that public authorities are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law"[5]. If that is the rationale for adversarial public law claims, it is unarguable but that the duty of candour should apply to investigations and inquisitorial processes such as inquests and public inquiries.

9. In some cases, Inquiry chairs have attempted to use existing provisions to achieve the same ends, notably Rule 9, Inquiry Rules 2006 and Section 21, Inquiries Act 2005. In the Arena and Grenfell Inquiries this achieved some limited success. But this has only underlined the need for statutory change which will drive a culture shift, prevent obfuscation and stop the putting of institutional reputation above future lives.

Saving public funds

10. At paragraph 5 above, I have noted that one effect of enacting an effective duty of candour, applicable to investigations and inquisitorial processes, would be to expedite such processes. The obvious advantages are: compliance with A2 and A3 (which require expedition), reducing trauma and stress on the bereaved and survivors, ensuring so far as possible that progressive change occurs as soon as possible to minimise the possibility of further similar deaths or events.

11. However, expediting and shortening major inquiries would also save substantial amounts of public resources. It is a matter of record, and legitimate public concern, that these processes are very expensive[6].

12. A duty of candour would require public authorities (and others) to act with all cards face up on the table, and to identify the "needle in the haystack", from the outset[7]. In doing so, the Inquiry, and everyone involved, would be in a better place to understand which matters are in dispute, and which are not. Inquisitorial processes should not be reduced to a game where participants can ignore inconvenient facts or sit on their hands to see whether shortcomings or wrongdoing goes unnoticed. Unfortunately, that is the reality.

13. The fresh inquests into the deaths of 96 people[8] at Hillsborough were ordered by the High Court which quashed the original 'accident' verdicts[9], following the disclosure

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acts."
It is therefore clear that Strasbourg not only requires substantive compliance with the right to life but also frankness, transparency and positive involvement from public authorities to the attached procedural rights, as an element of adherence to the rule of law itself. This plainly implies an obligation of candour and proactive cooperation on relevant public authorities.

[5] Hoareau (above cit) at [20]
[6] https://researchbriefings.files.parliament.uk/documents/SN06410/SN06410.pdf, https://www.nao.org.uk/wp-content/uploads/2018/05/Investigation-into-government-funded-inquiries-press-release.pdf, https://www.instituteforgovernment.org.uk/article/explainer/public-inquiries
[7] Hoareau (above cit) at [16 and 20]

of material to the 'Hillsborough Independent Panel' (HIP), which issued a damning report in 2012[10]. The new inquests were highly contested and became the longest jury process ever in this jurisdiction. Why? Following the HIP report, the Chief Constable of South Yorkshire Police appeared on TV[11], and posted on their official website[12]:

> *"On 15th April 1989, 96 Liverpool fans went to Hillsborough to watch the FA Cup Semi Final and died as a result of the Disaster. On that day South Yorkshire Police failed the victims and families. The police lost control.*
> *In the immediate aftermath senior officers sought to change the record of events. Disgraceful lies were told which blamed the Liverpool fans for the disaster. Statements were altered which sought to minimise police blame.*
> *These actions have caused untold pain and distress for over 23 years. I am profoundly sorry for the way the force failed on 15th April 1989 and I am doubly sorry for the injustice that followed and I apologise to the families of the 96 and Liverpool fans…"*
> *Chief Constable David Crompton*

14. The Chief Executive of the Yorkshire Ambulance Service (a legacy organisation), David Whiting, fully accepted the findings of the HIP report[13], which had found multiple failings in its response[14].

15. At the inquests, SYP did not repeat these candid admissions and its former senior officers who were in place at the time, and some of whom perpetrated the cover-up, were allowed to repeat the untruths of the past: that drunken, ticketless, late-arriving supporters had forced a gate and caused the disaster. The Ambulance service ran a case that all those who had died were deceased before it would have been possible for them to come to their aid, arguing that this negated causation from any alleged failures, which were not admitted. Ultimately, the jury found that:

    - those who died were unlawfully killed by the gross negligence of the Police Commander,
    - the supporters had not contributed to the disaster in any way, and that
    - the failed emergency response of both the police and ambulance service had contributed to the loss of life.

16. Had SYP and the Ambulance Service been subject to an effective duty of candour, it would have been extremely difficult for the false arguments to have been advanced. Undoubtedly, the process would have been substantially truncated, and a huge amount of public resources saved. Media reports indicate that the cost of the Hillsborough

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[8] Regrettably, now 97 as a further person has died of his injuries since the inquests.
[9] A-G v HMC for South Yorkshire (West) [2012] EWHC 3783 (Admin)
[10] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/229038/0581.pdf
[11] https://www.itv.com/news/granada/2012-09-13/police-chief-shocked-at-findings
[12] *http://www.southyorks.police.uk/newssyp/chiefconstableapologisesfamilies96 (Accessed 19 February 2016, now removed)*
[13] *http://www.yas.nhs.uk/Media/PressReleases/2012/Publication_of_the_Hillsboroug.html (Accessed 19 February 2016, now removed)*
[14] HIP Report (above cit), §41-60

Inquests was over £100m. Estimating the savings from an effective duty of candour is obviously highly speculative, but it is realistic to suggest it could be in the region of 50% if the adversarial stance of the two main state protagonists was removed, given their earlier response to the HIP report.

17. Hillsborough is far from an isolated example. At the Bloody Sunday Inquiry, the Mid-Staffs NHS Inquiry, the Grainger Inquiry, the Manchester Arena Inquiry, the Grenfell Tower Inquiry, the Contaminated Blood Inquiry and many others, there were the clearest examples of institutional, corporate, and personal denial and obfuscation of the true facts. Institutional denial, responding to inquiries in litigation mode, rather than with candour and transparency is a pervasive approach, because it is allowed to be. It will not change until there is a clear legal requirement to do so.

Judicial and official support for a statutory duty of candour

18. The Public Authority (Accountability) Bill 2017 itself was sponsored and signed by MPs from across the spectrum: Labour, Conservative and Lib Dem parties, the SNP, SDLP and Greens. It had its first reading, unopposed, in March 2017 but stalled because of the general election. At least three Metro Mayors have endorsed the law: Andy Burnham, Steve Rotheram, and Sadiq Khan. It is expected to be a manifesto pledge at the next election. A wide variety of bereaved family campaigns, the charity INQUEST, and other civil society groups, have supported the Bill. Importantly there has been 'official' support too.

19. A significant number of former judges and inquiry chairs have expressly endorsed the need for a statutory duty of candour, no doubt informed by their personal experiences. Of particular importance is the 2020 report *When Things Go Wrong: The Response of the Justice System*[15], produced by a Working Party of the law reform organisation, JUSTICE, set up to investigate urgent reforms needed for major inquests and inquiries. The WP was led by Sir Robert Owen, former High Court judge who chaired the Litvinenko Inquiry, Sir John Goldring, former Lord Justice of Appeal and Hillsborough Coroner, and Sir Peter Thornton, former Chief Coroner, and included a gallery of leading lawyers and academics with expertise in this area of law. The report endorsed the need for a statutory duty of candour as set out in the 2017 Bill.

20. Other Inquiry chairs who have called for statutory change of this nature include:
    a. Sir Robert Francis: Mid-Staffs NHS Trust Public Inquiry 2013[16]. His report led to the provision of a limited duty of candour in the healthcare sector, through secondary legislation.
    b. *The Report of the Morecambe Bay Investigation*, March 2015[17]: Dr Bill Kirkup CBE, commended the recently introduced duty of candour in healthcare and proposed that it be extended: Recommendations 24-27, and in particular Recommendation 30.

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[15] https://justice.org.uk/wp-content/uploads/flipbook/34/book.html, at p2, and §4.35 et seq, §4.41-4.49

[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/279124/0947.pdf
Recommendation No. 181 of the Francis Inquiry, led to *Regulation 20* of the *Health and Social Care Act 2008(Regulated Activities) Regulations 2014*

[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408480/47487_MBI_Accessible_v0.1.pdf

c. The Equality and Human Rights Commission report *'Preventing Deaths in Detention of Adults with Mental Health Conditions' (July 2015),* recommended that the Healthcare provisions be extended across prisons, police custody and psychiatric units[18].

d. The *'Harris Review: Report of the Independent Review into Self-inflicted Deaths in Custody of 18-24 year olds' (July 2015)[19],* picked up this theme and recommended a duty of candour should be imposed with a specific duty to fully cooperate with the inquest process to combat "institutional defensiveness".

e. The Government-commissioned report following the Hillsborough inquests: *The Patronising Disposition of Unaccountable Power, 2017[20].* Bishop James Jones KBE urged the Government to consider a statutory duty of candour and appended the Bill to the report. Six years since the report was provided, the Government has still to respond. As the Committee knows, the Bishop gave evidence to the JCHR in support of the Bill.

f. *The Report of the Elizabeth Dixon Investigation,* November 2020[21]*:* Dr Bill Kirkup CBE called for the Public Authority (Accountability) Bill 2017 to be enacted: Recommendation 7.

g. *The Report of the Daniel Morgan Independent Panel*: 15 June 2021[22]. The Chair, Baroness Nuala O'Loan called for a statutory duty of candour: Recommendation 61.

21. In the course of a 2021 debate on a proposed amendment to the Police, Crime, Sentencing and Courts Bill, Lord Pannick noted:

> "*The statutory duty of candour is vital not just to affect the culture of the police and enhance public confidence in policing but to give confidence to those police officers who face enormous internal pressures from their colleagues not to be candid. They need support; they need a statutory regime they can point to in order to justify to their colleagues what is required*."[23]

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[18] *https://www.equalityhumanrights.com/en/inquiries-and-investigations/preventing-deaths-detention-adults-mental-health-conditions/preventing* : Recommendation 3

[19] *http://iapdeathsincustody.independent.gov.uk/wpcontent/uploads/2015/07/HarrisReviewReport2.* Para 7.157.17

[20] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/656130/6_3860_HO_Hillsborough_Report_2017_FINAL_updated.pdf

[21] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938638/The_life_and_death_of_Elizabeth_Dixon_a_catalyst_for_change_accessible.pdf

[22] https://webarchive.nationalarchives.gov.uk/ukgwa/20220331105136mp_/https://www.danielmorganpanel.independent.gov.uk/wp-content/uploads/2021/06/CCS0220047602-001_Daniel_Morgan_Inquiry_Web_Accessible.pdf

[23] *Hansard,* HL Deb 3 November 2021 vol 815, col 1253