

Warning Letter Protocol

Purpose of the Protocol

1. The purpose of this Protocol is to:
 - A) Set out what is covered by this Protocol;
 - B) Explain the legal rules which are relevant to the issuing of warning letters to individuals or organisations;
 - C) Set out the approach which the Inquiry intends to take to criticisms and the issuing warning letters and why;
 - D) Set out the Inquiry's intentions with regard to significant criticisms of Mr Eljamel and others; and
 - E) Provide relevant contact details.
2. As with all of the work of the Inquiry, this Protocol and the procedures and policies set out in it should be read in the context of the Inquiry's [Statement on Protocols and Principles](#). In particular, the Chair may deem it appropriate to change or update the contents of this Protocol in accordance with the provisions of that Statement.
3. Further, this Protocol and the procedures and policies set out in it should be read in the context of the Inquiry's:
 - (a) [General Restriction Order](#);
 - (b) [First Order](#);
 - (c) [Protocol on Approach to Evidence and Written Statements](#);

- (d) [Protocol on Disclosure, Publication, Restriction and Anonymity](#); and
- (e) [Public Hearings Protocol](#).

A) What is covered by this Protocol

Criticisms

4. In the conduct of the work of the Inquiry, the Chair is under an obligation to act with fairness, consideration of which requires to be undertaken alongside the need to avoid unnecessary cost.¹ One of the important aspects of the Inquiry's obligation to act with fairness is how criticisms, explicit or inferred, actual or potential, which emerge during the course of the Inquiry's investigations, are handled. Though the process of the Inquiry is inquisitorial and not adversarial, the Chair still requires to incorporate fairness into the Inquiry's search for the truth.
5. It is thus an important part of the Inquiry's function that criticisms which are made in or can be inferred from the evidence heard by the Inquiry are properly and fairly considered and assessed. In making findings in any Inquiry report, the Chair will require to take account of any criticisms which arise in or can be inferred from the evidence of the Inquiry. He will have to make decisions about whether those criticisms are well-founded and whether they should be accepted or rejected in his findings, to the extent that he considers it necessary to do so in the discharge of his [Terms of Reference](#).
6. Those Terms of Reference make clear that:
 - (a) The Inquiry is empowered to make findings about matters falling within its Terms of Reference, including (where appropriate) the identification of things which fell below a reasonable standard². This means that the Chair's starting point for judging whether

¹ 2005 Act, section 17(3)

² Explanatory Notes to the Terms of Reference paragraph (c)

criticisms should be made will be to consider the question of whether action or inaction fell below a reasonable standard; and

- (b) When the Inquiry has made such a determination, the Inquiry is empowered to determine who or what organisations were responsible.³ This means that the Chair will consider criticising individuals or organisations when he is satisfied that action or inaction fell below that standard.

Fairness in dealing with criticisms

7. Equally, those who are criticised or about whom criticism could be inferred deserve to be treated fairly, including being offered a reasonable opportunity to answer those criticisms (as is mandated in relation to criticisms contained in warning letters under rule 12(7)(b) of the Inquiries (Scotland) Rules 2007 ("the 2007 Rules")). Rules 12 – 14 of the 2007 Rules set out the procedures which are to be part of how this is to be achieved. They involve the sending of letters, called warning letters, though there are other mechanisms available to the Inquiry to achieve the fairness which the statutory regime and the rules of natural justice demand. This Protocol explains how the Inquiry intends to comply with the requirements in Rules 12 – 14 of the 2007 Rules.
8. "Person" for these purposes means legal person and thus encompasses both individuals and organisations (including, for example, health boards, government departments or directorates or other bodies, such as those listed in Term of Reference 6).⁴ It is not limited to core participants, nor to those who have given oral or written evidence to the Inquiry at the point where the Inquiry comes to consider whether a warning letter should or must be sent, or some other process should be adopted to provide an opportunity to a person to respond to an actual or possible criticism, in the interests of fairness.
9. In circumstances where a criticism which may give rise to a warning letter being served is directed against an organisation, the Inquiry will take a view as to the identity of the

³ Explanatory Notes to the Terms of Reference paragraph (c)

⁴ Interpretation Act 1978, section 5 and schedule 1

party or parties on whom or on which any warning letter should be served to best achieve fairness and meet the requirements of the 2007 Rules. In doing so, the Inquiry will seek guidance from the organisation and/ or its representatives, subject to the obligations of confidentiality which are imposed by the 2007 Rules in this regard. In such circumstances, the Inquiry will often direct any such warning letter to a senior representative of the organisation in question. That senior representative will be asked to return the warning letter to the Inquiry, in the event that he or she considers that the letter should more appropriately be directed to another party or parties within or on behalf of the organisation, as opposed to the recipient simply redirecting the letter, which would potentially breach the obligation of confidence owed to the Chair of the Inquiry by the recipient of such a letter by such a recipient under Rule 13(1)(b).

10. It is inevitable that in the course of the Inquiry's proceedings criticisms will be made of individuals or organisations, whether in applicant statements provided to the Independent Clinical Review (which also become evidence in the Inquiry), in witness statements provided to the Inquiry in response to a rule 8 or section 21 notice or in oral evidence, where witnesses are called upon to provide evidence to the Inquiry by these means. In addition, criticisms may appear in documents otherwise provided to the Inquiry in its investigations, or otherwise. Furthermore, the Chair may, in his report or reports, make findings and/or reach conclusions in relation to a number of such criticisms and his proposed findings or conclusions may involve him making explicit and/or significant criticism of individuals and organisations. The purpose of the warning letter procedure in the Inquiry Rules is to ensure fairness to those who may be criticised. These provisions exist alongside section 17(3) of the Inquiries Act 2005 which provides, amongst other things, that in making any decision as to the procedure or conduct of an Inquiry, the Chair must act with fairness.

B) The relevant provisions of the 2007 Rules

11. Rule 12(1) of the 2007 Rules provides that:

- (a) The Chair may send a warning letter to any person he considers may be, or who has been, subject to criticism in the inquiry proceedings (Rule 12(1)(a));
- (b) The Chair may send a warning letter to any person about whom criticism may be inferred from evidence that has been given during the inquiry proceedings (Rule 12(1)(b)); and
- (c) The Chair may send a warning letter to any person who may be subject to criticism in the report, or any interim report (Rule 12(1)(c)).

12. The Chair must not include any explicit or significant criticism of a person in his report, or in any interim report, unless he has sent that person a warning letter and the person has been given a reasonable opportunity to respond to the warning letter (Rule 12(7)(b)).

13. The effect of Rule 12 is that the Chair has the power to, but does not have to, send a warning letter to a person who is or may be the subject of criticism; but that the Chair cannot include any explicit or significant criticism of a person in an interim or final report unless a warning letter has been sent and the recipient has been given a reasonable opportunity to respond to the warning letter.

14. Rule 13 provides that, subject to certain exceptions, the contents of a warning letter are to be treated as subject to an obligation of confidence owed by the Inquiry team to the recipient of the warning letter and owed by the recipient to the Chair. The obligation of confidence means that the Inquiry team may not disclose the contents of the warning letter to other witnesses, core participants or publicly; similarly, the recipient of the warning letter may not disclose the contents of the letter, save to the recipient's recognised legal representative or as otherwise permitted by the Chair of the Inquiry.⁵ The implications of the obligations of confidence owed under rule 13 are considered more fully below.

⁵ In term of rule 7 of the 2007 Rules, such term should be deemed to include any qualified lawyer appointed by a person to assist their recognised legal representative in the discharge of their function

15. In the case of a warning letter sent under Rule 12(1)(b) (to a person about whom criticism may be inferred from evidence that has been given during inquiry proceedings) the warning letter must refer to the evidence from which the criticism could be inferred (Rule 12(4)(b)).

C) The Inquiry's approach to handling criticisms and the issuing of warning letters

Criticisms which arise from the evidence in the Inquiry

16. Not all proposed criticisms trigger the requirement to send a warning letter under Rule 12. Only those proposed criticisms which are explicit or significant require a warning letter to be sent to a criticised person. Whether a criticism meets this threshold is a matter of judgement for the Chair.⁶

17. Further, under rule 12(7), it is only in circumstances where a criticism may be made of a person in an Inquiry report that it is mandated that a warning letter be sent. Otherwise, the Chair has a discretionary power under rule 12(1) to send a warning letter or not. The result of this is that not all criticisms which arise from Inquiry evidence must or will be directed to a criticised party in a warning letter.

Duties of confidence

18. It is important to emphasise that, by virtue of Rule 13 of the Inquiry Rules, the fact of a warning letter having been sent and its contents (including any extract from any draft report) are subject to an obligation of confidence owed by each member of the Inquiry team (including to the Chair) to the recipient of the letter, and owed by the recipient and their recognised legal representative (if any) to the Chair. This obligation is owed in addition to any other obligations owed to the Inquiry, for example by way of a confidentiality undertaking. These obligations mean that the Inquiry team

⁶ Rule 12(7)

(including the Chair) cannot, subject to the process set out below, disclose the fact of a warning letter having been sent or its contents to anyone beyond the Inquiry. It also means that, subject to the process set out below, any recipient of a warning letter cannot disclose the fact of it having been sent or its contents to any other person, other than their recognised legal representative (who cannot generally disclose it any further) or as otherwise permitted by the Chair.

19. The above obligations of confidence which are derived from the 2007 Rules can be waived, either by the recipient of a warning letter in writing in respect of obligations owed by the Inquiry team (including the Chair) or by the Chair of the Inquiry in writing in respect of obligations owed by the recipient and their recognised legal representative. Recipients wishing to disclose the fact of a warning letter having been sent and/ or its contents to any person other than their recognised legal representative should submit a written application to the Chair, which sets out:

- (a) the name of any individual(s) they are requesting a waiver in respect of;
- (b) details of their role and/or relationship with the recipient; and
- (c) an explanation as to why it is considered necessary that each individual has sight of the warning letter.

The recipient or their recognised legal representative must not make any such disclosure unless and until the Chair has granted written permission to do so.

20. If the Chair permits such disclosure, he may attach conditions and, in particular, may require the person to whom disclosure is authorised to give a written confidentiality undertaking before the disclosure is made, if such an undertaking has not already been provided by that person. In the event that the Chair is satisfied that such disclosure is likely to be necessary to other named individuals routinely, he may grant a waiver which is applicable to future warning letters to avoid the need for multiple applications.

21. Equally, if it becomes necessary for the Inquiry team or the Chair to seek to disclose the fact of a warning letter having been sent and/ or its contents to anyone beyond the Inquiry team, the Chair of the Inquiry will seek the written permission of the recipient to enable them to do so.
22. The obligations of confidence owed by the Chair and the Inquiry team to the recipients of warning letters arising under the 2007 Rules end when an Inquiry report containing findings relating to matters to which the warning letter related is signed.⁷ Thus Inquiry reports can contain details of the fact of warning letters having been sent, their contents or the contents of any response, as by the time the report is published the obligation of confidence will have come to an end on its signature by the Chair. These matters and their contents could not routinely be disclosed or published to others (including for their comments on them) before that time. The obligations of confidentiality arising from the 2007 Rules and owed to the Chair by recipients, their recognised legal representatives and by all those to whom disclosure of the contents of warning letters has been permitted, end when an Inquiry report containing findings on matters to which the warning letter related is published.⁸
23. In any event, the contents of a warning letter are subject to any restriction on the disclosure of evidence, documents or information pursuant to Sections 19 (restriction orders made by the Chair) or 23 (risk of damage to the economy) of the Act or resulting from a determination of public interest immunity.

Form of warning letters

24. Where a warning letter is sent under Rule 12(1) or 12(7), it must:
- (a) state what the criticism or proposed criticism is;
 - (b) contain a statement of the facts that the Chair considers may substantiate it;
 - (c) refer to any evidence which supports those facts;

⁷ Rule 13(3)

⁸ Rule 13(4)

- (d) invite the person to make a written statement if the person wishes; and
- (e) note that the information is subject to confidentiality restrictions (see rule 12(2)).

25. It is often the case that the fairest and quickest way of complying with the requirements of Rule 12(7) is to provide, with the warning letter, the relevant extract from the draft report. However, it is for the Chair to determine whether to do so, or whether to send copies of any evidence referred to in the warning letter which the Chair considers supports the facts which substantiate the criticism(s).⁹ He will do so if he considers it appropriate to do so, in the interests of fairness.

26. All warning letters issued by the Inquiry will specify a date by which a response should be received and the Inquiry expects that recipients will respond by that date. Any response should be in the form of a written statement.¹⁰ The time limit for responding may vary and may depend on the nature and extent of the proposed criticism and on the extent to which the criticism is one which has already been the subject of a warning letter, has been the subject of a previous rule 8 request or section 21 notice issued by the Inquiry, or has been explored during the course of the Inquiry's hearings (see below). In the absence of a response by the date specified it will be assumed that the recipient does not intend to respond.

27. Extension of the time for response will only be granted by the Chair on cause shown. Any application for extension should be made in writing and as soon as possible to the Solicitor to the Inquiry.

28. All responses to warning letters will be provided to and considered by the Chair before finalising his report(s). Though each such response will be considered in this regard on its own merits, the Inquiry team will generally not enter into correspondence concerning the terms of, or amendments to, any criticism or proposed criticism in any report(s).

⁹ Rule 12(2)(b) and (c) rule 12(3)

¹⁰ Rule 12(2)(d); see the template for written statements appended to the Inquiry's [Protocol on Approach to Evidence and Written Statements](#)

The effect of the warning letter procedure on the completion of the Inquiry

29. The Chair of the Inquiry is aware that concerns have been expressed that some public inquiries have been too slow in producing their reports and that this delay has been caused, or contributed to, by the time taken for inquiries to handle the warning letter procedure. Concerns have also been expressed that potential criticisms have been discussed in private correspondence rather than being explored in an individual's oral evidence. The Chair and the Inquiry team are aware of, and understand, these concerns. These are of particular importance in an inquiry such as the Eljamel Inquiry, where the Terms of Reference and interested parties rightly require and expect the Inquiry to get to the stage of producing its findings and recommendations as soon as reasonably practicable. Thus, the Inquiry needs to adopt an approach which complies with the duty to be fair, the provisions of the 2007 Rules and the Chair's stated commitment to balance speed and reasonable thoroughness in the Inquiry's processes.

30. The Inquiry's approach to this matter is to focus on the need for fairness. Thus, the Inquiry will seek to ensure that significant criticisms of relevant individuals and organisations are aired, as far as practicable, in the course of the Inquiry's investigations and/ or the Inquiry's oral hearings in the interests of fairness, transparency and avoiding unnecessary delay.¹¹ This may be achieved in a number of different ways. Examples are:

(a) drawing criticism(s) to the attention of an individual or organisation and requesting (under Rule 8 of the 2007 Rules) the provision of a written statement and/or relevant documents in response. The Chair is likely consider issuing such a rule 8 request in circumstances where a criticism has arisen in the evidence (or may be inferred from it), and which the Chair considers would constitute an explicit or significant criticism

¹¹ The proposed processes relating to criticisms arising from written statements available to the Inquiry are set out in paras 43 *et seq* of the Inquiry's [Protocol on Approach to Evidence and Written Statements](#) and para 43 of its [Protocol on Disclosure, Publication, Restriction and Anonymity](#)

were it to be included in his report (or any interim report). In such circumstances, the rule 8 request would be in the normal form. It would ask the recipient to repeat the questions posed in the rule 8 response. In the normal course, the response to such a rule 8 request would be disclosed to Core participants published, subject to any restrictions imposed on publishing it or parts of it, in accordance with the practices and Protocols of the Inquiry;

- (b) sending warning letters under Rule 12(1) to the individual or organisation during the course of the Inquiry's investigation or prior to the conclusion of the Inquiry's hearings. In such circumstances, neither the warning letter nor the response could be disclosed or published during the course of the Inquiry's proceedings in accordance with the obligations of confidentiality associated with the warning letter procedure, which are imposed by law and are addressed above;
- (c) seeking to ensure that significant criticisms are explored, to the extent considered necessary and proportionate, during the Inquiry's oral hearings, including (as part of that process) intimating in advance of Inquiry hearings the broad topics which it is intended be covered with individual witnesses in the evidence proposals sent to them in accordance with the Inquiry's existing procedures¹²; and/ or
- (d) where criticisms or relevant documents come to light after a witness has given oral evidence, by recalling that witness (where proportionate to do so) in order that they might be asked questions about the issue or sending them an additional request for a written statement on matters or materials which have arisen.

31. This is not intended to be a complete list. There may be other ways during the course of the Inquiry's proceedings in which a criticised person or organisation can be given a fair opportunity to respond to that criticism.

32. Given the breadth of the Inquiry's Terms of Reference, the large number of individuals and organisations who may be subject to some form of criticism during the course of the Inquiry, and the fact that the criticisms made of different individuals or organisations are likely to vary considerably in their nature and seriousness, the

¹² See the Inquiry's [Protocol on Public Hearings](#), paras 25 et seq

Inquiry considers that there is no single approach to warning letters and the reasonable ventilation and investigation of criticisms which emerge during the course of the Inquiry in public. Judgements will have to be made by the Inquiry on a case by case basis as to the best way of ensuring fairness whilst avoiding unnecessary delay.¹³

33. Provisions relating to how the Inquiry intends to intimate material containing or relating to significant criticisms to an individual or organisation to whom such a criticism is directed which would not otherwise be so intimated in light of the Inquiry's rules and procedures on restriction can be found in the Inquiry's General Restriction Order at paras 19 *et seq.*

Approach to warning letters

34. The Chair must send a warning letter to a person where he envisages including any explicit or significant criticism of that person in the report (rule 12(7) of the 2007 Rules). He must also give that person the opportunity to respond in a written statement, if the person wishes to do so (rule 12(2)(d) of the 2007 Rules). Thus, where the Chair proposes to make explicit or significant criticism of a person in a report, a warning letter under Rule 12 will be sent to the person concerned at that stage, inviting the person concerned to provide a further written statement on the criticism or criticisms, if they wish to do so.

35. However, given the iterative approach to the ventilation of criticisms or proposed criticisms set out above, the Inquiry anticipates that this mandatory process need not cause significant delay, because, as set out above, most, if not all, significant criticisms should have been aired or raised with the person concerned already by that stage. As a result, the Inquiry anticipates that it will not be necessary either for detailed evidence to be referred to the person concerned at that stage (which ought to have been disclosed to the party already) or for a lengthy period of time to be allowed for the proposed criticism(s) to be addressed, given that the person concerned will

¹³ See the provisions at para 48 of the Inquiry's [Protocol on Approach to Evidence and Written Statements](#) to the possibility of names of criticised persons being redacted from disclosed or published materials

already have had the opportunity to comment on the criticism and the basis for it. The Chair's interpretation of what would be a reasonable opportunity to respond to the contents of a warning letter issued under rule 12(7) will be influenced by the previous opportunities which the Inquiry may have afforded to the recipient to make their position on the criticism clear to the Inquiry.

36. In many instances, therefore, it will be open to the recipient to refer to a previous written statement as a means of expressing their position on the proposed criticism, as opposed to submitting an additional written statement. It is considered unlikely that any new or different evidence will emerge at that stage. If, however, it does but is evidence which was available previously to a person subject to the potential criticism who now seeks to rely upon it, and it could have been relied on earlier, then it may be rejected by the Chair on the basis that for this reason it lacks credibility. If not rejected as lacking in credibility or cogency, then in the light of the Inquiry's commitment to transparency and openness, consideration will be given to whether the witness should be recalled or whether core participants should be invited to make further submissions on the evidence then relied upon.

Service and representation connected with warning letters

37. Intended recipients of a warning letter will be asked to provide a designated address for the warning letter to be sent to, if they have not already provided one to the Inquiry. The provisions of rule 3 of the 2007 Rules apply to the service of a warning letter and any response thereto. A warning letter is validly served if sent by e-mail to the designated email address provided by the recipient of the warning letter to the Secretary to the Inquiry or, where no e-mail address has been provided by the recipient, by first class recorded delivery post to the designated postal address provided to the Secretary to the Inquiry. In cases where no such email address or postal address has been provided, a reasonable opportunity having been afforded to the recipient to do so, service of a warning letter will be deemed to have been effective by any means deemed by the Chair to have been reasonable and fair in all of the circumstances.

38. Warning letters may, alternatively, be sent to an intended recipient's recognised legal representative if the intended recipient requests that the Inquiry does so. The involvement of a legal representative should be notified without delay to the Solicitor to the Inquiry, by email at legal@eljamelinquiry.scot.
39. Where the recipient of a warning letter wishes to apply for funding for legal representation in connection with the warning letter, they should notify the Solicitor to the Inquiry without delay. The process to be followed in seeking funding for such legal representation is set out in the Inquiry's [Legal Funding Protocol](#). The Solicitor to the Inquiry will be able to provide such guidance as is necessary.

D) Criticisms of Mr Eljamel and others

40. It is inevitable that criticism will be made during the proceedings of the Inquiry of Mr Eljamel himself. As has been ventilated at the Inquiry's public hearings, the Inquiry will continue to endeavour to make contact with Mr Eljamel so that evidence about his position on significant matters (including significant criticisms of him) can be sought by way of rule 8 request, section 21 notice and/ or warning letter under rule 12.
41. In addition, the Inquiry is aware of others who may face criticism during the course of the Inquiry who, due to the passage of time, have moved away (in some cases abroad). Similar reasonable attempts will be made by the Inquiry to seek the evidence of these individuals, in the interests of thoroughness.
42. Where criticism or proposed criticism concerns a person who is deceased, the Inquiry will take reasonable steps to contact that person's next of kin in order to give them an opportunity to make representations on behalf of that person.¹⁴
43. As is noted above, when it comes to warning letters issued under rule 12(7), the Chair requires to afford a reasonable opportunity to those who receive them (or on whom

¹⁴ See also the inquiry's intended approach in such case as set out at para 47 of its [Protocol on Approach to Evidence and Written statements](#)

they are deemed to have been served) to respond to their contents. What is considered to be a reasonable opportunity will depend on the circumstances of each warning letter and the recipient of it, and will take account of previous attempts to elicit evidence or a response from the individual concerned and the Chair's powers of compulsion under section 21 of the 2005 Act (and its limitations), and will also be influenced by the Chair's obligation to take account of considerations of economy under section 17(3) of the 2005 Act.

E) Contact information

44. All queries about any matter covered in this Protocol or the Inquiry's approach to warning letters more generally should be sent to the Solicitor to the Inquiry, as follows:

- (1) By email to: legal@eljamelinquiry.scot; or
- (2) By post to:

Eljamel Inquiry Legal team
LG2 Floor
Waverley Gate
2-4 Waterloo Place
Edinburgh
EH1 1AA

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