

DETERMINATION ON THE REVIEW OF CORE PARTICIPANT STATUS OF FIVE ACTION FOR MUCKAMORE PARTICIPANTS

INTRODUCTION

1. This Public Inquiry has been instituted to examine allegations of abuse and poor care at Muckamore Abbey Hospital in County Antrim, Northern Ireland. The Terms of Reference are published on the Inquiry website.
2. Section 30 of the Inquiries Act 2005 provides that in relation to any Inquiry for which the Northern Ireland Minister is responsible:
 - (3) *The Minister may not, without the consent of the Secretary of State, include in the terms of reference anything that would require the inquiry to inquire into events occurring—*
 - (a) *before 2nd December 1999 (the “appointed day” for the purposes of the Northern Ireland Act 1998 (c. 47)), or*
 - (b) *during a period when section 1 of the Northern Ireland Act 2000 (c. 1) is in force (suspension of devolved government in Northern Ireland).*
3. Paragraph 2 of the Terms of Reference reads as follows:

[2] *The Inquiry will report and make findings on events that occurred between 2nd December 1999 and 14th June 2021.*
4. With the consent of the Secretary of State, paragraph [3] of the Terms of Reference allows the following with respect to the start and end dates:

[3] *The Inquiry will be able to receive and take account of evidence outside of that period where such evidence will assist the Inquiry in examining, understanding and reporting on matters within these terms of reference.*
5. As Chair of this Public Inquiry, I am responsible for its conduct and the procedures it adopts. I have previously indicated that save for exceptional circumstances I will adopt the statutory rules applicable to Public Inquiries in England there being no such provisions enacted in Northern Ireland.

6. Part of my role is to consider the grant of Core Participant status for any individual who applies for it.
7. Core Participant status confers a number of benefits which include: the right to make an opening statement and closing submissions; the right in certain circumstances to ask questions of witnesses either directly or indirectly through counsel to the Inquiry; early access to material disclosed to the Inquiry; and, in this particular Inquiry, permission to watch a delayed video and audio feed of the testimony even when a restriction order has been made. Finally, a Core Participant is, with limitations, entitled to receive an early copy of the final report prior to its publication.
6. S17 (3) of the Inquiries Act 2005 requires that:

In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).
7. Rule 5 of the Inquiry Rules 2006 states that, in considering whether to grant Core Participant status, I must in particular consider whether -
 - (a) *the person played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;*
 - (b) *the person has a significant interest in an important aspect of the matters to which the inquiry relates; or*
 - (c) ...
8. In considering the grant of Core Participant status, I have to have regard to the particular considerations set out above, but they are neither exclusionary nor exhaustive, and my duty to act fairly will warrant my consideration of a wide number of issues when deciding both whether to grant Core Participant status or to revoke it.
9. In Inquiry Protocol Number 2, which was issued on 10 November 2021, it was indicated that, in considering the grant of Core Participant status, I would take into account a number of other considerations in addition to the matters set out in Rule 5. Those include the individual circumstances of the applicant; the extent to which designation as a Core Participant would assist the inquiry fulfilling its terms of reference; the need to act with fairness and to avoid unnecessary costs whether to public funds or to witnesses or others; as well as the matters set out in my Statement of Approach (see below) which potential applicants were advised to read.

10. Paragraph 18 of Protocol Number 2 is also relevant:

[18] Core Participants have a role that involves more than giving an account of their personal experiences and offering up their own documents, they are expected to further the work of the Inquiry and assist it in fulfilling its Terms of Reference.

11. In the document entitled 'Chair's Statement of Approach to Core Participant Status, Joint Representation and Funding of Legal Representation' also issued on 10 November 2021, I set out my approach to considering the grant of Core Participant status to individuals directly affected by the issues at MAH. It is relevant to repeat part of that statement here:

[9] I am aware that a number of individuals, who may have been patients or are family or friends of patients of Muckamore, have formed associations or groups to campaign for an Inquiry into abuse at Muckamore Abbey Hospital, or to discuss issues relating to the hospital. By those actions, those individuals have already demonstrated a significant role and/or interest in the matters to be examined by this Inquiry, as well as how important the conclusions of the Inquiry are for them. I met persons affiliated to those groups/associations in the engagement sessions, which I undertook in October and November 2021. It was apparent at those sessions that the associations/groups already have detailed collective knowledge and experience of some of the issues, which will be examined by the Inquiry. That leads me to the provisional conclusion that, in general, those individuals who are affiliated to the following groups/associations should be granted Core Participant status, if they wish to have it:

a. Action for Muckamore;

b. The Society of Parents and Friends of Muckamore Abbey Hospital

12. It is to be noted that this statement was couched in terms which focused on those who were then, at the time of the statement, affiliated to one or other of the two societies, and reflected upon the role that they had played to that date in demonstrating a close interest in, and knowledge of, the matters to be examined by this Inquiry.

13. According to their website the Society of Parents and Friends of Muckamore Abbey Hospital (SPFM) was set up a number of years ago to safeguard the well-being of patients with physical and learning disabilities resident at the hospital and to enhance their quality of life where possible by involvement in their social, health, and educational pursuits. The Society has historic links with the hospital.

14. Action for Muckamore (AfM) appears to have been set up after concerns arose over the treatment of patients at the hospital. The society's spokesperson has a son who is said to have been abused at the Hospital.
15. Neither organisation appears to be a registered charity nor a company or partnership.
16. The Chair's statement established a presumption, but not a rule that those affiliated to the two named groups would be granted Core Participant status without further detail as to the individual's role or participation in those organisations. It was an approach which in my view was justified at the beginning of this Inquiry but should it be clearly demonstrated that this approach is not in fact working or assisting the Inquiry then the status of any individual currently a Core Participant would be open to review.
17. Following the publication of those documents, the Inquiry received applications for Core Participant status from a number of individuals said to be affiliated to AfM and SPFM. All of those applications were received from Phoenix Law Solicitors.
18. Separately, an exercise was conducted by the Inquiry to encourage people affected by the issues at MAH to contact the Inquiry by personally filling in a contact form or by speaking to a member of the Inquiry team who could assist with that task. The form required contact details and a brief explanation of the writer's connection to or interest in MAH. Information was given to the Inquiry in relation to each of the five individuals currently under consideration providing very limited details of their connection to MAH.
19. Lists of applicants were received from Phoenix Law. Each of these five applicants was declared to be affiliated to AfM. No specific detail was provided relating to the applicants either as to their suitability in terms of the criteria set out in Rule 5, or as to when they became affiliated to AfM or SPFM. Reliance was placed upon the Chair's statement of approach to Core Participant status. It was open to the Inquiry to make a request for further information about each individual and their connection to MAH but it did not. Each of the applications for Core Participant status now under consideration was granted based upon the application by Phoenix Law.
20. The applications to be designated Core Participant in respect of each of the five individuals the subject of this determination were received and granted on the following dates:

| Core Participant | Application Received | Granted |
|-------------------------|-----------------------------|----------------|
| Foy Kennedy | 01.12.21 | 09.12.21 |
| Peter Riley | 15.12.21 | 21.12.21 |
| Margaret McGuckin | 04.07.22 | 15.07.22 |

| | | |
|-------------------|----------|----------|
| Bernadette O'Hara | 29.06.22 | 15.07.22 |
| James McMorran | 20.04.22 | 15.08.22 |

21. The applications were granted in accordance with paragraph 9 of my statement of approach issued on 10 November 2021, which set out what was a general and provisional conclusion that individuals then associated with one of the two groups should be granted Core Participant status. Phoenix Law were appointed legal representatives for these individuals and accordingly were so designated by me under Rule 6.
22. On 27 September 2022 the Solicitor to the Inquiry, on my instructions, wrote to Phoenix Law to indicate that I had reviewed the information so far provided in relation to specific individuals who had been designated Core Participants to this Inquiry. It was made clear that I was considering revoking the Core Participant status of those listed in Appendix 2 to that letter because the information those individuals appeared able to provide was too historic and significantly outside the date range in the terms of reference. Each of the current individuals under consideration was listed in that schedule
23. It was said in that letter that the continued grant of Core Participant status to individuals who are not in a position to provide evidence or information that will assist the Inquiry in addressing its terms of reference could not be justified. The letter invited the provision of further information which might have a bearing on this decision to revoke Core Participant status which would otherwise take place fourteen days from the date of the letter (i.e. on 11 October 2022).
24. On 28 September 2022 Phoenix Law wrote to the Solicitor for the Inquiry requesting an oral hearing. On the same date, the Solicitor to the Inquiry responded indicating that I required written submissions by 4 p.m. 12 October 2022 and that if necessary an oral hearing would take place later in October.
25. On 14 October 2022 written submissions relating to the proposed revocation were received from Phoenix Law, drafted by leading counsel together with a request to make oral submissions to me. The written submissions put forward a number of arguments as to why it was now unfair to revoke Core Participant status and addressed a number of matters of law. The written submissions did not provide any information in relation to the individual Core Participants whose status was under review.
26. Although the written submissions were dated (and received) outside the time limit imposed, I read them and agreed to the request to hear oral submissions. That was notified to the five individuals' solicitors on 21 October setting out in further detail the reasons why the status of the five Core Participants was being considered which were as follows:

In relation to Foy Kennedy the information that he provides (based upon the information provided in his contact form) relates to his training at MAH in the late 1970s.

In relation to Peter Riley the information that he provides (based upon the information provided in his contact form) relates to the abuse at MAH of his mother between 1979 and 1983.

In relation to Margaret McGuckin the information that she provides (based upon the information provided in her contact form) relates to the abuse of her brother at MAH between 1973 and 1990.

In relation to Bernadette O'Hara the information that she provides (based upon the information provided in her contact form) relates to the abuse of her brother at MAH between 1973 and 1990.

In relation to James Michael McMoran the information that he provides (based upon the information provided in his contact form) relates to his own abuse at MAH between 1972 and 1974.

The letter also stated: "All of the information these witnesses can give is limited to their individual experiences at least nine years prior to the start of the Inquiry's terms of reference (December 1999) and therefore considerably outside the terms of reference, it is upon this ground that the Chair is considering revocation of their Core Participant status".

27. Four of the individuals were either a former patient or relatives of former patients. One of the five trained briefly at MAH.
28. On 24 October 2022 I heard oral submissions from leading counsel for the five named Core Participants. These submissions were helpfully supported by a speaking note. I also heard brief and helpful submissions from leading counsel to the Inquiry which were appropriately focused upon my powers and the nature of my discretion.

ARGUMENT

29. Counsel for the five Core Participants deployed a number of arguments, both in her original written submissions and orally (reflected in her speaking note) to persuade me that it would be wrong at this stage to revoke Core Participant status for any of the five Core Participants under review. The arguments can most usefully be broken down into two basic grounds. The first ground of argument might be termed a technical one (by which I mean to give it no less weight or respect). The second ground is based upon further information provided in respect of each five individuals, which it is said meet the criteria set

out in Rule 5 and in my statement of approach which justifies their continued status as Core Participants.

30. Dealing first with Ground One. What follows is a summary of those points and related arguments (which I do not seek to set out fully or comprehensively):
- i) The information given in relation to any reason for considering the revocation of Core Participant status was insufficient;
 - ii) The correspondence from the Inquiry did not provide sufficient information to establish why the criteria originally found to be met are no longer considered to be established;
 - iii) The Core Participants have the right to be given sufficient information (“reasonable specificity”) to enable representations to be made on their behalf and insufficient information has been given;
 - iv) That I must have been satisfied at the stage that CP status was granted, that each of the Core Participants met the required criteria;
 - v) The information available now is no different than it was at the time of the grant;
 - vi) Although it is conceded that I am entitled to change my mind, the appropriate starting point is that the grant remains valid and justified until it is shown not to be;
 - vii) It would be irrational to revoke Core Participant status absent a material change in circumstances;
 - viii) The special position of patients and their relatives and carers was emphasised in my opening address on 6 June 2022, four of these five individuals are in the category of being former patients or relatives of former patients and therefore had a legitimate expectation that they would satisfy the criteria of having a significant interest in the Inquiry;
 - ix) Paragraph 24 of the Protocol Number 2 said: “The Chair will give careful consideration to all applications and, if he considers that further information is required before he can make a *decision*, *he may direct an applicant to provide such further information as he considers necessary*” (emphasis added). No further information was sought by the Inquiry from any of these individuals;
 - x) Specific justification for revocation by reference to the facts is required for each individual;
 - xi) It is wrong and unfair to seek to deny Core Participant status in relation to their perceived utility to the Inquiry prior to them having made statements and without proper consideration being given to the importance to them of the Inquiry.
31. In relation to (i) to (iii) (relating to reasonable specificity) I am satisfied that by the letters of 27 September and 21 October 2022, sufficient information was provided to these individuals to allow them to know why I was considering revocation and for appropriate arguments to be formulated on their behalf, as they were.

32. The five individuals argue that it would be contrary to public law principles now to revoke Core Participant status when there has been no significant change of circumstances since the grant was made. They rely in particular on the case of *McKinney* [2022] NIQB 23 and invite me to give it detailed consideration.
33. In that case a decision had been made by the PPS, after careful consideration of the evidence available, that it was appropriate to prosecute “Soldier F” for the murder of Mr William McKinney. The case proceeded to the committal stage but prior to committal taking place, the PPS wrote to the family to indicate that, having considered the ruling in another case known as “A & C”, a different conclusion had now been reached, which was that there was insufficient admissible evidence to provide a reasonable prospect of the conviction of Soldier F. The “A & C” judgment focused upon the admissibility of evidence provided by two accused soldiers to the RMP in 1972. All of that evidence was held to be inadmissible.
34. In the course of the judgment in *McKinney*, other cases were considered such as *R v DPP ex parte Manning* [2001] QB 330 and *Regina (Monica) v DPP* [2018] EWHC 3508, which also considered decisions by the prosecuting authorities not to prosecute individuals.
35. Although I was encouraged to read the *McKinney* case, and I have done so, I have not found it, or the other authorities cited of great assistance. The nature of a decision to prosecute or not is entirely different to the decision I made originally to grant Core Participant status and different to any consideration I have to apply to this determination. In particular, prosecutors have a two-stage test, which they are required to apply in making the determination. The first is the evidential test, which requires a careful evaluation of the evidence available in coming to the determination as to whether there is a reasonable prospect of a conviction based upon that evidence, and secondly they have to apply the public interest test, which in short is a consideration of whether the prosecution is in the public interest.
36. Neither of those tests are applicable to the exercise that I have to carry out. Nor are the consequences of prosecution or non-prosecution in any way similar to the decision to grant or revoke Core Participant status to an individual in a public Inquiry.
37. Further, in *McKinney* it is plain that a very careful assessment had been made of the likelihood of success of the prosecution, including consideration of the pitfalls, reliability and admissibility of the evidence available. It was very clearly a merits based decision, carefully taken after a review of all of the available material. In those circumstances, the High Court found that the decision in “A&C” had been an insufficient factor to justify a different decision as to prosecution. My original determination was not based upon the merits of each

individual application and the assistance each could individually offer to the Inquiry. The decisions at that stage were based upon the general view that affiliation to AfM was in itself sufficient to justify granting CPP status. The consideration of individual merits was therefore very limited.

38. Despite very significant differences between the decision made and criticised in *McKinney* and the decision I now have to make, I accept that there is a fundamental question of fairness in circumstances where it may be said that there has been no significant alteration of circumstances since the original determination was made. There is said to be a legitimate expectation that the status of these Core Participants would remain, subject to any such change in circumstances.

CONSIDERATION

39. It is clear that not every witness will become a Core Participant, nor will every Core Participant necessarily be a witness. It would however be a highly relevant consideration in my view that a potential Core Participant had little or no relevant evidence to give which fell within the terms of reference. The grant of Core Participant status confers no special rights in so far as whether or not that Core Participant becomes an evidence provider.
40. In relation to the consideration of whether an individual is granted Core Participant status I have a wide discretion. Furthermore, it must be appropriate to keep the grant of Core Participant status under review. Core Participant status once granted is neither permanent nor irrevocable. However, I accept that for the individual concerned there may appear to be unfairness involved in the revocation of Core Participant status when there has been no significant alteration to circumstances since it was granted.
41. Factors which could justify revocation must include (and are not limited to): the receipt of further information by the Inquiry which would demonstrate that Core Participant status was no longer justified for a particular individual because for instance they had become incapacitated from fulfilling that role; a refusal by the individual to comply with the rules and procedures set down by the Chair; the individual may demonstrate an unwillingness to assist the Inquiry in the role of a Core Participant; or other information comes to light which demonstrates that the Core Participant's continued participation is unjustified.
42. The central question it seems to me is whether a decision now to revoke the status of any of these five Core Participants could be sensibly regarded as unfair.
43. The original determinations of Core Participant status were made at different times. Two were made in December 2021 before any evidence had been

heard. Three were made in July and August 2022 when evidence had been heard from eleven witnesses all of whom gave evidence relating to the patient experience at MAH.

44. The position at the time that the letter of 27 September 2022 was sent, indicating the possibility of removing Core Participant status from these five individuals, was that a total of twenty-one witnesses had been heard or read into the record.
45. That evidence provided a solid body of information about the patient experience and has led to several potential themes and lines of inquiry for the Inquiry to further explore. The effect of this was that the consideration of whether it might become necessary to seek out and hear very historic accounts significantly outside the time period within the terms of reference could properly be reevaluated. The issue of whether or not an individual could provide relevant evidence should be distinguished from, but is relevant to the question of whether or not that individual is granted Core Participant status, or keeps that status. Should it transpire that an individual is unable to provide relevant evidence to assist the inquiry that would inevitably bear upon the consideration of Core Participant status.
46. Although in my view that change in the Inquiry's progress justified a reconsideration of the Core Participant status of the individuals concerned, I accept that in the absence of other significant change, to remove their Core Participant status now based upon the limited information available could be regarded as unfair and unjustified. Accordingly, I have decided that each of the five should remain as Core Participants at this stage.
47. It should be understood however, that this only affects these five individuals and is no indication of how applications for Core Participant status made in the future by others will be decided. Nor should it be taken as an indication that further reviews of Core Participant status will not take place should fresh considerations become relevant.
48. This decision removes the need for me to consider at this stage 'Ground Two', which relates to the specific role of each individual and the knowledge that they can provide to assist the Inquiry. It may be that, had I not come to the view I have on 'Ground One', the information that can be provided by some of these individuals would of itself be a tenuous basis to allow Core Participant status to remain.
49. I should say however, that this decision does not bear on whether or not full statements should be taken from each of the five individuals. That is a separate assessment which will have to be undertaken at the beginning of the drafting process by the statement taking team and is not affected by this decision as to Core Participant status. It will be the duty of the Inquiry, as it has to date, to

examine the nature and relevance of the evidence which can be provided by any individual prior to embarking upon the process of taking a full statement.

Tom Kark KC
15.12.2022