

MINISTERIAL ENGAGEMENT BRIEFING: JOHN SWINNEY

Copied to: First Minister and [redacted]

<p><i>Engagement Title</i></p>	<p>Meeting with Lady Poole, Chair of Scottish Covid-19 Inquiry, for her to give further explanation for her proposed termination of rights text, in order to progress and finalise her letter of appointment.</p>
<p><i>Timing</i></p>	<p>URGENT</p>
<p><i>Organisation/Venue and full address including postcode</i></p>	<p>Scottish Parliament (DFM's office)</p>
<p><i>Date and Time of Engagement</i></p>	<p>Date(s): 21 September Time(s): 10.30 – 11.15</p>
<p><i>Background/Purpose</i></p>	<p>In response to [redacted] submission of 19 August, DFM requested the meeting with Lady Poole to resolve this remaining issue, in order to progress and finalise her letter of appointment.</p> <p>Annex: A – Summary of issue and lines to take</p> <p>Annex: B – Background briefing</p> <p>Annex C – Current letter of appointment draft</p> <p>Annex D – updates and lines on other key workstreams and issues</p> <p>Annex E – timeline of events relating to letter of appointment (enclosed separately)</p>
<p><i>Official Support</i></p>	<p>Official Support:</p> <p>Names: [redacted] [redacted] (both Covid Inquiry Establishment Division)</p> <p>Lady Poole will be accompanied by [redacted]</p>

SUMMARY PAGE

Purpose of meeting:

- To clarify Lady Poole’s concerns and the need for, and purpose of, her suggested additional waiver text in the schedule of the appointment letter, as shown in red below:

“5.4 You are not entitled to any gratuity, allowance or compensation when your appointment as Chair ends (whatever the reason). **For the avoidance of doubt, this shall not be construed as a waiver of your rights in the event of termination of your appointment in circumstances other than as set out in paragraph [4.1] or [7.1] of this Schedule.**”

- Opportunity for Lady Poole to give further explanation and clarification for the termination of rights text she has asked for, in order to then progress and finalise her letter of appointment.

Lines to Take:

- Agree with Lady Poole that it is time to reach agreement on the outstanding appointment letter issue, so that we can finalise her appointment to confirm her terms and conditions, including her indemnity.
- Clarity on the purpose and intended effect in practice of the additional proposed text at paragraph 5.4 is essential in order to address this issue. No further consideration of that wording can be given without this information.
- [redacted].
- [redacted].
- [redacted].
- [redacted].
- [redacted].
- [redacted].
- [redacted].
- [redacted].
- *[If you are minded to accept the text Lady Poole wishes to see added] – if **doing so, you will want to clarify that you will follow up with a letter**, putting on record what Lady Poole has said about the explanation and how you understand it.*

Key Issues - background:

1. [redacted].
2. [redacted].
3. [redacted].
4. The [redacted] Inquiry [redacted] has suggested the additional wording would be relevant if Lady Poole were to dispute the termination of her appointment or if she felt obliged to resign. [redacted].
5. [redacted].
6. Separate to the above discussions with the [redacted] Inquiry [redacted], Lady Poole has also indicated that “termination rights” may relate to the indemnity provided to her by Ministers. Lady Poole expects an equivalent protection to that which has been given to [redacted]. However, Lady Poole’s letter of appointment already includes the same level of indemnity as that for [redacted]. The additional text may be intended to go much further than what [redacted].
7. [redacted].
8. On the point regarding Lady Poole’s wish to have equivalent protections to those given to [redacted], we have confirmed with the [redacted].
9. [redacted].
10. [redacted].
11. [redacted].

BACKGROUND BRIEFING

Rights on Termination

1. The three letter of appointment issues previously raised with Ministers (wording relating to conduct, reference to the Management Agreement between SG and the Inquiry, and confidentiality obligations) have now been resolved and agreed with Lady Poole. In each case, SG has offered concessions to Lady Poole's preferred approach in order to reach agreement. However, in this instance officials are not content to explore the same for this provision in relation to rights on termination until the further information which has been repeatedly sought is provided.
2. [redacted] briefings of 14 July 2022 and 19 August 2022 provided updates on the discussions about the one outstanding issue to be considered at the meeting with Lady Poole. In response, DFM stated:
 - [redacted]. I have made clear by desire for the letter to be finalised as quickly as possible but if we continually have to try to resolve more issues it is no wonder it takes a protracted time."
3. Lady Poole has asked for the inclusion of the red text below about rights on termination (included as part of the full appointment letter draft at Annex C):

"5.4. You are not entitled to any gratuity, allowance or compensation when your appointment as Chair ends (whatever the reason). **For the avoidance of doubt, this shall not be construed as a waiver of your rights in the event of termination of your appointment in circumstances other than as set out in paragraph [4.1] or [7.1] of this Schedule.**"
4. [redacted].
5. [redacted].
6. [redacted].
7. [redacted].
8. [redacted].

Indemnity

9. Lady Poole has separately suggested that a key concern for her in relation to her "termination rights" relates to indemnity, and that she expects an equivalent protection to that which has been given [redacted]. Paragraph 8 of Lady Poole's draft appointment letter as it currently stands (Annex A) offers the same indemnity as that provided [redacted], including [redacted] revised schedule in March 2022. It covers actions taken by [redacted] as Chair. [redacted].
10. [redacted].

11. [redacted].

Publication

12. The Inquiry intends to publish Lady Poole’s letter of appointment once agreed, which is an approach we would support as demonstrating openness and transparency. It is very likely to attract interest, regardless of whether or not this particular additional text is included, and has already been the subject of media enquiries including requests for more detail of when publication will take place. [redacted].

13. In addition, Lady Poole’s letter of appointment will also act as a precedent for appointment of future Chairs, [redacted] have been precedents for this and other recent Chair appointments.

Current Letter of Appointment Draft

An Leas-phrìomh Mhinistear agus Ath-shlànachadh
Cobhid
Deputy First Minister and Cabinet Secretary for Covid
Recovery
John Swinney MSP



Scottish Government
Riaghaltas na h-Alba
gov.scot

T: 0300 244 4000

Hon. Lady Poole
Chair, Scottish Covid-19 Inquiry

by email

Xx 2022

Appointment as Chair to the Scottish Covid-19 Inquiry

I am writing to confirm the terms of your appointment as Chair of the Scottish Covid-19 Inquiry (“the Inquiry”). The Inquiry will be held under the Inquiries Act 2005 (“the Act”) and will be an Inquiry for which the Scottish Ministers are responsible, as referred to in section 28 of the Act.

This letter and associated schedule, serves as the written instrument of your appointment as Chair to the Inquiry pursuant to section 4(1) of the Act and also confirms that the formal setting up date is to be agreed and notified separately for the purposes of section 5(1)(a) of the Act. The schedule to this letter sets out matters which have been discussed and agreed with you.

This letter confirms your appointment as Chair. Your appointment commenced on 14 December 2021. Your appointment will end when the Inquiry comes to an end, or on such an earlier date as may be determined in accordance with section 12 of the Act. You will wish to note the terms of section 12. I can reaffirm that I will not be appointing any additional members to the Inquiry Panel at this stage.

The Act sets out various statutory powers and duties which Scottish Ministers have in relation to the Inquiry. The Chair too has statutory powers and duties under the Act.

You have assured me that whilst you are Chair you will continue to uphold the obligations, qualities and standards of judicial appointments.

I should be grateful if you would confirm in writing your willingness to accept this appointment by signing and dating the attached terms of appointment. A copy of the terms is attached for your retention.

I am grateful for the commitment you have shown in agreeing to this appointment.

JOHN SWINNEY

Schedule of the Terms of Appointment of Hon. Lady Poole as Chair of the Scottish Covid-19 Inquiry

1. Status

1.1 You are appointed as Chairman (“Chair”) of the Scottish Covid-19 Inquiry (“the Inquiry”), an Inquiry to be held in accordance with and subject to the provisions of the Inquiries Act 2005 (“the Act”). In this Schedule, except where stated, “you” and related expressions refer to the holder of that role.

2. Interpretation

2.1 Where relevant, statutory terms, conditions and other requirements of appointment also apply to you.

2.2 The terms and conditions contained in this Schedule (“the terms”) are to be read in a way that is consistent with any relevant enactment. If such a reading is not possible, the terms do not apply to the extent that they are inconsistent with any such enactment.

3. Functions

3.1 Your main function as Chair of the Inquiry is to fulfil the Inquiry’s terms of reference (attached at Annex A), acting in accordance with the duties on you as Chair under the Act.

4. Duration of Appointment

4.1 You remain Chair of the Inquiry under the terms of section 12(1) of the Act, or until such earlier date as may be determined, in consequence of your resignation under section 12(2) of the Act or the termination of your appointment under section 12(3) of the Act.

4.2 You may resign from your appointment by giving written notice to the Scottish Ministers of a period of no less than 3 months.

5. Time Commitment and Remuneration

5.1 Your time commitment will vary over the course of the Inquiry, however you are expected to devote such time to the Inquiry and to your appointment as you consider necessary for the effective performance of your functions and to ensure that the Inquiry reports within a reasonable timescale. It is acknowledged that at the time of your appointment, you work on a part time basis (80% of the full time equivalent). In the event you consider that you are unable, at any time, to exercise your functions as Chair under this appointment on this part time basis, you may do so on a higher percentage of the full time equivalent, or on a full time basis. You are required to record any days undertaken in addition to your 80% full time equivalent working pattern, and provide this information to Judicial Office and Scottish Government on a quarterly basis. Adjustments will then be made so that you receive the correct level of remuneration and other benefits such as pension relevant to your appointment as Senator of the College of Justice both for 80% FTE and any additional days worked.

5.2 In relation to the performance of your functions as a Chair of the Inquiry, you will retain your current terms of appointment as a Senator of the Outer House, including in relation to rate of remuneration (and payment thereof) and pension, as this appointment is considered to comprise a temporary assignment within the functions of your appointment as a Senator.

5.3 Nothing in this appointment shall be construed as or have the effect of giving rise to a relationship of employer and employee as between the Scottish Ministers and you.

5.4 You are not entitled to any gratuity, allowance or compensation when your appointment as Chair ends (whatever the reason). **For the avoidance of doubt, this shall not be construed as a waiver of your rights in the event of termination of your appointment in circumstances other than as set out in paragraph 4.1 or 7.1 of this Schedule.**

6. Expenses

6.1 You are entitled to be reimbursed for any reasonable expenses that appear to the Scottish Ministers to be necessary for the proper discharge of your functions as Chair. Reimbursement will be in line with prevailing Scottish Government Travel and Subsistence rates, which may be amended from time to time.

7. Removal from Office

7.1 Your appointment as Chair may be terminated in accordance with section 12 of the Act, if the grounds in section 12(3) apply.

- **Liability**

8.1 Section 37 of the Inquiries Act 2005 states that no action lies against the Chair of an Inquiry in respect of any act done or omission made in the execution of the Chair's duty as such or any act done or omission made in good faith in the purported execution of the Chair's duty as such. The Scottish Ministers will meet all and any reasonable expenses incurred by you in the process of invoking immunity under section 37.

8.2 If any legal proceedings are brought against you by a third party in consequence of the execution of your duty as Chair of the Inquiry or any act done or omission made in good faith in the purported execution of your duty as such, Scottish Ministers will meet all and any reasonable expenses in relation to defending those proceedings in the event that it is determined that section 37 does not apply, and indemnify you in relation to any award made in those proceedings.

8.3 The Scottish Ministers as indemnifying party will, with prior discussion with you, and having regard to your views and keeping you informed of any significant developments, be entitled to take control of, and conduct, the litigation in your name.

Confidentiality

9.1 In the course of performing your functions or in consequence of your appointment, you will use reasonable endeavours to exercise due care in the use of information to which you have access, adhere to applicable data protection and

GDPR legislation; and protect information that you receive in confidence from unauthorised disclosure.

9.2 When your appointment ends (for whatever reason) you will continue to owe a duty of confidentiality to Scottish Ministers on the basis of their appointment of you as Chair in relation to any confidential information to which you had access during your appointment and you will continue to be subject to any other duty of confidence arising as a matter of fact or law in the course of your appointment.

9.3 If the Scottish Ministers are satisfied that you disclosed information, without authority (statutory or otherwise), that you received in the course of performing your functions or in consequence of your appointment, or used it for personal gain or advancement, this may constitute grounds for termination of your appointment as Chair in terms of section 12(3)(d) of the Act.

10. Impartiality

10.1 Under section 9(3) of the Act, you must notify the Scottish Ministers if, whether before the setting-up date or during the course of the Inquiry, you become aware that you have a direct interest in the matters to which the Inquiry relates, or a close association with an interested party. Your declaration email of 4 December 2021 has been recorded as part of this requirement.

10.2 Under section 9(4) of the Act, you must not, during the course of the Inquiry, undertake any activity that could reasonably be regarded as affecting your suitability to serve as Chair.

Signed: [xxxx]
A Member of the Scottish Government

Signed: Hon. Lady Poole
Chair of the Scottish Covid-19 Inquiry

UPDATE ON KEY WORKSTREAMS AND ISSUES

Management Agreement between SG and the Inquiry

The Management Agreement was formally agreed on 5 September. A copy for information was sent to Ministers on 12 September.

Inquiry's Long-Term Accommodation Business Case

DFM and FM approved a business case prepared by the Scottish Covid-19 Inquiry team, on 7 September, to support their proposal to lease office and hearings accommodation at Waverley Gate, 2-4 Waterloo Place, Edinburgh.

[redacted].

A great deal of work by the Inquiry team and the Scottish Government, including Finance Business Partners, iTECS, Security & Business Continuity and Property Division and Property Controls, has gone into bringing the business case to its conclusion.

Section 40 Determination

Ministers received advice on 12 September, to which FM responded on 13 September and DFM's response is awaited at time of drafting this briefing.

It is proposed that Ministers' section 40 determination will maintain hourly rates and expenses, and award travel and subsistence rates, as well as compensation for loss of time, in line with other current inquiries in Scotland. Ministers have also been invited to decide whether to implement a means-testing waiver for bereaved families in respect of awards for legal representation. Officials will then finalise the section 40 determination, which we expect to submit to Ministers soon.

Officials have kept the Inquiry team updated on the progress of the section 40 determination.

Staffing (recruitment and appointment of Inquiry Secretary role on permanent basis)

The grading for the appointment of the (permanent) Secretary role was agreed on 2 September at Director level, following the Inquiry's submission of a revised job description for a second grading review on 17 August.

A grading of Director level is the outcome the Inquiry had wanted and we are now working with the Inquiry to support their preferred recruitment approach.

[redacted]