



SELECT COMMITTEE ON THE INQUIRIES ACT 2005 Written and corrected oral evidence

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WEDNESDAY 23 OCTOBER 2013

10.45 am

Witnesses: Julie Bailey and Christopher Jefferies

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Lord Trefgarne
Lord Trimble
Lord Woolf

Q152 The Chairman: Good morning, Ms Bailey and Mr Jefferies. A warm welcome to you to our meeting. We are very grateful that you are able to come and talk to us. I have one or two preliminary things to say and one is this: the session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. This session is also being televised. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as you can. If after the session you wish to clarify or amplify any points made during your evidence or any additional points that you want to make, you are welcome to submit supplementary evidence.

I realise that the inquiries with which you have been concerned have both been dealing with very difficult times in your lives and we hope that any questions will not trespass on matters that you find distressing. What we are concerned about is the inquiry, how it works and how you found it. That is hopefully what we will be asking questions about. I wonder if you could announce yourself just so that your names are on the public record and then we will move on to the first question.

Julie Bailey: I am Julie Bailey, founder of Cure the NHS, a campaign group established in 2007 following the death of my mother after I witnessed eight weeks of appalling care at Mid Staffs Foundation Trust Hospital. There was utter neglect going on in those wards. Patients were drinking

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out of flower vases, they were that desperate for fluids. When I came out of the hospital I thought that I would just have to tell people and something would be done about it. Instead, a small group of mostly elderly people had to stand out in the wind, snow and rain for nearly two years following Ministers round to try and get the public inquiry. If this Committee can do anything to stop that ever happening again just to find the truth I would appreciate that.

Christopher Jefferies: I am Christopher Jefferies. I appeared on two occasions before Lord Justice Leveson at the Leveson inquiry in connection with the libel action that I took against a number of newspapers arising out of their reporting of my arrest on suspicion of the murder of Joanna Yeates.

Q153 The Chairman: Thank you very much for those introductory comments. The first question to both of you is: do you think that the holding of public inquiries into matters of public concern is helpful to get to the truth of what happened? Do you think the inquiry in which you were involved got to the truth of what happened?

Julie Bailey: Very much so. That is why we campaigned for nearly two years. What we wanted was for evidence to be given on oath and for that evidence to be given in public. Until then we felt that lessons would never be learnt in the NHS because we would never know what was going on. I believe that the Mid Staffs public inquiry has exposed what has gone wrong in the NHS and the culture and the denial, so I believe it has answered the questions and exposed what we were looking for. I think there should be a right for people to be able to have a public inquiry, particularly when there are such large disasters, and there should be a formula that people can access to get the public inquiry, to get those answers.

Christopher Jefferies: Yes, I found the whole process of appearing before the Leveson inquiry extremely helpful. I thought the inquiry was one of the most valuable that there has been, certainly from my perspective. I think that it did a very great deal to highlight the culture within the press that we have had in this country recently. It also did a very great deal to highlight the relationships that have been allowed to develop between the press and politicians and between the press and members of the police. It did that in a way that just focusing on individual examples of malpractice would not have been able to do, and it certainly gave me an opportunity to bring to public attention what I think has been a particularly striking example of that kind of malpractice.

Q154 Lord Soley: In terms of the process of the inquiry—for both of you—do you think that it is well suited in a way that enabled you to put your own views forward and also to question others? I am thinking of the whole process of the inquiry. Were you feeling able to put your own views forward and to question others where appropriate?

Julie Bailey: We had an opportunity to write a full statement before we gave evidence to the inquiry. What we were not able to do was challenge views of the others. That was something I felt at times should have been allowed. I appreciate that time was of the essence, as this was an inquiry that had been delayed many years, and we needed to expose what was going on in the NHS. But I felt at times that some of the witnesses were reading from a hymn sheet, so to speak, and it would have been appropriate at times to have been able to challenge certain aspects of the evidence.

Lord Soley: Can I summarise your answer and tell me if I have it right? You are saying that you felt it was good for putting forward your own views but not so good at enabling you to question the views of others.

Julie Bailey: That is right, yes. We did not have that opportunity.

Lord Soley: Can I ask you the same question, Mr Jefferies?

Christopher Jefferies: Yes. Certainly as far as putting forward my own views are concerned, I had ample opportunity to do that and there was nothing that I would have wanted to say that I did not have the opportunity to say. As far as questioning others or challenging the views of others, I am not sure that that was particularly relevant in my case. I do not think it would have been

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particularly helpful if I, for example, had had the opportunity to question journalists who had reported on my arrest. In any case, that was done probably more effectively by Robert Jay when those journalists themselves appeared.

Q155 Baroness Gould of Potternewton: Thank you for coming. Do you think that people are sometimes frightened to come forward to give evidence, particularly if you feel that it is an adversarial system that you are facing? That is the first question. Secondly, what sort of support were you given, if any, and was it of any value to you? Do you think that more needs to be done? Do you think there are any changes that need to be made to the system that would help the process you went through to be much easier for you to handle?

Julie Bailey: I think the first point was about restricting people not wanting to give evidence because it was going to be in public and adversarial. We had an opportunity at the public inquiry to give our evidence behind a screen or in private and some witnesses chose that option. They were given that option. The second point was regarding support for witnesses. We felt very supported. I felt we had a very good team at the public inquiry and I think we felt supported when we gave evidence, but we need to bear in mind there was a group of us at the public inquiry every day, so that helped. How people felt who just gave evidence I do not know, but we had a separate room and were given all the help we needed. What I did find uncomfortable at times was having to share the same rooms with other witnesses who I felt were responsible for some of the harm. So I felt uncomfortable at times and that may be an issue with other witnesses.

Baroness Gould of Potternewton: Two things come out of your reply. First, how would you have felt if you had not been part of a team—if you had been there on your own having to do that? Secondly, should we recommend that we are very clear about the two sets of witnesses not being in the same room?

Julie Bailey: I think that is an issue about the two sets of witnesses sharing the same room and the same areas. I cannot recommend anything else about support because we were offered counselling if we needed it, and some witnesses did take up that offer. But I did feel quite unnerved some days by some witnesses being there around us after they had failed so badly.

Q156 Baroness Hamwee: Could you spell out the support that you said was helpful so we can understand what it was? Also, we have heard previously from witnesses that counsel to the inquiry sometimes meets witnesses before the public session, to put them at their ease basically. Did either of you have that experience and, if so, was that was useful?

Julie Bailey: We most certainly did. Before the inquiry started we were taken through the room and shown where everybody would be sitting, then we were given a range of questions of what we were likely to face and who would be asking the questions. At mealtimes we were escorted into a room and given support during meal breaks and that sort of thing.

Baroness Hamwee: That was coming from the secretariat to the inquiry.

Julie Bailey: That is correct, yes. We were shown where the toilets were and all that—the necessities. So I think we did feel supported. The same with giving our written evidence, somebody sat with us throughout and went through it quite meticulously.

Q157 Lord King of Bridgwater: Was the person who did the written evidence a lawyer?

Julie Bailey: Yes.

Lord King of Bridgwater: He was legally qualified.

Julie Bailey: Yes.

Lord King of Bridgwater: It was not just a member of the secretariat? It was somebody with proper qualification?

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Julie Bailey: I am sorry, I am not sure to be honest. They were junior.

Lord King of Bridgwater: They were capable anyway.

Julie Bailey: Yes.

Christopher Jefferies: Shall I respond too?

The Chairman: It might be helpful if you would respond. I know Lord Morris wants to come in but perhaps you ought to respond to the initial question.

Christopher Jefferies: Certainly as far as having any qualms about appearing was concerned, I can only speak for myself, although I think there is anecdotal evidence of some people being reluctant to appear at the Leveson inquiry for the reasons that you suggest. But from my own point of view, I knew that I had nothing to hide. I was not guilty of anything so it did not seem to me there were any conceivable grounds on which I should not appear. In terms of support, I suppose it depends what sort of support you have in mind. I had more than adequate legal support. I do not think I needed any kind of emotional support, if that was also in your mind. I have forgotten Baroness Hamwee's point, I am afraid.

Baroness Hamwee: It was about talking to counsel to the inquiry before giving evidence.

Christopher Jefferies: On both occasions that I appeared I had an opportunity to meet with Robert Jay before the session began, although not a great deal of time was spent talking about those areas of my witness statement that he intended to focus on, but it enabled a certain personal rapport to develop, shall we say.

Q158 Lord Morris of Aberavon: Unhappily, we read of cases week after week of mismanagement of the care of the elderly. The cry goes out for a public inquiry. Ms Bailey, you attached importance to a public inquiry. Fortunately both of you were professionally qualified and therefore able to look after yourself in the demand that you made. But there are hundreds of people who have relatives in care homes who do not have the strength or skills that you might have. Is it a public inquiry that you would prefer in all cases or would you be content with a trusted formula for eliciting the truth?

Julie Bailey: We wanted a public inquiry. We had already had the Healthcare Commission report and that had explored what had gone on at the hospital. The night of the Healthcare Commission report, I went home to hundreds of e-mails from all over the country telling me that there was neglect and abuse going on all over the NHS. From that day on we started our campaign for a public inquiry. We had already had the Healthcare Commission report, which was the independent one, but we wanted the regulatory bodies investigated and explored, because we wanted to know why it had been going on for so long and, if it had been going on there, where else it was happening. We also wanted to stop it happening. I think there are times when a smaller inquiry is needed but the Healthcare Commission, it was leaked, has estimated that 400 to 1,200 people may have lost their lives unnecessarily. That needed exploring and there was no system in place to allow that to happen.

Q159 The Chairman: You have only been here 15 or 20 minutes but my view is that you both have presence. There is a sense in which there will be plenty of people who do not have the presence that you have. Do you believe that has been the problem to them in turning up at a public inquiry and giving evidence?

Julie Bailey: Not necessarily so, no. I never had presence. I have had to have presence. I have had to be damn determined to get the public inquiry and expose the failings that I did, so it has not been easy. I did not find it hard to go and give evidence because it was something that I wanted to tell.

The Chairman: You lived the experience.

Julie Bailey: Yes.

Christopher Jefferies: Yes, I would very much concur with what Ms Bailey has just said. Certainly I did not come across anybody who gave evidence to the Leveson inquiry who did not feel that they were extremely well supported throughout that experience. As a result I am sure that they were able to give an effective account of what had happened to them in a way that, without that support, might have been very much more difficult.

Lord Soley: You are both saying that you were well supported, and that sounds very positive. That support you are referring to, it was about information, advice about how to handle things; it was not about emotional support, is that right? Essentially you felt plenty of information was available and you knew what was going to happen, when it was going to happen, and how it was going to happen, is that right?

Christopher Jefferies: That is exactly right, yes.

Q160 Lord Trimble: When an inquiry is being set up the Minister will consult, as a matter of practice, with the person conducting the inquiry as to what the terms of reference should be. It has been suggested to us that that exercise should be expanded into a scoping exercise on the issue, to assess what the public concerns are, what type of evidence is needed, how long it is likely to take and to gather and receive the evidence and all the rest of it. In other words, they would want to try to work out all the parameters of the inquiry at an early stage as a matter of efficiency. But it is also something that could be argued that the persons who are interested in the inquiry, such as members of the public, victims, families and so on, should have an opportunity of feeding in to the scoping exercise. Would you have a view on that at all?

Christopher Jefferies: Yes, I obviously have no experience of exactly what discussions did take place on establishing the scope of the Leveson inquiry. As I have already indicated, it was extremely valuable that it extended to relationships between the press and politicians and the press and police. From my own point of view, there is one other area that might profitably have been aired and that is the question of press ownership—after all, people have been rather concerned about that ever since the establishment of the first royal commission on the press immediately following the Second World War. It is something that has still not been resolved.

Q161 Lord Morris of Aberavon: You may or may not be able to give me any assistance on this question but is it right that under the Act the Minister, as well as the chairman, has a right to restrict public access to the inquiry? You may or may not wish to comment.

Julie Bailey: I think once the chairman has taken over the public inquiry it should be his decision and his decision only. Ministers may have a conflict of interest. I think it should be the chairman's decision once he has taken responsibility of the public inquiry.

Christopher Jefferies: I entirely agree with that and also, given the nature of the Leveson inquiry, it would have been entirely improper for there to be any restriction in terms of members of the public being able to hear what was going on. I think it was extremely valuable that so much of it, in fact all of it, should have been readily available—it was televised to members of the public—particularly given the sometimes rather partial way in which the press themselves reported on proceedings.

Q162 Lord Richard: Before we leave this section of the questioning on the inquiry process, can we go back to something that Ms Bailey said right at the outset? She said she thought there should be a right for people to get a public inquiry. How far would you extend that right? Anybody who feels aggrieved?

Julie Bailey: I have because it is one of the things that I was disappointed about. One of the things that I felt was missing from the public inquiry was a chance at the beginning to all get together and look at lines of inquiry that we needed to look at. We did have an opportunity to send in a list of

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witnesses that we thought we would like to give evidence but one thing that I felt was missing from the very start of the terms of reference of the Mid Staffs public inquiry was whistleblowing and an analysis of that, and I have been proved right.

Julie Bailey: No, not at all.

Lord Richard: Or an issue? Would you define it in that way?

Julie Bailey: No, not at all.

Lord Richard: How?

Julie Bailey: There should be some formula that says that if there is such a disaster these are the criteria that you can use for a public inquiry. If you can imagine, we gave up two years of our lives to follow Ministers all around the country. That is not easy to do and people do not do it normally. But we were determined because we had lost in such a way we wanted other people not to suffer. That is not right. We should not have had to do that. There was no way we were going to get a public inquiry unless there was a change of Government and that is the only reason we got the public inquiry. We could have followed the Labour Government all over the country for 20 years, we would not have got the public inquiry because it was not in their interests to give it to us.

Lord Richard: I am interested in the formula. Can you help us on the formula that you think might work in terms of having a right to get a public inquiry?

Julie Bailey: One is if there are enough people shouting for a public inquiry. We had lots of bodies out there. It was in the public interest to have a public inquiry because the NHS is ours and people were going in and still being harmed, and that is not right. There should be some set formula. How that is worked out I do not know.

Lord Soley: A quick one if I could on that, because you seem to be saying also that the regulatory body had failed, so that is almost one of your triggers, is it not?

Julie Bailey: It could be.

Baroness Hamwee: Just again to dig down into this, the Inquiries Act gives us the criteria “where it appears that particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred.” That seems to be close to what you are saying. The problem in your mind is that it is when all that appears to a Minister and it is who takes the decision, is that right?

Julie Bailey: That is correct, yes.

Q163 Lord Woolf: Ms Bailey—I think this goes into quite an important matter—are you saying that you would like there to be some body, independent of Government, to which the question can be put, “We think that this should be the subject of an inquiry. Please consider it as an impartial person and give your decision”?

Julie Bailey: Very much so, yes. At the moment, it is left to the Minister and the Cabinet Office. We would never have got the Mid Staffs public inquiry.

Christopher Jefferies: The only two points that I would like to add to what has already been said are, first of all, that in the case of the Leveson inquiry it was very clear that the only body in existence that might have been considered to be capable of exercising a restraining influence on the press, the Press Complaints Commission, was not entirely able to do so. The other point I think I would make is that if a public inquiry is refused for any reason, then it is absolutely essential that cogent reasons are given for that refusal. It must not simply be: we are not prepared for a public inquiry to take place no matter who is responsible for instituting that public inquiry.

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Q164 Lord Trefgarne: Much of what I was going to ask I think has already been touched on, but I am concerned about the issue of your representation at the inquiry. You had lawyers to represent you but you did not, I think, have counsel to represent you, is that right?

Julie Bailey: Yes.

Christopher Jefferies: Yes.

Lord Trefgarne: So there was no possibility for those who had given evidence to be cross-examined on your behalf by your counsel at all?

Julie Bailey: No, that is right. It was felt that the public inquiry had been delayed for so long that we wanted to learn lessons and learn lessons quickly. We wanted to know what was happening. If we had had that opportunity, I feel we could have delayed the inquiry a lot longer.

Lord Trefgarne: The people who gave evidence to the inquiry were no doubt endeavouring to justify what had happened. Would it not have been a good thing to have been able to cross-examine them?

Julie Bailey: Very much so and it was very frustrating not being able to. Perhaps there could have been a set limit of how long that could have been an option, but I think we all felt that we wanted to get the public inquiry and what was going on in the NHS out as quickly as possible—what was going on with those regulators. We needed to know as soon as possible. Although it was frustrating, we felt—

Lord Trefgarne: If I understand you right, you are saying that in a perfect world it would have been good if you could have been supported by counsel but the timing and the convenience really did not allow that.

Julie Bailey: No, that is right. We had ample opportunity, though, to prepare questions for each witness, so that was a way of gleaning information that we wanted.

Lord Trefgarne: Were all those questions put?

Julie Bailey: No.

Christopher Jefferies: Just to add to that, at the Leveson inquiry, of course, core participants had the benefit of representation by counsel, namely David Sherborne.

Lord Trefgarne: Yes, and he would have put questions on your behalf to the witnesses.

Christopher Jefferies: Exactly.

Lord Trefgarne: To your satisfaction?

Christopher Jefferies: Entirely.

Q165 Lord Morris of Aberavon: Were you satisfied that the questions that you wanted to be put were put and, as regards those that were not, did it cause you any difficulty?

Julie Bailey: In balance, I think we did get most of the questions that we wanted. There were occasions where we would like to have pushed a little bit more and got more evidence out of the witness. There was always at the back of your mind that you wanted this inquiry to finish quickly to get on with fixing the NHS.

Lord Morris of Aberavon: You have no sense of grievance that your case was not fully exposed?

Julie Bailey: Apart from the whistleblowing, that was one area where I felt we were lacking.

Q166 Lord King of Bridgwater: I am sorry if I do not have it quite clear, but Lord Trefgarne asked you if you had counsel to put the questions. As I understand it, and Mr Jefferies made this point, at the Leveson inquiry, Sir Robert Jay came and gave evidence to us that he talked to the various lawyers representing people and they put forward questions that they wanted asked. In

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fact, the counsel was really acting for all sides in that way to try to seek the truth. Can I just be quite clear? That was true in your inquiry, too, that your lawyers or you together with your lawyers put questions to the counsel suggesting he should ask those questions.

Julie Bailey: Yes.

Lord King of Bridgwater: He looked at them; some he thought worth asking and some he did not.

Julie Bailey: That is correct.

Q167 Lord Woolf: Ms Bailey, and I am sure this applies to Mr Jefferies, the position is that this is not a court procedure. Do you think the fact is that we are all conditioned by seeing court scenes on television where everybody has their own counsel and their own counsel puts forward arguments? The way the counsel to an inquiry is meant to work is to save the chairman from having to ask all the questions. If he asks all the questions, then it will look as though he may have prejudices. If you put it in the hands of somebody independent of him but acting for him as counsel to the inquiry, the counsel should have the task of deciding what the best questions to ask are, relying on information he got from you or whoever else wanted to give him that information. In general terms, do you think that worked well?

Julie Bailey: I do. I thought it worked really well and the counsel ensured the smooth running of the inquiry and was always there with the relevant information and legislation to give to the chair.

Lord Woolf: Yes. What do you think, Mr Jefferies?

Christopher Jefferies: Yes, I entirely agree. It seemed to me that Robert Jay's function was twofold in my experience. The first part was to highlight aspects of the evidence that I had given that he felt particularly significant and then, secondly, to invite me to enlarge on any aspects that he thought might be valuable or of public interest. Certainly, I was, for example, at his invitation able to highlight the fact that a letter that I wrote to the Press Complaints Commission had until that time gone unanswered.

The Chairman: Lord Richard, do you want to deal with your questions?

Q168 Lord Richard: This is in the same sort of area as the ones you have just been answering. Looking at the inquiries in each of your cases, do you think you had the opportunity to say everything you wanted to say?

Julie Bailey: I believe so. I was able to give written evidence. As a group, we were able to give an opening statement and then I gave evidence in public and was asked questions around my witness statement. Then at the end of the inquiry I was able to give a closing statement and our recommendations for a safer NHS. I felt we were given ample opportunity.

Lord Richard: You took the opportunity and you came out of it feeling you had had your say.

Julie Bailey: Very much so.

Lord Richard: Good, thank you. Mr Jefferies?

Christopher Jefferies: Yes, I would entirely concur with that. As I said, I did appear on two occasions so there were both written submissions and then oral evidence on both occasions. At the end of each session, Robert Jay was extremely careful to ask whether there was anything that he had not covered that I wanted to say more about.

Lord Richard: I will just ask one follow-on question to that. Do you think there was anything the inquiry could have done to make things easier for you to get your views across?

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Christopher Jefferies: Certainly not in my case, and I would like to say just how extraordinarily gracious I thought Lord Justice Leveson was to those appearing before the inquiry to ensure that they felt as much at ease as was at all possible.

Julie Bailey: I would agree. I do not think there was anything that we were not able to say. We had an opportunity after we had given evidence to come back if we wanted to. No, not at all.

Lord Richard: You, in effect, represented yourselves, did you not?

Julie Bailey: That is correct.

Lord Richard: Yes. As far as you were concerned, Mr Jefferies, did you think you needed separate representation?

Christopher Jefferies: Well, I certainly would not have been able to appear with anything like the confidence that I hope I did have had I not had available the benefit of legal advice in preparing for the inquiry and, indeed, at the time that I was giving evidence to the inquiry.

Lord Richard: I suppose it was put to you at some stage or you knew at any rate you could represent yourself, attempt it on your own, if you wanted to.

Christopher Jefferies: Yes, I think I would have had considerable reservations about doing that.

Julie Bailey: Sorry, I should just say we did have legal representation. I misunderstood what you were saying.

Lord Richard: I am sorry.

Julie Bailey: We had barristers and a legal team and without them we would never have been able to get at the truth. We would never have been able to prepare ourselves. The NHS is such a complex body, with the legislation, the Acts, we just would not have been able to manage without a legal team. I believe our legal team were a great asset to the public inquiry.

Q169 Lord King of Bridgwater: The background to the issue about what sort of inquiries to have is the very deep scar left by what is called the Saville inquiry, which was the Bloody Sunday inquiry, where everybody had counsel, where it lasted years and years and years, as you know, and cost nearly £200 million. Lord Woolf made the point as to why simplifying with one counsel to assist the chairman would be also a cost-effective way to do it. Were you at any stage under the impression that we have to get on because it is costing too much money; we cannot keep asking all these questions; it is all dragging on too long? Did the feeling that there was a cost background to it appear at all in your inquiries?

Julie Bailey: In my case it did because it was in my local newspaper every night that I went home how much the public inquiry was costing us. There was a big culture of denial within the town of Stafford and that followed through to the press as well. We were mindful of that but we were also mindful that while we were sitting in that inquiry room the NHS was still harming patients and that was an urge that we needed to—

Lord King of Bridgwater: Was it in the inquiry itself? Did you feel that they were conscious of cost pressure or not in the inquiry?

Julie Bailey: No, not at all, no.

Q170 Lord Morris of Aberavon: Were you able to choose your legal representation and who paid for it?

Julie Bailey: With us that was one of the things. We are a small group and we knew nothing about public inquiries. I just went off and read that that was what we wanted. We had advice from Bill Cash, our MP at the time from Stone, about the different inquiries. We had no idea that we could have legal representation and that was an area of confusion, really, because we had to wait to find

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out if we were going to get legal representation. It would be a good idea if we could all meet at the beginning of an inquiry where we decided terms of reference and how much funding there was going to be. Although it did not happen, what we felt was that all the other bodies that were coming to the inquiry knew that they were going to have legal representation because they were well experienced. We are talking about public bodies. We felt that we were going to be left behind and there would not be any legal team left to represent us. That did not happen.

Lord Morris of Aberavon: But you got it at public expense in the end.

Julie Bailey: We did, yes, we did.

Q171 The Chairman: How did the penny drop for that in terms of how that actually happened? There must have been an occasion when you thought, “Good, we have our lawyers. Good, that is wonderful”. How did that happen?

Julie Bailey: Well, we had to write to the inquiry team. We had to write to Robert Francis and ask permission for us to have legal funding for legal representation, and then we had to wait for them to reply as to what funding we would get. It was a delay that we could have done without and it was work that we could have done without.

Lord Trefgarne: How long did it take them to make up their mind?

Julie Bailey: I am not sure of the time.

Lord Trefgarne: Weeks, months?

Julie Bailey: It was weeks. Weeks, yes.

Q172 Lord Morris of Aberavon: Were you able to choose your own? Was it allocated to you or did you go to them?

Julie Bailey: No, we had an opportunity to choose and we were fortunate that we had used the barrister, our lead barrister, for the non-statutory inquiry so we had had experience of him. It is a tall task to expect the public to be able to choose who they think is going to be able to represent them. It is only because we had had experience of the non-statutory inquiry.

Christopher Jefferies: If I could just go back briefly to the previous question and say that certainly as far as my experience was concerned there was none of the pressure that you suggest. Indeed, my experience was that the inquiry was conducted extremely efficiently and expeditiously and I hope will be thought to have been extremely cost-effective.

Lord Morris of Aberavon: Did you have legal representation?

Christopher Jefferies: Oh, yes.

Lord Morris of Aberavon: Paid for?

Christopher Jefferies: Yes.

Lord Richard: But not on your own? Not just you?

Christopher Jefferies: No, the legal representation was common to the core participants.

The Chairman: Right. I wonder if we might move on to Baroness Buscombe’s question. I think she has a couple of questions where Mr Jefferies can sit out, as these are to Ms Bailey.

Q173 Baroness Buscombe: Thank you, Lord Chairman. First of all, I should declare an interest having given written and oral evidence to the Leveson inquiry. As our Chairman has said, my questions are really for you, Ms Bailey. One of the things that we are looking at in inquiring into the Inquiries Act is why, how, what if there is an inquiry that is not statutory versus having an inquiry that has been set up according to the Inquiries Act 2005? We are seeking to learn lessons about why in certain circumstances there is a non-statutory inquiry and in other circumstances Ministers

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agree to a statutory inquiry. Let me take you, first of all, to the question of whether you could talk us through the circumstances around the setting up of the first non-statutory inquiry into Mid Staffordshire NHS Foundation Trust. What was your involvement in that inquiry and were you happy with the terms of reference? Were you satisfied with the way the inquiry was run?

Julie Bailey: The first question is I did not want the non-statutory inquiry. We had followed Ministers all over the country, by the time we got the non-statutory inquiry, asking for a public inquiry. As I said, I went home the night of the Healthcare Commission report to hundreds of e-mails. I knew this was a national problem. It was not confined to Mid Staffs and it certainly was not an isolated case, which was what the Labour Government were trying to tell us it was. The non-statutory inquiry was decided by Andy Burnham. What he said he wanted to do was to look at the hospital. What we continually told him was that the Healthcare Commission report was an adequate report into what had gone on at the hospital. We now needed to look at the regulatory bodies, and that is exactly what the Mid Staffs public inquiry did. What I learnt from evidence from the Mid Staffs public inquiry was why we were given the non-statutory inquiry. We had tried a judicial review. We tried to judicially review the Secretary of State to give us the public inquiry. What the non-statutory inquiry did by giving it to us was that it stopped our judicial review. That is why we were given the non-statutory inquiry. There was absolutely no need to look at the Mid Staffs hospital again. We had already had the Healthcare Commission report. We had had George Alberti's. We had had David Colin-Thomé's. The non-statutory inquiry looked again at the hospital.

Baroness Buscombe: It was a system of narrow inquiries. Someone obviously has billed them as something called independent, but quite a lot of the evidence was kept secret.

Julie Bailey: Yes. Well, we do not know who provided the evidence. It was all given in secret. We did not decide on the terms of reference until it was given over to Robert Francis. The non-statutory inquiry report, as you will see, refers to witness A, witness B. We have no idea who gave that evidence. We know that something like 3% of the staff gave evidence.

Baroness Buscombe: Do you think that first set of narrow, if I can call them that, inquiries was a waste of time and public money, perhaps?

Julie Bailey: I do. I really do, yes, although, to be fair to Robert Francis, it exposed all the failings within the hospital. What the Government told us at the time—Andy Burnham was the Secretary of State at the time—was it would be an opportunity for families to give their story. Well, we did not need to give our story. We wanted to stop this going on all over the country.

Baroness Buscombe: Of course, also am I right in saying Robert Francis QC proposed and recommended that there be a public inquiry and that that was finally acceded to by the next Secretary of State, Andrew Lansley, when the Conservatives came into government? Do you know the reason why there was that change in approach and why he decided there should be a public inquiry?

Julie Bailey: While the Conservatives were in opposition, they—

Baroness Buscombe: By the way, I should call it, sorry, a statutory inquiry.

Julie Bailey: Yes. While the Conservatives were in opposition, they already promised us a public inquiry if they came to power and they had put that in writing. They wanted to know themselves what was going on in the NHS, I believe, so when they did get into government they knew exactly what was going on within the NHS. I believe that is what the Mid Staffs public inquiry has done.

Q174 The Chairman: I wonder if I might just interrupt for a moment because I am not clear about this. Am I right in thinking that we are talking about three inquiries? In the first, we are talking about the Healthcare Commission doing a piece of work, then Robert Francis coming not under the Act, and then him coming under the Act. Am I right about that?

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Julie Bailey: Yes, that is correct. We had the Healthcare Commission report, which reported on the hospital failings. That was March 2009. Then we started our campaign for a public inquiry.

Baroness Buscombe: Then you got a non-statutory.

Julie Bailey: Eighteen months later we were given the non-statutory inquiry into the hospital again when what we needed was a public inquiry into the regulatory bodies where they were compelled to give evidence and it was given in public.

Q175 Lord Trefgarne: By the time you were pressing for the first time, to which he eventually agreed the non-statutory inquiry, there was already a judicial review process going on.

Julie Bailey: That is correct.

Lord Trefgarne: To review the decision not to hold a public inquiry.

Julie Bailey: That is correct.

Lord Trefgarne: Which you had initiated.

Julie Bailey: That is correct, but what the non-statutory inquiry did was it stopped our judicial review.

Lord Trefgarne: You say that that is why he agreed to it.

Julie Bailey: Yes, I believe so. Why did we need another look into the hospital? We needed the regulatory bodies looking into. That is what we needed.

Lord Trefgarne: You would say that Mr Burnham frustrated the process towards a public inquiry.

Julie Bailey: Very much so.

Q176 Lord Morris of Aberavon: What was your attitude to the Healthcare Commission inquiry, the first inquiry?

Julie Bailey: What did it add?

Lord Morris of Aberavon: What did you think of the report of the Healthcare Commission, which preceded the public inquiries?

Julie Bailey: That was all we needed to examine the hospital. I think all the non-statutory inquiry did was add to that, but it was more of the suffering of what our loved ones had to go through. That is what the non-statutory inquiry did. It really had an impact outside the public, but we did not need to tell our story again. We knew what had happened and we told the Healthcare Commission. What we needed to do was to stop it going on throughout the country. The Keogh reviews, which have come out this year, were evidence. As for those hospitals that were reviewed in the last year, those e-mails came through to me in 2009 when the Healthcare Commission report came out. That is why we were determined that we had to have a public inquiry, because people were suffering. It was no good examining the hospital again. It had already been examined. It needed to move forward, but that is precisely what Andy Burnham was telling us—that the hospital needed to move forward; we did not need the public inquiry. But by giving us the non-statutory inquiry into the hospital, it was holding the hospital back.

Q177 Baroness Buscombe: This is very important, I think, and thank you for being so clear about it. For you, a public inquiry was necessary not just, if I can put it that way, to ensure that the truth was exposed but so that change could then take place to the system, that your actions could then help to change a large public body rather than, in a narrower sense, just elicit the truth about what had gone on in a specific hospital. You wanted to help make change.

Julie Bailey: Very much so.

Baroness Buscombe: You saw a public inquiry as the route to that change.

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Julie Bailey: Very much so. It was the regulatory bodies that had failed.

Baroness Buscombe: You felt that the inquiry set up under the Inquiries Act, under statute, helped you with that process.

Julie Bailey: Very much so.

Q178 Lord Morris of Aberavon: You say the regulatory body had failed and that is the Healthcare Commission, as I understand it. Is that so? No? Could I go back and see if I can simplify it? You had a report from the Healthcare Commission. Was there enough evidence there for someone to act to ensure it did not happen again? If somebody had acted, there would not have been any need for any public inquiries.

Julie Bailey: No, that is incorrect.

Lord Morris of Aberavon: That is what I want to know.

Julie Bailey: What the Healthcare Commission did was look into the hospital. What we needed to know was why it had been allowed to carry on so long with all of the regulatory bodies within the NHS. There are something like 30 who were going into that hospital and saying everything was fine. They were not looking in the right places. What we needed to examine was, if it was going on at Stafford, where else was it going on and why had it been allowed to go on for so long? Why were these regulatory bodies thinking they were doing a good job when, in fact, they were not because they had not spotted failings of such a disaster as it was at Mid Staffs?

Q179 The Chairman: I do not know whether you have a view on this, but when we have this Act that has the power to summon persons and papers and take evidence and all this stuff, do you have a view on whether Ministers should be able to continue to set up inquiries that do not have those sorts of powers?

Julie Bailey: I believe there are going to be instances where the smaller inquiries—the Healthcare Commission’s inquiry was a smaller inquiry—do what they need to. But I think there is a conflict of interest just allowing a Minister to be able to make that decision, as Mid Staffs has proved.

The Chairman: Yes, thank you. Do you have a view on that?

Christopher Jefferies: Well, I am not sure that I have any very strong view. I think the only point I would reiterate is that if a Minister is responsible for deciding whether or not an inquiry should be set up, then it is absolutely imperative that adequate reasons are given should an inquiry be refused.

The Chairman: Okay. I wonder if we can move on.

Q180 Lord Woolf: Yes. Taking your last answer about adequate reasons, did you understand or was this something you were not aware of that if inadequate reasons are given by the Minister, then that is the sort of matter that can be tested in the courts, assuming you have the ability to do so financially, on judicial review?

Christopher Jefferies: Absolutely. Absolutely right, yes.

Lord Woolf: I think, if I am right in following that, Ms Bailey, you also understood that there was this ability to use judicial review and, indeed, you and your group took proceedings for judicial review and that did the trick, so to speak.

Julie Bailey: Not at all, no. It stopped. By giving us the non-statutory inquiry, it stopped our judicial review for a public inquiry.

Lord Woolf: Yes, but what I am suggesting to you is that if you had not brought the judicial review proceedings you would not have got the inquiry you did.

Julie Bailey: The non-statutory inquiry?

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Lord Woolf: Yes.

Julie Bailey: But we did not need the non-statutory inquiry. That is what I am saying. It was a waste of public money. We should have gone straight for the public inquiry, to the statutory inquiry.

Lord Trimble: Your issue is not just the question of whether it is a statutory or non-statutory inquiry; your issue is really about scope because the independent non-statutory inquiry was just dealing with the hospital itself, whereas what you wanted was something that was dealing with the NHS generally.

Lord Woolf: Yes, but that would not have stopped—forgive me just for one moment—your ability to go on with your judicial review, but it may have meant that the prospects of a judicial review succeeding would be greatly reduced.

Julie Bailey: That is exactly what happened and the barrister advised us not to continue.

Lord Woolf: The barrister advised you not to continue so you took what you had, but you would have wanted more. This is a problem because you had to rely on your own resources.

Julie Bailey: Well, it is not just rely on our own resources. We knew people were dying throughout the NHS. It was not just Mid Staffs. We continually told the Labour Government. We followed Ministers all over the country. We stood outside in their constituencies throughout the winter.

Lord Woolf: Yes, but that goes back to a different matter that I raised with you very early on in your evidence, which is whether the decision should be taken by Ministers, and you already expressed your views. You did not think that Ministers should be the people who decide.

Julie Bailey: No.

Lord Woolf: Have I now—

Julie Bailey: You have, yes, because it is a conflict of interest.

Lord Woolf: Yes.

Q181 Lord King of Bridgwater: Just a quick final point. Lord Woolf said you may go to judicial review as one of the ways to put pressure on a Minister. There is Parliament. You referred to the fact that you went to Bill Cash, who was your MP, and then you said that you were given a pledge while in opposition from a possible Conservative Government that they would agree to a public inquiry. That presumably came through going to your MP and him putting pressure on, if he could not get it through the Government, through the opposition side. Is that correct?

Julie Bailey: That is correct. We lobbied everybody. We stood outside constituency offices. We were not going away. We were determined we were going to get the public inquiry.

Lord King of Bridgwater: You put pressure on Ministers, quite rightly, for—

Julie Bailey: But I believe it was only because of a change of Government. We were just lucky that the timing was right.

Lord King of Bridgwater: Yes, but I am not seeking to get into that point. I am seeking to get into the point about whether Ministers should take this decision and, if they do take the decision—and it might be a decision that is open to question as to whether it is the right decision—how is pressure put on them? The implication, with great respect to Lord Woolf, is that it is only a court of law that can solve that problem. My contention is there is a thing called Parliament and parliamentary representation that might play their part, and they did in your case.

Julie Bailey: Well, we were lucky in the fact that Bill Cash was supportive.

Lord King of Bridgwater: That is it, absolutely.

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Julie Bailey: If it had been a different MP we may not have got that support.

Q182 Baroness Buscombe: Just to be cynical for a moment, going back to the question of judicial review, would I be right in saying that the difficulty with judicial review was that it was probably seen by a Minister as a useful way of stifling an open inquiry or a public inquiry? If you say to somebody, “Right, we will give a small non-statutory inquiry” the Minister will know in saying that that he is probably killing off a rather uncomfortable judicial review.

Julie Bailey: Very much so. I read every piece of evidence that went through the public inquiry and that is what I read.

Baroness Buscombe: That is really the weakness of judicial review in that it only survives if it has a clear run. As soon as a Minister has an opportunity to offer something outwith the Inquiries Act, any form of non-statutory inquiry, that will then diminish the chance of a judicial review succeeding.

Julie Bailey: That is correct.

Lord Trefgarne: It is the other way around, or should be.

Julie Bailey: How many of the public would go for a judicial review?

Lord Trefgarne: That is the point, yes.

Julie Bailey: It is only because we were determined that we had to stop others suffering.

Lord Trefgarne: In other cases of which I am aware, it is the parliamentary procedures and the informal inquiry procedures that have to stop if there is a judicial review going on because the issue is then sub judice. Why did that not happen in your case?

Julie Bailey: We were advised to withdraw our judicial review and go ahead with the non-statutory inquiry because we would have never got it through. That was the advice that the Department of Health gave—

Lord Trefgarne: Do you think the judicial review process would have failed?

Julie Bailey: Yes. Well, that is what we were told. By giving us the non-statutory inquiry, our judicial review would have failed.

Lord Trefgarne: Do you mean that the judges conducting the judicial review are easily persuaded by such things?

Baroness Buscombe: No, that was the advice they were given.

The Chairman: I think we can now move to Lord Morris’ questions.

Q183 Lord Morris of Aberavon: First of all, may I thank you for the very valuable and particularly articulate way you both have expressed yourselves? I am concerned also about hundreds of my former constituents who would not be as articulate as you or would not have persevered. We are grateful to you. From your experience—you have lived through all this, both of you—is there anything you would like to see changed in the organisation and procedure of the inquiries as you saw it from the ones that you went into? Were you feeling better after the end of the inquiry?

Julie Bailey: I certainly felt better at the end of the inquiry, but the one thing I would like, as I have mentioned, is a meeting where we could be involved in the terms of reference. We had fought for that public inquiry for years and to not be included in the terms of reference I felt was a gap. I think the whistleblowing should have been included. Another area is the recommendations. I do not know if you are going to come on to that.

The Chairman: Yes, we are.

Lord Morris of Aberavon: That is the next question.

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Julie Bailey: Well, this is about being involved in the setting up of an inquiry.

Q184 Lord King of Bridgwater: What about the recommendations?

Julie Bailey: Well, at the moment we had an inquiry 10 years ago that cost the public purse a fortune that was near identical to the Mid Staffs public inquiry recommendations. Nothing happened. That is 10 years ago. People say that, if the Bristol Royal Infirmary inquiry recommendations had been implemented, Mid Staffs would never have happened and our loved ones certainly would not have lost their lives the way they did. What we need is a system in place to ensure that if the public are granted a public inquiry then we get those recommendations.

Lord Soley: To follow through you mean? You would want a situation where the inquiry reported but then maybe looked at it six months or a year down the line to see whether the recommendations had been put into effect. Is that what you are saying?

Julie Bailey: That is correct. I think Robert Francis in his recommendations did say he would like to revisit some of the bodies to see what recommendations they had implemented. There is nothing in statute that says that public inquiry recommendations do not have to be implemented and that is a huge gap. When I sit here today and think 10 years ago we had a similar inquiry and those recommendations were not put in place—

Lord Morris of Aberavon: Putting words into your mouth, I suspect that what you are suggesting is there should be a parliamentary procedure in order to look at an inquiry, maybe spanning back a year or so, to find out exactly what has happened. Perhaps you might have the opportunity then of making suggestions to that committee that is looking at the post hoc situation.

Julie Bailey: Well, as well as that, I think there should be something in statute that says that certain recommendations have to be implemented if there is an agreement on those recommendations. 6 February was a disappointing day for us at the public inquiry because we were shocked at the 290 recommendations. We would have liked to have seen a few that could be put into place. What I believe very often is we have this huge amount of recommendations so it can get kicked into the long grass. If the chair was advised at the start that out of this public inquiry we want, say, 20 recommendations that we intend to implement, it would be a lot fairer. I am here today. We have been on tenterhooks waiting for these recommendations. It is not over for us yet. It may even be just the beginning because now we have to start campaigning—we hope not—for the recommendations to be implemented. That would be even worse if we had campaigned for a public inquiry and then the recommendations were not adhered to.

The Chairman: I do not know whether Mr Jefferies has anything to add, and then Lord Soley.

Christopher Jefferies: Yes, I think I would agree with a great deal of what has just been said. As far as my experience of the inquiry and its outcome are concerned in terms of the report of Lord Justice Leveson, I am very happy indeed. I agree with the point about the possible value of wider consultation over the terms of reference of the inquiry. I think the only thing that I would add so far as the outcome is concerned is that it has been rather unfortunate that we have had such a tortuous procedure to get to where we have with the, I hope, imminent sealing of the cross-party charter at the end of this month.

Q185 Lord Soley: It is a very difficult area, this, because the suggestion Ms Bailey is making is that there ought to be a legal enforcement of the recommendations, but we heard from Sir Brian Leveson that the last thing he wanted was to be involved in carrying forward any recommendation. In a sense, I suspect it has to be a parliamentary thing and Parliament has to decide what is going to be carried forward, whether it is on the health service or on Leveson. If you have a situation where there is a legal requirement, then in all cases, including the Leveson one, they would just have to act on it. Although some people might say that is a very good thing, other people most notably would say it is not a good thing. I wonder if you would agree that maybe this is where Parliament

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ought to be looking—indeed, as it perhaps has in Leveson—very, very carefully on how the recommendations are put into effect or whether or not they are put into effect. Certainly, Sir Brian Leveson did not want a follow-up approach as you would want with Mid Staffs, and I can see why. I think there is a very real difference, but you can see where there is, if you like, a political dilemma. Maybe it is a challenge to Parliament that we ought to find a way of dealing with that.

Christopher Jefferies: Yes, I think I would very much agree with the direction in which your argument is taking you. Again, the only thing I would add is that it was rather unfortunate in that having, in effect, set up both before and during the inquiry his own tests as to whether or not the recommendations would be acceptable—namely, that the Leveson recommendations had to be acceptable to victims as well as the press and politicians, and that they would be implemented unless they were bonkers—there was a considerable stepping back from what everybody had taken to be that commitment once the report of the inquiry was published.

Q186 Baroness Buscombe: I am very taken with Ms Bailey’s point about there being so many recommendations and that perhaps fewer would make it much more achievable in terms of putting some of those recommendations into action. Of course, a public inquiry is not just for the various bodies involved but also for the public. Is there a problem, for example, whereby—and using the Leveson published report as an example—it is so long that you cannot even carry it? One person cannot carry this Leveson report and I suspect very, very few people have actually read it end to end. Is that something that we should be thinking about as well? It is far easier to ignore when it is so long and so detailed.

Lord Richard: It proved so in the case of Leveson.

Christopher Jefferies: Could I just very briefly interject there?

Baroness Buscombe: Please do.

Christopher Jefferies: There is a very handily produced summary of the core recommendations of the inquiry, which was published at the same time as the full report. That is certainly in terms of length or density not an impediment to comprehension or being grasped by anybody who is interested in the subject.

Julie Bailey: I would like to add that Robert Francis had a task. He examined the whole of the NHS and that was a difficult task because it had never been examined in that way before. The size of the volume is what it needed to be. He examined something like 30 regulatory bodies. What I feel is that the recommendations were far too many. I think we needed to hone it down to those that are achievable and that we need to do. We could have those that we need to do immediately and those we need to work on.

Lord King of Bridgwater: One of the reasons for that is that Ministers then are able to say, “We have already implemented 60% of the recommendations”. What nobody actually knows is: are they the ones that matter or the ones that do not?

Julie Bailey: I think the public have had that. We have finished. We cannot be conned any longer.

Lord King of Bridgwater: No, that is right.

Q187 Baroness Gould of Potternewton: I appreciate that having a whole range of recommendations is not necessarily the best way of handling it, but what worries me, again picking up the point that has just been made, is that you may end up by not satisfying the audience that you are trying to satisfy, which is the public, because there will be so many issues that they will be concerned about. I am really worried about the concept that one might tighten up to such a degree that you make it then easy for the recommendations to be carried out and other things that should have been happening are not happening because the recommendations have been tightened up. I think it is something of a dilemma to go down that road.

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Julie Bailey: I can understand that, but the point I am coming from is that 10 years ago there was an inquiry very similar to the Mid Staffs public inquiry and those recommendations were not implemented and the public have suffered since.

Baroness Gould of Potternewton: Yes, but I think that is a slightly different issue. It goes back to the point that there should be monitoring of the recommendations, whether it is by a parliamentary body or some other body, rather than saying the way to solve it is to reduce the number of recommendations.

Julie Bailey: I understand.

The Chairman: I think we are ready for our concluding points. Is there anything left for you, Baroness Hamwee? It may be that we are finished, I do not know.

Q188 Baroness Hamwee: Well, what I am taking from this is that there is also an issue about the presentation of recommendations. Contradict me if I am wrong about that. No, nobody is shaking their heads. Can I come back to an overall question? Leaving aside areas that you have covered so far, is there anything else that can be done to improve public confidence?

Julie Bailey: Public confidence is the recommendations, because what everybody said to me from 2009 is that you never get the recommendations—it takes that long to get the public inquiry through that by the time the recommendations come out the public has forgotten them anyway. It is ensuring that the public inquiry has an effect and those recommendations that come out of it are implemented. The other thing is that the public really do not know what a public inquiry is. I think we need to be educated of the benefits of a public inquiry as opposed to a non-statutory inquiry.

Christopher Jefferies: Yes, I entirely agree. Implementation of the recommendations is key. I think the only other thing that I would add is, of course, there is one matter that Lord Justice Leveson was not able to consider because it was sub judice and that is the phone hacking question. I would like to emphasise the importance in due course of part 2 of the inquiry taking place.

Q189 Baroness Buscombe: I was simply going to say, of course, we have been blessed with having two witnesses who have the support of in one case Hacked Off and in Ms Bailey's case Cure the NHS. If the question were put to a witness who did not have the benefit of working as a team in a group with support, would the hope of the recommendations being implemented be ever weaker?

Christopher Jefferies: Well, I am certainly not here as a representative of Hacked Off and my involvement with Hacked Off was post appearing at the Leveson inquiry rather than in preparing for the Leveson inquiry, so I do not think that point is relevant when one is considering whether or not one feels equipped to appear before an inquiry.

Baroness Buscombe: No, forgive me, Mr Jefferies, I was meaning in terms of a group of you helping to see the recommendations through.

Christopher Jefferies: Oh, I see, yes.

Julie Bailey: I think it would be very difficult for an individual. What we found from the Bristol inquiry is that they were very much individuals and there was not that group to try to push them through. Whether we do or not we will have to wait and see.

The Chairman: Well, I think that we have had a very good morning. We thank you very much indeed for coming along and sharing your experiences with us. It has been very valuable to the Committee. Thank you very much indeed for coming.

Julie Bailey: Thank you.

Christopher Jefferies: Thank you.

Lord Justice Beatson – Written evidence

I Introduction

1. The Select Committee on the Inquiries Act 2005 (“the 2005 Act”) invited me to submit evidence to it in the light of my work almost a decade ago on the use of serving judges to chair or conduct public inquiries. The Committee has my 2004 Lionel Cohen Lecture, “Should Judges Conduct Public Inquiries?” and the article in the *Law Quarterly Review* based on it.¹
2. I have prepared this paper to bring my earlier analysis up to date, drawing on examples from the most recent inquiries as evidence for some of the points I make. I consider the use of judges and retired judges in inquiries conducted under the 2005 Act, and in non-statutory inquiries and reviews. For ease of reference, I have listed these in the table appended to this document.
3. In 2004 I asked whether judges should be less used for inquiries with what can be, or can be seen to be, a heavy policy or political element, as opposed to those concerned with particular incidents and other disasters. I did not consider inquests conducted by judges because they are part of the judicial process. I recognised that inquiries into the administration of justice, although they may often contain a significant policy element, can legitimately be seen as different because of the particular technical legal expertise a suitable judge would bring to the inquiry.
4. My answer to the question I posed was that serving judges should only be used for inquiries with a heavy policy or political element where a matter is of vital public importance, and where there is really no alternative. I considered that there is a particular need for caution where an inquiry is to focus on alleged failures of government or the political system. I recommended that there should be scrutiny of the government’s assessment of whether these tests are satisfied. This updating material is primarily concerned with inquiries which have such a policy or political element, including but not necessarily limited to inquiries which investigate government policy or issues over which there are party political differences.
5. Developments in the last nine years have not led me to reconsider the overall thrust of my analysis of the risks to the perception of the independence of the individual judge or the judiciary as an institution which may be run when serving judges chair politicised inquiries. Lord Hutton’s experience of questioning by Parliament, to which I referred, was then novel. The media criticism he faced was, however, not novel. Sir Scott Baker and Sir Brian Leveson have since both undergone similar experiences with both the media and Parliament,² and Sir Peter Gibson with the media.³ Recent developments have, however, led me to gloss that analysis in two ways. The first, and more significant, point concerns the post-inquiry consequences of using a judge. The second point concerns the use of retired judges.

¹ (2005) 121 LQR 221. The lecture can be found at: <http://www.judiciary.gov.uk/media/speeches/2004/should-judges-conduct-public-inquiries>

² Sir Scott Baker’s evidence to the Home Affairs Committee is at <http://www.publications.parliament.uk/pa/cm201012/cmselect/cmhaff/644/644.pdf>. Sir Brian Leveson’s evidence to the Culture, Media and Sport Committee is at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmcmums/uc143-iv/uc14301.htm>

³ His impartiality was questioned by some civil liberties groups from the outset, and his, as yet unpublished, interim report on the treatment of detainees after 9/11 continues to attract controversy: see e.g. Francis Elliott in *The Times* 14 November 2013.

6. Constitutional reforms designed to achieve a greater separation of judicial power from legislative and executive power and to ensure the independence of the judiciary were proposed but were not yet in place at the time I wrote my *LQR* article. Today, while the reforms are in a sense incomplete, the head of the judiciary of England and Wales is not a member of government, and the Supreme Court of the United Kingdom has replaced the Judicial Committee of the House of Lords. This greater formal separation of powers makes the use of serving judges to chair inquiries with a political element even more anomalous than it was before the abolition of the old office of Lord Chancellor.
7. The incompleteness and unsatisfactory nature of that process of constitutional reform was shown only a year after the abolition of the old-style Lord Chancellorship and the decision to increase the separation of powers and to foster the independence of the judiciary. As foreshadowed in the 2004 consultation which led to the 2005 Act, the Act empowers ministers to appoint a judge to undertake or chair an inquiry without the need for the concurrence of Chief Justice of the relevant part of the United Kingdom. All that section 10 requires is that the relevant Chief Justice be consulted. Section 10 appears to be the only example in the statute book of a government minister being empowered to deploy a serving judge.
8. It was and remains my view that it should not be for government alone to decide that a serving judge is to be used and to choose the judge who is to chair or conduct the inquiry. In at least one of the other jurisdictions where judges are used for this purpose, the head of the judiciary either appoints the judge directly or has to concur with the relevant government minister in the appointment.
9. It may be said that, in practice, no judge would be appointed without the consent of the relevant Chief Justice but, if this is so, it is unsatisfactory for the legislation not to reflect the reality. There are a number of reasons why this is important. First, the relevant Chief Justice has the clearest view of which members of the judiciary have the skills and experience needed for a particular inquiry or review.⁴ Secondly, in constitutional terms, the underlying legal position is important because deployment is recognised to be a judicial and not an administrative or government function.
10. I also remain of the view that the consent of the relevant Chief Justice and that of the judge who is conducting or chairing the inquiry should be obtained to its terms of reference and to any changes in those terms of reference during the course of the inquiry. This would help to ensure that they do not require a judge to conduct an inquiry of a sort that it is inappropriate for him or her to conduct.
11. The rest of this document follows the sub-headings used in my Lionel Cohen lecture and sets out such recent material as I believe may be of assistance to the Committee.

II Context and types of inquiry

12. In 2004 I referred to Department of Constitutional Affairs statistics which stated that 64.5% of notable public inquiries since 1990 had been chaired by a judge. 58% had been chaired by a serving judge, and 6.5% by a retired judge. It is clear that, since then, the appetite for judges to chair inquiries has not abated, although the proportion of retired judges used has greatly increased. Three serving judges and seven retired judges have been appointed to

⁴ See, for example, the comments by Lord Judge in his speech on Press Regulation in 2011:
<http://www.judiciary.gov.uk/media/speeches/2011/lcj-speech-annual-justice-2011-19102011>

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conduct inquiries under the 2005 Act.⁵ In total, 71% of the inquiries under the 2005 Act have been chaired by serving or retired judges. Additionally, several notable non-statutory inquiries and “reviews” have been chaired by judges and retired judges. These include Lady Justice Macur’s “review” of the Waterhouse inquiry into the abuse of children in care homes in North Wales, Sir Scott Baker’s “review of the United Kingdom’s extradition arrangements”,⁶ Sir Stanley Burnton’s review of the death of Daniel Morgan, and Sir Peter Gibson’s “Inquiry into the treatment of detainees after 9/11”.⁷ The first two are in progress. The third was terminated before completion.

13. The inquiries which judges and retired judges have been asked to chair during the last nine years continue not to be confined to factual, “what happened” inquiries. The terms of reference of some recent inquiries have required them to make recommendations which bear on wide questions of public policy relating to, among other areas, the army, the prison service and the press.⁸

III Skills and availability

14. I reiterate what I said in my Lionel Cohen lecture but would like to add two points. As I then stated, the use of serving judges to chair inquiries inevitably puts pressure on the work of the courts. It reduces flexibility in deployment, which, as the Lord Chief Justice has very recently emphasised, is necessary to meet the fluctuations in the business of the Courts and Tribunals.⁹
15. I add that in England and Wales the potential loss of flexibility is particularly felt in the Court of Appeal and the High Court, where there is a statutory limit on the number of judges who can be appointed. I recognise that the impact is ameliorated as a result of the payments that are generally made to enable the employment of retired judges and deputy high court judges to undertake some of the work which the judge conducting the inquiry would otherwise do. It is, in my judgment, imperative that, where a judge is released to undertake an inquiry, adequate funding is provided for this purpose. It is also very important that those who have appointed the judge immediately provide an adequate support team to enable the judge to work efficiently and effectively. I understand that, in one recent case, ensuring that the appropriate support was in place was not a straightforward matter.
16. Insofar as judges are chosen because of their forensic and analytical skills, and their knowledge of the law, I reiterate that they are not the only group who are likely to have the required skills. Experienced senior practitioners and academic lawyers are also likely to do so. There are two notable examples of the use of senior practitioners since then. The 2009 Nimrod Inquiry was conducted by Charles Haddon-Cave QC and the 2010 – 2013 Mid-Staffordshire NHS Trust Inquiry was conducted by Robert Francis QC. The examples involving academic lawyers are less recent but are equally telling. The Bristol Royal Infirmary

⁵ Lord Gill, the Lord Justice Clerk, investigated the 2004 explosion at the ICL factory in Glasgow between February 2008 and July 2009. Lord Justice Gage was appointed to investigate the circumstances surrounding the death of Baha Mousa, although the bulk of the inquiry was conducted after his retirement. Lord Justice Leveson (now Sir Brian Leveson PQBD) inquired into the culture, practices and ethics of the press between July 2011 and November 2012. See Appendix “A” for a full list, including retired judges.

⁶ www.gov.uk/government/uploads/system/uploads/attachment_data/file/117673/extradition-review.pdf

⁷ See www.detaineeinquiry.org.uk

⁸ The Baha Mousa Public Inquiry (see note 4), the Billy Wright Inquiry (chaired by Lord MacClean, a retired Scottish Appeal judge), and the Inquiry into the Culture, Practice and Ethics of the Press (chaired by Sir Brian Leveson, then a serving Lord Justice of Appeal).

⁹ See e.g. paragraph 2(v) of the Birkenhead Lecture delivered at Gray’s Inn on 21 October 2013 www.judiciary.gov.uk/resources/ICO/documents/speeches/lcj-birkenhead-lecture-21102013.pdf

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Inquiry between 1999 and 2001, chaired by Professor Sir Ian Kennedy and the Pension Law Review Committee in 1992 – 1993, chaired by Professor Sir Roy Goode, are examples of effective and efficient inquiries led by academic lawyers. These examples of successful inquiries suggest that, to the extent that there is a tendency to turn first to serving judges, it should be countered, and serious consideration should always be given to the available alternatives.

IV Risks to perceived independence and impartiality

17. In my lecture and article I gave a number of reasons why the perceived impartiality of a judge, and potentially the reputation of the judiciary as an institution, may become compromised if judges chair inquiries with a political element. These were:

- (i) the appointment of a judge does not depoliticise an inherently political issue;
- (ii) (a) those disagreeing with a report which is non-binding, unenforceable and not subject to appeal will have a strong incentive to seek to discredit its findings by criticising the judge;
- (ii) (b) those disagreeing with limitations in a report that result from its terms of reference and the practice of not making findings as to civil or criminal responsibility will also have some incentive to seek to discredit it by criticising the judge;
- (iii) Risks to independence from the fact that it is the government which sets up an inquiry, determines its terms of reference, and chooses the person or persons to conduct it;
- (iv) Risks of perceived partiality because of the discretion as to the procedure to be adopted by an inquiry;
- (v) Risks arising from increasing recourse to judicial review during an inquiry.

18. Judges who are asked to chair inquiries are fully aware of these risks. The solution to diffusing them is not necessarily for judges to refuse requests to chair inquiries, but for a convention to be recognised that judges should not be asked to chair politicised inquiries, for the consent of the relevant Chief Justice to be required to ensure that a judge is not used where this is inappropriate, and for the other branches of government to understand the consequences of appointing a judge, both during the inquiry and after its conclusion.

19. In 1996 Lord Woolf made an important observation about the consequence of judges accepting invitations by government to conduct inquiries on the government's behalf. He stated that, although this means they are sometimes exposed either by being drawn into public debate or subjected to ongoing scrutiny and criticism during and after the inquiry, where a judge has been appointed, those in the executive and the legislature who might wish to criticise the judge need to exercise restraint.¹⁰ He suggested that, absent such restraint, it might be necessary to dispense with what he saw as an important public service by the judiciary, voluntarily undertaken out of a sense of public duty. In 2004, I commented that experience since 1996 suggested that the appropriate restraint was exercised less frequently. The recent experiences of Sir Scott Baker and Sir Brian Leveson suggest that this is still the case.

20. Against this background I shall make brief observations about the recent examples concerning risks (i), (ii) (a) and (iii). I also observe that recent experience suggests that

¹⁰ 572 HL Det. (5 June 1996). See also 121 LQR at 236.

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some of the risks also apply where a retired judge is used, and points to two further potential problems.

- *Risk (i) – the appointment of a judge does not depoliticise an inherently political issue:* It was and remains my view that political issues cannot be resolved by the application of judicial standards and court-like procedures. Justice Blackmun of the United States Supreme Court stated that the judiciary’s reputation for impartiality and non-partisanship “may not be borrowed by the political branches to cloak their work in the neutral colors of judicial action”¹¹. Sir Brian Leveson was asked to chair his inquiry into the Culture, Practice and Ethics of the Press on the basis of cross-party consensus relating to his terms of reference. He has said that, absent that consensus, he would not have agreed to conduct the inquiry. The difficulties in maintaining a political consensus about the way forward following the publication of Sir Brian’s report have been evident in recent months.
- *Risk (ii) (a) – those disagreeing with a report which is non-binding, unenforceable and not subject to appeal will seek to discredit its findings by criticising the judge:* The significant example of this in 2004 was the unrestrained nature of the criticisms of the Hutton, Scott and Nolan inquiries. Sir Brian Leveson has faced voluminous and similarly unrestrained criticism from many, in particular elements of the media and politicians who wished to discredit his findings. Overblown criticism has not been confined to the tabloids but has included some pieces in broadsheets. Sir Brian no doubt anticipated this, and where appropriate has provided measured responses.¹² Nevertheless, it seems highly likely that a higher proportion of the public has read the criticism than read the responses.
- Recent experience also suggests that those who advocate a particular position or are involved in the public debate about the inquiry’s recommendations will try to draw the judge into discussion about the recommendations or about matters which were not the subject of recommendations. At the time Sir Brian’s Report was published, and subsequently, he stated that the report spoke for itself and it would not be appropriate for him to discuss his conclusions or recommendations any further. He accepted an invitation from the Culture, Media and Sport Select Committee to give evidence to it, but sought to identify in advance the limits of what he would be able to say to the Committee.¹³ The difficulty, as anticipated by him and the then Lord Chief Justice, was that, despite this, the Committee asked him questions relating to whether the competing models of self-regulation being debated satisfied the principles set out in his report. Answering such questions would have involved him giving a view without hearing evidence on the questions from those on different sides of the argument. It would have required him to comment on questions of policy which were directly in the political domain. His declining to answer such questions was a source of frustration to some members of the Committee.¹⁴ The fact that it was is an illustration of how some in the other two branches of government did not fully appreciate or accept the consequences of appointing a serving judge to chair an inquiry.

¹¹ *Mistrette v United States* 488 US 348 at 361 and 407 (1989), cited by the High Court of Australia in *Grollo v Palmer* (1995) 184 CLR 348 at 364

¹² See, e.g., www.levesoninquiry.org.uk/wp-content/uploads/2012/06/judges-comments-in-relation-to-Mail-on-Sunday-article.pdf

¹³ Sir Brian summarised the pre-hearing exchanges in his answer to Q771 by John Whittingdale MP, the Chair of the Committee, when he gave evidence on 10 October.

¹⁴ See Mr Whittingdale MP’s comments at Q772 – 774, and Questions 778 – 783 by Angie Bray MP.

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- *Risk (iii) – Risks to independence from the fact that it is the government which sets up an inquiry, determines its terms of reference and chooses the person or persons to conduct it:* Sir Brian’s experience suggests that this may not (or may not always) be a problem. He made clear in his evidence to the Select Committee on the 2005 Act (transcript p. 9 and p.21) that he did not face any difficulties relating to the terms of reference of the inquiry. He also stated that it had not been a difficulty that, formally, it was a minister and not the Lord Chief Justice who appointed him. He was fully involved in setting up the terms of reference and considered that, in practice, he and any other judge would respond to the Lord Chief Justice’s wishes. Nevertheless, in my view it is important for the rules governing inquiries to reflect the principle that the relevant Chief Justice should consent to the deployment of a serving judge in this way, to the appropriateness of the terms of reference, and that the judge conducting the inquiry also consents to the terms of reference.
- Recent experience suggests that there may be an additional and different problem concerned with judicial independence. There have been comments in the press about one aspect of the recent appointment of Sir Brian Leveson as President of the Queen’s Bench Division. It has been observed that, as such, one of the areas for which he is now responsible concerns defamation litigation. If the fact that a judge has chaired or served on an inquiry is thought to preclude that judge from being responsible for assigning judges to deal with litigation concerning the broad subject-matter considered in that inquiry thereafter, or sitting on a case about it, that would be an important practical reason for not allowing a judge to serve in the first place. In fact, the history of judicial chairs of inquiries, including, most recently, Lord Justice Jackson, who undertook the “Review of civil litigation costs”, shows that this is not so. Judges can and do continue to preside over legal proceedings concerning the area over which they conducted an inquiry, in particular where that inquiry concerned the administration of justice. Their ability to do so without having their impartiality being called into question is an important reason for circumspection about what they say about their inquiry after its conclusion.
- *Risk (v) – Risks arising from increasing recourse to judicial review during an inquiry:* Judges are used to the scrutiny and overturning of their decisions by colleagues in higher courts sitting on appeals against their decisions. But the decisions of High Court and Court of Appeal judges (and their Scottish and Northern Irish equivalents) or of justices of the Supreme Court in legal proceedings are not susceptible to judicial review proceedings. Decisions made by a judge conducting an inquiry are, however, challengeable by way of judicial review.
- The effect of judicial review can be similar to an appeal, in particular where the error is a straightforward error of law or misconstruction of a statute. But the classic grounds of judicial review include breach of the rules of natural justice or procedural fairness, and the portfolio ground of *Wednesbury* unreasonableness or irrationality. A challenge based on bias, procedural unfairness or irrationality may be seen as damaging the perception that the judge conducting an inquiry so challenged is impartial or that the process is fair, whether or not it succeeds. It must be recognised that this will also be the case for inquiries which are not chaired by judges. There may, however, be differences in relation to the downstream consequences where it is a judge who chairs the inquiry. I have referred to the possible impact on perceptions of the judge when he or she resumes presiding over legal proceedings after the completion of the inquiry and, albeit of a lesser order, the possible impact on perceptions of the reputation of the judiciary as an institution.

- My earlier work referred to the three successful judicial reviews against the Savile inquiry, and the devastating effect judicial review had on the judge who chaired the Air New Zealand Disaster Inquiry.¹⁵ Several challenges were launched by way of judicial review against case management decisions made by Sir Brian Leveson during the course of his inquiry. None were successful. Indeed none were granted permission. There was therefore no successful challenge by way of judicial review in respect of his inquiry so that neither Sir Brian nor the Inquiry was tarnished by any adverse perceptions arising out of a successful challenge. But the number of challenges demonstrates the reality of this risk. I am informed that Lord MacLean faced a large volume of challenges in relation to the Billy Wright inquiry. No decisions of a High Court or Court of Appeal judge (or their Scottish and Northern Irish equivalents) would otherwise be subject to judicial review proceedings.

V Risk to authority

21. My article expressed concern that the rejection of the finding of fact or recommendation as to personal responsibility may damage the authority or the reputation of either the judge or the judiciary. I am not aware of a recent example of the government rejecting such a finding or recommendation by an inquiry. It is of course proper to government to reject policy recommendations, and the government has rejected some of Sir Brian's recommendations.

VI Risk arising from structure and formality without the constraints of litigation

22. I have two comments. The first concerns the Salmon principles. I am not aware of an example in a recent inquiry of a departure from the Salmon principles which has led participants to feel they have been treated unfairly. I note that, in his evidence to the Committee, Sir Brian said this (transcript, p. 25):

“Rule 13 is the opportunity to give witnesses the chance to respond to possible criticisms and that is absolutely critical as a matter of pure fairness. I think it is rule 15 that required me to set out the potential criticism, the facts forming the basis of the criticism, and all the evidence. Had I done that in terms, I need never have finished because they were all very specific. I decided that I wanted to approach it in a different way and I invited submissions on that different way. I gave a ruling as to how I would proceed deliberately before I did the work so that, if anybody wanted to challenge it, they could go to the Divisional Court and challenge it. Nobody did.”

23. My second comment concerns the use of non-statutory inquiries and reviews. The purpose of the 2005 Act was to provide a legal framework for inquiries and to provide an appropriate procedure for them. Since it has been in force it has been decided to conduct a number of inquiries or reviews outside its scope. I am aware that it has been suggested that such non-statutory inquiries or reviews have been used to get round inconvenient restrictions in the 2005 Act. I am unable to comment on this. There may be good reasons, possibly the nature and sensitivity of the evidence or a particular need for greater procedural flexibility, for having an *ad hoc* non-statutory process rather than an inquiry under the 2005 Act. It is, however, important for there to be careful consideration of the justification for not using the procedure so recently established by Parliament as the appropriate one for inquiries.

¹⁵ See (2005) 121 LQR at 240 - 241

24. Three of these non-statutory inquiries or reviews are or have been conducted by retired judges and one is being conducted by a serving judge.¹⁶ I believe that the considerations which apply to inquiries under the 2005 Act involving serving and retired judges, in particular the role of the relevant Chief Justice and the consequences of appointing a serving judge, also apply to non-statutory inquiries and reviews.

VII Risk relating to the achievement of closure

25. It has been argued because the recommendations in Lord Devlin's 1959 report on the riots in Nyasaland and Sir Richard Scott's inquiry into the "arms for Iraq" affair were not taken forward by government those inquiries did not achieve "closure". The recent experience in relation to the 1989 Hillsborough football disaster and Sir Ronald Waterhouse's North Wales child abuse inquiry is important because it shows there are other reasons for an inquiry not achieving "closure" than the political system not taking up the baton. The Hillsborough football disaster has been the subject of two inquiries led by judges (the 1990 Taylor inquiry and the 1997 Stuart-Smith review), as well as inquests by coroners. The reasons for the forthcoming new inquest ordered in 2012 into the deaths included alterations in the statements considered previously and allegations about failures by medical and other emergency services. The new inquest is being conducted by a serving Court of Appeal judge, Lord Justice Goldring, and runs alongside two other investigations into the same issues (being conducted separately by the Independent Police Complaints Commission and a police team headed by Assistant Commissioner Jon Stoddart). It remains to be seen whether the combination of these further investigations will enable the families of the deceased to achieve "closure".

VIII Concluding remarks

26. The risk to individual judges, and to the judiciary as an institution, through the involvement of serving judges in inquiries with a political element, point towards the establishment of a convention that judges should not be asked to chair such inquiries. It also suggests that a number of other protective measures should be taken. I summarise these below by reference to the chronology of an inquiry.

Setting up the inquiry:

- A requirement that the Lord Chief Justice consent to the use of a judge to chair an inquiry should be enshrined in statute;
- A requirement that the Lord Chief Justice and the judge who is to conduct or chair the inquiry consent to the terms of reference of the inquiry and to any changes in them.

Running the inquiry:

- Just as judges will not comment on the progression of a case in front of them, they will not, and should not be asked to comment on the substance of the progress of their inquiry or its likely recommendations.

After the report:

- Unless an inquiry directly concerns the administration of justice, or where there has been prior agreement about this (normally when the terms of reference are settled),

¹⁶See paragraph 12 for details. The fifth non-statutory inquiry was conducted by Charles Haddon-Cave QC.

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a judge should not be asked to comment on the recommendations in his report or to take part in its implementation. This is the position of judges in relation to their decisions in legal proceedings over which they have presided. There are three principal reasons for the same principle governing judge-led inquiries:-

- (i) the judge may be asked to give an opinion without hearing evidence;
- (ii) the judge may be drawn into political debate, with accompanying risks to the perception of impartiality, as discussed above; and
- (iii) implementation is the responsibility and the domain of the executive.

18 November 2013

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

Evidence Session No. 5

Heard in Public

Questions 102 -128

WEDNESDAY 16 OCTOBER 2013

10.45 am

Witnesses: Sir Robert Jay and Jason Beer QC

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Sir Robert Jay and Jason Beer QC

Q102 The Chairman: Good morning. Welcome to the meeting with us. We are grateful for your coming along. The session is open to the public, a webcast of the session goes out live as an audio transmission, and it is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If after this evidence session you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us. Would you both like to introduce yourselves for the record? If you want to make any opening comments, you are welcome to do so.

Sir Robert Jay: My name is Robert Jay. I was leading counsel to the Leveson inquiry into the culture, practices and ethics of the press, which reported at the end of November last year. I should say that in the past I was also junior counsel to the King's Cross fire inquiry, which reported in the autumn of 1988 when the Act that you are considering obviously was not in place, but I can tell you a bit about that if you like. I am now a judge of the Queen's Bench Division, having been appointed on 4 June of this year.

Jason Beer: My name is Jason Beer. I am a member of the independent Bar and I have appeared in a number of inquiries.

The Chairman: If you do not have anything else you want to say at this point, we will go straight on with our questions, if that is okay. You can box and cox as to how you operate. The first question to put to you is that the chairman must have absolute confidence in counsel to the inquiry, but is it right that he alone appoints them? Should the 2005 Act not provide for the appointment of counsel?

Sir Robert Jay: I am of the view that it should not. Most public inquiries these days, not all, are against government or members of the Crown, or however you want to describe them, so it is absolutely essential that the appointment of counsel is independent of any of the organs of government. In the past the Attorney-General might have had a role. I cannot recall what happened in relation to the King's Cross inquiry, which I mentioned. I know in some Commonwealth jurisdictions the relevant Attorney-General has a role in appointment.

I think it is far better that the chairman, who may or may not be a judge—let us assume that he or she is—is wholly responsible for appointments, so you have a complete aura of independence and independence in substance. What is more, there has to be alchemy, chemistry, whatever you want to call it, between the chair and counsel, otherwise the thing will not work. The notion that the Minister should have a role in appointment I just find rather anathema.

The Chairman: There will be occasions where a judge is not appointed. That person may well not have the background of who is around. Where do you think they should be looking and who might help them?

Sir Robert Jay: As I think happened in relation to Sir Brian Leveson's inquiry, he took advice from the Treasury Solicitor, although in the end I believe he came up with his own view. But the chair who is not a judge will take advice from the Treasury Solicitor or from anyone else, and the Treasury Solicitor can be trusted to give an independent view.

Jason Beer: I agree with that. I think in the cases of non-judicial appointments to inquiries, under the 2005 Act and otherwise, the chair has sought the advice of both civil servants and the Treasury Solicitor and has made appointments. I am thinking in particular of Sir Michael Bichard.

Lord Morris of Aberavon: I agree entirely, Sir Robert, that because of the issue of chemistry, and the issue of being independent, it should be the responsibility of the chairman. The Treasury Solicitor has, as you have indicated, sources of advice. In the case of the Stephen Lawrence inquiry, I was consulted in providing counsel to that inquiry as attorney. So sources are there, but the decision must be the chairman's, I would think, and I would agree with you there.

Q103 Lord Trefgarne: Sir Robert, you were leading counsel to the Leveson inquiry. You had three junior counsels to assist you. Four other barristers also assisted you. That makes eight of you altogether. Did you really need that many?

Sir Robert Jay: We believed so. The background is that the timescale for the inquiry was very short and we kept more or less to the deadline. I think we fell over the edge by only two weeks. A lot of things were going on simultaneously and there are only a certain amount of hours in any working week. I know the number of hours I was working; I know the number of hours my two main juniors were working. The three main counsels, me and the two more senior juniors, prepared the witnesses on a day-by-day basis. That involved an enormous amount of reading and fielding of questions from a whole variety of sources, not just core participants. In these days of the internet and e-mail, I was receiving sometimes hundreds of questions from members of the public, sometimes anonymously, and I had to read them all and take a view as to whether they were worth pursuing. Most of them were not.

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

On the question of meeting the witness beforehand, we can discuss as a separate issue whether that is desirable in all inquiries. Dealing with points of law and inquiry practice was the subject of a lot of discussion with the chairman. There were frequent meetings with the Treasury Solicitors, the assessors and the chairman. There was an awful lot of administration. Although the Treasury Solicitor was largely responsible for getting witnesses there on a particular day, I was primarily responsible for the timetable and the sequencing of evidence, subject to availability. Although it may not always have seemed like it, we did have a grand plan in the background. Then there were countless e-mails to deal with every day.

So that is what the three of us were doing. Of course, you know about Section 21 of the Inquiries Act, and there are questions about that, but it was a tremendous amount of work to frame the Section 21 notices. The first lot of Section 21 notices, which we put together for the first module, arguably could have been better, but we were rather learning the ropes at that point. They did get substantially better for modules 2, 3 and 4, but that was tremendously time consuming, and the very junior barristers were doing a lot of that. For example, during the second module many of the junior barristers, and on occasion, the more senior ones, were doing the Section 21 notices for module 3. Each witness took about a week to prepare, if you looked at all the internet sources, all the available books and so on.

Lord Trefgarne: Prepare the witnesses? I thought witnesses come and give evidence?

Sir Robert Jay: They do, but we prepared a huge list of questions for them so that they had to answer them, and there were criminal sanctions if they did not answer. I think that is one of the great features of the Inquiries Act, because it does put the witness's metaphorical thumbs in the screws, and I think it is a very valuable procedure.

The role of the very junior barristers, under five years' call, was to prepare the bundles on each witness, prepare a note suggesting the questions that might be asked—they were not always asked, of course—to assist in the Section 21 process and then the rule 13 process, which is extremely time consuming. That occupied most of their time between May and the end of July. A 121-page—I think it was—general rule 13 notice was prepared for the press. That has since been leaked into the public domain. We did not leak it. But that took a tremendous amount of work, work that the very junior barristers were best placed to do and could do most economically since they, if I may say so, were extremely cheap and extremely good value.

Then finally, as Sir Brian Leveson has explained to this Committee and to another committee, the very junior barristers assisted with the first drafts of certain parts of the report, although I emphasise they were first drafts. A lot of work had to be done on them, but that is not to diminish what they did. It was extremely valuable, since it obviated the need for people like me to have to go on to the internet, go back to all the evidence and put it all into first narrative form.

I can assure this Committee that no time was wasted and no unnecessary public money was spent.

Lord Trefgarne: I must be honest with you: when Sir Brian Leveson came before us last week, he persuaded us that he was conducting the inquiry. You make it sound like you were.

Sir Robert Jay: He did conduct the inquiry. It was all under his direction, but I was responsible for a lot of the more mundane business, if I can so describe it. But I hope I am not giving you the impression that I did it. I delegated it.

The Chairman: Do you want to respond first? There are five noble Lords who want to come in. Do you want to give a response on the numbers and so on?

Jason Beer: No, because I was not involved in the inquiry as counsel. Sir Robert has already given his answer.

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Q104 Baroness Hamwee: I just wanted to clear a couple of bits of undergrowth. The appointments of the counsel who assisted you made through discussion between you and the chairman, and they were the chairman's appointments. Is that correct?

Sir Robert Jay: It depends which ones. For the main junior barristers, the ones described here of over 10 years' call—Mr David Barr and Ms Carine Patry Hoskins—I took advice from the Treasury Solicitor. I interviewed a number of people, and I made a recommendation to Sir Brian Leveson. There were various reasons for my choice, which I can explain but I do not think that is helpful.

Baroness Hamwee: No, it is okay. That is not necessary.

Sir Robert Jay: I mentioned chemistry. That was just one factor among others. When it came to the very junior barristers, we thought, and the Treasury Solicitor agreed, that it would be preferable to have one barrister from each of our chambers so that we could direct what they were doing and, moreover, spread the work around a bit, rather than, say, have them all from my chambers, which might have ruffled some feathers. So that was what happened.

Baroness Hamwee: Did you call on the secretariat to the inquiry for admin help? Did you use your own resources? As another aspect of that, could it be argued that in some inquiries, rather than having very junior members of the Bar, who I know are cheap anyway, non-qualified people might undertake some of the work?

Sir Robert Jay: Yes. The danger of my answering the specific question posed here is that I run the risk of diminishing the role of others, namely the secretariat and the Treasury Solicitor. If they are watching this live, they may be rather annoyed by the impression I give.

Baroness Hamwee: We have lots of security here.

Sir Robert Jay: I certainly was not intending to diminish their role at all. They were working extremely hard as well in a complementary way and doing their own thing. There was a centre of activity that we were individually responsible for and then overlapping duties where they assisted us and we assisted them. To answer your question directly, it is valuable to use very junior barristers for certain types of work and not just in terms of the economies. They are extremely good at reading and finding vast quantities of material with extraordinary rapidity and then synthesising it for the older members of the team like me. Some of us have lost, perhaps, the sharp edge of our abilities in that respect and may have gained different abilities. But that is what they are good at and I think they were very well deployed in that respect.

Q105 Lord Soley: Sir Robert, in your opening answer to Lord Trefgarne, you talked about the amount of time spent preparing witnesses, and you mentioned that that was in the background of potential criminal sanctions, because there were potential criminal offences that were not before the inquiry but that could come as a result. If there had not been potential criminal sanctions, do you think the time of counsel generally would have been much less and the need for counsel would have been much less? In other words, is it the nature of the potential criminal bit that increased the time and use of counsel?

Sir Robert Jay: When I referred, Lord Soley, to criminal sanctions, I meant the sanctions that apply for failing to comply with a Section 21 notice and they are laid down in the Inquiries Act. They are not the background criminal proceedings, which of course were going on and are still going on.

Lord Soley: No, I understand that, but you referred in your answer to the preparation of the witnesses. In other words, you were presumably talking to them about the potential aspects of the criminal implications for other people or for themselves. Is that right? That presumably leads to an argument, rightly or wrongly, that legal counsel is more necessary than perhaps doing without legal counsel.

Sir Robert Jay: It is true there were a few witnesses who we compelled to give evidence using Section 21, who were either going to be witnesses in separate criminal trials or defendants in

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separate criminal trials, and they had to be dealt with very carefully indeed and express assurances given at all stages. Many of them obviously did not want to be there at all, and plainly that gave rise to its own difficulties. The whole nature of the process, whatever the context, mandates experienced counsel.

Lord Soley: Regardless of the implications of possible criminal proceedings?

Sir Robert Jay: Yes.

Q106 Lord Trimble: My point is along the same lines or in the same areas mentioned by Lord Soley. Sir Robert, I heard you say that because of the Section 21 background to this, a lot of work had to be done to prepare the questions because the person giving evidence would be exposed, by virtue of Section 21, to potential criminal sanctions in terms of quality of answer and so forth. You thought that that was a very useful aspect of the whole inquiry procedure. Presumably that is not available if the inquiry is not a statutory inquiry?

Sir Robert Jay: That is correct.

Lord Trimble: Therefore, if you are in a non-statutory inquiry, because there is not going to be the same careful focus on defining the questions, does that not then raise questions about the validity of non-statutory inquiries?

Sir Robert Jay: Non-statutory inquiries will remain valid in their own way but will be less powerful if you have recalcitrant witnesses. Those witnesses are not as readily compellable. We could issue threats to witnesses. If they had indicated that they were not going to turn up to give evidence, we could serve them with a notice, their having already supplied a statement, and we could force them to turn up. If they do not turn up, that is a criminal offence. Non-statutory inquiries cannot do that. They are bigger teeth, that is all.

Lord Trimble: The bigger teeth, as you say, are needed if you have recalcitrant witnesses. Would that not lead one to say that if you are contemplating putting up an inquiry or establishing an inquiry where there may be recalcitrant witnesses, it would be a bad idea to have a non-statutory inquiry in that context?

Sir Robert Jay: I agree.

Lord Trimble: If you are going to have potentially recalcitrant witnesses, that ought to be a statutory inquiry in order to have those sharper teeth available?

Sir Robert Jay: Precisely.

Jason Beer: I think that is right. There have been a number of examples in the past five or six years of statutory inquiries that have had Section 21 and Section 35 powers at their disposal and have required evidence to be given on oath, where witnesses have co-operated and revealed evidence that has hitherto been unrevealed.

Lord Trimble: Would you know, out of your own experience, of any non-statutory inquiries that perhaps laboured under difficulties because they did not have the statutory powers that you are referring to?

Jason Beer: I have no personal experience of those, because the inquiries in which I have been involved have all been statutory inquiries. But I know that some chairmen and panel members of non-statutory inquiries have sung the praises of their own non-statutory inquiries, saying that they think the opposite to what you are saying, Lord Trimble: namely, that it is the absence of powers that has encouraged people to come forward and speak, that there has been fostered a collegiate atmosphere among witnesses and that they have opened up. That is in the distant past.

Lord Trimble: The nice, warm collegiate atmosphere must not involve any recalcitrant people.

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Jason Beer: That is a matter for them to speak to that. I am just drawing the Committee's attention to the fact that some previous chairmen have expressed the opposite view. The modern model is to have, with some exceptions that will be familiar, statutory inquiries.

Q107 Lord Woolf: Sir Robert, in your earliest remarks you said, "We were learning the ropes". You said that in the background, presumably, of the Leveson inquiry, which was the most recent of the inquiries in which you have been involved, but you still had to learn the ropes. What did you look at to learn the ropes?

Sir Robert Jay: My answer was specifically in the context of the first set of Section 21 notices in the first module of the inquiry. The rope learning applied to the way in which the press in this country works. Some of the questions we asked were, in retrospect, rather naive questions. I certainly would not ask them now, because I have learnt the ropes.

To speak more widely, I could throw my mind back to what happened with the King's Cross fire inquiry in 1988, but that was a whole generation ago, a different culture. It was a statutory inquiry because it was set up under a Transport Act, but it did not have any of the panoply of powers this Act does and the culture was very different. I spoke privately to counsel to the inquiry in two other recent inquiries to ask for any pearls of wisdom that could be imparted.

Lord Woolf: Do you feel that if you are going to continue with matters as they are at present there is a shortfall, or do you think there is no such problem about information that has been gleaned from previous inquiries being made available so that it can be consulted in some suitably digested form by even leading counsel?

Sir Robert Jay: I know that Lord Hutton and Sir James Dingemans wrote a paper, which is in the Inner Temple library, speaking of their experiences in that inquiry. But the difficulty is that the best information will be information that is imparted wholly confidentially over a drink somewhere. What one might read in a publication suitable for the Inner Temple is probably not going to be any use. It is just the way the world works. I learnt quite a lot from an individual, who will be wholly anonymous, about things to do and things not to do. Obviously, I would be well placed to assist someone else, should the need ever arise.

Lord Woolf: Including, as he was then, the chairman?

Sir Robert Jay: Yes.

Lord Woolf: - because they need help as well sometimes. Do you think the powers that exist should be in a statutory form? How important do you regard them?

Sir Robert Jay: Lord Woolf, which particular—

Lord Woolf: I am thinking of the Section 21 powers.

Sir Robert Jay: Yes, I really like Section 21. I think it is essential.

Lord Woolf: Do you think that contributed to your ability to conduct the inquiry properly?

Sir Robert Jay: Yes. I was often completely dissatisfied by the evidence given pursuant to our Section 21 notices, but that is another story.

Q108 Baroness Buscombe: First of all, I declare an interest that I submitted written evidence and gave oral evidence to the Leveson inquiry. Touching on from what Lady Hamwee and Lord Woolf said about what I would call a learning curve, meanwhile a huge body of written evidence has been submitted, whether it be the Leveson inquiry, as we commonly call it, or others. Is it possible for each and every one in a group of lawyers to have read that body of evidence? If it is not, is there really a point to having qualified barristers—and I can say, as a qualified barrister, that no barrister is cheap—when clearly they were not experienced in media law? At the end of the day, you can only tell the truth if you have been asked the right questions. How does it work

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behind the scenes? Is there one person out there among you who has read all the written evidence and therefore has a proper oversight of the evidence prior to setting off?

Sir Robert Jay: No, there is not, Baroness Buscombe, because there is just too much material. In an ideal world, before any inquiry starts, leading counsel should have read everything, should have understood how witness A dovetails or contradicts witness ZZ, and so can proceed in a perfect way, asking the most finely honed and accurate forensic questions. But that never happens, and it certainly did not happen in our inquiry. It was very much a voyage of discovery, an iterative process. Questions were asked without knowing what another witness might say on the same topic, simply because very often his or her evidence was not available at the material time. I was asking questions of Mr Rupert Murdoch without knowing what those he was fingering up, as it were, might say, so I could not contradict him immediately with their contrary evidence.

We do not live in an ideal world. This inquiry had to be finished within a reasonable timescale and had to entail only a limited amount of expenditure. The sort of ideal inquiry one is talking about would last three or four years and would cost £20 million, £25 million. This inquiry did neither of those two things, so it depended wholly on the forensic instincts, often fairly untutored, of Sir Brian Leveson asking questions at the appropriate time, and of counsel.

Lord Morris of Aberavon: Could I ask Mr Beer one question on the difficulties that might arise in a non-statutory inquiry? Of course, if difficulties do arise, it can always be converted to a statutory inquiry.

Jason Beer: Yes, and indeed that has happened.

Q109 Lord Richard: I am going to ask some questions on the mechanics of operating as counsel for an inquiry. You are appointed as counsel and you come to it fresh. What is the first thing you do? Do you go and talk to the chairman and see what he has in mind?

Sir Robert Jay: Yes.

Lord Richard: Then he gives you a general idea of the scope of the exercise?

Sir Robert Jay: It was very general, but within about two or three weeks, if my recollection is right, we had a fair idea of the way the inquiry was going to work, having four modules, the general timetabling, when module 4—the last of the modules—would end, and what each module, in general terms, would cover.

Lord Richard: Was that your plan, the chairman's, a mutual one, or the Treasury Solicitor's?

Sir Robert Jay: It involved primarily four people, headed by the chair: the secretary was invaluable, Rowena Collins Rice; the Treasury Solicitor, the inquiry solicitor, Ms Kim Brudenell; the chair and me. We very quickly worked out the best scheme.

Lord Richard: So you got your four modules?

Sir Robert Jay: Yes.

Lord Richard: Take module 1, for example. I assume you started with module 1?

Sir Robert Jay: Yes.

Lord Richard: Who decided which witnesses you would call?

Sir Robert Jay: We started, if you recall, with the “victims”.

Lord Richard: That is an easy one. Yes.

Sir Robert Jay: To be fair, we did not have sufficient control over who they would be, because their identity was only known to us clearly with two weeks to go, but that was because not everybody would want to come forward and speak out publicly, with millions of people watching on the telly and so on, against the press. So we were very much vulnerable, I suppose, to the

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vagaries of predilection and last minute decisions. But beyond that, we had a clear plan and the last chunk was going to be the press witnesses, then the Press Complaints Commission, and then some wrap-up witnesses, people who we had not been able to call earlier or whatever. But the intention was to call the Press Complaints Commission towards the end, because that just seemed logical.

Lord Richard: That was on module 1?

Sir Robert Jay: That was on module 1.

Lord Richard: We come to module 2. Who decided which witnesses you could call there? How was it decided on?

Sir Robert Jay: We had had more time to think about that. We took advice from the police assessor, who identified the police forces outside the Metropolitan Police who we should target. There were discussions involving the police as well as to the identity of individuals. We then identified in general terms who we would want and in what order but we were going to start with the Met.

Q110 Lord Richard: Who decided what questions you would ask each witness?

Sir Robert Jay: Once the witness statements in response to the Section 21 notices had come back, several things went on simultaneously. The assessors looked at the statements and had their own questions from their own perspective and expertise. The junior barristers trawled them very closely, went on the internet to see, for example, whether anything they said in the public domain contradicted what they had said in the witness statement. Core participants then came up with questions, but those were often at the very last minute. It was all funnelled through counsel and then an editing process took place, often quite late in the evening, when you decide what questions to ask. But it is not just a question of trying to nail the witness; it is a question of balancing what you know the witness wants to say—and you can confirm that by meeting them beforehand—giving them the chance to do justice to themselves, and then perhaps asking a few more pointed questions that whoever wishes to be put.

Jason Beer: In a more conventional inquiry, one that is not under such great pressure of time, it would be normal for counsel and solicitors to conduct a scoping exercise on the existing materials to identify those witnesses that needed to have statements taken from them; for the statements to be taken; for the statements to be disclosed to the core participants; for counsel to draw up a witness list of those that were to be called and those to be read; and for the core participants to be allowed the opportunity to make representations, moving witnesses from one column to the other and, in the event of dispute, for the chairman to rule on who was to be called and who was not.

Lord Richard: Presumably all this was done in very close co-operation with the chairman.

Sir Robert Jay: Under his general oversight, yes. I described a lot of this as mundane. That is not to downplay its importance but it could be done by the Treasury Solicitor, counsel and the secretariat working in conjunction. Sometimes, for example, someone insisted that a witness be called who we did not particularly want to call and usually you would cede to that request, but sometimes the chair's final decision needed to be obtained.

Lord Richard: You must have had ideas of what it was you wanted to get out of the witnesses, though.

Sir Robert Jay: Yes.

Lord Richard: That was your decision, of course, on the basis of the general plan that the chairman had agreed.

Sir Robert Jay: Yes. But the role of counsel is independent. It could have been played in a different way. I did not see my role as to go hell for leather and nail the press so that every question would

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be designed to try to bludgeon the witness into giving a so-called favourable, helpful answer. It was not like that. It was much more low key, maybe deadpan, inquisitorial, but in showing with each witness that there are some spicy questions there so that they are put on the spot a bit. It would depend from witness to witness. Some witnesses cried out for a more proactive approach. Others were obviously entirely truthful witnesses. Witnesses had given comprehensive witness statements. There was nothing more to do than to let them tell the story.

Lord Richard: How do you define your function?

Sir Robert Jay: Grand inquisitor, but not in the sense of the Spanish Inquisition at all. It is very different from the role of cross-examining counsel. It is just a different mind-set. The way someone put it to me is that you have to act almost as if you are a High Court judge asking the questions, so that people can say this is fair, this is independent. Not that I necessarily had it in mind to apply for this job—maybe I did—but you have to act judicially. That is the word I wanted, judicially, and judiciously.

Lord Woolf: It is very different from an advocate appearing in a case because you are not putting forward a case on a client. You are helping the inquisitorial process.

Sir Robert Jay: Yes.

Jason Beer: In the context of litigation, it would be described as an amicus.

The Chairman: Should it be defined? Should the Act or the inquiry rules define counsel's main duties?

Jason Beer: I do not think so, because the function that counsel has to perform will vary significantly from inquiry to inquiry. Although there are some core functions, such as asking questions of witnesses, beyond that I think it would be dangerous to be prescriptive as to what they are to do. In some inquiries counsel sits, effectively, as the personification of the chairman of the inquiry. I am thinking perhaps of Presley Baxendale in the Scott inquiry.

Q11 Lord Morris of Aberavon: It will help us with other questions to other witnesses. You have referred, Sir Robert, to the Treasury Solicitor. Can we define that? Would there be one or more sources there? Obviously that source would be very experienced and presumably would have done other inquiries? Would you be looking for one particular link in order to assist you? This applies to a whole range of questions.

Sir Robert Jay: The inquiry's solicitor, Ms Kim Brudenell—I cannot remember what her civil service grade is or was—is a very senior solicitor with experience of other inquiries. Underneath her there was a team of four or five other more junior solicitors. There was never a sense that she was on the sort of learning curve I have mentioned. Of course she was in terms of the culture, practices and ethics of the press, we all were, but in terms of how to run an inquiry, absolutely not. Of course there are many inquiries where you would not want the Treasury Solicitor to be the inquiry solicitor because the entity being inquired about is the Government, so you would need to go to AN Other.

Q112 Lord Trefgarne: I thought that barristers acted on the instructions of their client. Your client in this case is the chairman of the inquiry but you seem to be saying it is something different.

Sir Robert Jay: No. His role is exactly the same. He is entirely independent. He is a judge.

Lord Trefgarne: You ask what he wants to do. You carry out his instructions ultimately.

Sir Robert Jay: Ultimately, but I do not think there was an occasion where he said to me, "Ask this question, do not ask that question".

Lord Trefgarne: But he could have done.

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Sir Robert Jay: Yes, he could have done. He did suggest a general approach and general line. Of course he can ask his own questions, and if he felt that the thing was going in the wrong way, no doubt he would let that be known. But I know he wanted an inquiry that would not be partisan, that would be and that would appear to be judicial and independent.

Q113 Baroness Stern: I declare an interest in that my husband was a panel member of the Billy Wright inquiry. Much of the evidence we have received is to the effect that the prime purpose of an inquiry is to get at the truth. My first question is: do you agree that the prime purpose of an inquiry is to get at the truth, or would either of you have a slightly more nuanced description of the purposes of an inquiry? The second part of my question is: is an inquisitorial method better at achieving that objective, without going into too much definition?

Jason Beer: If I can answer that question first, in answer to the first part I have a slightly more nuanced answer than the primary purpose is to get to the truth. I would say that is one of the main functions of an inquiry but it fulfils many other important functions such as ensuring accountability, discharging investigative obligations that are imposed by the convention, seeking to learn lessons, formulating or improving policy, acting as catharsis for victims.

Baroness Stern: Is that the complete list, because we would be happy to have any more?

Jason Beer: That is all that come to mind at the moment. I think there were six purposes there. I would not necessarily draw up a scorecard as to their importance because I think it may vary from inquiry to inquiry.

As to whether an inquisitorial model is best to achieve those purposes, I would say yes, certainly because it saves time, therefore it seeks to keep costs down. It allows the inquiry to remain focused on its terms of reference. An adversarial system or model may tend to veer away, at the parties' wishes, from the terms of reference. It allows the inquiry to focus on the issues that are of concern to it, to the chairman or the panel members, because an inquisitorial model has the inquisitor at its centre. Lastly, it allows often contentious and difficult issues to be examined and determined in a relatively dispassionate environment, without the extra heat that is brought to an affair when people are adversaries to each other.

Sir Robert Jay: I agree with that. The question is precisely whether an inquisitorial method is preferable to an adversarial, which brings in all the wider points that have just been made. But there are situations in an ideal world, which this is not, where if you had the advocate of someone whose behaviour or conduct is directly the focus of the inquiry asking the questions, it is arguable that those questions will be more pointed, perhaps even better questions than the inquisitor's questions. For all the other reasons that have been given, not least that these inquiries have to be run in a way that reduces time and public expense, I strongly favour the inquisitorial process above the adversarial process, otherwise you have inquiries running for years, as of course one famous one did.

Q114 Baroness Stern: Could I pursue it with a supplementary, which is primarily to Mr Beer? You have been associated with four high-profile inquiries—Stephen Lawrence, Baha Mousa and two in Northern Ireland—that were about violent deaths. The relatives of the deceased, of the person who had met this violent death, were in a sense core participants. Would you add anything to what you said about what the inquiry is for and how it should be conducted when looking at it from the perspective of an inquiry that is about such a matter, a violent death, and the relatives are the people who are at the centre of it?

Jason Beer: I think a balance has to be struck there and in cases such as that, which involve very serious allegations, where there has been a tragic outcome to the event, there has to be allowed within the inquiry process a greater degree of participation than might otherwise be the case for those that represent the victims. So although one adopts a primarily inquisitorial model, there must be some allowance made to ensure that the inquiry is fair and seen to be fair and that the relatives

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of the victims, or alleged victims, participate fully in it. In particular, that may help to achieve the last outcome that I mentioned, namely some sense of catharsis or moving on. In one of those inquiries in particular, the very strict inquisitorial model was adopted where counsel to the inquiry, and only counsel to the inquiry, asked all the questions and everyone else was excluded from the process and that certainly, with some, left a slightly bitter taste.

Baroness Stern: Can you tell us which one?

Jason Beer: The Rosemary Nelson inquiry.

Sir Robert Jay: There is nothing I can usefully add to that. It was a very full answer.

Q115 Baroness Buscombe: I might move on to a related question . I would like to talk a little bit more about this issue, which I think is so important. We have been told in written evidence that it is not truly inquisitorial for an inquiry to allow witnesses or core participants to provide their own evidence and that a public inquiry should do its own work in establishing the evidence. Do you agree?

Jason Beer: I am not necessarily sure that I fully understand the premise of the question. If it means obtaining documents from parties, then I think that happens already. If it means obtaining witness statements from parties—

Baroness Buscombe: Perhaps I may help. Eversheds has said in written evidence, “We do not believe that it is truly inquisitorial for an inquiry to allow or encourage witnesses or core participants to provide their own evidence. This is often done in an apparent attempt to save costs. This, however, is not the outcome. It encourages all witnesses and core participants to obtain legal advice they may not need if there is no realistic prospect of that witness or core participant facing criticism. Additionally, evidence provided on that basis invariably is what the witnesses want to say, which may well not be what the inquiry needs to know about. In our view”—in Eversheds’ view—“therefore, a public inquiry should do its own work in establishing the evidence if it is to be truly inquisitorial, effective, and serve the public interest”.

Jason Beer: I think what those solicitors are advocating is that solicitors should take the witness statements: that is, themselves. Under the present scheme that is not a mandatory process and is not provided for. The Act and the rules read together allow the inquiry to demand that a person produces a statement and allows an inquiry to demand that a person attends to give evidence. It does not permit the inquiry to demand that a person attends to give a statement.

Baroness Buscombe: Is there not an issue here that, on the one hand, saving time and keeping costs down has to be a good thing generally, but that there is a problem if the outcome does not achieve very much? In other words, on the one hand we are saying that we are either too adversarial or too inquisitorial, neither beast nor fowl. Is there not a problem here that in preferring to be inquisitorial, one is going to find it much more difficult to get to the bottom of the issue that the inquiry is all about?

Jason Beer: Yes.

Baroness Buscombe: Is that not a problem? Previous individuals giving evidence to this Select Committee have suggested, for example, that perhaps it should be more informal and maybe in a more informal environment, so that people who have been through a very difficult process and felt hurt and harm may feel able to open up to that inquiry more easily if it were less either inquisitorial or adversarial and more like dispute resolution. On the other hand, perhaps it needs to be more adversarial so that you really can get to the bottom of what is going on.

Jason Beer: Baroness Buscombe, returning to the first question you asked, I think the solicitors there were talking about the narrow question of whether solicitors for the inquiry should obtain the witness statements or whether witnesses should be allowed to provide their own witness statements. I can think of a whole host of reasons why it is a bad idea for the inquiry solicitors to

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have to go out and get the witness statements, including the need to make a record of the interviewing process in the event that a dispute arises as to what was and was not said, which then makes the interviewers witnesses, so the solicitors to the inquiry then become witnesses as to what was said in the course of an interview. Then to avoid that, one has to audio or video-record the process of the interview; the need for a lawyer to be present representing the witness in the course of the interview; the added cost and delay; and the fact that often witnesses will ask for breaks in an interview to freely consult their legal adviser.

There are many good reasons why it is preferable to allow parties to produce the evidence that they wish, but of course a balance has to be struck. If the evidence that is produced is unsatisfactory, if it does not address the relevant questions, some inquiries have adopted the process of calling a witness in, voluntarily, and saying, “You have not answered this question or that question. Please supplement it”. But the ultimate sanction is calling the witness to give evidence, and any deficiencies in their written account can be addressed at that stage, when they are asked questions.

Baroness Buscombe: But, for example, in a situation where it is inquisitorial, is it not more difficult to question the credibility of a witness? For example, in the Leveson inquiry, were there not people who might have lacked credibility and had an ulterior motive as to why they wanted to give evidence in something quite as emotive as an inquiry that is impacting on the culture and ethics of the press? It must have been in the forefront of the minds of counsel that people have different reasons for wanting to put them in the slot of victim. If you cannot be adversarial, are you not too constrained?

Sir Robert Jay: Yes, but barristers are extremely used to understanding what the motives may be underlying a witness’s evidence, which could undermine or strengthen the credibility and reliability of a witness. So we know all about that.

Jason Beer: I think the problem with the idea that an inquisitorial process cannot include adversarial parts within it misses the point, if I may say so. The overall process is inquisitorial in that it has at its centre an inquisitor, the chairman. That does not mean that all parts of the inquiry follow an inquisitorial model. There can be proper cross-examination. It is going on as we speak in an inquiry. There can be proper cross-examination by counsel to the inquiry or by the core participants. I do not think that because the overall scheme of the inquiry is inquisitorial in nature you necessarily lose the benefits of the traditional adversarial system.

Baroness Buscombe: Do you think this is understood by the core participants and others when they are attending the inquiry?

Jason Beer: If the inquiry is run properly, it is set out well in advance. There are a series of directions hearings or rulings promulgated by the chairman that set out, by way of directions or protocols, how the matter is to be conducted. Everyone is under no doubt whatsoever about what their role and function is and the limits of it.

Q116 Lord Trimble: Listening to the discussion over the last few minutes leads me to the concept of core participants. Clearly the core participants have a privileged position within the process, but they are probably persons who have an axe to grind. Is it right that there should be this concept?

Jason Beer: I think it has to be, in fairness to each of them, that they are given a privileged status because they will, in general terms, either be accuser or accused.

Baroness Buscombe: But they put themselves forward to be core participants.

Jason Beer: Not necessarily. The chairman can designate people as core participants. Ultimately they have to consent to it, but he can say, “I think you are likely to face significant criticism and therefore I wish to designate you as a core participant”. It is not necessarily a voluntary scheme.

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Lord Trimble: Could you enlighten us a bit further about the process by which some people are identified as core participants?

Jason Beer: I think practices vary, to be honest. Some chairmen have issued an open invitation at their first hearing. Within a short period of the announcement of the inquiry, perhaps three to four months, they will have a first hearing and the chairman will make a public announcement saying, “Anyone that wishes to be a core participant must make an application in the following form and set out the following information”. Other chairmen have looked at the papers and made decisions themselves and said, “I think the following three are the core participants in this inquiry”.

Lord Trimble: If someone wants to be a core participant and is not classified as one, does that person have a remedy?

Jason Beer: Yes, judicial review, as in fact happened in the Leveson inquiry. They went to the High Court and sought to review Sir Brian’s decision refusing them core participant status.

Lord Trimble: Was that an effective remedy, because judicial review is process not substance?

Jason Beer: You will know, Sir Robert. I think she argued both.

Lord Trimble: Did they win?

Sir Robert Jay: No. The cases were wholly without merit. Usually the core participants will be self-defining, will be obvious. There will be those at the margin, who you can have a debate about, but it is the people with axes to grind, to use Baroness Buscombe’s term, who come along wanting to be core participants, whose role would be marginal at best, who are not given that privilege.

Q117 Lord Soley: Is the virtue of being a core participant that you are likely to qualify for some assistance with regard to legal fees?

Sir Robert Jay: You might qualify, but if you are not a core participant you are going to find it much harder to qualify.

Jason Beer: There is no direct relationship.

Lord Soley: No direct relationship, but one of the comforts that can arise from being a core participant is that you are then in the best position to have representation. Do you think that it would be better if there was no system of core participants? The difficulty is that once you create a special category, you are then dealing with matters in a way that undue attention will be given to the question of whether this particular person is properly classifiable as a core participant or not. You then get satellite litigation over an issue that does not really go to the heart of the inquiry.

Sir Robert Jay: You can only be a core participant if you have a sufficient interest in the inquiry, either because you are the target—in other words, you face the risk of criticism—or you are the victim. Usually it will be obvious whether you meet those basic tests or not and the chair is given a fair amount of discretion. There may be some more problematic cases, but the satellite litigation over it is likely to be quite limited, as it was in the Leveson inquiry. It involved some public expense, since summary grounds of defence in judicial review proceedings had to be prepared about five times, four of them involving one litigant. The public have to pay for that. It is true that the losing party, the litigant I am describing, had, in theory at least, to pay the costs, but I would be very surprised if she has paid the costs. It is not a very significant issue, in my view.

Jason Beer: I think that, in all the inquiries, in only one case—one single person—has someone sought to challenge a decision relating to core participant status, so I am not sure that it is right to say that there is a good deal of satellite litigation. In the eight years or so since the Act was brought into force, I think that is the only example.

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

Q118 The Chairman: It seems to be common practice for counsel to the inquiry to meet witnesses informally before taking evidence. Is this practice helpful to the inquiry and to the witnesses?

Jason Beer: I think Sir Robert is going to answer in relation to the Leveson inquiry, but I would like to say before that that I am not sure that is common practice. Certainly in cases involving hard-edged issues of fact and very serious allegations, so in a number of the inquiries in which I have been involved where very serious allegations have been made—conspiracy to murder—both in relation to the accusers and to the accused, counsel to the inquiry has not had a pre-meeting with the person they are about to question. I think it depends on the context. Each inquiry will be different. If an inquiry is addressing the rather softer issues that the Leveson inquiry did, the position is different.

Sir Robert Jay: I would strongly endorse that. If the subject matter of the inquiry is extremely serious—Baroness Stern mentioned four inquiries my colleague was involved in—I would go further. I would say that it is an extremely bad idea for counsel to meet the witnesses beforehand, since that can give rise to misunderstandings or all sorts of uncovenanted difficulties. The Leveson inquiry was unusual inasmuch as the material was softer. We were painting a picture of the culture, practices and ethics of the press, rarely deciding hard evidential dispute between witness A and witness B.

I would say that the advantage of doing it is that if you have a high-profile televised inquiry, often with very nervous witnesses, it is just common courtesy to put them at their ease, to explain in general terms the way it is going to go. The exact questions are not prefigured but the general lines of questioning are and it avoids the witness saying, “You have not warned me about that. I need time to consider”.

So there are all sorts of advantages in the right sort of inquiry, but even in the Leveson inquiry I would never meet a witness without the Treasury Solicitor being there taking a careful note of the conversation. There was one occasion where at best a misunderstanding arose as to what was said.

Q119 The Chairman: Earlier in the evidence this morning you referred to the preparation of witnesses, and you also said you know what the witness wants to say. Do you also know what the witness does not want to say?

Sir Robert Jay: Yes.

The Chairman: Are some witnesses frightened to give evidence?

Sir Robert Jay: Yes, for different reasons. The untruthful witness will always be frightened to give evidence. They may not display it overtly but a sixth sense will usually tell you who that person is, certainly when you start to engage with them. It depends on the subject matter of the inquiry. Obviously in the Leveson inquiry there were witnesses who did not want to speak out against the press because their perception was that they would be monstered—to use a horrible word—by the press at some later date. There were all those disincentives. I do not want to comment as to how well based their perceptions were, but it was certainly a strong perception and gave rise to difficulty.

The Chairman: Was any of that a disadvantage to the inquiry as a whole?

Sir Robert Jay: It is difficult to know because one is trying to prove a negative, but I suspect that there were people out there who could have given effective, relevant evidence but just did not want to.

Q120 Lord Soley: The Act requires the Minister to consult the chairman before setting the terms of reference, but it has been suggested that it would be better if the inquiry proceeded for a little while before you agreed the terms of reference. Would you agree with that or not? That applies to both of you.

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

Jason Beer: Yes, I think a cooling-off period, if I can describe it in that way, is quite good. Under the present system, I think what happens is that there is quite an early engagement between the Minister and the chairman and the terms of reference are settled. The chairman is not necessarily in the best place to provide meaningful input into what the terms should or should not include because they are very new to the matter. I am not sure that that requires legislative change, because under the Act and the rules it is permitted for the Minister, when he signs the instrument setting up the inquiry under Section 4 of the Act, only to announce the chairman or, if there is to be a panel, the identity of the panel members, and the start date of the inquiry. He does not at that stage have to announce the terms of reference. I think in the Act, as it is presently drafted, there is provision for a cooling-off period before the terms of reference are announced.

Lord Soley: How long should that period be? You could argue it should be a rolling process and carry on, or do you think it ought to be decided after a certain period of time?

Jason Beer: I do not think that one could be prescriptive now as to what that period should be because, of course, one has to bring into account the provision for the amendment of the terms of reference, which already exists and has occurred in a number of inquiries. So if there is a real problem discovered further down the track, the inquiry's TORs can be amended. I would put it that it is when the chairman is content that he or she knows enough about the inquiry to say, as part of the consultation period between him or her and the Minister, that the terms of reference are now settled. I would not put a date on it.

Lord Soley: So a final statement by the chairman at whatever point he thinks it appropriate.

Jason Beer: Yes. "I now know enough about this case to say I am happy with my terms of reference".

Q121 Lord King of Bridgwater: Just to clarify that point, I got the impression you said that you would not set out the terms of reference until the inquiry was well under way. But surely you have to set out some terms of reference so that the people who are going to appear or give evidence know what the terms of reference are. What you are talking about, surely, is then to have the power to amend if further things come to light that suggest that the terms of reference need enhancing or amending in various ways. Is that not right?

Jason Beer: I am talking about two different things. The first of them is in the days, weeks and perhaps months after the announcement that there is to be an inquiry. Under the present scheme I think all three things happen at once. There is an inquiry, this is the chairman and these are the terms of reference. Under Section 5(4) the Minister is required to consult the chairman as to the terms of reference. As I understand it, that happens at a relatively high level of discussion, when the chairman is not necessarily best placed to provide meaningful input. I am talking about allowing a little cooling-off period. Announce the fact of the inquiry, announce the chairman or panel members, do not announce the full terms of reference, have a relatively short period while the chairman familiarises himself or herself with the material, consult, then publish the terms of reference.

Lord King of Bridgwater: What about the power to amend?

Jason Beer: That exists already and has happened in a number of inquiries when a big issue arises after full investigation: "We need to go here, we need to go down this track, let us amend". That exists already.

Q122 Lord Trefgarne: I think it was Lady Hamwee who asked whether there is not a risk that the witnesses, when they come before you, are very nervous and put off. Faced as they are by the whole panoply of the inquiry, the chairman, you, all the other counsel sitting there, they will indeed be put off and perhaps not give as good evidence as they might otherwise have. As everybody knows, I was a witness before the Scott inquiry. That did not happen to me, but one of the

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

witnesses before the Scott inquiry subsequently had a nervous breakdown and never worked again as a result of the cross-examination. I hope that did not happen in yours.

Sir Robert Jay: Well, I hope not either.

Lord Trefgarne: But there is a risk of that if the questioning becomes too aggressive.

Sir Robert Jay: It does. The risks are all the ones you have mentioned, as well as the omnipresence of a television camera and knowing that a lot of people are watching the whole thing live. It has its powerful advantages but also its disadvantages.

Lord Trefgarne: Perhaps it should not be televised.

Sir Robert Jay: I am strongly of the view that the Leveson inquiry should have been televised because otherwise the press were going to report on it as they saw fit, but instead there was a reasonably objective eye, namely the little camera. I think that argument has been lost generally. The television cameras have gone into the Court of Appeal. That is going to start next week, I think. I am not in favour, but there we have it. Television cameras operate obviously here and that has been generally beneficial, I think. You can argue it in different ways depending on who you are and where you are sitting

Lord Trefgarne: It is destroying innocent witnesses that troubles me, that is all.

Sir Robert Jay: Yes. It is the duty of independent counsel to be well aware, because it is obvious from body language, demeanour and everything else, of who is a vulnerable witness. You can have a vulnerable witness who is vulnerable because he or she is mendacious, and it is as simple as that, but even in that case you give them the chance to settle in with gentle questions and then you can start—I would not say aggressive questioning—the more pointed questioning.

Q123 Baroness Buscombe: I probably should have put this to Sir Brian Leveson last week, so forgive me, but I was re-reading some of the transcripts of our previous evidence the other day and I notice Peter Riddell said of the Leveson inquiry, “One of the problems there was that it got off on the wrong basis because it could not tackle what it was originally asked to do. I think it is a fair prediction that it never will”, which is a view.

Do you think that the process is too hurried? In particular there was a strong reason why you might have been hampered, and the whole process was hampered in relation to the Leveson inquiry, because the initial terms of reference referred to phone hacking, which of course is a criminal offence, and there were issues that were sub judice. In terms of the outcome, were you not hampered right from the start and therefore in some difficulty, not only with the terms of reference themselves but with who might be called and what the point was?

Sir Robert Jay: There was a whole area of unlawful activity that was, I suppose, terra incognita—you just could not go there—but I am not sure that mattered particularly. It was the elephant in the room in one sense, but I think we all had a pretty clear idea of how much phone hacking may have been going on. I am not going to say any more than that. But everything else surrounding the culture, practices and ethics of the press, though, could be properly investigated against the background of an urgent inquiry and a rapid timescale and limited resources. That meant that we did not achieve a 100% job, which would be desirable for some inquiries but was not, in my respectful opinion, necessary for this inquiry. It was good enough to do what was achieved within the limited time.

Q124 Lord Richard: Did you, as counsel to the inquiry, have any input into the discussion as to what the terms of reference should be?

Sir Robert Jay: Yes.

Lord Richard: So you were appointed before the terms of reference were finalised?

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Sir Robert Jay: Before they were finalised, but only a few days. Of course, that inquiry was unusual in that the terms of reference were agreed at a high level between the leaders of the three main political parties. So a degree of compromise, if that is the right word, had already taken place. Obviously I was not privy to exactly what went on in dark rooms, but I know that the end result had the imprimatur of cross-party support. Therefore, although one could argue about the language, which perhaps was a little bit loose, the main thing was to get the show on the road, knowing that the politicians were behind it. That was far more important than anything else. In the end, it is the interpretation of the terms of reference.

The terms of reference of the King's Cross fire inquiry were extremely wide: to investigate the causes of the fire and the circumstances surrounding the fire. You could construe that as widely or as narrowly as you like. You could go back to the first underground tube trains in 1863 if you wanted. Those were part of the circumstances, part of the causes. But the chair construed it sensibly. In the end, that is what happens. I do not think that the terms of reference are vital in that sense. It is the interpretation that is important. But you do need them, otherwise the inquiry does not have the statutory basis for proceeding. You cannot send off your Section 21 notices without having proper terms of reference. It would be an unlawful process.

Lord Richard: Did you, as counsel to the inquiry, feel any inhibitions arising from the terms of references as they were presented to you?

Sir Robert Jay: No.

Q125 Lord Morris of Aberavon: I want to ask you about rule 13. We have had criticism that it is unduly prescriptive in comparison with the rules on notice, on fairness, on inquest. From both of your experiences, do you find that rule 13 is unduly prescriptive or, when one looks at it again, does it set out fairly simply and cogently the requirement to give notice?

Jason Beer: I think it is sensible in that it does not require the notice of the three things set out in rule 15 to be given before a witness gives evidence. That is a marked improvement on the Salmon principles—in particular the fourth and the sixth Salmon principles—because there one had to serve notices, if one was to fully comply, before a witness even went into the witness box. That is the good part of rule 13. The obligation is to comply with its terms before the publication of the report.

On the downside, the three elements in rule 15 can in some circumstances—and I think Sir Robert is going to speak in particular about the experience of the Leveson inquiry—lead to unnecessary complication and an overly prescriptive approach. The difficulty again is that it is designed to cater for a whole range of circumstances. A lot of the inquiries that I have tended to be involved in, as Baroness Stern has said, involved very serious allegations, the most serious allegations, and if you were on the wrong end of those allegations you would want full and meticulous compliance with rules 13 to 15. So they are very well suited and absolutely necessary in such cases. However, if you move to an inquiry that looks at softer-edged issues or is really looking at policy issues, which may be the case with the Leveson inquiry, it is questionable whether all the rules 13 to 15 are required.

Sir Robert Jay: I think that is a very helpful analysis. In rule 15, you have to state the criticism, the facts and the evidence. That can be an extremely onerous requirement, particularly when it will be obvious, once you have identified the evidence, what the finding of fact might be and what the inferential criticism might be. However, there are cases—Article 2, Article 3 convention cases—where, because of the gravity of the issue, I think solemn compliance with rule 15 is desirable. There are other cases where it may not be. Rule 15 caused us huge grief and a huge amount of work and incurring of public expense. I think literally thousands of hours of work went into the generic letter, but had we not done it more or less in full compliance with rule 15, I think the inquiry would have been derailed. I know of inquiries that have struggled with these rules, but they are there for a reason. Even if you did not have them, the common law would fill in the gaps in any event, in my view. The general requirement that the person who is going to be criticised knows

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what the basic case against him or her is is ordinary common law fairness. It is nothing more, nothing less, than that. These inquiries must be fair, if they are nothing else.

Q126 Lord Morris of Aberavon: Thank you very much. We have had the distinction between a soft subject and something that might be described perhaps as not so soft. Have you any suggestion, bearing in mind the common law and the need for fairness, of something that could take the place of these two rules and make it simpler, more cost effective and perhaps save an awful lot of time?

Sir Robert Jay: Maybe finding some words that water down rule 15 a bit, the warning letter “must generally”, or a rule that refers in general terms. Section 17 of the Act of course, if my recollection is right, speaks of the general obligation to act fairly. Am I right about that?

Jason Beer: You are.

Sir Robert Jay: You would want that in the rules, particularly in the context of rules 13 to 15, and a slight dilution of rule 15 since its rigour is not required in every case.

Jason Beer: One could introduce a flexible approach that lay in the decision of the chairman as to which parts of rules 13 and 15 were required to be followed in the circumstances of his or her inquiry, but I suspect that may lead to satellite issues. If the chairman said, “My inquiry is looking at these very serious allegations where I am going to make definite conclusions to the criminal standard”, for example, “but I have decided not to insist on full compliance with rules 13 to 15”, I suspect that might lead to further litigation, which is obviously to be avoided.

Lord Morris of Aberavon: Do I take it that it could be well worth our time to look further at 13 and 15 to see if they could be simplified and made less onerous?

Jason Beer: Overall, yes.

Sir Robert Jay: Yes.

Q127 Baroness Hamwee: You have said a lot about the rules and a good deal about the Act, but is there anything else that you would like to say about possible changes to either of them? Can I ask specifically—and it is because, Sir Robert, of your experience of the King’s Cross inquiry—whether you feel there should be any change as regards checking to see whether the recommendations have been implemented at a point after the inquiry has concluded?

Sir Robert Jay: To go back to King’s Cross, there were, I think, 46 recommendations. The late Sir Desmond Fennell’s role finished when he signed off his report in November 1988 but he took a personal interest, ex cathedra I suppose, to ensure that his recommendations were fulfilled. I believe, to be fair to the then London Regional Transport, that they were. The Leveson inquiry, I must say, is rather different because of its political nature. Sir Brian Leveson has given his recommendations. He signed off the report. He is *functus officio*. That is the end of it.

Baroness Hamwee: He is very clear about that.

Sir Robert Jay: Either the political class implements what he has recommended or they will not. I think he is quite right, if I may say so, to put a line underneath it all.

Baroness Hamwee: Yes. It was King’s Cross that prompted me but we have had some other evidence as to the desirability—and, from some people, undesirability—of going back. But I think you are saying horses for courses and no statutory requirement.

Sir Robert Jay: Yes. Thank you.

Baroness Hamwee: Is there anything else on the rules or the Act that either of you would like to say?

Jason Beer QC and Sir Robert Jay – Oral evidence (QQ 102- 128)

Sir Robert Jay: No. I suspect that we are not the first witnesses who have identified possible tweaks to rules 13 to 15, but the Act itself and most of the rules made under it worked extremely well, with sufficient flexibility, to meet the particular requirements of the Leveson inquiry, and do not warrant significant change. I think it is a good piece of legislation.

Jason Beer: I agree overall. I think it provides the right framework for both the chairman and counsel to the inquiry to conduct an inquiry.

Q128 Lord Woolf: Can I just ask for clarification? Is what you say applicable both to the legislation, the Act, and the rules?

Sir Robert Jay: Yes.

Jason Beer: In my case, I have one minor tweak to that in relation to the rules. I think some work could be done—it is a very minor point for you, but if you are involved in an inquiry it is a significant one—in relation to the definition of the inquiry record and what must be done with the inquiry record. As presently drafted, it requires all the material created by or received by the inquiry to be transferred to the public archives or to the sponsoring department, and that is sometimes very problematic.

Baroness Hamwee: Is it not easier in these days of IT?

Jason Beer: That is part of the problem in terms of what it captures.

The Chairman: I am told that Sir Robert has been referring to your book, Mr Beer. I may be wrong about that but I am told that is the case. What you are really saying is that you do not really see the need for a revision.

Jason Beer: In general terms overall, no.

The Chairman: Fine. Thank you very much for coming along and being so helpful to us. Thank you.

WEDNESDAY 4 DECEMBER 2013

10.40 am

Witnesses: Sir David Bell and Dr Judith Smith

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Lord Strasburger

Examination of Witnesses

Sir David Bell, former Financial Times Chief Executive, and one of the assessors on the Leveson inquiry, and **Dr Judith Smith**, Director of Policy at the Nuffield Trust, and expert witness and assessor to the Mid Staffordshire inquiry

Q295 The Chairman: Good morning to you both and welcome to this meeting of this inquiry into the Inquiries Act 2005. I have a formal statement to read, which we do at the start of every session. The session is open to the public and a webcast of the session goes out live and is subsequently accessible through the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence, or have any additional points to make, you are welcome to submit supplementary evidence to us.

If I can start, I understand that you have been given some draft questions. Perhaps I may start with the first one. Chairmen of inquiries who need expert help have differed as to whether this should come from expert panel members with a full decision-making role or expert assessors with only an advisory role. What is your view on this?

Sir David Bell and Dr Judith Smith – Oral evidence (QQ 295 – 316)

Dr Judith Smith: Shall I go first? Thank you. I think that inquiries clearly have differing needs, and that will determine the approach taken to experts whose advice is clearly always going to be on the public record. The inquiry with which I was particularly involved, both as an expert and subsequently as an assessor, the Mid Staffordshire inquiry, had a particular context in that there had already been an initial non-statutory inquiry that Robert Francis QC had undertaken. That probably affected the approach to experts and assessors. Reflecting on the process of having been involved in the inquiry, I can see the value of having a panel with the experts sitting alongside the chairman from the start. First, I can see the potential advantages there in terms of a broader range of expertise being available throughout the deliberations. Secondly, I can see the value of potentially helping with acceptability to all the stakeholders of the final recommendations. However, my main caution about that approach is that I think it would be really difficult to find people of distinction who would be able to give the amount of time that would be required to sit alongside the chairman throughout what could be months or indeed years of an inquiry. That very practical concern takes me back to thinking that having a group of assessors or experts available to the chairman is probably most appropriate. I guess that we may come later in the discussions to think about how that can operate, and the different ways in which that availability could work in practice.

Sir David Bell: I think that I would agree with that. We found in our inquiry—I have never been on another inquiry so I have no idea about how other inquiries have operated—that our role worked very well. We were there because each of us had been concerned with one or more aspects of the terms of reference of the inquiry, and we were there to advise the judge. It worked extremely well. We obviously thought that there were three options. We could have been panellists, which would have meant that we would have been jointly responsible for the report which would not have been appropriate in this case. We could have been experts or we could have been assessors chosen for our expertise. We thought that that third approach was the right one, and I think it worked well.

Q296 Baroness Hamwee: Sir Brian Leveson explained to us the role of the assessors very clearly, but one of our witnesses said, “Well, I don’t know what they were doing; we never saw them”. Is there an issue here about public confidence, given that one of the objectives of inquiries is satisfying public needs and so on?

Sir David Bell: Yes, I am sure that there is. It was very important that we declared exhaustively our own interests in advance, which we did. We gave a very strong declaration of our interests, which was published on the website from the very first day, so there could be no doubt about what we had done in the past and what we had been connected with. That was important. We were very conscious of our responsibility. When Sir Brian rang me up after I had been rung by the Cabinet Secretary to be asked to do this—completely out of the blue, when I was on holiday in Italy—Sir Brian spent an hour on the phone very carefully explaining that he had what he called a killer question. The killer question was: “Do you feel, given what you have done, that you have an open mind on these issues and that you would be fair and objective?”. I said, “Yes I did feel that”. I think that the public should have been reassured by the fact that the declaration of interests made that absolutely clear. It is a very fair question and of course the assessors ought to be not necessarily held to account, but it ought to be clear who they are and where they come from.

Baroness Hamwee: And what their role is. Was that made clear on the website?

Sir David Bell: It was made very clear on the website. It was made very clear to us in the protocol for assessors with which we were issued, and we were careful to consider the terms of reference, which were very clear, and whether we were qualified to advise the judge on the issues that arose. On some of them—for example, the role of the police—I was not at all qualified. However, having been in the newspaper industry for 40 years, having started on a local newspaper and then been on a national newspaper, I did think that I was qualified as regards the issues to do with newspapers.

The Chairman: Who wrote all that script? You referred to the protocol and so on. This was very early days.

Sir David Bell and Dr Judith Smith – Oral evidence (QQ 295 – 316)

Sir David Bell: The protocol for the assessors? I have absolutely no idea. We were given it by the inquiry. I have a copy of it here if you would like it later.

Q297 The Chairman: Perhaps we would like it. One of the things that we have been concerned about is that inquiries have been started and it is often as if it is the first inquiry in the world, with people starting from scratch and having to invent it all. We have had evidence that there should be a group of people who can be brought in to assist someone who has been appointed to chair the inquiry, and that they can start with a list of things that have to be done, and so on—a real starting point. I am interested because it looks as if there was something of that in your case, and we are not certain that always was the case.

Sir David Bell: In our case, this protocol is very simple. It starts by saying that it “provides guidance as to the role of the assessors appointed by the Ministers to assist the chairman during the course of the inquiry”. It goes on, “An assessor will assist the chairman in dealing with any matter in which the assessor has expertise”. It then lists five of them.

The Chairman: Is there any indication as to who has authored that?

Sir David Bell: Actually, there is not.

Dr Judith Smith: It is the same with my protocol.

Sir David Bell: I should imagine that it has been given to every assessor. It is very straightforward. It had nothing to do with the subject of the inquiry.

Lord Woolf: Are they both the same?

Sir David Bell: I have not had a chance to compare notes.

Lord Trimble: I just want to make sure that I heard correctly what Sir David Bell read out. Did that refer to the assessors as being appointed by the Government? Is that the phrase that was used?

Sir David Bell: It says here: “This protocol provides guidance as to the role of the assessors appointed by the Ministers to assist the chairman”. In our case, my appointment was made through Gus O’Donnell, the Cabinet Secretary, who rang me when I was actually standing in a field in Italy. He said that the Prime Minister wished me to do this. We were technically answerable to the Home Secretary and the Secretary of State for Culture, Media and Sport. I think that that is why Ministers may have come into this.

Lord Trimble: I was just going to ask about the statutory basis for the appointment, and I have just been passed a copy. It is an appointment of an inquiry panel, each member of which is to be appointed by the Minister. That surely relates to persons who are members of the panel. An assessor is something different. Perhaps there is a different section. I just wanted to see what the statutory basis of that was. Clearly, it is all done by the Minister.

Lord Richard: What does it say?

Lord Trimble: Section 11 says—

Baroness Buscombe: “The power to appoint assessors is exercisable before the setting-up date by the Minister”.

Lord Trimble: It says that during the course of the inquiry the chairman can do so, whether or not the Minister has appointed assessors. So assessors can be appointed by the Minister before the setting up of the inquiry, and then during the course of the inquiry by the chairman.

The Chairman: That is in the Act.

Sir David Bell: The protocol does refer to the appointment of extra assessors during the inquiry.

Sir David Bell and Dr Judith Smith – Oral evidence (QQ 295 – 316)

Lord Morris of Aberavon: Sir David, you said that you were asked this killer question when you were on holiday in Italy—whether you could be fair and objective. Given your long experience, could you have answered otherwise that you would not be fair and objective?

Sir David Bell: Well, I suppose I could have said that I had such a strong view. For example, the terms of reference referred to future systems of regulation. I could have said, “I think that there should be only one system of regulation and therefore I am not open-minded about what system of regulation there should be or how it might work”. That was not the case. So I think the answer is yes. I am well aware that in operating like this you cannot leave your whole past behind you but you can be fair and objective. I did not have one fixed idea about any of the solutions to the terms of reference.

Q298 Lord Woolf: Dr Smith and Sir David, can you help me on this? In a court, we have the power to have assessors. We very rarely have them because the normal way in which evidence is given in the court is that you come as an expert witness. You give evidence and can then be questioned on it. Bearing in mind the influence that you as an expert, from your background, could exercise on the chairman, do you think that assessors—by whomever they were appointed—should be able to be questioned by interested parties at the inquiry?

Dr Judith Smith: I am in a different position. I started out as an expert to the Francis inquiry, so I prepared extensive written evidence and gave oral evidence over two days. I was one of the two opening witnesses to the whole inquiry, and so I was clearly very much subject to public and legal scrutiny from the outset. I then had a period of almost two years of work with the inquiry before I was appointed as an assessor towards the end of it. So from my perspective, I tend to think of the experience as a whole, which started out in that very public way.

Lord Woolf: Perhaps in those circumstances you are in a very good position. Do you think that the cross-examination and questioning to which you were subject was of use to the inquiry?

Dr Judith Smith: Very much so. I would like to think that it enhanced the evidence and advice that I gave because it made me think more profoundly about that. After I had given two days of oral evidence, there were some follow-up questions and challenge from the legal teams of the core participants, to which I responded. It feels to have been a very searching and satisfactory process from my perspective.

Sir David Bell: I would have been very happy to have been questioned as an assessor. As it was, before the inquiry began, the counsel for Associated Newspapers raised an objection to the appointment of three of us as assessors. Sir Brian eventually ruled and turned down that objection. The objection was that we were not sufficiently connected to the whole newspaper industry, but that issue was raised. I would have been perfectly happy to have been questioned. I can see an argument for saying that assessors ought to be asked, if there is a question in relation to their declaration of interest that is not clear, to explain it. I would have had no problem with that. In fact, the way that we operated did not mean that we were somehow bringing great pressure on the judge. Sir Brian is very much his own man. He had 40 years of assessing evidence and treated each of us scrupulously equally. The issue never arose but I would have been quite happy to have answered questions if I had been asked to.

The Chairman: Sir David, in the brief biography that we have there is a note about you being roughed up by the *Daily Mail* after the Leveson inquiry—not beforehand, although you are indicating that they could well have been people who did not like the idea of you being set on in the first place. Does this roughing-up business—perhaps this is a question for both of you—put you on alert as to whether to take on a job like this?

Sir David Bell: “Roughing up” is your phrase, not mine. What happened was that three weeks before the report was published, the *Daily Mail* published 12 pages almost entirely about me, but not only about me, in which it suggested that I was part of a “quasi-masonic” nexus that was attempting

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to undermine the freedom of the press and, in particular, to concentrate its fire on the tabloid press of which it did not approve. That was before the report was published, but the article came at the end of the process. They had of course raised objections to the three of us, particularly to me, at the beginning. Then counsel for Associated Newspapers raised objections at the end of the inquiry as well. The fact that they did not think that I particularly was a fit person to be an assessor was not exactly a surprise. The scale of the story when it appeared was.

Dr Judith Smith: When I was appointed, initially as an expert, we were asked to declare any interests. Inevitably—certainly speaking for myself, and I think the three other experts appointed at the time—we know lots of people in the health and social care system. Each expert therefore had potential conflicts of interest to declare. As a result of that, my appointment was questioned by one of the core participants due to the fact that I had previously worked for the University of Birmingham, which had been involved in carrying out one of the studies of mortality rates in Stafford. However, I was able to reassure those who were challenging that fact that it was a completely different part of the university and I had had no part in that work—indeed, I was working overseas for two years at the point at which that study had been carried out by colleagues in the medical school at Birmingham. So there was a challenge at that point. When I was appointed as an assessor towards the end of the Francis inquiry, there was no formal challenge to my appointment or, as far as I know, to the appointment of my three colleague assessors.

Q299 Baroness Buscombe: I should declare an interest as somebody who gave both written and oral evidence to the inquiry. Sir David Bell, you wrote to me, as the then chairman of the Press Complaints Commission in early 2011, a confidential, personal and deeply unpleasant letter that showed, in my view, a strong bias, which is entirely your prerogative, against both me personally as chairman of the commission and the commission itself. This letter was of course part of the written evidence that I submitted and the Press Complaints Commission as a whole submitted, as we were required to do,¹⁷ so I feel very comfortable in raising it today. Given that this letter contained this extraordinary bias, did you really feel comfortable that you had an open mind: that just stepping down as chairman of the Media Standards Trust was sufficient in order to wipe the slate clean and have an open mind?

Sir David Bell: Yes, I did. Obviously, it would be very good if you could explain exactly what was an example of terrible bias in that letter to you. My view was that we started the Media Standards Trust back in 2006, long before any issues to do with phone hacking or anything of that kind, not because we thought that the Commission should be replaced or was a terrible organisation but because we thought that there were ways in which it could be improved as a self-regulatory body. I think, actually—because I remember we talked about it—you agreed with that.

Baroness Buscombe: Entirely.

Sir David Bell: We produced a report in 2009 that received no coverage from anyone at all, except perhaps briefly in the *Guardian*, in which we set out models of self-regulation, both elsewhere in Britain and also abroad, because of course the newspaper industry in other parts of Europe and elsewhere has other self-regulatory systems. There are other organisations such as the Bar Council and the Advertising Standards Authority which have other regulatory systems we felt were relevant to ways in which the Press Complaints Commission could improve. We felt that the central problem with the British newspaper industry—not all or even most of it—was that it had a code of conduct that was too often honoured in the breach. Therefore, there were ways in which we felt that the self-regulatory system could be improved. We talked about that and you and I, I think, agreed about that.

Baroness Buscombe: The report was published before I became chairman.

¹⁷ Baroness Buscombe is very clear that this letter was submitted to the Leveson Inquiry. However the letter does not appear on the Inquiry website.

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Sir David Bell: It was published before you became chairman. I think that that is why we talked about it. Your predecessor if you remember took very very strong exception to any criticism of that kind at all. However, we made that criticism simply because we thought that there was a better way, which has now been very widely accepted. I apologise if you felt that the letter was deeply offensive to you. It certainly was never intended to be. What we believed was that the regulatory system was not working as it should, which of course was what the Prime Minister said when he announced the inquiry and what the terms of reference referred to.

The Chairman: I do not want to snuff out Members in any sense but we have to be very careful about reopening an inquiry. We are talking about how it is to be involved in an inquiry and not actually the substance of an inquiry.

Q300 Lord Morris of Aberavon: I want to ask both of you about the time you were assessors. Given the difficulty of finding eminent people to carry out such a role, how much time do you specifically have to give to each of your inquiries as assessors, not as expert witnesses?

Dr Judith Smith: In my case, the time that I spent as an assessor was quite short because I was appointed just three months before the inquiry report was published. That role was very clearly about helping the chairman to, in a sense, road test the draft recommendations that he had come up with. It involved a couple of days of reading the material and the draft recommendations, and then a two-day meeting with the chairman and inquiry team in which we discussed matters and carried out a process of deliberation and challenge regarding those recommendations. I therefore spent probably four or five days in total in the assessor role. From my point of view, the more significant amount of time and energy went into being an expert throughout the previous two or so years.

Lord Morris of Aberavon: Did you feel there was a conflict of interest with having been an expert on the one hand and an assessor on the other?

Dr Judith Smith: No, I regard my work for the inquiry as a whole. It is in some ways only when I reflected in detail on the process, preparing for today that I have even thought in depth about that kind of distinction between being an expert and then an assessor. The three colleague assessors who were appointed at the same time as me in November 2012, although they had not formerly been experts, had all taken part in the series of inquiry seminars in late 2011, so each of us had an involvement in offering advice and being part of some of the discussions on the inquiry. The issue of inquiry seminars may be something that we want to come back to later, because I found that a particularly helpful and fruitful part of my work as an expert.

The Chairman: Well, I think we got to know you on question one.

Lord Morris of Aberavon: Can I ask Sir David about that matter?

Sir David Bell: I was fortunate in that I had recently retired from my full-time job, so I had more time. My role took a lot of time because there were several hundred witnesses and, as assessors, we were given the witness statements to read in advance. On many of them we were asked to suggest questions that counsel might or might not want to put. Sometimes he did and sometimes he did not. It meant that we read those and I personally attended a lot of the hearing because I always felt that if you can it is better to see people in person than in any other way. It is just a better thing to do, but some of my fellow assessors lived a long way from London, so they tended to watch more of the proceedings on the webcast. In some areas in which I had no expertise at all, such as the police, I was obviously much less involved. So it did take a lot more time than I expected. That is a factor to be considered by people who are willing to do this—that they should have the time. It is difficult to find and I was in a lucky position because I had just retired.

The Chairman: We ought to move on.

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Q301 Baroness Gould of Potternewton: I think that in some way you have already answered the first part of the question of whether any lack of knowledge or experience in a particular field can be counteracted by appointing by suitably experienced assessors to assist the chairman. Can you explain in more detail your role as an assessor on respective inquiries in which you have participated? Was it helping to set the evidence, helping in deciding who should give evidence, and what might or might not be significant as part of the evidence? If you can say a little more about the process of being an assessor, it would be helpful.

Sir David Bell: The judge thought that we should start the inquiry with a series of seminars on the industry, to which we should invite people from right across the entire industry. The inquiry team did that, and it was probably the most remarkable concentration of editors in a single place there has been in the past 50 years. We were asked to contribute names of people—from the newspaper business, academia and other areas—who might come and talk, which we did. We helped to run the three seminars and we each chaired a different bit. The people who came to talk were from right across the whole spectrum and it was an extremely good process. The first phase was to advise on who might take part in that process. Then we were asked to advise as to whom the inquiry might call as witnesses. Of course, a lot of work had already been done on that by the inquiry team but we gave lists of people who we thought might be useful. Some were accepted and some were not—that was not up to us at all. We were sent the witness statements in advance. We responded with notes about questions that might be asked of witnesses—some of them were asked and some were not. During the hearings, very rarely, we might send a note to the counsel suggesting that he asked a further question, which he most often ignored because he was in the middle of his cross-examination and it was rather irritating to have someone saying, “Why don’t you ask this?”. We then from time to time among ourselves discussed the evidence that we had heard, because the oral evidence did not always elaborate on the written evidence. That was the basic process we followed. When it was over, as the judge was writing his report, which was extremely long, he would, from time to time, go through with us things that he was thinking about saying—not *primarily* to ask us whether we agreed but just in order to get advice. That was the process.

Baroness Gould of Potternewton: It must have been very different for you, Dr Smith, because you came in later in the day.

Dr Judith Smith: As an assessor, yes. I clearly cannot comment on the role of the original four assessors to the Francis inquiry. I can comment only on being one of the second tranche of assessors. It is very much as I have already explained: we were asked specifically to do one job, which was to help the chairman in testing out the draft recommendations that he had reached after many months of analysis and deliberation with his core team and, I assume, with the other assessors. Our role was very much reading and reflecting on the draft recommendations and then engaging in a two-day process of discussion and challenge with the chairman and his counsel about those recommendations. It was a specific, time-limited task.

Lord Richard: I have two points, really. Did you find it useful having counsel to the inquiry?

Sir David Bell: Very useful. Our counsel was, first, extremely good. Secondly, he was not simply getting from us questions that he might ask. All the core participants were also suggesting questions that he might ask or raising issues that he ought to address on behalf of their own clients. Almost all newspaper groups were represented throughout the inquiry by senior counsel. The counsel for the inquiry was not simply representing, or even primarily representing, any questions that we might have asked. He was following his own lines and then the lines of the core participants.

Lord Richard: From the point of view of the inquiry itself, was it useful to have a counsel?

Sir David Bell: Very. It was actually indispensable.

Lord Richard: Was that because the inquiry was so complex?

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Sir David Bell: Although I cannot remember the exact number, I think we had 339 witnesses in person. There were more than 400 people, most of whom gave evidence in person. Seeing a way through that was essential. One of our biggest concerns with the Leveson inquiry was never to do anything that would infringe on the rights of the people who might in future come to trial. We took very seriously the importance of keeping out anything that might prejudice their forthcoming trials.

Q302 Lord Richard: Do you think that having that counsel to the inquiry speeded it up?

Sir David Bell: Yes, I would say so, although I have no experience of any other inquiry.

Lord Richard: The other thing that I am interested in is how you arrived at the questions that you submitted to the counsel. Was that done on the basis whereby all the assessors agreed the questions or did you do it individually?

Sir David Bell: We did it individually.

Lord Richard: So you would sit there and think, “It would be a good idea if he asked x”, and you would send that up.

Sir David Bell: Yes, we sent them to counsel; sometimes they would be asked and sometimes they would not be. We never expected that they would or would not be asked. We were simply advising.

Lord Richard: I see. About how often did the chairman actually ask for your advice?

Sir David Bell: During the process of hearing evidence, not all that much, really. We would occasionally talk during the course of the evidence session, but not very much.

Lord Richard: Was there a formal structure in which, say, once a week the assessors got together?

Sir David Bell: Yes, but it was significantly less than once a week.

Lord Richard: It was at his initiative?

Sir David Bell: It was of the inquiry team, yes.

Lord Richard: What role did you play in producing the conclusions?

Sir David Bell: We were very clear from the very first conversation that the final report would belong entirely to the judge and that it was not our responsibility or role to make the report. We discussed with him some, but by no means all, of the things he was thinking through, purely because he sometimes wanted advice about various issues to do with how this or that would or would not work. However, very little advice did he ask for or did we offer about the detailed wording of the actual conclusions

Lord Richard: Sir Robert Francis was rather different.

Dr Judith Smith: In terms of?

Lord Richard: From the evidence you gave us earlier, he discussed the issues more, apparently?

Dr Judith Smith: He specifically asked us, as a group of assessors, to provide comment and challenge on his proposed recommendations. We saw those; we did not see the whole report. Our role was specifically road-testing those recommendations.

Lord Richard: But that was not your experience of Leveson that he road-tested his conclusions on you.

Sir David Bell: Not all of them. There were some elements of the report, as I think he said in his evidence, that we never saw at all—for example, the sections dealing with BSKyB and so on—which he did not think were relevant for us to see. He was completely right; so there were certain things that we did not see.

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Lord Richard: Looking back on your experience of Leveson, do you think it was useful—not from your point of view but from the point of view of the inquiry?

Sir David Bell: What?

Lord Richard: Your experience at Leveson of being an assessor.

Sir David Bell: Was my experience useful to him?

Lord Richard: To the inquiry.

Sir David Bell: I hope so. I had spent 40 years in the newspaper industry and I had thought very deeply about all the issues set out in the terms of reference—particularly regarding whether it was possible to have self-regulation that was an improvement on what we already had, and on the issues to do with the future of the industry and so on. You would have to ask him, really, but I hope so.

The Chairman: Dr Smith, do you have any views on the usefulness of the counsel to the inquiry?

Dr Judith Smith: My views would be very much informed by when I was an expert witness to the inquiry, and my sense would be, yes, they were incredibly useful. I saw that through the process of counsel questioning me as a witness, and also in the way that the views of core participants and their legal teams were drawn together and fed into the questioning that was put to me in both the oral evidence session and, indeed, afterwards, when some written evidence was sought to supplement the evidence that I had given in the public session. From having observed the inquiry in action, my sense would be that counsel were able to lead that questioning and that they enabled the chairman to have more space and time to reflect on what he was hearing and draw together the overall messages and impressions that would ultimately feed into his conclusions.

Q303 Lord Soley: Thank you. Perhaps I may say, Sir David, that the 12-page attack in the *Daily Mail* makes some of us green with envy. I have only managed a page or two. You get the Victoria Cross but I get the Distinguished Service Order. There is no contest in these battle honours. Can I put it to you that it has been said to us that the experience of assessors was not necessarily good for everyone in the Leveson inquiry? Did you or others find it an unsatisfactory experience in any way?

Lord Soley: Thank you. Perhaps I may say, Sir David, that the 12-page attack in the *Daily Mail* makes some of us green with envy. I have only managed a page or two. You get the Victoria Cross but I get the Distinguished Service Order. There is no contest in these battle honours. Can I put it to you that it has been said to us that the experience of assessors was not necessarily good for everyone in the Leveson inquiry? Did you or others find it an unsatisfactory experience in any way?

Sir David Bell: I do not think that I found it unsatisfactory at all. When I talked to people outside the inquiry, they did not always understand the distinction between an inquisitorial inquiry and an adversarial one. The inquiry is not a court. It is not an adversarial process in which prosecution and defence are arriving at a verdict, if you like. Sometimes people said, “Why didn’t x ask y, or why did you go this way”. Sometimes there was a feeling that issues were raised but not quite answered, but that was not the purpose of the inquiry. So I did not find that to be unsatisfactory at all and thought that it was a very fair hearing of a very complicated issue on which passions are, correctly, strong on all sides. I think that it was by far the most exhaustive review of the state of the newspaper industry ever to be conducted, and I thought that it was, by and large, very good.

Lord Soley: Again, from your experience, maybe of talking to other assessors at Leveson, did you feel that everyone who was an assessor understood their task? There was a slight implication in what you just said that perhaps they did not understand.

Sir David Bell: I think the assessors understood. I think it was the general public, the people who were watching on television, who were sometimes doubtful and did not quite understand. After all, courts are not televised. This was a courtroom and here was somebody cross-examining

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somebody and they did not understand why no one was defending. I think the fact that the whole inquiry was televised or on the web was, first, very good and, secondly, broke new ground. That was where the doubt arose. Among the assessors, we perfectly understood right from the start.

Q304 Lord Soley: Can I ask you the same question, Dr Smith? Did you find it to be a satisfactory experience, or was it unsatisfactory and, if so, in what way?

Dr Judith Smith: Is this specifically about being an assessor?

Lord Soley: Yes.

Dr Judith Smith: I go back to my point that I see my contribution to the inquiry as a whole. For me the more significant part was as an expert witness in all the work I did over the two-year period. My specific piece of work as an assessor looking at the Inquiry's recommendations served the purpose it was intended to. In one sense, only Robert Francis can properly answer that in terms of how useful it was. I guess that for me, being the expert witness was probably the part that feels to have been the most significant and satisfactory overall. It is not however easy to distinguish.

Lord Soley: Your situation was rather different from the norm because you had been involved directly in the first non-statutory inquiry, and then you became a formal assessor.

Dr Judith Smith: I was not involved in the non-statutory inquiry, but I was involved as an expert witness from early on in the public inquiry.

Lord Soley: Again, if you think about that now, would it have been better if you had been appointed as an assessor right at the beginning of the second inquiry, instead of at the end?

Dr Judith Smith: Again, I have thought about that only in the past few days when preparing for this hearing today. I am content with what happened because I very much value the fact that the work I did for the inquiry was so clearly on the public record. I made my significant and long written statement along with a colleague expert witness. That was subject to two days of questioning and scrutiny. Clearly, I was involved with other work, particularly in writing papers and presenting them at two of the inquiry seminars that were held in 2011. No - I like the fact that my expert work for the inquiry was very public, and that feels appropriate in a public inquiry. It did feel slightly different to then be an assessor working in a way that is confidential in the sense that the detail of those discussions was not reported. I absolutely understand why that is the case—it is important that deliberative processes can be honest and challenging. Overall, it feels like that role as the expert was the one that was probably more satisfying for me.

Lord Soley: You would not accept that the idea of being appointed as an assessor at the end of an inquiry, as you were in the second one, would be useful unless you had been involved in the first one. Do you think it would have been useful?

Dr Judith Smith: The three colleagues who were appointed alongside me as assessors had been involved in inquiry seminars, but not as experts right at the start, and had not given evidence formally to the inquiry. My own reflection is that they brought a freshness of challenge and approach to the inquiry and its work. They had obviously been following it, because everyone in health policy and management had been. There is a sense in which I was more deeply involved in the work of the inquiry, which probably had its advantages, but as I said, the other assessors certainly brought a freshness of challenge and perspective from not having been more involved. Both have advantages.

Lord Soley: Sir David, finally, would it have been helpful if assessors had been appointed half way through or further on in Leveson, or do you think everyone needed to be there from the beginning?

Sir David Bell: : I think in our case it helped a lot that we were there from the beginning. I should point out that all the evidence was published and all the transcripts of everything that was said

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would have been on the web so if they had been appointed half way through, they could certainly have caught up. It would have been possible to appoint extra assessors if that had been appropriate.

The Chairman: Baroness Buscombe, you will no doubt lead on to your own question, which may have been dealt with.

Q305 Baroness Buscombe: Dr Smith, you have in large part answered questions in relation to how it came about that you were both an expert witness and then an assessor. You have also said that the role of expert witness was possibly more significant. The question concerned which contribution you consider to be more useful. One of the things that I was quite intrigued about was that you said that you were asked to be an assessor to road test the recommendations but you were not party to the report itself. Did you feel, therefore, that you were cognisant of all the facts and all that had taken place prior to the drafting of that report—in which case, you were comfortable focusing on the recommendations themselves without access to that report?

Dr Judith Smith: Yes, because it was a very specific task about assessing how practicable the recommendations would be, and whether they would actually work for the health service and other related bodies. Four of us were chosen as assessors at that point, and between us we had a range of experience. There was someone who manages a very large NHS trust; another is a highly experienced clinician, a doctor in the health service; and myself and a colleague who both have extensive experience of health policy. It was very much about: would these recommendations work and, if so, how? It was about looking at them in that respect, rather than whether or not they made sense from all the deliberations of the inquiry. That was not what we were being asked about. It was very specifically about the practicability of those recommendations, and felt very appropriate.

Baroness Buscombe: Were you the only expert witness who was then invited to become an assessor?

Dr Judith Smith: That is correct.

Baroness Buscombe: All the others were assessors throughout the entire process.

Q306 Dr Judith Smith: At the start of the Francis inquiry, four assessors were appointed and they obviously remained assessors throughout. When I was appointed as an expert witness, there were four of us who had different experience—one in health organisational law, one on patient safety, one on healthcare regulation and myself in respect of health organisation and commissioning. The four of us provided written and oral evidence during the first week of the inquiry. I guess that we were helping to set out the territory and helping the chairman and the team start to work through some of the themes, preparing for questions later in the inquiry. I was the only one of those witnesses who subsequently was asked to be one of the second tranche of assessors. **Lord Morris of Aberavon:** To both of you, I should have thought that the fundamental difference—a self-evident proposition—between the role of an expert on the one hand and the assessor on the other is that the evidence of the expert is in public, it is transparent and should inspire the confidence of the participants. The assessor, in Shakespeare's language, is behind the arras and nobody knows what his views are. Is that a good thing?

Sir David Bell: We were in front of the arras, really, in terms of where we were physically.

Lord Morris of Aberavon: Not in the discussions.

Sir David Bell: No. What I said earlier remains the case. First, it is very important that the background of the assessors, and what they had done and do, should be clear. Secondly, you are right—there is a distinction between the two, and that is why if anybody asked the assessors to answer questions about their position, I personally would have been very happy to do so. In fact, the way that we operated did not mean that we had either the wish or opportunity to operate as if we were behind the arras, if you see what I mean. However, it is a fair question.

Lord Morris of Aberavon: How would you improve on that?

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Sir David Bell: Possibly with the benefit of hindsight, it would have been a good thing for us assessors to have been available to be asked questions by counsel to the inquiry about our views. I did not think so at the time but, in retrospect, that might have been a good thing. It would then have been clear in public—so I would have been very happy with that.

Lord Morris of Aberavon: It would have helped transparency.

Sir David Bell: It would have helped transparency. I think we all felt that the declarations of interest and the fact that everything we had previously done was in the public domain was really quite transparent, but maybe that would have been an extra help and would have been fine.

Lord Morris of Aberavon: Dr Smith, is your position unique in having been an expert and then being asked to road test as an assessor?

Dr Judith Smith: I do not know: I cannot speak for other public inquiries, but it was certainly unique within the Francis inquiry. I have one reflection about this. I want to return to the point about the inquiry seminars that we held during the Francis inquiry. These took place just after the conclusion of taking oral evidence, and there were seven of them, which were held in different places around the country. They involved some of us who had been formally appointed as experts, as well as many other people who could be considered to be experts. The people attending included the core participants—for example, the families of the people at Stafford—and the seminars were on a range of topics such as healthcare regulation, the role of NHS boards and nursing. They were filmed, were very public and were independently facilitated. People wrote papers in advance for them, and they were all on the website. There was significant debate and discussion at the seminars. The reason I mention them is that they were very deliberative, interactive and engaging. They just had a different feel to them. They were more like a seminar or workshop but they brought out some different perspectives and there was a lot of challenge.

They were very helpful to the Chairman and the Inquiry team. It just leaves me to wonder: clearly, they were fed into the Francis inquiry and that is a different way of using experts and potentially assessors, to have some of that challenge and debate in a public setting. It is partly about it being on the public record, and there is a slightly different, less formal feel. Does that make sense? It was a very rich part of the inquiry process.

Lord Morris of Aberavon: The recommendations covered a very much wider field than the particular point of the expert evidence that you gave.

Dr Judith Smith: Oh yes.

Lord Morris of Aberavon: Human nature, I should have thought and presume, means that you would have liked the recommendations on a particular aspect to be in line with your expert evidence.

Dr Judith Smith: There were 290 recommendations—

Lord Morris of Aberavon: We are dealing with your particular evidence, your expertise and there was, I suspect, a particular recommendation on that. It is human nature that you would have liked the recommendation to be in accord with that evidence.

Dr Judith Smith: I really did not think of it in that way. My expert evidence was actually pretty broad because it was about the whole history of the NHS and how it has been structured. I was doing a lot of context setting for the inquiry rather than looking forward. I was very much being asked to look back, and to set out why the NHS is being run as it is. So in one sense my expert evidence was retrospective, whereas the recommendations were clearly forward-looking. I did not see a connection or conflict of interest in that way.

Lord Morris of Aberavon: In the interests of transparency, one might have thought that an expert should not be the judge of the recommendations. Is it a path that should be followed, or was your situation perhaps unique and valuable?

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Dr Judith Smith: I go back to the fact that it was for Robert Francis QC to judge how useful that was. On the broader question of the role of assessors alongside experts—which is very much what we are talking about this morning—I suggest that that is not very clear to the public. I would not have understood that in advance and, looking back at the Inquiries Act, if I am correct, I do not think that there is anything in there at all about experts, whereas there is mention of assessors. Greater clarity about the two roles and how they complement one another or, perhaps, conflict with one another would be helpful. As I see it, there is guidance in the Act about assessors but, unless I have got this wrong, there is none about the role of experts. Greater clarity would be welcome for individuals taking on those roles and someone ending up in the sort of role that I had—and most importantly for the public.

Q307 Lord Soley: Sir David, you have just indicated that you concluded that it would have been good if you had been cross-examined, and I can understand that because the assessor's role is strange. It is difficult to see how it fits in to this public process. But, and it is an important but, you could envisage yourself being cross-examined for some length of time and on a number of occasions. We have to bear in mind the cost. This is a cost on the taxpayer at the end of the day. Can I put it to you that one other way of doing this might be to allow assessors to be challenged, rather as a jury member might be challenged, as to whether they should be there, rather than cross-examined throughout the process? That would add days or perhaps longer to an inquiry, with considerable implications on costs.

Sir David Bell: I think that that is very wise and it is more or less exactly what I had in mind. It would be perfectly reasonable at the start of the inquiry if any of the core participants raised issues and asked questions about potential bias among one of the assessors or, not having an open mind, just as you can regarding the selection of a jury—not necessarily with the right to remove the assessor but to air the questions. I would have been very happy for the question to have been aired. I do not think it would be appropriate for that to happen all the way through the inquiry but at the beginning, in order to air it and maybe taking the declaration of interest as the starting point. It would not be so much a cross-examination but amplification. If that improved the process of transparency it would be a good thing.

Lord Soley: Dr Smith, I ask the same question. Would you accept that it might be better, rather than be cross-examined on your role as an assessor—not in giving evidence—that it would be possible to challenge you at the stage at which you were appointed about your vested interests, for want of a better term?

Dr Judith Smith: Yes, it is quite different because it was such a contained piece of work in a short period. As I have said already, as I reflect on my role, the public nature of being an expert felt more comfortable and appropriate. I guess that that is what I am saying, albeit—I return to the point that I made earlier—it is important that the expert advice and so on that you give is public, wherever possible. However, it is important that some of the deliberative discussion, the direct advice or challenge to a chairman, can be confidential. There are some similarities here with civil servants giving advice to Ministers. There is always a debate there about to what extent that is in the public domain, and there is some of that nuance that we are talking about here. It would alter the nature of that challenge and advice if you felt that all of it was going to be completely in the public arena. Does that make sense? Overall, however, I feel more comfortable that the expert advice was public.

Q308 Baroness Gould of Potternewton: Can I go back to the question of seminars, which you both mentioned but have not gone into in any detail. What was the purpose of the seminars? You both said how useful they were but who determined the subjects? Who determined who should attend them? What was the outcome? What value were they to the rest of the inquiry?

Dr Judith Smith: With the Francis inquiry, they came just after the taking of evidence. My understanding was very much that the chairman, Robert Francis QC, wanted to explore in more

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depth what seemed to him to be the main themes arising from all the evidence that he had taken. In terms of how the seminars were organised, that was very much down to the inquiry secretariat and the team, together with the chairman. They decided where the seminars should be and on what topics, and who should attend. They did seek the advice of those of us who were experts, and the assessors, about who we knew to be experts in the area and who might also be able to help with contributions or attendance. However, much of that was done through the networks and expertise of the inquiry team.

Baroness Gould of Potternewton: How were the outcomes of the seminars, the discussions, decisions or whatever passed into the inquiry?

Dr Judith Smith: There were seven seminars and papers were prepared for each of them and placed in the public domain. The independent facilitator of the seminars wrote a report that drew together all the material that had come out of them—again, that is all on the inquiry website. My sense is that they were very much then used by the chairman to inform him in the drafting of his report. They were intended to help him reflect on what had come out and start to scope where he was going next in his analysis and, ultimately, in drafting his recommendations.

Baroness Gould of Potternewton: Sir David, your seminars came right at the beginning. Am I right?

Sir David Bell: They did, and I was just looking back at what Lord Justice Leveson said he wanted them to do. He said that we should start from the right place and intended, “to hold a series of seminars ... so that we can focus on the perspective of all those involved: these seminars will include, among other topics, the law, the ethics of journalism, the practice and pressures of investigative journalism both from the broadsheet and tabloid perspective and issues of regulation all in the context of supporting the integrity, freedom and independence of the press, while ensuring the highest ethical and professional standards”. That is exactly what the seminars focused on. The goal of them was to better inform him, “to make recommendations: a. for a new more effective policy and regulatory regime”, and, “how future concerns about press behaviour, media policy ... should be dealt with”. I think he hoped that the seminars would start the inquiry off on a very good footing by airing these issues as broadly as possible. Indeed, that is exactly what happened. The report itself came a year later after a great deal of evidence, but the seminars were very helpful to get us started on the right foot.

Q309 Lord King of Bridgwater: I apologise for arriving late and I shall read your earlier evidence with great interest. One of the reasons why we are sitting here for this inquiry is the huge range of different matters that have been the subjects of inquiries. You are here today really as proxy for all those assessors. You are the only assessors we are going to see and you, Dr Smith, are the only expert witness we are going to see. What I am really interested in is to what extent your evidence is representative of the problems that are generally faced across inquiries. I appreciate that that may be an impossible question to address to you. You can have experts such as ballistics experts who have been involved in one or two of the more serious inquiries. People have been shot and experts have provided very important evidence—a lot of highly technical evidence of that kind. Your expert evidence, Dr Smith, was about the policy, general structure and management systems of the NHS, and went much wider. Then, Sir David, we come to you and I slightly understand what the *Daily Mail* is getting at because you cannot have done the jobs you have done with great distinction over a number of years without having some pretty firm views on what should happen in the press. I make this point because of what you said about cross-examination. It seems to me that your cross-examination at the start of the hearing might have taken a considerable time if various core participants were able to supply your interrogator with all the questions. Would you care to comment on that, looking more generally at the issue of assessors in inquiries?

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Sir David Bell: It is very hard for me to comment on other assessors because I have never been involved in an inquiry before and I am not enormously keen to be involved in another one. I therefore really do not know about other assessors. In terms of my experience, what fundamentally we were focusing on in the inquiry was: is there a better way of developing the self-regulation of the British newspaper industry. We and the judge hoped very strongly that we would find a way to satisfy all the different interests—they are very broad and different—and take us forward. This, after all, was the seventh time in 70 years that these issues had been raised. That is something to which I had given a great deal of thought. I had no absolutely no fixed idea about what the right system of self-regulation should be, other than that the one we had was not functioning effectively. To that extent and in many other ways the *Daily Mail* was completely wrong. I had an entirely open mind about the outcome. The fact that I had experience of the industry over a long period ought to have been a plus rather than a minus. In the way that Lord Soley just described—a process at the beginning by trying to discover if anyone did not agree with that, and holding me up to the light and saying, “Does this man look as if that is how he is”—that would be useful and, in the interests of transparency, a good thing. But beyond that, I believe myself to be perfectly capable of acting as an assessor, as set out in the terms of reference—following the evidence where it led, trying to think about ways in which we could have a better self-regulation system than we do, consistent with the code of conduct set out by the newspaper industry, which remains absolutely the bedrock of what should be done.

Lord King of Bridgwater: I have absolutely no criticism of you and you have, no doubt, behaved with integrity throughout. However, is it not a big challenge to have somebody as an assessor who knows something about the subject but has no opinion at all on the subject he is being asked to assess?

Sir David Bell: I think that it is a very big challenge and I did not mean to say that I had no opinion at all. What I meant to say was that it is perfectly possible—and I imagine Dr Smith would agree—for you to go into a situation and listen to the evidence. You listen to what people say because what you are looking for is a solution. You are looking for a regulatory system for which we have been looking for a large number of years and which works better than the one we have got. It is possible, listening to the evidence to come up with an idea or ideas that you might not have had when you started. I think I have the capacity to be—

Lord King of Bridgwater: You see the problem, do you not, perhaps with other inquiries on this issue regarding how you find assessors?

Sir David Bell: I see the problem and it is an important matter for the public. I completely agree with you. It is a matter of public interest that everyone looking at assessors should know where they come from, because that is only right. But I believe that they can operate in a way that I described.

Dr Judith Smith: In reflecting on my role as an expert witness to the Francis inquiry, I consider that it was very much about the supervision, regulation and commissioning of health services. It was about the health system, how it was that the events at Mid Staffordshire were able to happen, and how it was that they were not noticed much sooner. That was profoundly what the inquiry was concerned with. My expert evidence was sought because of the 20 or so years that I spent researching the health system and how it works—in particular, the commissioning of health services. It was for that sort of breadth and because I was someone who had been an analyst and, I guess, critic of how the health system works. One other thing to say is that when I was asked to be an expert, my understanding was that it was both because of my expertise and because, it was said to me, I had not worked in the Department of Health or national bodies. There was a sense that I was something of an outsider.

The Chairman: I might be moving to a time when I say let us be a bit more succinct. We have Lords Trimble, Richard, Woolf and Soley still on this question.

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Q310 Lord Trimble: Dr Smith, you described how the papers prepared for the seminars were published as a summary of what had happened, and those conclusions were also published. Did that provoke any responses? Did anyone take issue with what happened at the seminars?

Dr Judith Smith: That is a question that should be addressed to the inquiry secretariat because although I was involved as someone who prepared papers and presented them at the seminars, I was not involved in any of the discussion after them.

Lord Trimble: Sir David, you referred to the seminars held in the context of Leveson. Forgive me if I did not hear it but did you have a process similar to that for Dr Smith, whereby material related to the seminars was published?

Sir David Bell: Everything that took place at the seminars was published.

Lord Trimble: What does “everything” mean?

Sir David Bell: Some of the people at the seminars came with prepared statements or issued them in advance. Others spoke and it was all put on the website.

Lord Trimble: Did you publish a transcript?

Sir David Bell: Yes, I think it was—

Lord Trimble: Did you get any people coming back saying, “Oh no, what was said in the seminar was not right”?

Sir David Bell: Not to me. They might have done to the staff to the inquiry. I stand to be corrected if it transpires that the material was not on the website but I am almost certain that it was. Certainly our intention was that it would be.

Lord Richard: I wanted to come back to seminars, too. Who was at the seminars?

Sir David Bell: If it would be helpful to the Committee, I could provide a list of them—I do not have it with me—but it was an awful lot of people. I think we had every national newspaper in Britain and a lot of people including from schools of journalism, individual journalists and academics who specialised in regulation—a whole range of people.

Lord Richard: The difference between the seminars in your case, Dr Smith, and yours, Sir David, is that at the Stafford inquiry, seminars were to help the chairman come to his conclusions. In your case, Sir David, they were surely a public exposure of the problems.

Sir David Bell: I think they were held partly to expose the problems, but partly for exactly the same reason as in Dr Smith’s case.

Lord Richard: The timing?

Sir David Bell: The timing was different but the seminars enabled the judge to see very quickly the broad range of opinion and to set the basis and tone for the things that he would need to look into very closely. It was different but very effective.

Dr Judith Smith: The people at the Stafford inquiry seminars included doctors, nurses, managers, people from health regulatory bodies, and academics as well as patient organisations. I am trying to remember whether health journalists were also there, but it felt a very open process. As I recall, when seminars were advertised, there was an opportunity to get in touch, for people to say, “Can I come to them?” and then contact the secretariat. The seminars were definitely filmed and very much on the public record. As I have said before, they felt very interactive and deliberative, somewhat different from the core inquiry itself.

Lord Woolf: I think I detect that when you say you would be quite open to questions and you could see that that would serve a purpose, you were really referring to questions on your appropriateness to be an assessor. I would like you to deal with a different question. Do you think

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it would have been practical for your conversations or communications to the judge, in helping him to come to his conclusions and recommendations, to be made public?

Sir David Bell: No, I do not think it would have been appropriate for all that to be public.

Lord Woolf: So in that way your role could not have been played by an expert witness.

Sir David Bell: I imagine that that is true. It would not have been appropriate to do that.

Q311 Lord Woolf: Could you, very shortly because of time, say why you feel it would not have been appropriate? You may have formed opinions that others would like to, in their view, correct.

Sir David Bell: The answer is that there were six assessors and a big team working with the judge. The team had good deal of discussion with the judge about the report but, in the end, these were all his decisions. I just do not think that it would have been appropriate to have discussed all that as it was going on. I just do not think that that would have worked properly.

Lord Woolf: Is that because you would have been inhibited in saying things or just because of the practicalities of carrying on the sort of conversations you were having?

Sir David Bell: I think both, but primarily the practicalities.

Lord Soley: Sir David, can I clarify the position again? You accepted that cross-examining assessors throughout the inquiry was not a good idea, but there is a case for challenging at the beginning of it, as I have indicated. Can I be clear about the purpose of that? In my view, the purpose would be to put in the public domain the interests that may be challenged by anybody in that inquiry. That would apply regardless of whether it is Leveson, the health service inquiry or any other kind of inquiry—which touches on Lord King’s point. So is the purpose of having a short period at the beginning to enable people to say to an assessor, “You have these interests. We want to put them in the public domain”? Is that what you have in mind?

Sir David Bell: Yes.

Lord Soley: Before you answer that, I apologise, Lord Chairman, in that I should have declared my interest in that I gave written evidence to Leveson and, as I am sure Sir David knows, I have had a long involvement in issues of the regulation and freedom of the press.

Sir David Bell: I agree with that. I can talk only about my own case, but if there were people who believed that because of my involvement with an organisation called the Media Standards Trust, which we founded not to focus primarily on regulation at all but on a whole range of issues—regulation being only one—that might bias me in favour of a particular conclusion it is right they should have the opportunity to ask about that. That is entirely right and I would favour it.

The Chairman: Lord Trefgarne, have you anything left on this one?

Lord Trefgarne: I was simply going to make the point that several colleagues have already made about the publication of advice provided by assessors. Am I right in concluding that you are not in favour of publishing the advice that you as assessors submit to the chairman?

Sir David Bell: No, I think that I am not in favour of publishing the advice that we gave or the processes of the discussion.

Lord Trefgarne: Or the assessment of the evidence that you received?

Sir David Bell: No, because that is too fluid and would be impractical.

Lord Trefgarne: Not even subsequently at the end of the inquiry in, for example, the annexe to the report?

Sir David Bell: The report belonged to the judge. He made decisions on the basis of the evidence that he heard from hundreds of people and the whole process of the inquiry. I do not think that that would be necessary or appropriate.

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Lord Trefgarne: The judge or chairman of the inquiry must be free to disregard your assessment if he so chooses.

Sir David Bell: Completely and absolutely. I am sure that he did, too.

Lord Trefgarne: Did he? It would be interesting to know which of your assessments he disregarded. Perhaps that is for another day.

Lord Woolf: It has just occurred to me as I have been sitting here listening that I have been to one meeting of the trust. Perhaps I should disclose that.

Sir David Bell: Yes I think you may have been, funnily enough. I completely forgot, but I think that that is right. I would like to re-emphasise the point that the purpose of the trust's attempt to deal with this issue long before anything to do with phone hacking and so on was not—although it was portrayed as being—adversarial in the sense that what we wanted was simply a more effective way in which the industry could regulate itself, based on the editorial code that the industry itself had written. That was all. That is still what everybody is looking for.

The Chairman: I was just saying to the clerk that it occurs to me that as a Rowntree trustee I may well have been a funder of that trust. However, it is more than four years ago. There we are; these things occur to us as we go on. Was there anything else, Baroness Hamwee?

Baroness Hamwee: No.

The Chairman: Fine. Can we move on to Baroness Stern?

Q312 Baroness Stern: I declare an interest because my husband was a panel member at the Billy Wright inquiry. Can we move on to a brief discussion about appointments? I confess that I have only just discovered that the assessors to the Leveson inquiry were appointed from a short list of government suggestions, which I found interesting. Is it right, Dr Smith, that you were appointed by Mr Robert Francis QC?

Dr Judith Smith: Yes, by the chairman.

Baroness Stern: I would really like to probe this a little. How do you feel about the appointment of assessors and how appropriate is it that they come from a shortlist of government suggestions, in the light of the fact that they are talking about independent public inquiries?

Sir David Bell: We had no idea of the basis on which we were appointed as assessors. The particular background of the Leveson inquiry was set up following the suggestion that the phone of Milly Dowler had been hacked, and a further suggestion, which turned out not necessarily to be the case, that her voicemails had been interfered with. If you remember, that caused a great furore. It was in the backwash of that that the inquiry was set up by the Prime Minister. What the Cabinet Secretary said to me was, "The Prime Minister would like you to do this". The next thing that happened as far as I was concerned was that I then talked to Lord Justice Leveson. That is more or less all I know about the process.

Baroness Stern: You would not want to be pushed into commenting on whether you feel it appropriate that the chairman should be given a shortlist from the Government? You probably would not.

Sir David Bell: It is outside my frame of reference.

Baroness Stern: Would you like to comment on how the appointment of assessors relates to the perception of the independence of the inquiry?

Dr Judith Smith: In terms of the appointment of both experts and assessors, speaking from the perspective of someone whose work is all focused on a major public service—the health service in my case, which was the business of this inquiry—it feels to me that it was highly appropriate that

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the decision about experts and assessors was made by the chairman, as the independent person appointed to run the inquiry.

I feel that way very much because the business of the inquiry was about a major government-funded and government-run service. For me, it feels absolutely appropriate that it was the independent person appointed to run the inquiry who made those decisions.

Sir David Bell: Might I add that Sir Brian interviewed each of us for about an hour on the telephone? Although he may or may not have been operating off a list, he did not tell me that he was doing so. Had he decided that we were not appropriate, I think he would not have accepted us. So I do not believe that he was told by the Government, “This is who you have to appoint and that is it”. Had he decided that we were not appropriate and left me out of this, the other five assessors were indisputably appropriate. We had a retired chief constable; Shami Chakrabarti, who has had a distinguished career in running Liberty; Lord Currie who has vast experience in the private and public sector; Elinor Goodman, who is a television political journalist; and George Jones, who had been the political editor of the *Daily Telegraph*. Actually, as a group of assessors, it was quite good—in fact, it was better than quite good. Whatever the process was, there was a good outcome in this case.

Lord Trimble: Baroness Stern has covered the question. My concern is over the perception—whether the public are likely to perceive the process as being genuinely independent when the Government’s fingerprints are all over everything.

Sir David Bell: I do not think that that is for me to comment on.

Q313 Lord Woolf: In the course of this inquiry, it has been suggested that it would be to great advantage if some of the decisions such those which you have been talking about—the appointment of the assessors under the terms of reference—should be left to after the inquiry has begun. Do you agree with that or do you think that the Minister’s power to amend the terms of reference as the inquiry continues is sufficient for this purpose?

Dr Judith Smith: I think that when Robert Francis QC gave evidence to this Committee he talked about the possibility of having a slightly more iterative process, in the

sense that others could also be involved in helping draft terms of reference. There would be a period of time, obviously with some limits, in which there could be some engagement with assessors, experts, core participants and others, as an opportunity to refine the terms, given the huge complexity of some of these inquiries. To me, that instinctively feels like an appropriate way to go because you are then drawing on that broader expertise, and on groups of interest to try to make sure that the inquiry is appropriately focused. Also, people would then understand the limits to the inquiry’s remit. That could help.

Sir David Bell: When I read this, I thought that this was a very good question. I went back and looked at the terms of reference to see whether they ought to have been changed or amplified. In our case, which I am sure is different because each case is unique, I thought that our terms of reference were perfectly satisfactory and that it was a good thing that they were set out at the beginning. But there would have been scope to expand them if necessary. In terms of Part I of the inquiry, which is the only part that has so far been held, the terms of reference have stood the test of time.

Lord Woolf: Why do think that it would be good thing to have them fairly firmly established at the outset?

Sir David Bell: In our case, because of all the circumstances that led up to the inquiry. I could imagine a completely different subject in which, as the inquiry was going on, a series of facts emerged that dramatically altered the nature of the question. In which case, the terms of reference might then be changed. That did not happen with us. Most of the basis on which the terms of

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reference were set out had already emerged in various ways. So I do not think that it was necessary to change them in our case. However, I can imagine a different kind of inquiry on a different subject where that might have been necessary.

Lord Woolf: Would you be a bit worried about there being an inquiry into the terms of reference before the inquiry started?

Sir David Bell: Yes.

The Chairman: There is a question that we have asked other witnesses about the aftermath of the inquiry. Often some chairmen have said, “No, I have done my job and that’s it, and it is up to others to get on with it”. Others have said, “No, I want to see that something happens after all that work I have done”. What is the view of the assessor on this? Do you feel, “Well, we are finished and that is it”?

Lord Trefgarne: Leveson’s view was very clear.

Sir David Bell: Our view was very similar to Lord Justice Leveson’s view. Maybe I should not say “our view”, but my view was that it was my duty to keep absolutely silent after the inquiry and not take part in any of the debate about what might follow it, because I thought that that would not be appropriate. I have not therefore made any comment at all about the outcome of the report or what the judge proposed because I did not think that it would be appropriate, having been involved in it before. That has been true of almost all of us, all the time. In this case, I thought that it was the judge’s responsibility[, was] to produce a report which he did.. It was then for the industry to decide what to do with it. For me to contribute to that would not have been right, so I have not done so at all.

Dr Judith Smith: It was a different situation with the Francis inquiry. Robert Francis took a clear view that he wanted to take forward the inquiry’s work as he has done. He has spoken at countless conferences and spent a lot of time out in the health service explaining his conclusions, and talking about the inquiry’s recommendations and what he feels needs to happen. That is clearly a decision that he took. It was made clear to us as assessors and, indeed, as experts that we were free to talk after the inquiry. Clearly we were not free to talk about the private advice that we had given as assessors but, once the report was out, it was for us to make our own commentary about what we thought about the report and how it would be taken forward. A number of us have been involved with writing about, researching or supporting the health service in trying to take forward the inquiry’s findings.

Q314 Baroness Buscombe: Lord Justice Leveson did not attribute blame. He set out his recommendations. Do you think that an expensive inquiry is the right vehicle for improving a self-regulatory system?

Sir David Bell: The terms of reference of the inquiry were very broad, as you know. They were handed to us, if you like.

Baroness Buscombe: I should add that we have been asking this question of others. Do you think there is another route to solving a difficult situation such as this?

Sir David Bell: It very much depends on the particular subject being inquired into. In this case, the process of the inquiry was very revelatory to everybody in terms of setting out the issues—not just involving the police and politicians but everybody. The judge was entirely right to say that having written the report it was not for him to then—as might have been the case with a different subject—try to find a solution. I do not see how he could have possibly have done so without getting involved in a whole series of political or quasi-political situations, which would be quite wrong. He was completely right on that. I think his hope was that his report would be taken as a basis on which the industry could then coalesce around a set of solutions that the industry chose.

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Obviously, the self-regulatory solution was the one that he proposed. That, I think, in this particular case, would have been the right outcome.

Baroness Buscombe: Do you not think that, for example, a series of seminars such as those that took place at the beginning, with perhaps other discussions among experts and others, might have been a quicker, less expensive and perhaps more expeditious route than an inquiry pursuant to the Inquiries Act?

Sir David Bell: I think that in this case, given the history of everything involved—this inquiry took barely more than a year—it was important for all the issues to be laid out in the way that they were. I can imagine other inquiries where that would have been a good approach. In this case, this worked very well in terms of airing all the issues. Having read almost all the evidence, they were aired right across the spectrum in very great detail. So in this case, given the history of all this and the furore that surrounded its setting up, it was the right way to do it.

The Chairman: Lord Strasburger wants to ask a question. It will be in order for him to do so.

Q315 Lord Strasburger: Sir David, a little throwaway remark you made about an hour ago has been worrying me. You said that you would prefer not to be invited to take part in a future inquiry. It would be interesting to know whether any aspects of your experience on the Leveson inquiry lead you to be reluctant to be involved in a future inquiry.

Sir David Bell: It was not intended to be much more than a throwaway remark. Part 2 of the inquiry, which could not start until all the court cases are finished and which will take a long time, if it ever happens, will be very complicated and time-consuming. If you are saying whether my experience put me off the idea of doing this, my answer would be absolutely not, although I do not know what Dr Smith's answer would be. I would like to think that on balance it has been a good thing to have done and it is a really important issue. I hope eventually that there will be an outcome that will be better than where we started. Therefore, in principle, it certainly has not put me off. Having looked at the terms of reference, I then looked at the terms of reference for the second part of the inquiry. Since that will not start until 2015, probably at the earliest, I then thought, "Wow. That would take until 2018". Gradually I began to think that there might be other things. However, in principle, my answer would be absolutely not.

Lord Trefgarne: Baroness Buscombe asked whether you thought that a public inquiry was the right way to bring forward a new scheme. Would you not agree that in circumstances such as this, where the press were accused of the most appalling things such as hacking people's telephones and bribing police officers, that a public inquiry was, frankly, inevitable? In other words, they brought it on themselves.

Sir David Bell: I would agree, with one proviso. We started very much from the premise that all the people who were accused of the things they were accused of were innocent until they were proven guilty. We said this time and time again in our discussions. What was emerging in the evidence or had emerged before in various newspapers was very compelling but it had not been tested, as it is now being tested, in a court. Therefore, we felt that it was important always to remember that they were innocent—are innocent—until proven guilty. That was a very important principle that informed us all the way through. I think that an inquiry was inevitable because of the public outrage at what had happened, which got worse as the details of what had happened to people who had nothing to do with either bribery or phone hacking emerged. As they emerged during the course of the early part of the inquiry, that outrage increased, which further justified having an inquiry. However, we were very conscious that it was not our job to decide who was or was not guilty of anything. That would have been wrong. Whenever anyone asks me about this, my answer is always, "I have no idea about the guilt or innocence of any of the people involved here. They are innocent until they are proven guilty". That was a very important point. Lord Justice Leveson handled the inquiry very well. One of the things that he did brilliantly was to go around that subject so that nobody, as far as I know, has ever suggested that the rights of any of the

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individuals have been infringed. That perhaps makes this inquiry unusual in terms of inquiries because that does not usually arise as an issue.

The Chairman: Lord Soley wants to come in. I am a bit concerned that we might be reopening an inquiry.

Q316 Lord Soley: I just want to make it clear that the one thing that has not been mentioned here, which is critically important in view of Leveson and, indeed, other inquiries, is the victims. They would not have felt satisfied without a public inquiry. I might say the same about the other inquiry. I do not worry about my own views but I, along with many other politicians—

The Chairman: Order, please.

Lord Soley: The key issue is the victims because they would not have felt satisfied without some form of public inquiry.

Sir David Bell: I completely agree and I think the same must be true for my colleague.

Dr Judith Smith: Absolutely, yes.

The Chairman: I think we can conclude on that, and we very much thank our witnesses for coming in and being so frank with us.

Lord Bichard, Robert Francis QC and Professor Sir Ian Kennedy – Oral evidence (202 – 229)

Evidence Session No. 9

Heard in Public

Questions 202 - 229

WEDNESDAY 30 OCTOBER 2013

11.20 am

Witnesses: Robert Francis QC, Professor Sir Ian Kennedy and Lord Bichard

Members present

Lord Shutt of Greetland (Chairman)
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Robert Francis QC, Professor Sir Ian Kennedy and Lord Bichard

Q202 The Chairman: Welcome to the three of you. We look forward to your contribution this morning. I have a formal piece to read out to you, which is this. The session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It will be helpful if you could advise us of any corrections as quickly as possible. If after this evidence session you wish to clarify or amplify any points made during your evidence or have any additional points to make you are welcome to submit supplementary evidence to us. Would you introduce yourselves, one at a time, for the record and make any introductory remarks you want to make? Then I will start with the first question.

Professor Sir Ian Kennedy: My name is Ian Kennedy. I currently chair the Independent Parliamentary Standards Authority. I have chaired public inquiries and currently am chairing a private inquiry.

Lord Bichard: Michael Bichard. I am a Cross-Bench Peer and Chairman of the Social Care Institute for Excellence.

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Robert Francis: I am Robert Francis. I am a Queen’s Counsel. I have chaired various inquiries, including most recently the two Mid Staffordshire inquiries. I did submit—and I apologise for its lateness—a memorandum of the various things I thought might be helpful to you.

Q203 The Chairman: I have a copy, I have read it and it is very helpful. Thank you for that. Let me make a start, then. Ten of the 14 inquiries so far under the Inquiries Act 2005 have been chaired by serving or retired judges. What advantage do you see in not having a judge as chairman? How generally could the appointment process be improved?

Lord Bichard: I am happy to kick off on that one. It may be career-limiting for you, but I think there are some advantages in having a judge chairing an inquiry in that of course they are used to weighing up evidence and using their judgment and getting to the core of an issue quickly. I think there are some disadvantages, potentially. One is that I am not sure that they tend to follow the inquiry afterwards by making sure that something happens, because they are not used to doing that. They make a judgment in the court and that is the end of it. I think it is rather important, if you have been chairing an inquiry, to try to make sure that people are clear about what you said and make sure that something happens. We may want to come back to that.

I think they have some other disadvantages, and I tread carefully here. I do not think they are necessarily the best people to draft reports in a way that normal people can understand. Of course they could get someone else to do that for them but sometimes I think they tend to not do that. Finally, I am not sure that they are absolutely the best people to work with the press. I believe that working with the press during an inquiry is an important step to getting a good outcome in terms of something happening. So I think there are some advantages but I do not think they are overwhelming.

The Chairman: Lord Soley will be asking a question on recommendations and we may well follow that with other questions but that will come a little later.

Professor Sir Ian Kennedy: First of all, thank you for inviting me. I have submitted to the clerk a piece of paper I wrote in a volume with Lord Woolf that may help. I think that there are significant disadvantages in having a sitting judge—and I emphasise “sitting”—and very few advantages. It is true, as Michael [Lord Bichard] says, that there should be an understanding of notions of fair play and proper procedure, but I do not think one needs to be a sitting judge to be aware of that.

The disadvantages are two. First, judges are familiar with courts of law and tend, if they are not prevented, to convert public inquiries into courts of law, and they are very different enterprises. Secondly, if a public inquiry is set up, as it usually is, in the context of political controversy or the inability of political leaders to reach some kind of alternative solution then the judge is necessarily, as a sitting judge, embroiled in political controversy. The independence of the judiciary is thereby, in my view, impaired. We know of a number of examples. For example, before Lord Hutton did his inquiry into the Iraq War he was hailed as the voice of reason and when he reported he was deemed to be a lackey of whatever side people did not agree with. Those dangers about judicial independence are huge, so I would argue for either a non-sitting judge or someone with knowledge of procedural fair play and due process who is not a judge.

Robert Francis: My view is that there are some inquiries where it is not only proper but probably almost essential that a senior judicial figure undertakes it. Those are the inquiries where the need for independence and proven integrity and authority are the greatest, and probably those that involve very contested facts. In other words, most inquiries do not involve much by way of contested fact; it is just a question of finding out what the facts are. People might want to prevaricate in front of an inquiry but there are not usually huge disputes about whether something happened. For instance—and I draw a long breath before saying this—the subject matter of the Saville inquiry, it would seem to me, was entirely properly undertaken by a very senior judge. We can comment on how long it took and so on. But so far as other inquiries are concerned, those more concerned with safety practice, my sort of inquiry, I do not think need to be undertaken by

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judges and, for some of the reasons that have been said, it would probably be a good thing if they are not.

Q204 Baroness Hamwee: We could not have had more different responses to this question than we heard in the first part of this morning. One of the questions that our Chairman asked then was the scope for using senior members of the bar rather than judges, who would bring a similar ability to distil facts and so on. Would any of you like to comment on that? It is rather a personal question.

Robert Francis: I have to declare an interest. That question really comes down to whether it is appropriate to have lawyers chairing inquiries, and if it is appropriate to have lawyers chairing them then clearly in most inquiries, other than the most trivial—and no public inquiry is trivial—you want at least a senior lawyer. I think a senior lawyer can in many cases provide the guarantee of independence, integrity and authority that a judge can. I would suggest that there may be some matters that are so controversial in terms of the facts that it would be better to have the authority of a judicial figure deciding them, but in general I do not personally believe that is the case.

Lord Bichard: I think it is possible to sometimes get the best of both worlds. I chaired the Soham inquiry but I had counsel interrogating witnesses and that worked terribly well. I am surprised, in a way, that other inquiries have not gone down that route. When I see chairs asking the questions themselves, I just wonder whether they are able to concentrate and reflect upon what they are hearing in the way that you can if someone else is asking the questions for you. That worked incredibly well for me. I met counsel every morning; we talked about what the questioning was going to be; we met at the end of the day; we reflected upon it; he did the first draft of the report before I took over drafting it. So I think you can get the best of both worlds by doing that.

Robert Francis: I have had experience of non-statutory inquiries, which I have had to chair and ask all the questions, and it is virtually and frankly an impossible job because the business of having to think of the questions, react to the answers and so on prejudices one's position as a chairman. Therefore, I would say that whether you have a legally qualified chairman, a judge, or not, you do in all but the simplest of inquiries need someone else to be asking the questions, and that skill, if I may say so, is different from the skills required as a chairman.

Q205 Lord Morris of Aberavon: I am very sensitive to the involvement of judges in anything that smacks of or is on the border of a political matter. Where do you draw the line? Is there a line that can be drawn?

Robert Francis: I think it is difficult to have any general principle that is ever going to stand up to experience. The best skill of judges is likely to be in the assessment of evidence for the purposes of determining facts and coming to conclusions about those facts. They are in reality, with all due respect, unlikely to be any better equipped than the rest of us in assessing recommendations and the policy implications that flow from things. With regard to matters of political controversy, it might well be thought that they are no better equipped than the rest of us and may be inhibited in expressing views because of their judicial status.

Lord Bichard: I do not think you can draw a line. Inquiries are very different. Some are complex; some have significant political dimensions; some do not; some are about delivery; some have been set up to lance the boil of public concern. You have to make a judgment on each case on its merits.

Lord Chairman, you made a point right at the beginning about recruiting chairs and supporting chairs. I must say I found it—and it may have changed now—slightly odd, first of all, that you are asked out of the blue, “Would you chair this inquiry?” and then you look around, or I looked around, to see what support in terms of knowledge of previous inquiries there was, and there was none. I think that may have changed a little because one or two of us have been on the stump trying to draw out the lessons of the inquiry we have been involved in, but you are almost starting from scratch.

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Robert Francis: As far as appointment is concerned, like most chairmen, I had the experience of being phoned up out of the blue and asked to decide within an hour whether I would like to chair the inquiry because the Minister was in a hurry to make an announcement. I am frequently asked, probably with some surprise, “Why were you chosen?” I have absolutely no idea, or about the process. I think there is absolutely no reason why the announcement that there will be an inquiry has to be accompanied immediately by the name of a chair. There would be a lot to be said for a process that is a little more transparent in relation to appointment.

Professor Sir Ian Kennedy: My experience was even more dramatic from that, in so far as I was phoned at about 8.30 pm to be told that the Secretary of State was delighted that I had agreed to take on this inquiry, which I might say left me with little room to negotiate. That said, Lord Morris, your question is exceedingly important. Is there a way whereby one can distinguish between circumstances calling for X or Y? I think the first question is: are there circumstances where a public inquiry is an appropriate response and where it is not? In that piece of paper I have given to your clerk, I attempt to distinguish as regards those matters that may well fall within the area of suitability at a public inquiry. Many of the issues ought to be dealt with, in my view, by Parliament. If Parliament does not have the procedures, it should acquire those procedures whereby it holds to account the Government of the day or a past Government. That is what Parliament is about and that is what parliamentarians are about. A public inquiry is a separate entity, and I suggest that that public inquiry notion is where one would have that entity.

Secondly, one then has to ask: what are the purposes that one seeks to meet or satisfy by having a public inquiry? They are very many. Robert has talked about establishing the facts. In my view, there is something illusory about the notion of the facts, although it is something that is attractive to forensic experts. If I can draw on my own experience, a doctor will say something to a patient and a patient will hear something. They may well be different. They are both telling the truth as to what they said and/or heard. The facts are somewhere in the middle of that, and the meta point of understanding that that discourse is itself complicated is as important as establishing whether it was a Monday afternoon or a Thursday morning. I think that process of exploring the facts, getting to the bottom of things, is just one of the purposes.

The more you look at the other purposes, like understanding, catharsis, healing, lessons to be learnt, recommendations, all of which are part of the process, then it becomes much more of a subtle question as to who to ask to do it. I think it is someone who is good at establishing facts and understanding that facts may be in dispute and remain in dispute, also good at having some empathy with those who are concerned with this and good, as Michael said, in terms of communicating with the press and others, and you begin to look for a different kind of animal. They may well be slightly rarer but they are, in my view, essential if you have defined the purpose as greater than a mere forensic exploration of what the facts are.

Q206 Lord Trimble: I want to come back, Lord Bichard, to what you were saying about finding it very useful to have counsel who is putting questions and so on. I thought what you were describing was the normal role of counsel to the inquiry and was standard practice, and I was quite surprised to hear you say that in the inquiry that you had you did not have someone doing that.

Robert Francis: That was a non-statutory inquiry. It was a homicide inquiry and there are a series of inquiries that have to be held if a mentally ill person kills somebody else in the UK. There is a cost pressure that leads those who set up such inquiries to try to persuade chairs not to have a legal team, and I had to do quite a substantial one. For others I have succeeded in persuading the commissioning authority to give me counsel, but in public inquiries I do not think I have ever heard of one in which there is not a counsel to the inquiry.

Lord Bichard: I may be wrong but I am not sure that the Chilcot inquiry is using counsel in quite the way that I use counsel.

Robert Francis: It is not a statutory inquiry.

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Lord Bichard: No, but nor was mine a statutory inquiry, and I am making the point.

Lord Trimble: This should not be a characteristic of a non-statutory inquiry. Surely not all inquiries should have this.

Professor Sir Ian Kennedy: I think Robert puts his finger on an important point that should not go below the radar, namely cost. Whatever the department, or whatever the Minister, has an eye to that. But in my view Robert is absolutely right that you cannot really conduct a public, private or any inquiry if you do not have someone to test, to ask, to draw in questions from other lawyers and counsel so that you can listen. However, that said, I think the need for the chairman to have an awareness of what due process, proper procedure is is important. From time to time counsel may well be drawn—and I have personal experience of that—by a particularly clever counsel, representing one of the interested parties in the inquiry, into a sparring match that you sometimes as a chairman need to lean back and say, “Hang on, that is not what we are here for. Stop.” I did this once and I was advised by my counsel, “There is no need to stop; we are doing fine”. I said, “You may be but I am not,” and we did stop. It took me three hours to work out what was going on and it was undermining the very nature of what we were doing. You have to have that alertness, and you cannot have it if you are doing the questioning as well.

Q207 Lord King of Bridgwater: Can I ask a question that I have just asked our previous witnesses, in terms of the purpose of the inquiry? For some people the purpose of the inquiry and coming to give evidence is to make a jolly sound basis for a huge claim for whatever negligence or other things they think have happened, and the inquiry is merely a stepping stone. The remark was made, which is a common remark that is made, “All we want is to know the truth”, which is not true at all. What they want to do is to also see if they can get a basis for substantial compensation. To what extent are you aware of that, that you are going to be the source point and that your findings will be the source point for substantive subsequent legislation?

Robert Francis: It is, of course, the common experience, not only of chairs to inquiries but also for coroners, because the attendance at an inquest is often not to find out the cause of death but to lay a foundation for a claim. In both cases the proper use of the inquisitorial process by the chair will prevent that, so it is quite difficult for someone to seek to follow that sort of agenda if you have the rules that most inquiries do whereby all the questions have to be asked via counsel to the inquiry unless there is some very special reason to do something different, which is the way I ran mine.

Lord King of Bridgwater: Does it condition in any way the writing of your report subsequently? You may qualify slightly what you say in the knowledge that this will be a very important document in further proceedings.

Professor Sir Ian Kennedy: The essential beginning of a public inquiry is to state what it is not about as importantly as what it is about. When I have said it has X or Y purposes, one needs to make it clear at the outset, certainly in my case, that we are not concerned with the discipline of medical practitioners or clinicians. That is for another body. We are not about the compensation of those who see themselves as victims. That is for somebody else. Having said that once, you then have to say it maybe every two weeks, because there is a sense in which, “I want something out of this,” whether it be the lawyer, the solicitor, the person.

Q208 Lord King of Bridgwater: Are you saying you have to keep saying it but it is not entirely true?

Professor Sir Ian Kennedy: You have to keep saying it, and when you close you remind people again. The important thing is that you are reminding both the media, so that their expectation is as it should be, and those who advise the members of the public who are appearing. You say again, “This is not what I am going to be doing. Do not expect this.” Then, of course, you reflect that in the report you write; you have laid the groundwork. Even having said it a hundred times, there is

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still some expectation that something will flow from that. That is human nature, but you have guarded yourself against that expectation.

Robert Francis: It is possible to prevent these considerations derailing an inquiry by being really strict on who asks the questions and the nature of the questions that are asked. If you keep your eye on that ball as a chairman, I think you avoid that very real danger.

Lord Bichard: I think this is part of the chairman's role in setting the tone for an inquiry. I did not have people who were probably coming along thinking they were going to make a claim. I had a lot of people who were coming along who were defending their careers and their reputations, and somehow my task as the chairman was to establish a tone and an environment where people came to tell us what had happened and allow us to draw conclusions. I did not feel that that was helped if the inquiry became excessively litigious and legal and so I would intervene on occasions, as you [Professor Kennedy] did, and try to make clear that that was not what we were there for.

You can draw to the attention of those who are giving evidence and those who are involved that there is a public audience out there. In relation to the Soham inquiry, there was a public audience that was looking at every day's transcripts and hearings. It was very easy for people, if they tried to obfuscate or if they tried to turn this into some sort of legal circus, to quickly become the butt of quite a lot of public criticism. You have a number of weapons that you can bring to bear, but your task is to create a place where people are incentivised and encouraged to tell the truth and to realise that there is a lot of public interest there.

Professor Sir Ian Kennedy: May I add one gloss to what Michael has said? He is absolutely right in terms of the tone and, as I said, one needs to make it clear right at the outset. I held a preliminary hearing where I set out the ground rules, "This is what we are going to do". Robert was a counsel in the inquiry that I chaired, and one of the things that I was keen to avoid was cross-examination, the capacity to hone one's forensic skills so as to reduce the world to black and white, whereas in my view it was always slightly shady and muddy grey. For that reason, I developed a procedure where cross-examination was not barred, although there was no right to it, but it was made irrelevant because counsel to the inquiry received all the requests from those representing interested parties and he or she then asked the relevant questions on behalf of those interested parties. By that notion alone, the nature of the exercise was completely changed. It was no longer a gladiatorial contest but rather a pursuit, as Michael said, of the various truths that might have been applied.

The Chairman: I think we had better move on and see if we can be a bit more succinct.

Q209 Lord Woolf: I will try. As it happens, we have been told the constituents of each of your inquiries and the fact is you all had different set-ups as far as panel members and assessors were concerned. What help can you give us as to whether the chairman of the inquiry should have the benefit, first of all, of wing members and, secondly, of assessors?

Professor Sir Ian Kennedy: I am happy to go first. I think that the default position for any chairman of an inquiry would be to sit with others, not least because he or she is not the repository of all wisdom and knowledge and may miss things. In my case I had three others who brought different skills. The second question, Lord Woolf, is what standing or status those people should have. You draw a distinction between sitting with side members or assessors. I think if an inquiry is going to last more than three or four months—and most of them do—it is not appropriate to regard those people who have sat there day after day, month after month as mere assessors, to be disregarded at the end of the day whereby you become *primus inter pares*. I think that they have to be full members of the inquiry, have a view, and insist that their view be taken account of in whatever final report. My position is you should sit with others, and ordinarily those others ought to be part of the inquiry's panel and therefore have a say.

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Forgive me if I go on, and I am prone to do so when we get into public inquiries. That is different from having experts. Experts are a different kettle of fish completely. I had statisticians, anaesthetists and all sorts of people, and Robert and Michael I am sure have also. As regards experts, they should belong to the panel. They should not belong to any of the people interested in the exercise. They belong to the panel and I had them sitting out during the evidence being able to challenge on your behalf, or even talk to witnesses sometimes, so that they helped the discourse, particularly if you have an anaesthetist giving evidence and he can look across and see the president of the Royal College of Anaesthetists and is able to say, “You understand this,” and he gets agreement. That has a meta purpose. It translates to the audience the fact that we are only here because things are very complicated. If it were very simple we would not—

Lord Woolf: Sorry, I am not quite clear what the difference is on your approach between an assessor and an expert. Assessors become very close to being members.

Professor Sir Ian Kennedy: I am translating the word “assessor” in my language to an expert. They are not part of the deciding panel. They sit there to help you and assess the evidence and contribute generally.

Lord Bichard: Each inquiry is different. Mine was more straightforward in a sense than either of these two. I took the view that I did not want to have a team of other members on the panel. I think the reason I came to that is not because I am not a very good team player, I hope, but because I did not want to get myself into a position where I was having to compromise what I thought needed to be said by having to trade off with others. That was just my view and it seemed to work pretty well. What I did have were some expert advisers. I had a police adviser and a social work adviser who worked in the team that I brought together. I had about seven or eight people in a small team that I set up right at the outset and I would speak to those expert advisers every day. They were part of the team and they would help me and counsel to develop a strategy for questions and they would tell us sometimes when they thought that the answers were not entirely full and we could go back and deal with that. But I did not have others sitting alongside me. I do not think I would have wanted to, personally.

Q210 Lord Woolf: Could I ask you to clarify one point? Did you let those who were attending the public inquiry know what you were being told by these experts?

Lord Bichard: I did not explicitly say, “Well, I had a chat with the police adviser last night and he tells me”. No, I did not.

Professor Sir Ian Kennedy: That would be my point precisely. If you do have people who were not on the record as either your panel or your experts in the hearing then you are receiving evidence and observations that cannot be tested. To that extent, you are denying the public the possibility of holding you to account, because if everything is done in public then you can be held to account. People can say, “Well, how can he possibly have thought that because of X, Y, and Z?” If everything, including the experts and the panel, is said in public then you can be held to account and also people can challenge it.

Robert Francis: In my two Mid Staffordshire inquiries, one non-statutory and one statutory, I sat alone but I had assessors, in effect expert advisers. In the public inquiry I had two panels. I started off with one panel who helped me assess the inquisitorial process. The second was specifically appointed in order to help me with my recommendations—not in drafting the recommendations, but I just wanted someone to bounce the recommendations off to see whether these experts felt they were practical. I did not have a panel because I felt in advance, certainly in the second inquiry, that I would not find people of the right expertise, authority and so on who would have the time to sit with me for the length of time that the inquiry would take. I also felt, as has been said, that a report written by a committee is a rather different animal from one that an individual chairman, for better or for worse, takes responsibility for. You can disagree with the report of a chairman and you can disagree with the report of a committee, but what you know about the report of a

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committee is that it is more likely to be a compromise, for obvious reasons. I think there are disadvantages with that.

I have to say I did not get my assessors to publish their views at all. I could have done, and I understand the issue about transparency, but then you have exactly the same issue about transparency if you have members of a panel, because no one publishes the discussions that go on in a panel. I think if any of my assessors had given me what I would call properly an expert opinion, which amounted to evidence as opposed to a view of what I was writing or the evidence that is being given, I would have required them to write a report. In addition to that—I am sorry to go on—I also had expert witnesses who gave expert evidence in a more conventional way.

Q211 Lord Morris of Aberavon: Non-statutory inquiries by definition have no statutory powers behind them. Some inquiries that are statutory have been held under particular Acts, like the NHS Act or the Transport Act. What is your experience and how far can you assist us, whether it is a non-statutory inquiry or a statutory inquiry, where you have found that you are constrained by the lack of powers?

Robert Francis: My first inquiry into Mid Staffordshire was non-statutory and I did not have statutory powers, although the Secretary of State made it clear that should I consider I needed them I could ask for them. I think that mechanism of saying, “If you need them you can get them,” was sufficient to persuade those whom I asked to come to give evidence or disclose documents to do so, because had they not done so it would have happened after rather more publicity than they were currently getting. I was not aware of constraint in that regard.

In relation to that first inquiry of mine, I know there is a considerable argument as to whether it was the right thing for the Minister to do to have an inquiry that was non-statutory in that way. All I would say is that, having been asked to do it, obviously I did it and I found that for the purposes for which I was asked to do that inquiry I had much more flexibility. I was able to undertake the job much more quickly and very significantly more cheaply than if it had been a fully blown statutory inquiry. I was able to deliver a report on a relatively complicated issue within I think nine months, as opposed to the two and a bit years that it took the public inquiry. The public inquiry dealt with a wider range of issues, but there are, on occasions, procedural benefits to a non-statutory inquiry.

Lord Bichard: I agree with every single word of that. I was in the same situation, non-statutory, but had been told that it would be made statutory if that was necessary. The only additional point I would make is about, as I said earlier, the importance of setting a tone and environment—remember I was dealing with the death of two young girls, and their parents were coming into the hearings. I think having a non-statutory inquiry was just another little way of keeping this as informal as we possibly could.

Professor Sir Ian Kennedy: I had statutory powers. I do not think having those powers in any way prevented me from creating the tone. I designed the hearing chamber so that people would feel that they could come there, because we were dealing with the deaths of lots of very small children, and a lot of thought went into that. I do not think whether we were statutory or otherwise had anything to do with it. It had to do with the vision of the chairman and the panel. I found having the power to subpoena, which was probably the most critical thing if I wanted to hear from someone, simply concentrated the minds of those who might otherwise not wish to come. I never had to resort to it, but there were two occasions on which we reminded someone who was dragging his or her heels that we did have that power and, as Robert rightly said, it was enough to persuade them to appear. I am in favour of having the powers, largely because if you have them you can use them. They are in your back pocket and you will not therefore have to use them, but I do not think statutory and non-statutory in any way affects the way in which you run it in terms of the tone.

Robert Francis: In my second inquiry I used the power to order the production of evidence, I think three times—twice at the request of the witnesses who wished to have protection against the consequences of coming to give evidence and once in order to formally test whether the

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witness concerned was genuinely unfit medically to come and give evidence. The way to do that, I felt, was to issue a witness summons. Medical evidence was produced, and so on. Those were the only three occasions in which I used those powers.

Q212 ¹⁸ **Lord Trefgarne:** I have a question for Mr Francis. Your first Mid Staffordshire inquiry was a non-statutory one and you have explained how you were asked to make up your mind very quickly about whether or not you would be willing to do that. We know that you later asked for the inquiry to be converted into a statutory one. If you had been given more time, would you have insisted that the first inquiry you conducted was a statutory one?

Robert Francis: No, given what I was asked. To put the record entirely straight, I completed the non-statutory inquiry and in my report I recommended that there should be a second inquiry but I did not specify whether or not it should be a public inquiry. The last Government decided to have that inquiry and asked me to chair it but on a non-statutory basis. The new Government converted that into a public inquiry, so I made at no point any request about whether it should be statutory or non-statutory.

Lord Trefgarne: That is not quite what we have been told, so there we are.

Robert Francis: It was one of the 18 recommendations I made in the report of the first inquiry, that there should be a wider inquiry into the NHS system, because the first inquiry was limited by its terms of reference to the events in the hospital, the hospital trust itself. It was quite clear to me on the evidence that I felt there needed to be a wider inquiry and that is what I recommended, so a second inquiry was set up. So there were two separate appointments. In answer to the question whether I would have insisted if I had had more time in the first inquiry, if it was going to be confined to an examination of what happened in the hospital then I am not sure that I would have insisted on it being a public inquiry. If I had had more time, I might have asked for a bit more consideration to be given as to whether that was ever going to be an adequate inquiry in the circumstances, but that is a different issue.

Lord Morris of Aberavon: As I understand it, Mr Francis, at no stage were you refused a statutory inquiry. Is that right?

Robert Francis: No. I never asked for or was refused a statutory inquiry. There was a public demand for a statutory public inquiry on both occasions, but that was not from me. I was asked to chair the first inquiry and I accepted the job.

Q213 The Chairman: If I may pursue this a bit further. We have a Hansard quote here. In announcing that inquiry, Mr Lansley said, “The shadow Secretary of State, Andy Burnham, must know that at the beginning of last September, 2009, Robert Francis came to him in the midst of his first inquiry to raise the issue of the legal base for that inquiry and the question of whether it should be brought under the Inquiries Act. He wanted the terms of reference to be extended sufficiently widely to ensure that at that stage he could have looked beyond the question of what happened, to the question of why the primary care trust, the strategic health authority, the NHS in general and other organisations did not intervene earlier and in a better way. On 10 September last year, the then Secretary of State did not agree that that should happen, but had he done so the first Francis inquiry could have achieved much earlier what the second will now have to do”. That is the quote we have from Hansard.

Robert Francis: My memory is now being tested, on no notice. In the course of the first inquiry, it became apparent to me that the inquiry I was being asked to conduct was unlikely to be one I would conclude was sufficient, because all I was being asked to do was look at what happened in the hospital. It is possible that I did have, from time to time, discussions with the Department of

¹⁸ The replies of Mr Francis to Questions 212 and 213 should be read with the Supplementary Written Evidence he submitted to the Committee.

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Health about that inquiry and I may have raised the issue with them. I think that the outcome was that I should complete inquiry 1 and then they would decide whether to have inquiry 2. But the precise nature of that conversation—I certainly do not recollect, can I put it this way, ever going to Mr Burnham and saying, “I think you should extend this current inquiry”. What I may well have said to him was that I doubted that this inquiry was going to be sufficient, and there may be a nuance in that.

Lord Morris of Aberavon: But that answers my earlier question; this is a back-up as I understand it. At no stage were you refused by Mr Burnham a request to have a statutory inquiry.

Robert Francis: No. My position, expressed informally, was no different from that which was contained in my eventual recommendation, which does not, to my recollection, require there to be a statutory inquiry. It recommended there should be a further inquiry into the wider system, because that was my conclusion on the evidence that I had.

Q214 Lord Soley: What you are describing is a process by which your earlier inquiry was revealing rather more that worried you about what might be happening, which led you then—and let us not worry too much about how it happened—to saying, “You are going to need to do more after this, because this is too focused, this needs to be a bit wider”.

Robert Francis: Yes. I never necessarily envisaged that it would be I who would be asked to undertake the second inquiry. It was not that I ever felt that I was trying to get a bigger job for myself. Unfortunately I turned out to be wrong about that.

Professor Sir Ian Kennedy: It is not unknown, in the course of public inquiries, for another stone to be turned over and something else discovered. In the inquiry I led, at some point one of the witnesses disclosed the fact that organs had been taken from young babies and stored, and this was commonplace. In the context, this was deemed to be something worthy of further examination. So, Lord Soley, I was asked by the Chief Medical Officer whether I could, as part of my general terms of reference—and it was squeezed into those terms of reference—look at the whole matter of the retention of tissue. That took six months of what I was doing to go away and look at that, and it is a very complex matter, and then come back. You ride with those punches, because they are very important, as long as your terms of reference allow you to do so. Robert was not able, in his first inquiry, to extend, but I was because my terms of reference allowed me to do so.

Q215 Lord Soley: A final question on this. You are, therefore, accepting that it is quite useful to have the flexibility that you start off with whatever type of inquiry but are able to go back to the Secretary of State or whoever and discuss extending it, changing it, or whatever. Do you approve of that process?

Robert Francis: Yes. With regard to the terms of reference of the inquiry, what happens at the moment is that there is a panic. An inquiry, usually after considerable institutional resistance, is announced with some terms of reference. A chairman is found at an hour’s or even less notice and given some terms of reference, which of course he is “consulted on” at a point where he has no more information than he has read in the newspapers about the subject. I personally think that it would be much easier if there was a staged process as appropriate. I think in a public inquiry there should be consultation with the public about the terms of reference that the Minister should be required to have regard to, though not bound to follow. In an ideal world, there should be a scoping stage, after which the matter is reconsidered. I am afraid that in my inquiry, complicated as it was, I felt that that was not possible, because we had already spent quite some time on the first inquiry. There was quite proper pressure to have a result from a second inquiry, to move things on to the health service, and a scoping exercise would have prolonged the inquiry. So I am afraid we just got up and started running with all we had been given, which is not a wholly satisfactory way, but it was pragmatic.

Lord Bichard: I think the terms of reference are really important. It is good to have a preliminary study, maybe some involvement in setting those. I do not believe then you should have a process where you are constantly going backwards and forwards, because the terms of reference give you and everyone else clarity about what you are doing. It became very clear to me, when we had produced the final draft and gone back to those who were criticised. One of the things that was said to us was, “This does not fall within your terms of reference, and we will judicial review you if you insist on publishing”. You have to end up with terms of reference that give you enough space, are not unduly narrow but are not so wide as to lose the clarity that I think is quite important. But my advice is to get it right before you start the hearings.

Professor Sir Ian Kennedy: I agree with Michael completely. The aide-mémoire that I passed on to the Chairman is that, first of all, you do not go into this unless you have talked through the terms of reference at some length with the commissioning Minister, Secretary of State or whoever, and Robert’s idea of consulting the public or wider community is a good one. The second thing is that you should insist that within those terms of reference there is some general proposition that does not allow you to go back, take the world back to primeval slime, but at the same time does allow you to have a little bit of room for manoeuvre. In my case, it was to make recommendations about the organisation of the National Health Service. I could still be there on one sense, but on the other I was able to expand a little to take on this further commission that had arisen during the inquiry. Once you have those terms of reference, having had those negotiations—I agree with Michael also—the iteration thereafter is not advisable for the very obvious reason that to those who are looking at you and looking to want to trust you, constantly iterating with Government and seeming to go with the flow of whatever might be the political wave of the moment is destructive of that trust. Once you have the brief, you have to carry it through.

Robert Francis: There is a need for some degree of clarity to protect the inquiry. I received several quite harrowing requests to inquire into events happening in other hospitals, which were all perfectly understandable as requests and could have been made part of the inquiry. But had I acceded to any of those requests, I would still be running the inquiry now and the health service would not be learning the lessons it needed to learn. There needs to be a protection of the inquiry to make sure that were there to be a challenge of that nature—there was not in my case—one could resist it.

Q216 Lord Woolf: I direct this initially to Robert Francis but the others may want to come in. Rule 13 requires warning letters. Do you think that you would have preferred more discretion than rule 13 gave you as to those warning letters?

Robert Francis: Yes, my Lord. The rule 13 process, as prescribed in the rules, means that you cannot, in the report, put in any express or significant criticism of any person without having gone through the process. The first point is—this may be a slightly nit-picking one—I had some difficulty in understanding what a significant criticism was if it was not express. It is implicit, but that could mean almost anything. But the more substantive point was that in practice I think my inquiry was extended by at least six months by having to undertake a rule 13 process. That was because, interpreting, as I did, the obligation toward organisations who had corporate entity, as well as individuals with potential criticism, there were a vast range of people who received these letters. They all took the opportunity, quite properly, to make very substantive responses to me, all of which had to be processed and then taken into account with regard to the report, and that took its time. All these parties had been sitting through the inquiry, legally represented, and should have been able to pick up, from the way in which things were going, what the issues were anyway. So there was that issue.

The thing that made me most uncomfortable was the requirement of confidentiality. There is this mutual obligation of confidentiality about the rule 13 process, which means that the letters that go out are confidential. One could see why, because the criticism might not be upheld. But the response has to be confidential too, because otherwise that reveals the nature of the criticism, and

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therefore there is a conversation going on with parties under the covers, which no one else has the opportunity to comment on. I think that there needs to be some revision of this procedure. It should be much more flexible and left to the chairman to decide, in the context of the inquiry, what is required to be found. That is the only requirement there should be.

Lord Bichard: In the framework within which I was working, we did advise a number of people that they were likely to be criticised in the report. I did have, at one stage, four judicial reviews on my desk. The only thing I would say on the other side of this argument is that I was very keen that when we published the report—and we may come on to that stage in a moment—I did not want a lot of distraction. I did not want to have judicial reviews, arguments, about what we were saying. I wanted it to be absolutely clear. So the process that we went through did not take quite as long as yours. It enabled the report to go out clean and unsullied, and it was not attacked on the grounds of fact or any other element of those proposed reviews.

Robert Francis: My experience of a number of inquiries, as counsel to an interested party receiving the equivalent letter, is that they can also cause quite unnecessary alarm. Counsel to the inquiry, out of an abundance of caution in order to comply with the rules, will sometimes, in a letter, accuse the organisation of everything from a minor traffic offence through to high treason in order to get to the bit in the middle. Therefore, a lot of time is spent on people responding to things that are not really in the mind of the chair at all.

Professor Sir Ian Kennedy: Having been the recipient of such a letter from Robert Francis, I can vouch for the fact that it is a little unnerving. I think, Lord Woolf, that the thinking behind rule 13 is misguided, if I may say so. It is rather like the Salmon letters—

Lord Woolf: It is probably derived from the Salmon letters.

Professor Sir Ian Kennedy: Yes, absolutely. What I tried to do was devise a procedure whereby that kind of step was no longer necessary. The procedure I developed was to accumulate as much evidence as we could before we started and get statements from just about anybody who wanted to give us a statement, have them read by our team and identify any criticism of anyone in those statements, and share that statement with the person criticised so as to get their statement. When we began, through my counsel, we had a much wider selection of opinion so that my counsel could run both the witness's view and all of those who said that was not the case and test everything.

By the time you reached that stage in the inquiry, people knew they were being criticised and had had an opportunity to advance their views. You did not, thereafter, have to waste time having Salmon letters, with all the procedure that flowed from that. Rather, you had the opportunity for everybody to see, to comment, and then to comment thereafter, through counsel or otherwise, having heard the evidence that was subsequently brought in. I think that was much more efficient. It was doing it before rather than after and put everyone on notice, and it was all done in public. There was no confidentiality, obviously, because all those statements were received and put immediately on the website, as were the comments on them on the website, and one could see the development of what is contested and what is agreed.

Q217 Baroness Stern: I have to declare an interest, in that my husband was a panel member of the Billy Wright inquiry. My question is back to the statutory, non-statutory, but a bit more general. Having heard your earlier answers, it seems that none of you has a strong view as to whether there should continue to be non-statutory inquiries, now that we have the Inquiries Act and there are statutory powers. Could I just confirm that that is what you believe? Although we now have legislation that, in the statute, gives inquiries powers to summon persons and papers and to take evidence on oath, it is not your view that non-statutory inquiries should no longer be set up because it is inappropriate.

Robert Francis: If I could speak on that with some experience of running non-statutory inquiries, I think it would be a shame if that option was removed. The very difficult matter is for Governments

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to decide which route to go down, but that is a rather different issue. To require every single review or inquiry into a matter of public concern to have the full panoply of the Inquiries Act would lead to probably fewer inquiries happening, because of the almost inevitable expense and length of time that such inquiries take. Speaking for myself, in the first inquiry I was able to do things that I could never have done in a public inquiry. I was able to go and see, for instance, the chairs of a number of regulators, in order to get a horizon-type view of what was happening. As chairman of a public inquiry, I could not have dreamt of doing anything like that. I was able to cut corners, I hope in a very proper way, in order to get a view about things. Frankly, without having been able to do that, I would not have necessarily had any ammunition in order to make the recommendation I made for the second inquiry.

Lord Bichard: I agree with all of that, absolutely. We have not talked a lot about time. You suggested that it is maybe easier to work under a non-statutory framework and you can move more swiftly. I think that is right and it is rather important. Some of the inquiries in this country have taken an interminable length of time to produce an outcome. That is unfortunate for two reasons. One is that you are not coming back to the public on an issue that they are clearly very concerned about at a time when they are still interested, they still want to know what happened and what can be done about this. You are in a much more difficult position in terms of dealing with their concerns.

You are also, though, dealing during one of these inquiries, with people under a huge amount of stress. I have been on the other side of an inquiry into a child's death, when I was running a local authority. It is a very stressful time. I was aware, in the Soham inquiry, of the stress that the police and social workers were under, and obviously that the parents were under. The quicker you can come to a conclusion the better. That does not mean that you can allow anyone to accuse you of not acting in a considered way. There is a balance to strike, but I think sometimes inquiries have been allowed to drift on too long.

Professor Sir Ian Kennedy: I would say that whatever we might say in this forum or any other forum, ultimately the choice as to whether there is a public inquiry or not, given that one has that choice, will be a political choice. It will be a function of the degree of pressure and the generation of calls for one. Unless one abolishes the possibility of private inquiries or non-public inquiries, political choice will be made. In the Bristol inquiry, the first two options were a private within the hospital, and then a private outwith the hospital. Only when the pressure was such that the Secretary of State felt that it was irresistible was there a public inquiry. Unless you abolish that option, it ought to exist, and whether it is used or not, public or private, will be a political choice, a function of pressure.

Secondly, if the choice is made that there be a statutory inquiry, I believe that the current rules—Lord Woolf was referring to rule 13, but others as well—need to be reconsidered so that there is more scope for running it in a way that Michael has already indicated, in a sensitive way, without being bound by rules. That said, there are no guidelines, as Robert said. My first task, when I was asked to do this, or told I was going to do it, was to speak to two friends who were both Court of Appeal judges. When they each gave me completely conflicting advice, I knew I was on my own and had to develop a procedure accordingly. I think the rules need to be readdressed if there is to be a statutory inquiry.

Thirdly, Michael is right as regards time. I think it is—and Robert will know this—very bad for a Secretary of State or a commissioning Minister to say, “You will report by the X day of X”, because it is ordinarily impossible. I remember the BSE inquiry where we were told we will report within six months, and then there was another six months, and in the end we were to report in September and the cry was, “Which year?” That is having a set timetable, but at the same time, the chairman must at all times impose on himself or herself a degree of rigour and do it as quickly and efficaciously as possible, and as cheaply as possible.

Q218 The Chairman: Do the three of you take the view that, whether it is statutory or non-statutory, it is purely a political view and there is not a sense of how you get the best result in terms of a public inquiry?

Robert Francis: What I was going to add was that, while I agree that there should be the choice available, there are going to be circumstances—and I hope I have set it out; I hinted at this in my submission—in which, arguably, there is a right to a statutory inquiry. I wonder whether the way forward is not to abolish the ability to have non-statutory inquiries but to set up some form of process by which those who demand a public inquiry can make an application for it and, if a Minister or the Government is refusing it, they are required to give, in some appropriate forum, proper reasons why that is the case so that the matter can be at least discussed. I would hesitate, if I may say so, to have an issue that meant that everything ended up in front of the courts. Maybe Parliament has a role to play in calling people to account but not, I would suggest, in requiring that automatically everything has to be a public inquiry.

Professor Sir Ian Kennedy: But of course the Inquiries Act does itself purport to give criteria as to when there will be a public inquiry, but it gives the game away almost immediately by saying whenever the Minister or the Secretary of State feels it is appropriate to have one, which is exactly the issue. Robert is right: it would help if there were certain criteria and they could be part of the regulations, that the commissioning Minister or Secretary of State needs to be able to persuade Parliament or otherwise that X or Y criteria are met. I think ultimately it is always going to be, in the world in which we live, a political choice.

Q219 Lord Trefgarne: Much of what I was going to ask has been covered. One of the things that we have to deal with is the fact that some of these inquiries go on for ever, do they not? The Saville inquiry is an obvious example of that. Is there anything that can be done, any powers that can be given to the chairman perhaps, to keep the whole thing under control and keep the time limited? Counsel to the inquiry sometimes get very carried away on these occasions, maybe rightly, but go on for ever.

Professor Sir Ian Kennedy: I am happy to plunge in while my colleagues think. I have already said giving a time limit is inappropriate. That said, I have also said that the chair must direct his counsel on otherwise how to do things in a way that is expeditious. There are things that you can look at that are procedural or process matters that save time and money. An example is the use of information technology, which I used in Bristol. There were 980,000 documents. They were all scanned in; they were all given a particular number; counsel knew the number; and they were displayed on a screen. All that the counsel had to do was say, “Can I take you to document X, Y and Z?” and it came up on the screen. There was no searching for a box file in the corner. The view was that that saved between 25% and 30% of the time that would ordinarily have been spent in the inquiry, because of that immediacy. There are other procedural devices. I talked about cross-examination. The extent to which you can limit the forensic jousting and get on with what you are about again saves time. Without putting a limit on it, having procedural mechanisms that allow you to get on with things is something that is worth thinking about.

Lord Bichard: You have to be very careful in terms of saying, “Should we give the chair power?” because people will very quickly accuse an inquiry of working to a timetable and therefore not taking the time it needs to consider the issues. I tried, right at the beginning, through talking to those involved, to come to a view on how long I thought we needed for this, and then said, “I am going to try to ensure that we complete this in six months, and everyone agrees with that. If something crops up, something crops up, but let us do our darndest, in fairness to all the people I have mentioned already.” I think that had an impact on people. They did not waste time. We did look for ways in which we could use new technology to speed things up. We did it in slightly less than six months, and no one accused me or the inquiry of not having done a thorough job.

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Robert Francis: I agree with everything that has just been said. A particular bugbear of mine at the beginning of my inquiry was the obligation, as I was advised, that in order to find a solicitor to the inquiry, it not being appropriate to have the Treasury Solicitor, I had to go through an EU-compliant tendering process. I was told that the process that was adopted was the expedited one, and that took three months in order to choose a solicitor. There is a panel of pre-approved solicitors, but by definition, if they are pre-approved in relation to health matters, almost all of them have a conflict of interest, so I needed a wider choice. As it happened, the one I chose in the end was a panel solicitor. That is point 1. Point 2 is the absence of any form of existing infrastructure, whether it be IT, venues, all that sort of thing. There are enough inquiries now to support there being these things in existence. I had to spend quite a lot of time getting IT support set up. Those issues take a lot of time. But so far as the general length of time that is taken, that can be sorted by making sure you have a timetable. We published a pretty early timetable with regard to what witnesses we were going to call, and when they were going to be called. The bit that surprised me was how long it took to deal with the rule 13 process, which meant that the report writing took much longer than it might otherwise have done.

Lord Trefgarne: Perhaps there has been a risk that counsel for the inquiry—I am not criticising anyone in particular—do get a bit carried away.

Robert Francis: I think that is a risk if it were to happen and, I may say, it did not happen in mine.

Lord Trefgarne: That is for the chairman to say.

Professor Sir Ian Kennedy: I had three counsel. They were noble in their capacity to restrain themselves and, had they not done so, they would have been restrained. Robert is quite right: you publish a timetable, you call the witnesses. In our case we were very keen not to call clinicians who were working in the hospital on days when they might be working because it would threaten the care of current patients. We kept to that timetable. Sometimes we were able to finish at 2.30 pm, at which time we had meetings to consider the next steps. Sometimes we went on until 8.00 pm because the witness took that long. But you had the schedule, you kept to it and everybody knew where we were going.

Lord Trefgarne: Counsel for the inquiry acts on your instructions.

Lord Bichard: Yes, absolutely.

Professor Sir Ian Kennedy: Correct, and Michael is absolutely right that you meet them every day. They are members of the independent bar and therefore they are required to and are not slow to tell you things you may not want to hear, but that is their job. On the other hand, you instruct them on what you want to get out of this particular witness or this particular day, and that is their job.

Q220 Baroness Stern: A quick supplementary that is inspired by Mr Francis's excellent paper, for which many thanks: you say that, "Less often considered when thinking about inquiries is the need for reconciliation and recognition". This is very well put and we are grateful for that. How do you fit the need for reconciliation and recognition with pressures of time and money and pressures to produce a result that are coming to you from outside? Do people need time and does that have to be factored in? It would be helpful if you could comment on that.

Robert Francis: Thank you. In my inquiries, I was conscious of there being no tools available to me to even undertake this and, given the fraught nature of the community in Stafford, I did not wish to experiment, quite frankly. But since those inquiries, helpful work has been done by the CEDR Working Group that Lord Woolf was party to. That prompts me to suggest that you can have a parallel process going on, maybe under the umbrella of the inquiry, so that you can use the skills of mediators and conciliators and so on. You have to be careful that in doing so you do not in some way taint the evidence that has been given to the inquiry. Not all inquiries are about a dispute as to who did what and when they did it. It is more a question of an overall acceptance of responsibility

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and things like that. That is rather better done not in a public forum but in a quiet room to the side. For instance, efforts could be made with a mediator or a facilitator to have a number of parties come up together with recommendations as to how things could be done better in the future. There is nothing in the procedure to stop all that happening now. It is just that I do not think we have enough experience or learning or tools available to us to readily get them, and it is an area that would benefit from more work. We are way behind what the courts are able to do, what happens in litigation now in terms of alternative dispute resolution, and some of those techniques could be transferred into inquiries.

Lord Bichard: I agree with all of that. A slightly different dimension is that there is huge pressure at the moment for any inquiry or serious case review, if you are talking about a similar process, to blame someone. The nice way of putting it is that you have to hold someone to account. You have to blame someone. I was trying to get to a situation where people were held to account when they needed to be held to account, but that something more came out of the inquiry—that there was some learning that took place as a result of the inquiry and, where systems needed to change or training needed to change, it was going to happen. That is why—and I know both my colleagues here today have done the same—I stayed very much involved after the inquiry was published, on a basis of trying to ensure that things improved. I do not want to get pretentious here, but I suspect all three of us—I certainly did—felt a real responsibility to the victims and wanted to do something so that something positive came out of these tragedies. Just blaming someone is not enough, in my view. Just saying the chief constable was at fault is not enough. You want to try to ensure something more positive comes out of all this.

The Chairman: We will come to that in a minute, but Lord Trimble has a point.

Q221 Lord Trimble: I just want to go back to when you were describing setting up and trying to work out the IT, this procedure, that procedure and all the rest of it. Other people have told us that there is an almost constant reinventing of the wheel and that there would be an advantage in having a body of knowledge and experience located somewhere to assist inquiries in being set up. There seems to be a consensus about the need to retain the experience and pass on that experience. The question in my mind is: where do you locate that? If it is located in the Treasury Solicitor's office or somewhere like that within government you are in danger of appearing to undermine the independence of the inquiry. I think it is important that it is located in such a way as to reassure the public about the independence of the inquiry.

Robert Francis: If I may say so, I am not sure that is so. I think probably someone like the Treasury Solicitor might be a better place than a directly controlled government ministry. But what we are talking about is a resource. If for a good reason the chair of the inquiry wants to do things in a different way, obviously it has to be made clear that they should have it and the resource should be known to the public. One of the extraordinary things I have discovered, thanks to Lord Woolf's review, was that there was some Cabinet Office guidance about the running of public inquiries that is restricted, and therefore I presume that was the reason no one offered to show it to me. We need to get away from that to having a resource. Personally, I think it could be set up so it would not prejudice the independence.

Professor Sir Ian Kennedy: I would distinguish in your question two kinds of resource. One is physical resource and know-how. The IT system we used we immediately figuratively put on a truck and it went up to the Shipman inquiry where it saved the taxpayer a lot of money because it did not have to be bought again, and the know-how as well. Chairmen of future inquiries ought to be aware of how this can be done so that they can tap into that knowledge, and that is why I have given your clerk what I have written about the sort of things you can do. Sadly, there is not that repository, even as regards the physical resources. I know the Saville inquiry also used IT to a very great extent and one speculates how long it would have taken had they not had that IT.

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The other repository or resource is the way that you handle the things we have been talking about—cross-examination, the tone you set and so on. That is a function of the current chairman and others coming together and writing something that could then lie anywhere. It could lie with Parliament or whomsoever. It could be in the library as a resource. But I think the absence of that causes chairmen to be very concerned as to how to do it, to take advice and listen to the last one or look up what has been done, and not be aware of the range of options that they can consider and therefore make a considered, informed choice as to what might be the best option there. There are two kinds of resources, both of which are currently somewhat neglected in being made available.

Q222 Lord Soley: I have a few questions, if I may, on recommendations. Lord Bichard, in your Soham inquiry you unusually did a six-month follow-up. Can you tell us whether you think that is a system that should be followed fairly generally to ensure that recommendations are followed up? How much was it an advantage to you in not being a judge, either practising or non-practising?

Lord Bichard: It is a huge advantage not being a judge. The serious point is that judges do not like, as I said earlier, to follow these issues up because they have given a judgment and that is an end to it. They do not want to get into other cases, but sometimes it is unfortunate that they do not. I think this issue of recommendation is really important. I was very clear that I wanted to produce a report that is going to have an impact. Therefore, the first thing I decided was that I was not going to have 199 recommendations, because people just cannot cope with that. I think we had 30 and we made it clear there were five absolutely key recommendations and that was it.

The second decision I took, egged on by my team, was that we had to produce this report in language that anyone could understand. It was not just for the professional stakeholders. This was an issue the country was concerned about and therefore I spent an obsessive amount of time rewriting and rewriting this report. Right at the end it was suggested to me, and I thought it was a fantastic idea, that I get a scriptwriter in to take my final draft and rewrite it yet again. So the final report was written by a professional scriptwriter and I think that had a real impact in terms of people being able to read through it.

The third thing that I did was to try to ensure, although I could not brief them on the report, we briefed the press daily during the course of the hearing so they were absolutely clear about what was happening and some of the more complex issues. By the time we produced the report they were very supportive of what we had done. They could have very easily become very critical of the inquiry not taking this issue seriously enough. I think it is very important to have the press on side.

Do not press me too hard on this but, again without breaking confidences, it does help on the day of publication for one or two organisations that are respected in the field to come out and say, “This is absolutely right, this is what we want”, rather than just say, “This is rubbish and we should not do anything about it”. You can do that without telling people what is in the report. It helped that in the Soham case the NSPCC came out immediately and said, “This is really important. These issues are absolutely right and we should take them seriously”.

Q223 Lord Soley: I understand the backdrop to reaching the recommendations. There is a lot there that I would respond well to. But when you have made the recommendations, whether it is two, two dozen or whatever, you chose to go to the Home Secretary who said, “Yes, by all means have a follow-up report”, which is fine.

Lord Bichard: Well, I did not give him a choice.

Lord Soley: Whether you gave him a choice or not, it happened. What I am interested in is that it is said—and, Mr Francis, you say this is paragraph 79 of your memorandum—that many recommendations are not followed up. Leave aside for a moment, if you would, the mandatory homicide one, which I think is rather a special one.

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Lord Bichard: Just to finish me off, I recommended that there should be a report to Parliament after six months and I did stay involved. The one recommendation that proved difficult to get sorted and took nearly eight years was the establishment of a police national database, which I thought was critical. I decided not to publicly advocate that during the eight-year period. I just stayed behind the scenes and supported the police in what they were trying to do.

Professor Sir Ian Kennedy: Lord Soley, I think you are absolutely right. I think Michael's suggestion is a constitutional development and I regret that I did not have the idea. But he did, and for my part I would like there to be an agreement by the Secretary of State that he or she has to come before Parliament after six months or a year to comment on the recommendations and explain, if they have not been put into operation, why not, and thereafter, make a progress report from time to time. But that is in the gift of Parliament and it is something Parliament should take up.

Q224 Lord Soley: It may be Parliament or it may be other bodies. In the case of the Piper Alpha one, it might be industry. In other situations it might be local authority, but what I am interested in is this. I must admit I have not checked it out yet, but you say in your memorandum, "A study of the fate of inquiry recommendations makes grim reading for inquiry advocates". I think for some that is true and for others it is not true.

Robert Francis: Lord Soley, we have sitting here Sir Ian Kennedy, who made I do not know how many recommendations. The number does not matter, but a significant number of them were not followed through and some of my recommendations are the result of those recommendations not having been implemented. My recommendation I—and I regret in many ways there were 290—was that the Health Select Committee should require the Secretary of State to report to it on whether the recommendations are accepted and what should happen, and also that all the organisations to which these recommendations were addressed, in so far as they were accountable to Parliament, should do the same. I believe that the Health Select Committee has accepted that recommendation. I have some reservation about automatically perpetuating the inquiry panel or the chair, because while that may well be appropriate in some cases, in others it may not be, for all sorts of reasons. One might be the antiquity of the chair of the panel and, secondly, the expertise. It may be that it is much better for the matter to be taken forward by other people.

Q225 Lord Soley: Your view would be that it is not necessary normally—leaving aside Soham for a minute—for an inquiry to revisit the things. What is more important is that somebody, whether it is the Secretary of State or some other people, has some way in which they are legally required to explain what recommendations they have put into effect, what ones they have not and, where they have not, why not. Is that what you are all saying?

Lord Bichard: All Members of this Committee know how the Civil Service works, but the reason why that is so important is that if a Secretary of State has to report to Parliament in six months' time, the Civil Service takes it seriously. One of my bizarre moments after the inquiry was walking into the Home Office to a large office with a banner that just said "The Bichard Inquiry", because they had a team working on the report to Parliament six months later and were making sure that none of the recommendations had not been acted upon.

Professor Sir Ian Kennedy: I completely agree. Robert is right. In my report there were 197, I think.

Lord Bichard: I am sorry. I did not mean—

Professor Sir Ian Kennedy: That is all right, Michael. We remain good friends. The key, Lord Soley, is that the Government may well accept them, and in my case all except seven were accepted with open arms and a great understanding of the importance of them. But that is not the key, of course. The key is whether anything is done about them, and that is why I call it a constitutional device. Whether it is industry or whatever, usually we are talking about legislative or governmental action by direction from a department. That is why, whether it be a Select

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Committee or some other device, it needs to keep the Minister responsible for that portfolio on his or her toes. In the absence of that, things fall away. I am with Robert. I do not think the chair or the panel needs to get involved and continue to be on the case because they need to move on to other things and not get in the way of the fact that thoughts may have moved on or recommendations are seen not to be as good as they were thought initially. They need to drop out but, having set up something deemed so important, there must be a mechanism to say, “What have you done about it?”

Q226 Baroness Hamwee: I have two questions, one about Soham specifically. When you decided that after six months you were going to review progress, how was that going to be funded, in your mind? Was it simply sheer force of personality that you were going to tell the Secretary of State this is how it had to be? Presumably you did not do it on—

Lord Bichard: I just told the Secretary of State I was going to include a recommendation that there should be a report to Parliament in six months’ time. He never disagreed with that and so it went into the report. I did stay more involved over a period of years, but very quietly, because I think the one thing a chairman can do, particularly on an issue and on all three issues—the Secretary of State did not want the chairman of the Soham inquiry to go public and say how appalled he was that nothing was happening on the police national database. I never did that and I never had to do it, but I was aware that the Secretary of State knew it would not be good news and therefore I made it clear I was still supporting the work that was going on. You have power as a chairman. It does not require a huge amount of time but you have power to ensure that some of the things you recommended do happen.

Lord Trefgarne: That judges refuse point blank to do.

Lord Bichard: Absolutely, yes.

Robert Francis: If I may say in defence of the judges, I think it is more difficult for them. The judge has to go back to a judicial post.

Lord Trefgarne: I am not arguing about it.

Robert Francis: I have stayed involved so far for two reasons. One is that I have very helpfully been asked by the Secretary of State and various of the quangos for them to be able to tell me what they are doing about the recommendations. That seems to me a helpful way of making sure things get moved along. The other is that in a report about a field as wide as mine, there are a number of audiences who, with the best will in the world, are not going to read 1,790 pages of the report. The bits of it that are relevant to them are almost better explained to, for instance, the nurses, surgeons and so on by me going and giving a talk to them. On the whole, people have been nice enough to say that has been helpful. It is not campaigning in relation to saying my recommendations are right, but it is explaining things in a way that does not necessarily come out in the written word, even if it was written by a scriptwriter, if I may say so.

Q227 Baroness Hamwee: Looking at Government responses to Select Committees recently, I have realised how easy it is for Government to say, “Yes, we very much agree with the thrust of a recommendation”. The Select Committee has not been precise enough about the action that needs to be taken. It has just said, “We think that such-and-such would be a great thing” and the Government has been able to say, “Yes, we agree with that attitude”. I would like to hear from you how much you focused on action in the recommendations.

Robert Francis: First, I feel the word “welcome” should be banned from ministerial and other responses to inquiries, because all organisations welcome a report and welcome its recommendations and then—not all, of course—seek to put their own interpretation on them. Implementation is, of course, everything, but sometimes it is not possible, when running an inquiry, to micro-manage, in terms of the recommendations, what should happen because there are a

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number of perfectly legitimate options. Therefore, there has to be executive discretion at some point. That is the sort of thing that can properly be reviewed by the Health Select Committee or whoever else it is in Parliament, and bring to account those who ought to be brought to account for implementation of the spirit of what is there.

Q228 Lord King of Bridgwater: You have to have a resource to do that, have you not? That is the problem. It seems an interesting suggestion that you should stand right back, you have done the job, made the report and let other people carry on. But you, having devoted some months of your life, know more about it than most other people who are dealing with the issue. It seems a great pity if you cannot stay in touch, but I do not quite see how you stay in touch.

Robert Francis: I was going to say that, in order for the chairman or the panel to remain to review the matter, it has to be resourced. If it is the panel or a chair, does that mean the inquiry is reconvened for a new hearing in terms of evidence and all the rest of it, which would be a nightmare?

Professor Sir Ian Kennedy: Lord King, I understand your point but at some point you have to move, do you not, from the process of having this inquiry and looking at it and coming up with recommendations, to the notion that you are engaging Government or large organisations who have to in some way translate that. At that point you cease to be as expert and it may be hubris to imagine that you can pilot these things through. You know what ought to be the vision or the strategy but the implementation of it is perhaps not for you. That is where Michael is right that there ought to be a watching brief. We can disagree whether that should be vested in the chair or some other constitutional mechanism. I do not think it should necessarily be the chairman whose expertise is there, but things have moved on.

Lord Bichard: As I said earlier, you may have to blame people in an inquiry, but the main reason for most inquiries is to find out how we can avoid something like that happening again and what changes to systems, training and procedures would help to avoid that happening. Therefore, I think it is absolutely about action. Once you have made recommendations about action, personally—and I think it is the same for my two colleagues—I find it very difficult then to just walk away and watch nothing happening.

Q229 Lord King of Bridgwater: How do you find out what the action has been? You say you do not want to walk away but they are not doing enough. You must have some resource or some source of information to make sure that is adequate and correct and that is telling you things are happening.

Lord Bichard: We all do it in different ways but you have to be prepared to put a bit of time in yourself. You are not going to get paid for it, but I would meet with the police on occasions and they would brief me on what was happening around the PND. I would meet others and they would talk to me about what they were doing in the social work field. Chairmen need to understand that when you get involved in chairing an inquiry it is not just for Christmas. It is going to last for a very long time. It is not just up to the point where you produce a report. You are going to be identified with these issues for a very long time. I still get phone calls from the press, the media and others that are related to the Soham inquiry even after all this time. I just do not see how you can make recommendations and say, “I will leave it and see what others do”.

The Chairman: Or you have to have the confidence that you are certain that someone is going to do something about it.

Lord Bichard: Yes, I know. I was a civil servant and I know how you draft responses to Select Committee reports and inconvenient inquiries. Frankly, having been a civil servant, I found that quite useful as a chairman in deciding the strategy to avoid that happening to the Soham inquiry report.

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Professor Sir Ian Kennedy: There is, however, another approach, responding to your question. That is to design what you regard as necessary action to make it concrete, understandable and relatively easy to implement, not iconic gestures such as saying that there ought to be a tsar appointed or whatever. These are perfectly pointless, although they sound great at the moment. If the actions you propose are concrete, affordable, realistic, sensible and fit within the political fabric of the moment, that is something you can hand on. I know it will engage some kind of civil war between civil servants. As the Jesuits said in Latin America in the 17th century, “We obey, we simply do not comply”, which was a nice way of dealing with the King of Spain’s requirements. That is what civil servants might do, but if your actions are concrete and set out what you recommend, it is that much more difficult to avoid. If you then have a constitutional mechanism that says, “You were supposed to do that by the X day of X. What have you done?” then that is enough. For my part, I would then prefer to stand back.

The Chairman: This tsar said that we were going to finish at 1 pm and we will, so I think we will conclude on that. Thank you very much indeed for giving the evidence that you have given this morning.

WEDNESDAY 27 NOVEMBER 2013

11.35 am

Witness: Sir Louis Blom-Cooper QC

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Solely
Baroness Stern
Lord Trefgarne
Lord Woolf

Examination of Witness

Sir Louis Blom-Cooper QC

Q283 The Chairman: I wonder if we might make a start. We have a couple of colleagues missing who ought to be with us. A 10-minute break was agreed but 10 minutes have passed so I think that we had better make a start. May I firstly welcome Sir Louis Blom-Cooper to our meeting? We are delighted to have you with us. I have an opening statement that I would make and that is that the session is open to the public and a webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after this session, you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us.

Just one further thing: in my absence the Committee met for 45 to 50 minutes with another person giving evidence and I know that the Committee would really feel it right to finish, certainly, by 12.30 pm. So we have 50 minutes or so, and you may want to take that into account in measuring your time in responding to answers or we will have to call a halt and we may not get through. We only have a certain amount of time.

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

Perhaps I can ask you the first question. You have said that you were involved in advising the Department for Constitutional Affairs on the preparation and content of the Bill for the Inquiries Act 2005. Can you tell us a bit more about this? Before you start, just give your name on the record so that it is there for those who see the webcast.

Sir Louis Blom-Cooper: Sir Louis Blom-Cooper. Thank you very much for inviting me. May I just say one or two very short things at the beginning? I have hearing aids in and I can hear you perfectly well but a little forbearance may be necessary from time to time. I will just say, very shortly, I think that the 2005 Act was a good piece of legislation, but the rules need reviewing. That is nothing original. I was just looking the other day at the document that the Ministry of Justice issued in 2010 on post-legislative scrutiny and they said precisely the same, so I merely endorse what they said.

Can I answer your question directly? I was marginally involved in the drafting of the 2005 Act. I am afraid I am not able to give you very much detail with one exception, which I will mention in a moment because I think it is crucial to what you are interested in. What happened was that I started doing public inquiries way back in the 1980s and it was as a result of that, no doubt, that I got involved in the Saville inquiry and Bloody Sunday. I should mention, because it is very relevant, that unfortunately the party I represented, the Northern Ireland Civil Rights Association, had long since gone out of existence. After direct rule in the 1970s they just simply dispersed. I do not think it was ever really formally wound up but it became extinct. As a result of that, when the Saville inquiry was set up nobody came and claimed any kind of representation for any of the members of the Executive Committee of NICRA. What then happened was that Saville started to take evidence and in the course of the evidence names were mentioned of persons who had been on the march but were also executive officers of NICRA. As a result of that, an application was made for representation; you will clearly remember Lord Widgery blamed NICRA for having been responsible for the killings and quite obviously they were entitled to representation in front of him, as he had ordered, and I came into the case. I only came in in 2000, which was nearly two years after the Saville inquiry had been set up. So that is quite relevant in the fact that so far as procedure was concerned it had been well determined and operated by all the parties.

Q284 The Chairman: Can I put this to you? You say that you were involved in setting up the Act and giving advice to the Department for Constitutional Affairs. Was it your view, when you did that piece of work, that this Act would cover the bulk of inquiries? We know that there are inquiries not under the Act. What is your view of that?

Sir Louis Blom-Cooper: I think I took one step at a time. I took the view that the Saville inquiry should never happen again. It was my concern in 2001 and 2002 that the manner it was conducted under the terms of the 1921 Act were quite hopeless and that we must change it. I could do nothing as counsel in the case. It had all been predetermined but I had a very close connection with Sir Hayden Phillips and I contacted him. As a result of that he got me involved with the department in the framing of new legislation. That was really what happened. I had two or three meetings with him. I told him of my deep concern about the 1921 Act and he put me in touch with a senior civil servant in the department, which I think by that time was the Department for Constitutional Affairs.

The Chairman: So you believed that, by getting the 2005 Act, you have a far better Act for public inquiries to take place under.

Sir Louis Blom-Cooper: To be modest, I have to say that I like to think that I had an influence but I do not think that I had more than an influence with one exception. In the course of the discussions that I had with the civil servant and also at a meeting where Lord Phillips and Lord Clarke were both present—I think at that time Lord Phillips was Lord Chief Justice and Lord Clarke was Master of the Rolls—there was great discussion about Section 17(3) of the Act. Let me give you just a general view; I cannot remember the details. As drafted, when I first saw it, Section

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

17(3) did not appear but there was a provision that dealt with costs and delay and there was substantial discussion about the cost, particularly of the Saville inquiry, but other inquiries and associated with it, of course, the delay. There was a strong movement, even in the department, to try to persuade the chairman of public inquiries to set out a budget for the cost of any inquiry. My memory tells me that they were also concerned in trying to fix time limits on the conduct of the inquiry and that there should be some estimate made at the time of the setting up of the inquiry that there should be a time factor. There was a very strong lobby against that. It all arose out of the advocacy of Lord Scott's inquiry. As a result of that inquiry, 17(3) came into existence. It had 17(1) and (2), as it is now, and 17(3) originally just simply said, "The chairman of the tribunal shall be fair" or, "There should be fairness". That was added in to the item that said, "And taking into circumstances costs and delay that are unnecessary", and those were words that were finally submitted in the draft Bill and approved by your Lordships' House. I hope that is enough.

Q285 The Chairman: Yes. Could I move on to another question? That is, and I cannot fathom how this happened, that the Bill was given a Second Reading, it happens, on 9 December 2004, the very same day that you gave oral evidence to the House of Commons Public Administration Select Committee and two months before they had finished their inquiry. What do you think was going on that they were doing this inquiry and yet the day you were giving evidence the Bill started?

Sir Louis Blom-Cooper: I have to confess to conflation. The fact that these two events took place on the same date had no impact on me whatever. In fact I think I only gave written evidence to the Committee—the date was of no relevance to me and I was unaware, at that time, of the passage of the Bill through this House. I am sorry I am not very helpful.

The Chairman: So be it. In your written evidence to them, back in June 2004, you said, "the projected legislation lacks any direct reference to the role and function of public inquiries in a modern democratic society". Can you explain that and say whether, in your view, the Bill then changed for the better?

Sir Louis Blom-Cooper: I think that I have developed my thinking. That is quite a long time ago now. My general view is that this piece of legislation is quite unique. Two things have to be remembered. The first is that it can only come into existence for national scandals or major disasters, so the limitation of it—which is purely ministerial, if you like, or governmental—is that it affects every one of us.

The second thing is that I think if one looks at the terms of the Act it is entirely a part of public administration. The decision to set up the inquiry is the Minister's. The Minister decides the terms of reference. If I may make one comment, I think that framing the terms of reference are terribly important. One of the failures of the Saville inquiry was that the terms of reference given to Lord Widgery in 1972, which were a very general guide, were simply repeated in 1998. If only somebody had sat down and said, "Surely we have to look more closely at what Government wants from the second inquiry", they would have made different terms of reference.

The next thing to say is that this is what I call the long arm of the Minister. He sets up the inquiry. He chooses the members. He chooses the terms of reference. What he does is to say to the chairman, "Of course the procedure is entirely yours. The adjectival law, the way you conduct the inquiry, is yours, but it remains an inquiry on behalf of the public. When one comes to the question of fairness, which one will have to deal with, fairness means fairness to every one of us because this is an inquiry that has been set up by us". What is most important of all is that it does not carry with it rights in any body. The fact is the chairman, with or without assessors, simply issues a report with recommendations. The Minister can say, "Thank you very much for your hard work. I do not accept one word of it". Of course, this is a travesty but the fact is that he is responsible for it and he publishes it—nobody else—and if the chairman of public inquiries chairs it, they do so by delegation. The Act specifically says that the Minister must report, and he reports to Parliament, but in fact it is his report not the inquiry's report, although in essence, of course, it is.

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

Q286 Baroness Buscombe: First, I should declare an interest as one who gave both written and oral evidence to the Leveson inquiry. I have two points, one leading to another. The power to establish an inquiry pursuant to the 2005 Act remains quite broad in that a Minister may cause an inquiry to be held where particular events are caused or are capable of causing public concern. That is hardly necessarily a national scandal, is it? Following on from that, do you think it right that it is the Minister, whose own department may be impacted by that particular concern, or in your words “national scandal”, who should have that power? In many cases we have heard—and we questioned this in previous sessions—that the difficulty is that Ministers may be setting up an inquiry when the politics are getting too close for comfort in relation to a particular issue. In that case, that long arm of the law that rests with the Minister to have that considerable power to set up an inquiry may not be right.

Sir Louis Blom-Cooper: You are absolutely right that, for setting up the public inquiry, it merely means great public concern, but look at Section 2. Section 2 is immensely important. Section 2 says to anybody, “The court of law is nothing to do with you. You must not determine or find any criminal or civil liability”. So immediately there is a declaration at the beginning of the legislation that this is outside the legal system. When somebody is chairing the inquiry, he is a commissioner of inquiry. He may be a diplomat, he may be a very high civil servant or he may be a judge, but for the time of conducting the inquiry he is a commissioner of inquiry who is doing the bidding of a Minister, who has given him his terms of reference. He may have been involved, incidentally, in framing the terms of reference, but the terms of the reference are the Minister’s, not his, so there is no question of any discretion in the tribunal to decide how they should interpret something. If they do, they can be judicially reviewed like any other Minister could be judicially reviewed. It is a unique body that operates in public administration and not in the legal system.

Baroness Buscombe: My point, if I may, is more that the Minister has extraordinary power to set up an inquiry in relation to an issue that is impacting on his or her own department, which may be becoming politically very uncomfortable.

Sir Louis Blom-Cooper: That is absolutely right and of course, although it is the Minister who sets it up, it is obviously a Cabinet decision. In relation to some inquiries—for example, I understand that some Ministry of Defence inquiries require international relations and witnesses who are abroad—it may be that this Act is inappropriate to use and you may have to use prerogative powers. As we know, they are used quite frequently. Lord Scott’s inquiry was not under the 1921 Act, although he dealt very largely with it. One of the things about his inquiry was that there was no legal representation and no oral representation in front of him. He and his counsel—

Lord Trefgarne: There was.

Sir Louis Blom-Cooper: He made a concession of it, but what I was saying was that he set out initially to do all the questioning by himself and his counsel, Ms Presiley Baxendale, and legal representation was not a factor in it until he got into discussion with those who had legalism in mind.

Lord Trefgarne: Forgive me, but that is not quite correct. I was there. I had legal counsel and would not have been there without it.

Sir Louis Blom-Cooper: Your memory is better than mine. Perhaps you are not even relying on memory, you remember on fact.

Lord Trefgarne: I was there.

Sir Louis Blom-Cooper: All I remember was that there was great controversy about the way that Lord Scott carried out the inquiry.

Lord Trefgarne: That is for sure, yes.

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Sir Louis Blom-Cooper: There were those who thought that it carried with it legal representation. On legal representation, let me say that where there are rights involved, there is an entitlement to be heard, to be told about what is alleged against you and to have an opportunity to reply. If you have no rights, then the witness is not entitled to legal representation. There is a mass of authority on that. The best is an Irish case in the 1990s. Mr Justice Murphy, in one of the Irish cases, set out quite beautifully saying that a witness has no right to be represented in front of a public inquiry.

The Chairman: We will believe you on that. I wonder if I might move on now to Lord Richard.

Q287 Lord Richard: I just wanted to ask you about the effects of the Act. In your evidence to the Select Committee, way back in 2004, you said, “That legislation should unequivocally adopt a non-adversarial approach to the conduct of inquiries”, outwith the legal system. Some witnesses have told us that they believe the Act has indeed facilitated an inquisitorial rather than adversarial approach. Do you think that is right?

Sir Louis Blom-Cooper: Yes, I do think it is right, but at the same time questions of adversary and inquisition are matters of procedure. They are very helpful. Criminal law is very adversarial. There is some court management that makes it inquisitorial. Equally, the civil proceedings are primarily adversarial between parties but they have a large element of public interest because it is the legal system.

I quite agree that a chairman under the 2005 Act could well say, “Well, I am going to conduct this as if it were a court”, and as long as he abides by Section 2 he can do so. What I am concerned with is: what is his duty? His duty is to carry out any procedure that he would like but he also has the duty to do what the terms of reference tell him.¹⁹ He also has a duty to report to the Minister. The Minister can come along and alter the terms of reference in the middle of it. So the chairman of the 2005 Act is a creature of public administration. If there is a problem that a Minister has 99.9% he can deal with it in his department, but there are occasions where the problem has multiplied, there are thousands of people affected, there has been a scandal, there is a disaster, and he will say, “I cannot handle it in my department, primarily because we are not impartial”—by definition he is not impartial—“and, secondly I do not have the equipment to deal with it. I will have somebody outside who will do the same for me as a civil servant would do”. It carries out a maxim, which I have had all my practising life: the law is one thing—we are all bound by it—but lawyers should always be on tap and never on top. That is to say they deal with the machinery. The law tells them what that machinery is and the law is the public.

Lord Richard: Can I just ask one supplementary to that? You say the lawyers should be on tap and not on top. Do you think counsel to an inquiry, as a body, helps to produce an inquisitorial rather than adversarial approach?

Sir Louis Blom-Cooper: I think neither, speaking for myself. My experience is that the trouble about legal representation is that the lawyers have a party to represent. They can tell a story in cross-examination that assists their purpose. They are not interested in the wider interests of the public and on the whole—and I do not say absolutely, as the chairman of the inquiry has complete discretion—as far as 17(3) is concerned I would leave it alone. It says the obvious—of course, the chairman must be fair in everything he does. You do not need to say it, but there are occasions when legislation can help.

Lord Richard: It is not legal representation of witnesses, but what about counsel to the inquiry?

¹⁹ The witness subsequently added: 'A chairman directing the procedure and conduct of an inquiry, under section 17(1) of the Inquiries Act 2005, acts in the sole capacity of a Commissioner of Inquiry, 'with fairness' (section 17(3)), and, to that end, using flexibly both adversarial and inquisitorial methods of eliciting evidence.'

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Sir Louis Blom-Cooper: He is the agent of the chairman. He must do what the chairman wants.

Lord Richard: Do you see that institution of counsel to the inquiry, the way it is operating, helps to produce a non-adversarial approach, an inquisitorial approach or the contrary?

Sir Louis Blom-Cooper: Can I take the Leveson inquiry? I thought that counsel was excellent in that. He had the right questions. He was limited in what he purported to do. He obviously was asking questions to assist the inquiry, not any party. One did not get any sense at all that he favoured one view rather than another. Of course, the chairman decided what the procedure ought to be and it depends also upon the nature of counsel. Some are rather more advocacy than others.

Q288 Lord Trefgarne: I would just add a little bit about ministerial involvement. I think you are on record as having rather regretted the absence of other powers, at least, to call an inquiry. At the moment the 2005 Act confers upon Ministers the power to start an inquiry, and I think you have said elsewhere that perhaps that ought to be the function of Parliament. Ministers, of course, also have the power to stop inquiries. If Parliament were to have the power to start inquiries, should they also have the power to stop them?

Sir Louis Blom-Cooper: That is a very large question that we could have a discussion on, but could I just draw your attention to what I think is the latest and most helpful observation of the courts? I do not know whether any of you have seen it but recently there was an appeal in the Privy Council in the case in the Turks and Caicos Islands. Have any of you read it at all? It was a huge corruption case that was conducted under the Foreign Office wish and Sir Robin Auld, a former Lord Justice of Appeal, conducted it.

There is a certain symmetry about this because the predecessor into corruption in the Turks and Caicos Islands is me. I went there in 1986 on behalf of the Foreign Office to do two inquiries for them and my conclusions then of the prospect of corruption were endorsed by Sir Robin Auld a few years ago in this inquiry. Paragraph 38 is on Turks and Caicos [2012] UKPC 17, and it was 23 May 2012. Can I just read the sentence that is, I think, interesting? A number of people were asked for information about allegations against their corrupt behaviour. Some of them were given it, others were not given it, at the discretion of the chairman. This litigation involved Mr Hoffmann, a Bulgarian citizen involved in the developments who was refused to be given any kind of information about his conduct. He took the case to the Privy Council and failed.

Lord Phillips said this, and I think this is probably the best modern guide on fairness: “The board”—we call the judicial committee of the Privy Council the board—“is broadly in agreement with the approach of the Court of Appeal”. Incidentally I ought to add that in the Turks and Caicos Islands he was operating under a commission of an ordinance Act of 1986, so there was a slight statutory element. “The Salmon principles cannot be inflexibly applied and the requirements of fairness”—this is the real passage I want—“must be tailored in a manner that has regard to all the circumstances of the particular inquiry”.

Of course I would include in that the genesis of the setting up of the inquiry as an act of public administration by a Minister. That is quite helpful in the question of fairness, which, I think, it is rather like the elephant, is it not: we all know what we mean by fairness but when we begin to apply it it becomes rather difficult to pin it down. I quoted somewhere a statement of Lord Nicholls in *Miller v Miller* about 10 years ago in which he said much the same sort of thing. We all know what it means, but its criteria in fact are impossible to set out.

The Chairman: I am slightly worried about time now. I would like to move on to Lord Woolf.

Q289 Lord Woolf: I will, if I can, just deal with the second part of the question about that. If a Minister decides not to hold a public inquiry, should he give reasons for his decision?

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

Sir Louis Blom-Cooper: He certainly would be judicially reviewable because he will have made a decision not to set up an inquiry. That decision is susceptible to judicial review and no doubt the courts would have to say, “You were right or you were wrong”. You can apply a principle of proportionality or *Wednesbury* unreasonableness to upset the Minister, but I do not think I would put it in the legislation. Somewhere, am I right in thinking, you have 14 days to query any setting up of an inquiry, but I am not quite sure about that. Like any other Minister, he is liable to judicial review.

Baroness Buscombe: I think question 7 has pretty much been answered, thank you, and possibly question 8.

The Chairman: Have you anything on question 8, Lord Morris?

Q290 Lord Morris of Aberavon: I can be very specific. Sir Louis, you have been critical of the length and cost of the Bloody Sunday inquiry. Would you suggest that when an inquiry is set up its cost and length limitations should be spelt out or at least indicated when the terms of reference are published?

Sir Louis Blom-Cooper: I think there is great social desirability in doing so. I wonder if one can deal with this under the commissioner’s wide discretion that he should be asked by the Minister, “How long do you think you would take?” For that purpose one thing is very useful, which I think is part of the law: that before you set up an inquiry you have a scoping inquiry.

In the six cases that were started in Northern Ireland in about 2004, a judge from Canada, Judge Cory, examined the question whether any of the cases ought to go to a full inquiry or not and whether, for costs and delay, there should be some examination in advance as to how much it will cost. The Minister can make that decision himself. He may need advice by having a scoping inquiry.

Lord Soley: You have spoken in favour of the 2005 Act, but there have now been a lot of Ministers who appoint inquiries outside the 2005 Act, and currently the Secretary of State for Defence is asking for the Iraq Historical Abuses inquiries to be outside the Act. What is your view about Ministers deciding that inquiries should be outside the 2005 Act?

Sir Louis Blom-Cooper: The subject matter, which is the topic of conversation, has to be decided politically. So far as lawyers are concerned, or those advising legislation, I think you have to take the Act as it is. The Minister has the decision. He is judicially reviewable, as I answered Lord Woolf. If he is wildly wrong in doing so he can be judicially reviewed, and I think I would leave that alone.

An Act of Parliament is always a compromise, so I am simply saying what I would like to do. The core participation was a genius idea of somebody to have some form of limited representation by lawyers. I am not sure that it has worked very well. As you know I am in touch with lawyers who appeared in Leveson and there was quite a lot of discontent about the system. I would just leave it to the chairman in his duty of conducting the procedure to decide if he wants legal representation there. He can judge well enough whether somebody needs to be represented and he can control it if he has the complete discretion, whereas with the Act in core participation, once he gives core participation, a lawyer comes along with his declared client to put his case, if in fact he is allowed to.

Lord Soley: What I am after here is whether Ministers appoint inquiries without using the 2005 Act. You are very much in favour of the 2005 Act, so in what circumstances do you think a Minister ought to consider having inquiries outside the 2005 Act?

Sir Louis Blom-Cooper: I mentioned the scoping inquiry. Of course in the scoping inquiry the Minister has acknowledged that there is something of great concern that needs examining, so he is already in a sense within the Act. So far as the subject matter is concerned he may say, “Well, it involves the military and it is not very suitable for public consumption under the Act, I must deal

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

with it under some prerogative power”. It means that in particular cases he either says that it comes within the scope of the 2005 Act or it does not.

Q291 Lord Soley: On counsel to the inquiry under the Iraqi Historical Abuses inquiry, the Divisional Court have said that they think there should not be a counsel to the inquiry on the grounds of cost, as the cost would be excessive. What is your view on that?

Sir Louis Blom-Cooper: I think quite the contrary. In conformity with my view about the activity of lawyers, it is very important that the inquiry should have a team that contains the necessary legal expertise. Can I give you an example, which I am not sure the public is aware of? Sir John Chilcot’s inquiry, which has been wholly outside any terms of any Act, was done under prerogative. In his team of practitioners behind the scene was Rosalyn Higgins, our past president of the International Court of Justice, so on international matters of diplomacy and all that he had ready the advice that he needed without encompassing a cost out there. She was in the team.

Incidentally, could I—it is a very minor issue—slightly put a question about that against what I call “advisers”? The Act specifically deals with it. It says you can have a single chairman or you can have chairman and assessors. The normal practice is that where the tribunal needs expert evidence it has assessors with it. If it does not have assessors it then calls the experts as witnesses to get from them the expertise that he needs. I cannot quite see what the idea is of six advisers to Sir Brian Leveson. I do not know quite what they were supposed to do. The Act does not indicate anything at all. They certainly did not sign the report. They did not sit with him. They sat in the courtroom.

Incidentally, if I could just make one practical point, and it is very much a practical point, it was something that I learnt from Lord Scarman. I appeared in front of him in the Brixton inquiry in the early 1980s. In one of my discussions with him he said, “One of the important things you should do if you are doing a commission of inquiry is not sit in a courtroom. Try to find a public building that sends out a message to the public that this is an inquiry for them. It is not a piece of litigation”. It is very important and I think he held all his inquiries in public buildings.

Of course it may not be possible for practical reasons to get away from a courtroom but you should attempt it. I extended this somewhat in one of my inquiries in that I insisted that we should not be confrontational but should sit around a table, rather like this, so that you could not identify who was against whom.

The Chairman: I think we must move on a little now. I am just worried about the time. Let us move on to Lord Woolf on warning letters.

Q292 Lord Woolf: Do you think there is a possibility that the requirement of Salmon letters is just too heavy an obligation and that the law should be clear because otherwise the chairman doing it—

Sir Louis Blom-Cooper: Yes, and I think the history is very interesting. Can I just take two minutes? You will remember in 1963 there was the Profumo inquiry. It was an extraordinary event. Lord Denning sat secretly in private. Nobody knew there were any witnesses. He just issued a report at the end of it, of his view, without anybody knowing one whit of what was being said. The Royal Commission on Tribunals, which Lord Salmon headed, very much reflected the reaction and, I think, the quite honest reaction. I thought—perhaps I better be careful—that the Denning inquiry was really monstrous. It did not suit our kind of democracy. It did not have any sense of what the public were concerned about. The legal profession, and many other people, reviled the Profumo inquiry. The result was the six principles that Lord Scott set out that attacked, not entirely, the six principles of Lord Salmon. That is the history.

Q293 Baroness Hamwee: As you say the inquiry is for the public. It is not a piece of litigation, so can you tell us what you think about the role of the chairman of the inquiry perhaps extending beyond the hearings with regard to the implementation of the recommendations?

Sir Louis Blom-Cooper – Oral evidence (QQ 283-294)

Sir Louis Blom-Cooper: Well, I think you—

Baroness Hamwee: Perhaps I could just wrap up, indeed as well as the chairman, there are other ways of ensuring that recommendations are implemented.

Sir Louis Blom-Cooper: I think you have put your finger on a vital point. I have written an essay on this called *Horses for Courses* and like anything else the selection of who should chair and who should take an appointment is a matter of assessment of the individual you are choosing. Some of the inquiry chairmen have been excellent; others less than excellent. I think we have to be grateful to Lord Saville. The one thing he demonstrated was how legalistic he was, how superbly a lawyer he was and how little he understood what the function was of a commission of inquiry into Bloody Sunday.

Baroness Hamwee: Do you have a view as to whether the chair should be involved in overseeing the implementation of the recommendations, or does it depend on the particular horse?

Sir Louis Blom-Cooper: That is a difficult one to answer. If anybody is approached to do a commission of inquiry, of course it requires his consent, and inevitably he will talk with his colleagues as to whether there is a case for doing it. Those of us in the know from time to time are aware that there are people who reject sitting as commissioners of inquiry. There have been recent examples of it.

The answer is yes, but how you formulate that is difficult. Perhaps you do not formulate it. You take a chance that you get the right horse for the right course.

Q294 Lord Richard: Can I just deal with a question of Section 2 of the Act that provides, “Inquiries have no power to determine civil or criminal liability”? Do you think there is any case at all for some inquiries to be allowed to determine civil liability?

Sir Louis Blom-Cooper: Yes, but not under this legislation. Criminal liability is even more important. I remember in Australia, about 10 years ago, that there was a criminal conviction that was said to be a miscarriage of justice and there was an inquiry, under their Commissions of Enquiry Act, into the liability of the particular individual. I believe if you want to have an inquiry into civil or criminal liability it is better left to the prerogative. It will be fairly rare that that would happen and I would rather not muddy the water with issues that concern the public generally.

Lord Morris of Aberavon: Sir Louis, thank you very much for your evidence. Is it right that the Attorney-General should give undertakings that evidence given to an inquiry will not be used in criminal proceedings against the person giving that evidence as was done in the al-Sweady inquiry by the Attorney-General? May I say in passing, as a law officer, that when the Bloody Sunday inquiry was set up I have no recollection of it being considered at all? Perhaps it should have been.

Sir Louis Blom-Cooper: I am inclined to think that is the \$64,000 question. It involves the nature of the office of Attorney-General. Is it political? Is he a government officer or is he independent of government? I am glad to say I have given no consideration to it for this purpose of this hearing. It is a difficult question to answer. The idea behind it, that there should be some independent officer who reviews the propriety of the action, is a good idea. How you put it into practice I think is a little more difficult.

Lord Morris of Aberavon: Well, he is the guardian of the public interest, which is not possible to define at all, as I found.

Sir Louis Blom-Cooper: Can I say that one of the things that I think we are in danger of losing in our society is a sense of trust?

The Chairman: On that then we will conclude. Thank you very much indeed. Thank you for coming.

Sir John Chilcot – Written evidence

My involvement with Inquiries extends across the past fifteen years. I have been a non-party member or chairman of a number of reviews, inquiries and other bodies including the Independent Commission on the Voting System (1997-8), the Lord Chancellor's Advisory Council on Public Records and its successor National Archives Council (1999-2004), a review of Royal and VIP security, an inquiry into the IRA break-in at the PSNI Special Branch HQ (2002), the Review of the Intelligence on Weapons of Mass Destruction by a Committee of Privy Counsellors, chaired by Lord Butler (2004), and the Privy Council Committee on Intercept as Evidence and its successor Advisory Group (2007-).

In the broadest terms, the conclusion I have reached over the past fifteen years is that the nature of any Inquiry should be driven by its core purpose, the nature and sensitivity of its subject matter and the breadth of its scope. Each type of Inquiry brings different advantages and disadvantages which must be considered carefully based on the Terms of Reference for the matter under investigation; I have concluded that there is no one single model which works equally well for any and all subject matter.

At the inception of the Iraq Inquiry the Government, members of Parliament and the media, and I made a number of public comments which bear on the pros and cons of its creation as a Committee of Privy Counsellors.

Immediately after the then Prime Minister, Mr Gordon Brown, announced that there would be an Inquiry to learn the lessons from the UK's engagement in Iraq between 2003 and 2009, debate centred on whether it would take evidence in public or in private.

On 15 June Mr Brown told MPs that evidence to the Inquiry would be heard in private, citing national security considerations. I wrote to Mr Brown on 21 June to explain my belief that it would be essential to hold as much of the proceedings of the Inquiry as possible in public. The then Shadow Foreign Secretary, Mr William Hague, argued during an Opposition Day debate on 24 June that "proceedings of the Committee of Inquiry should whenever possible be held in public" (House of Commons Official Report, 24 June 2009, Column 800). Mr David Miliband, on behalf of the Government, supported the proposal in my letter.

I explained to the media on 30 July 2009 that:

"We are all committed to ensuring that our proceedings are as open as possible because we recognise that it is one of the ways in which the public can have confidence in the integrity and independence of the inquiry process." (Iraq Inquiry Press Conference, 30 July 2009)

The absence of legal powers to subpoena witnesses and to take evidence on oath was also the subject of debate when the Inquiry launched.

In his letter of 17 June 2009, Mr Brown wrote: "I hope....that you will consider whether it is possible for there to be a process whereby they give their contributions on oath". Numerous media commentators queried whether witnesses would agree to attend, and provide an accurate account, and the subject was debated in Parliament.

In my statement on 30 July I said that the Inquiry is not a court of law and nobody is on trial, and that remains the case.

In practice, no witness approached by the Inquiry has refused to provide evidence. Although we are not able to administer a legally enforceable oath, as would be the case under the Inquiries Act, we nevertheless invited witnesses to give an undertaking that the evidence they provided was truthful, fair and accurate, and to sign the transcript of their oral evidence on that basis. Witnesses were also reminded, immediately before they gave evidence, that the Inquiry would be checking their statements against the papers to which it has access from the time in question. Those procedures served, in my view, to emphasise the Committee's expectations and remind those giving evidence of the severe reputational damage they would suffer if their evidence was perceived to fall short of those expectations.

Witness testimony, whether given in public or in private, represents only part of the evidence available to the Iraq Inquiry, which has been provided with an extremely large body of mostly contemporary written material. Access to the most secret of these documents was cited by Mr Brown as crucial to the Inquiry's purpose, and the ability to access documents on Privy Council terms a real advantage:

“The committee of Inquiry will have access to the fullest range of information, including secret information. In other words, its investigations can range across all papers, all documents and all material, so the Inquiry can ask for any British document to come before it and any British citizen to appear.” (15 June 2009, House of Commons *Official Report*, Column 23).

“As Privy Counsellors, you will have unhindered access to government documents.” (Letter Brown to Chilcot, 17 June 2009)

The Inquiry has, as promised, been given unhindered and prompt access to the material it has requested.

When announcing the Inquiry, Mr Brown also made a virtue of the nature of its membership, which comprises – in his words – “non-partisan public figures acknowledged to be experts and leaders in their fields” (House of Commons *Official Report*, 15 June 2009, Column 24).

For an Inquiry of this nature, having Committee members with a breadth of expertise – in this case: academic (including war studies), diplomatic, the operation of government and on standards in public life – has indeed proved invaluable. The Inquiry also recruited highly distinguished advisers on military matters and on international law to supplement its own expertise in those particular areas.

I said in July 2009:

“... I'm glad that the Government and indeed Parliament itself has endorsed the approach, that we should not be constituted as a judicial inquiry. The nature of the subject matter, the nature of the decisions we're examining, don't lend themselves to an adversarial inquiry or to the kind of rules of evidence excluding this, including that, and to the kind of indirect representation of witnesses that is involved in such an inquiry. This one enables us to do it directly, and I think that's a great virtue.” (Iraq Inquiry Press Conference, 30 July 2009)

I have not, since making that statement, felt at any point the absence of judicial leadership has been a disadvantage for the Inquiry. My colleagues and I have felt able to focus on learning

Sir John Chilcot – Written evidence

lessons rather than on apportioning blame, although we will not shrink from criticism where it is justified.

The absence of Counsel to the Inquiry undoubtedly placed an additional onus on myself and my colleagues in relation to the questioning of each witness who appeared before us. When preparing for our public hearings, we were assisted by staff employed within the Inquiry Secretariat and received some expert guidance on the questioning of witnesses. We were also able to divide the preparatory work and questioning between us in a manner that perhaps reflects the practice in Parliamentary Committees such as your own.

Your Committee will have observed, moreover, that during our public hearings we were able to adopt a procedure, also employed in Parliamentary Committees and which we consider to have been advantageous, whereby witnesses whom we wished to question about particular matters appeared before us simultaneously.

Since much of the evidence available to the Inquiry is derived from the rigorous examination of the many tens of thousands of documents in our possession, the Inquiry remains of the view that staffing its Secretariat with individuals drawn from departments, including some of the major departments that were involved in Iraq during the period covered by the Inquiry's terms of reference, is the most helpful approach; and one which offers good value for money.

I am satisfied that the approach we have adopted has also served to limit costs. As I wrote in June 2009:

“If a judicial inquiry, or a statutory Tribunal of Inquiry, had been established.....That would have required an extended process, with legal representation for the tribunal, witnesses, and other interested parties. That is not what we have been asked to conduct.” (letter Chilcot to Brown, 21 June 2009)

Michael Collins, Judi Kemish and Ashley Underwood QC – Oral evidence (QQ 248 – 271)

Evidence Session No. 11

Heard in Public

Questions 248 - 271

WEDNESDAY 20 NOVEMBER 2013

10.40 am

Witnesses: Ashley Underwood QC, Judi Kemish and Michael Collins

Members present

Lord Shutt of Greetland (Chair)
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Ashley Underwood QC, Judi Kemish, and Michael Collins

Q248 The Chairman: Good morning. Welcome to our meeting today to give evidence. I have to read out to you a formal piece and it is this. “The session is open to the public. A webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence or have any additional points to make you are welcome to submit supplementary evidence to us.”

Q249 The first thing I want to do is to thank you for your very helpful evidence. The first piece of written evidence the inquiry received was your joint evidence, so we are grateful for that and indeed for the additional paper by Michael Collins that we had. I wonder if you could introduce yourselves one at a time, just for the record, so that we hear the voices and this is properly noted. Then I will move on to questions.

Judi Kemish: Good morning, everybody. My name is Judi Kemish. I am the solicitor for the Mark Duggan inquest.

Ashley Underwood: I am Ashley Underwood. I am a barrister in private practice.

Michael Collins: I am Michael Collins. I am on secondment from the Ministry of Justice and I am secretary to the Duggan inquest.

Michael Collins, Judi Kemish and Ashley Underwood QC – Oral evidence (QQ 248 – 271)

The Chairman: Thank you very much indeed for that. I would like to start with setting up inquiries. You and other witnesses have told us that an investigation capable of allaying public concern does not necessarily have to be a full inquiry under the 2005 Act. The grounds for setting up a statutory inquiry are that a Minister believes that it is a matter of public concern. What process should lead up to that decision? What factors should be taken into account?

Ashley Underwood: I will kick off if I may. We think what should be done is that a Minister should grapple with the core in the first place. Generally speaking, by the time there is a head of steam for any sort of inquiry there will be a victim support group, there may be NGO support, there may well have been a lot of publicity, lobbying of parliamentarians and so on. It is quite easy to gather together the materials about that and engage with the people who have taken up the cudgels, if you like, to find out what people want and what they would expect to see out of an inquiry—what a good inquiry would look like from their perspective.

That could then be costed in terms of all sorts of resources. What sort of inquiry would fit the bill, what sort of chairman you would need, how long it is likely to take and what the whole thing is likely to cost. Then a cost-benefit analysis can be done to see whether in reality that process will allay the public concern that is driving all this. That is, we think, what should happen and sometimes does.

Baroness Hamwee: What are the good examples? You say sometimes it has been done. I am sorry, I am not trying to wrong-foot you.

Ashley Underwood: I think Al-Sweady, for example.

Q250 The Chairman: This is the question. It is about inquiries under the Act. What is the tipping point that takes it to an inquiry under the Act rather than one that is not under the Act?

Judi Kemish: Obviously there has to be public concern, and if there is public concern and there is a recognition that the inquiry, or whatever forum you have for hearing the evidence, needs powers and teeth to compel witnesses and evidence then it may well come under the Inquiries Act. We have found from experience that the powers of compulsion, section 21 powers under the 2005 Act, have been extremely useful.

Sometimes a little letter with a threatening tone that we may have to serve you with this may produce the results you want. But also some departments prefer having a section 21 notice when there is material they would not ordinarily wish to disclose. But then somebody can go to their big boss and say, “We have had a section 21 notice ordering production of documents and have to comply”. Therefore, sometimes it is a good safety net for the supplier of the material.

We have found the Inquiries Act was very beneficial in the Azelle Rodney inquiry in that we had the powers of compulsion. We did not use them very often and we did not have to enforce them, but having that little bit of stick does help. Also, on costs for section 40, which you get obviously under the Inquiries Act, it was very helpful for me when I was trying to have a cap on costs.

Ashley Underwood: If I can chip in there, we gave a tipping point ourselves. Judi and I were on the Robert Hamill inquiry, one of the peace process inquiries in Northern Ireland set up under a local act that did not have powers of compulsion over witnesses, and we were told unequivocally that the Protestant witnesses who were on the street and were vital to it would not give evidence. We were able to convert, thinking we needed to convert, to get powers under the 2005 Act, and as soon as we had the powers we had the witnesses.

There was one particularly recalcitrant witness who just would not come and we took her to the High Court and obtained a suspended order for contempt. That brought her to court. As far as we are concerned, the real distinction between a non-statutory inquiry and a statutory inquiry is those teeth.

Q251 Lord Woolf: I just wanted to ask you this. There is obviously within Government, at least as far as I am aware at the moment, a certain reluctance to have the inquiry under the Act. If the only benefits of having the inquiry under the Act in reality are the need for witnesses to be required to give evidence or produce documents and matters of that sort, is the Act not far too extensive in the provisions it contains, and a much simpler Act that gave those powers would perhaps be more amenable to the Government using it and do everything that is needed? So far as other matters are concerned, cannot the chairman deal with them?

Ashley Underwood: Yes. We think particularly, as you know, the rules are very much over-elaborated and if you are stuck with the rules when you have a statutory inquiry then you do end up with a lot of thickets to get through. It may well be there is too much there, yes.

Lord Morris of Aberavon: If I may follow Lord Woolf, the only difference that I can see in a statutory inquiry, and I repeat what he was saying, is compulsion. Leave the compulsion on one side, then it is an open field for the Minister with no established criteria as to what the form of the inquiry is.

Ashley Underwood: That is true and, of course, we know there is criticism of the way some Ministers have decided to deal with some investigations because of the lack of that guidance. I can only agree; it is a wide open field.

Lord Morris of Aberavon: It works.

Ashley Underwood: It does, subject to policing by the courts, of course.

Lord Morris of Aberavon: Other than the usual compulsion there should be no presumption that it should be a statutory inquiry?

Ashley Underwood: No. I have seen the evidence to suggest that and, if I may say so, I disagree. We would, I think, all agree you start looking for the most efficient, economical, minimalist investigation that will allay public concern. But if you are driven to a full-blown, judicial, all powers, all-singing, all-dancing inquiry, well, so be it. But if you can do something less that works then you should do that, we would think.

Lord Morris of Aberavon: I am grateful.

Judi Kemish: On the back of that, my Lord, is that the consultation process we have found is so important at the beginning. Obviously lots of parties have legitimate expectations. The family have an expectation maybe it will be a full-blown Bloody Sunday inquiry and then they will have, for example, maybe the Metropolitan Police Service would like an internal. I think the consultation exercise at the beginning to work out what people are expecting and maybe to then work out together a pragmatic approach to how the forum is going to run, getting everybody on board and signed up to protocols does really help.

Lord Morris of Aberavon: The Minister may just want to establish the facts. There is an additional factor to allay public concern. I have been involved in setting inquiries up but I want to establish the facts. That was the purpose in the non-statutory one on the Crown Prosecution Service. I wanted to know what was wrong with it. There was public concern additionally.

Ashley Underwood: Yes. We would say you are always going to be looking for the facts and very often that will do. But also very often you are going to need to go further. You will need to take people with you. Again, by the time many calls have been put together for an inquiry there is such a head of steam, people have become so worked up, so disappointed by other failures in the system that they really are anxious to have their voices heard. Then it is very much a matter of process. Process for them takes over.

Lord Morris of Aberavon: Thank you very much.

Q252 Lord Trefgarne: I am very nervous about you ordering people in front of the inquiry and going to the High Court to get an order to do so. I speak from experience. I was a witness before the Scott inquiry. That was voluntary and I at first declined to appear. I was bullied and cajoled so that I did eventually appear voluntarily. But to drag them before the inquiry in handcuffs is the one way of ensuring that the evidence will be wholly useless, and if I had been the chairman I would not have allowed you to do it.

Ashley Underwood: This was a murder.

Judi Kemish: My Lord, it was one witness and we have only done it on one occasion and it was settled effectively out of court because, as you well say, if you compel somebody to give evidence their evidence is not going to be as good as if they came along voluntarily. Having a good witness support team, having all the support you might need for witnesses who might have requests for additional information or say, “I would like to see my statement that I gave two years ago”, that is very important. We have only used it once.

Lord Trefgarne: The power to compel people is an empty power. If they are not coming voluntarily it is waste of time.

Judi Kemish: Not in terms of that one witness.

Lord Trefgarne: They are under oath, of course, so they have to speak truthfully.

Ashley Underwood: They are. In our experience it did work, I have to say. I cannot emphasise enough how much this was a last resort. It was a murder and an allegation of a conspiracy to cover up the murder on the part of the police and she was a critical witness. We had no option, we thought, but to do this and it worked. Our approach to this, and I think this is the approach of all three of us, is you start with the softest, most amenable possible approach. You encourage people along and only if absolutely all else fails and there is no alternative do you use these powers.

Lord Trimble: Coming back to the issue of statutory or non-statutory, I think I am right in saying that your view was you should start off with a simple and minimalist one and then see where it goes to. But if you are starting off with this minimalist inquiry how do you ensure it is fully in compliance with our international obligations?

Ashley Underwood: You are very often going to have article 2 or article 3 components and if you have those then you are stuck with the panoply that they come with. They will immediately ramp you up to the next level, whatever people individually might want, and I accept that entirely. But even there under article 2 and article 3 you may be able to get away with less than a full-blown £30 million-odd inquiry might entail.

Lord Woolf: Mr Underwood, is one of the problems once you have the Act that the Act sets out various provisions in it and people automatically then start thinking those are loops to go through?

Ashley Underwood: Not necessarily. I think that, interestingly enough, there has definitely been a shift since Bloody Sunday. It is very interesting that when we were involved in the post-Bloody Sunday Northern Irish inquiries, on the one hand the Northern Irish Office was saying, “For God’s sake, whatever you do, do not end up like Bloody Sunday”. Then every time we met an interested party they would say, “Well, we were in Bloody Sunday. What we had there was a suite of rooms, a hotel nearby, LiveNote, stenographers and so on, and of course we expect that otherwise this inquiry will be a farce”.

That has all changed. It is interesting, people come to these things with perceptions that are not necessarily driven by the statute, I think.

Lord Woolf: Not necessarily driven by the statute but when you have a statutory framework that refers to matters of this sort, then they automatically become things that people are going to say, “The statute allows you to do it, why are you not doing this?” I am not saying any more than it gives them expectations, and so if you start off with what I think you are saying is a minimalist

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approach, that can avoid those things. But you have to take into account any obligations that arise, say, under article 2 and article 3 of the Human Rights Convention.

Ashley Underwood: Certainly.

Judi Kemish: In our experience, my Lord, although I was not personally wowed by the Inquiries Act when it came out, as a solicitor it is a document of governance. It is very handy. Very few people cite the Act at you and usually it is a number of provisions: fairness on the part of the chairman. Section 17 is a quite all-embracing section. It is quite a small Act and is a confined Act. As a practitioner I have found it has worked for our inquiries. The rules, on the other hand, are far too cumbersome and often one does not want to stick to them because otherwise you would end up taking an extra year to agree costs and so on.

Lord Woolf: To what do you attribute the reluctance within Government to use the Act more extensively than they do? If it is only a tick-box check why is there this reluctance?

Ashley Underwood: I cannot help thinking that Bloody Sunday has seared deep into the consciousness and everybody thinks a statutory inquiry could so easily end up like Bloody Sunday, even with the safeguards built into the 2005 Act. I just think there is a terror.

Q253 Baroness Stern: Very briefly, I would like to return to “minimalist”. Lord Trimble very helpfully asked about international obligations that might put a few layers on the minimalist. I wonder if I could go down that track and ask you what objectives, in your view, does an inquiry have? Allay public concern, you said, and obviously get at the truth and find facts, but are there other outcomes that it is desirable to have which might slightly temper the minimalism?

Judi Kemish: Accountability I would add in the pot, in that a department may be called to account, or a Minister or an individual. You then obviously have the Human Rights Act and ECHR on top of that, protecting rights; fairness, duty of fairness. Article 6 does not come in generally because it is not a trial. Then you have the common law principles of fairness and transparency.

Ashley Underwood: I have seen the transcripts of the evidence previously given and “catharsis” was read out as if it is a separate component. We think it is absolutely fundamental. If you are allaying public concern, as I say, there is going to be a head of steam; there will be, if you want to call them this, victims; there will be people who have a vested interest in ensuring that a fair outcome is achieved. If you do not have the cathartic element you are likely to fail in those circumstances. You simply will not have allayed the public concern if you do not get reconciliation, if you do not have people thinking they have had their voices heard, if they do not think they have had a fair crack of the whip. It is absolutely integral to the process.

Judi Kemish: I think the independence point is helpful and also the fairness to witnesses, so that the inquest team and the chairman are totally impartial and that all witnesses are treated the same. That is very important. Then you often bring the family on board because they feel you are treating them with respect and dignity but also the witnesses and they all come under the same umbrella.

Baroness Stern: Finally, you would agree that “minimalist” encompasses more than getting at the facts and allaying public concern? There are a lot of other considerations that might require you to do things that take a lot of time and are not immediately obviously relevant to finding out the facts but are very important for fairness, catharsis or whatever you want to call it.

Ashley Underwood: We were discussing before we came in the Irish child abuse investigations that had in them the components by which some victims were able just to talk anonymously without any analysis of their experience, but just to get it off their chest. I would regard that as part of minimalism and very much a cathartic thing. Not expensive, it is not covered in lawyers, it does not involve complication but it clearly allays some concern.

Lord Woolf: Nor does it need statutory backing.

Ashley Underwood: No, it does not.

The Chairman: I think a lot of the second question has been covered, but I am still trying to get my hand on this issue of criteria. Are you saying that the major element of criteria is the temperature of public concern in terms of whether it is under the Act or not?

Ashley Underwood: Yes.

Michael Collins: If I could say that question may be for colleagues at the Ministry of Justice that have access to Ministers and talk to them about these things, but I know that value for money and cost will always be a factor. I know we are going to talk about that later.

Q254 The Chairman: If I may then move on, you recommended that before any inquiry is set up, it is subjected to a scoping exercise. Who would carry out such an exercise and how do you think it should be administered?

Michael Collins: If I could answer that, I think that our small team is a good example of a team that could carry out that process, because between us we have lots of experience now. When I first started on the Rodney inquiry, it was a very steep learning curve. We have now learnt so much and it would be a crime if we were not able to pass that experience on to other people. The exercise could be carried out. If this team was still in place, we could advise other teams in setting themselves up, in doing the scoping exercise, estimating costs, estimating resources and preparing to deliver whatever it was that needed to be delivered.

Lord Woolf: I am sorry to be the devil's advocate, but we have had an awful lot of inquiries, and we are not going to be able to keep in being all those who were involved in an inquiry just in case they can give guidance and advice to successive inquiries. Surely the point you make would be met if there was a way where what you have done to help us, for example, was accumulated into a readily available source to which those who are appointed to an inquiry could refer.

Michael Collins: I think there is a bit more to it than that, because what I found with Rodney was that it is a very slow start. You need to have in place all the financial structures, which we did through the MoJ; you need to have in place procurement contracts with experts or whoever that may be; you need to have contacts within, say, the Court Service if you require courtrooms and so on; you need to have a structure around you that allows you to hit the ground running; you are going to need to have the computer systems; you are going to need to have websites, email addresses, all of those things. They take time to set up, especially when you are doing it for the first time when you are starting from scratch.

If there was an operational unit that could assist with all those issues so that the team that was to take on an inquiry could have that kind of support, have access to all those procurement contracts and all the background infrastructure that is required, it would make the inquiry much less lengthy and therefore cheaper.

Ashley Underwood: Can I say something from counsel's point of view? I think it is well-known counsel do not fit very easily into a public inquiry setting, and it was absolutely fascinating to be launched into the first one I had, which was chaos, quite frankly. I think everybody knew there was Cabinet Office guidance, which frankly was no use at all. You need some of sort of living, practical help. I do not see an alternative to what Mick is suggesting for sort of leg-up assistance.

The other thing is that no amount of written guidance is going to allow somebody to cost and scope a particular inquiry. It is only somebody with a brain, with experience, saying, "These are the likely problems you are going to encounter in your next investigation".

Judi Kemish: I was going to say, it is a bit like setting up a business, is it not, in the sense that often a chairman is appointed, he then has his team. If they then had a point of contact—I am not saying that is a huge, great unit costing a fortune—for example, at the Ministry of Justice, the chairman would know who to contact and that person could then draw in what resources they thought. You would go in and you would basically have like a two-week induction session, helping people set up,

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just passing on knowledge in that way, because I have found reading guidance does not always cover all the questions you have.

Lord Woolf: I certainly fully understand that, but I am just not at the moment clear as to how it can be done practically, bearing in mind the distaste in Government circles for quangos, because I think what you are suggesting is that there should be a new service for inquiries, a branch of the Ministry of Justice.

Ashley Underwood: I certainly would not go that far. I think Mick has thought this through rather better than we have.

Lord Woolf: Perhaps more than I have.

Michael Collins: What I think is that it needs to be as simple a process as possible. There does not need to be any rules, there does not need to be any rigorous oversight of a new inquiry that is set up. It is more about an advisory role, very light touch, to help the people in the new inquiry to hit the ground running and to have access to everything that they need. For example, I mentioned some things just now, but just having a financial process where you can get invoices paid. It sounds very simple, but you need that process to be in place, you need to get the budget in place and you need to be able to pull in the staff that you need and the resources generally that you need.

Q255 Baroness Hamwee: Yes, two questions, and this is morphing into questions about costs, but we will come back to some of the detail of that later. Would I be right that a lot of what you are saying is that, as a team, you could provide a sounding board to others coming in and fulfilling the same functions? Is that a fair description?

Ashley Underwood: I am sure we are not the only people who could do it, but that is the notion.

Baroness Hamwee: No; but that is the notion, yes?

Judi Kemish: Not necessarily a fixed body with a title, but maybe—

Baroness Hamwee: A point of contact.

Judi Kemish: A point of contact so that the chairman, when he is appointed, would say, “I need to go that person” and they can come in and explain about IT contracts, value for money, telephone systems and what are the basics that you need and then go from there.

Michael Collins: Also complying with departmental procedures in terms of contracts and finances generally, because I have had to use the MoJ procurement contract system and at times it has been tortuous and taken too long, but now I know the system and now I know how things can be done, it does work very well.

Baroness Hamwee: Thank you. My other question was about the cost of having people available to carry this out. We have two of you who are employed in government and one person in private practice. Does our Civil Service run well enough to allow people to be made available to help out in other parts of the forest and to pay the frankly rather—it looks like—small hourly rate for somebody, a senior person in private practice, who can give them that?

Ashley Underwood: I hope nobody was thinking of including me in this.

Baroness Hamwee: I thought you were saying that it would be.

Ashley Underwood: No doubt if the likes of Mick and Judi were to do something like this within their department or departments, then no doubt they would go out to counsel from time to time, if and when they needed them, who had inquiry experience. But it is up to these two to know whether they could fit that in.

Baroness Hamwee: I am thinking about the cumbersome nature of some of the way Government runs.

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Judi Kemish: Because Mick—Mr Collins, sorry—works at the Ministry of Justice and they are our sponsoring department on Duggan and they were on Rodney, if they saw it as bringing a benefit to them in terms of efficiency and cost, they would welcome somebody that could say, “I have finished this piece of work. I need to go off for two weeks”. Lots of things are subject to negotiation, are they not, and setting things in stone is probably not a good idea, but I do think, for example, if I were to go and work abroad next year, I would just feel all my experience had gone. It is not just mine; I hear it time and time again.

When I was on the Treasury Solicitor’s inquiries consultation group, we kept on endeavouring to write guidance, but of course then somebody would come with a new problem, because every inquiry and inquest is different and you can never cover all the scenarios, so the guidance was out of date as soon as you had written it. I have been over to Belfast for the hyponatraemia inquest and I helped them on a couple of days, just setting up systems. We spent a long time drafting an anonymity protocol. Once we have it in place, you can rejig it quite quickly and so I sent them our anonymity protocol. But the chairman often is appointed and then draws in a huge legal team that maybe is not necessary. It is having somebody independent of that to come in.

Q256 Lord Morris of Aberavon: Mr Collins, your opinion appears extremely valuable, if I may say so, on the nitty-gritty of setting up an inquiry. What impresses me is the problem of, first, naivety of chairmen who may not have done this job before; the support machinery, even more important; and the idea within Government that nobody owns the procedure for setting up an inquiry. Therefore, leaving on one side the contractual matters, the IT—all those of fundamental importance these days—it is when a department embarks on the idea of a public inquiry, statutory or non-statutory, there is no expertise within that department and the Cabinet Office with, I think on the last count, six Permanent Secretaries, nobody owns anything. The need is for the focus perhaps in the Ministry of Justice, and you make a very valuable point in paragraph 13.4 of your paper about a unit based in Her Majesty’s Courts and Tribunals Service, that might be the focal point. But it does need perhaps a wider input than that, it does need ownership. Is that the main theme of your paper?

Michael Collins: I agree with you. I think there is a lack of ownership and something does need to be done. It is almost the mindset that people approach these inquiries with from the outset, because it is a bit like the process and procedure issue from before. If you start off by thinking that you need the most expensive and best IT system possible and if you work out from the beginning that you are going to have the widest scope possible in the terms of reference, you are going to end up spending lots of money. You need to focus in on what is good enough, and if something is good enough and it does the job, then that is absolutely fine.

Lord Morris of Aberavon: So it basically comes down to ownership of the issues of setting up an inquiry within a government department, wherever it is?

Michael Collins: Yes.

Ashley Underwood: It is interesting having a contrast between two sponsoring departments that we have had. The MoJ, which is utterly disinterested, but literally just does provide whatever needs to be provided, has been a model department. That is why I would certainly favour, if we are looking at ownership, it being parked there.

Lord Morris of Aberavon: I tend to agree.

Q257 Lord Soley: I find this very useful, but I am trying to put together several bits that we are now covering. Mr Collins, you have indicated in paragraph 13.4 of your written evidence that it could be done by a central unit in either the Ministry of Justice or Cabinet Office and I am tempted to ask you, first of all, would the logical place not be the Ministry of Justice, simply because there is, to some degree, a judicial structure for inquiries? Is that right?

Michael Collins: Absolutely, I would agree with that, yes.

Lord Soley: Secondly, could I now ask you about the implications of that, because if you have, for example, IT systems, which are incredibly expensive and very complex, the IT system that would work for a complex inquiry on, say, hospitals within the National Health Service, who have this enormous structure, as opposed to an IT system for something like the Dunblane inquiry on the killings in the school, which was very specific, would that not make it difficult to get some degree of overlap?

Michael Collins: Not necessarily. I would not go so far as to say that a bespoke IT system should never be necessary. There may well be times when it is. What I would say is that if you start from what you have and how that system might be adapted and you look at the contracts that are in place—the MoJ has a big contract with IT suppliers, they supply the Government system—there is not any reason why, in principle, they could not supply another system specifically for an inquiry. In fact, what the MoJ have done for us is expand the size in terms of storage volume within our IT platform so that we can function. That is not something they would normally do, but if you ask the right questions, you might get a good answer.

Lord Soley: Following on from some of that, if you have it in the Ministry of Justice, which you have indicated is probably the preferred option, and I can see the Cabinet Office could work well too, in a way it removes it from the department that is under scrutiny in a sense; if it was the Department of Health, for instance. Given that, going back to some of your earlier comments, these inquiries are almost always a reaction to public concern, that public concern is usually highly political, and particularly in cases like hospitals. How do you separate out the need for the department concerned to have, if you like, an oar in the process as opposed to having what appears to be an independent structure you are talking about?

Michael Collins: With the Azelle Rodney inquiry, we are a non-departmental body attached to the Ministry of Justice and that gives a degree of separation. I am not sure that separation is absolutely necessary, but the judicial independence element is, I think, and I know that there has been some discussions about whether the chairman should always be a judge or a retired judge, but the judicial independence would allow for that to happen if the inquest was of that kind of nature.

Lord King of Bridgwater: If I was very cynical, I could say that some of your evidence looks like a pretty powerful job application! One of the things that concerns many of us is that the very understandable Civil Service approach to career development has led in many cases to very short terms and people continually moving their position, so even if the expertise lodged in a particular department, you find the chap who knows anything about it is now off dealing with something entirely different. Could I ask you, Mr Collins, you have a continuity of exceptional experience in this field, but are there other people in the Ministry of Justice who have similar experience? On the face of it, it is a no-brainer, that there ought to be some centre of excellence and experience that can guide individual different departments. The Ministry of Defence, which has had a succession of inquiries of one sort of another, you might think quite experienced, but different people have come up each time. Would you like to comment on that?

Michael Collins: Yes, sure. Lee Hughes, who I know has given evidence, is probably the most experienced person that was in the MoJ, but is retired now. I do not know of anybody else. I think there is a culture in the Civil Service, as you say, of people moving jobs and trying to get the kind of experience that will allow them to be promoted and so on. I know there are lots of people that would love to do the job that I do and would like a chance to have a go. I can understand that, but because the issues are so big and because the costs are so large, I think that is a mistake.

Ashley Underwood: There is a networking point to be made here, I think. One of the things we have had to learn is who to go to and there are a lot of civil servants scattered around the country who have inquiry experience, and with a good deal of hard work, you can work out who and

Michael Collins, Judi Kemish and Ashley Underwood QC – Oral evidence (QQ 248 – 271) where they are. One of the things that a central unit could do is know where these bodies lie, if you like.

Lord King of Bridgwater: Absolutely right. Thank you very much.

Q258 Baroness Stern: I should declare an interest, in that my husband was a member of the Billy Wright inquiry. Can we now have a look at the overlap between inquiries and inquests? This is quite a controversial area, as I am sure you know, and Liberty gave us evidence saying, “Liberty has long objected to Government attempts to introduce secret inquests and secret inquiries masquerading as inquests.” Clearly there are feelings about it. The Coroners and Justice Act 2009, as I remember well, allowed for an inquest to be discontinued in the event of an inquiry being established. Could you tell us a bit about how this is now being used, this new power that we brought in in 2009?

Ashley Underwood: To say that we are at the sharp end of this would be an understatement, I think.

Judi Kemish: We sound like another job application.

Ashley Underwood: No, this is rueful, I assure you. We were catapulted into the Azelle Rodney inquiry, as we understand it, because attempts to deal with this as an inquest utterly failed and attempts to change the law utterly failed. We know Liberty was involved in the argument about all of that. I know the strength of feeling that there is about the power in the Inquiries Act to cut off an inquest and make it an inquiry.

There are two things. First, I think the only experience of that power being used so far is just that, allowing an inquiry into Azelle Rodney rather than the stalled inquest. As far as we can see, that power was used perfectly well. The second thing is that it would be madness for any Minister or any chairman of an inquiry to allow that power to be used to suppress truth. They would get quashed. I fully understand the theoretical difficulty that Liberty have with it, but it is not a practical problem, we would say.

Baroness Stern: Thank you for that. Could I ask you then what do you think influences Ministers to decide to have an inquiry rather than an inquest, or the other way round?

Ashley Underwood: We have talked about this a lot. As far as we understand it, Ministers think there is a great driver to having a jury, if they can possibly have one, to investigate a death, because the popular perception is that unless you have a jury, somehow it is being swept under the carpet. Now, it is an irony that when people think of inquiries they think that the Rolls-Royce of an inquiry is to have a judge. Quite how it is that people would prefer to have a jury than a judge, nobody has ever explained, but the driver simply is that. We have seen this very much with Mark Duggan, where it could so easily have been an inquiry rather than an inquest, but I think there was a great deal of pushing for it to remain a jury matter and the Ministers took that on.

Baroness Stern: I am speaking here from some ignorance: normally you would assume you would have an inquest when there is a death?

Ashley Underwood: Yes, you would, and the question is whether there is something more than just the death. For example, let us look at allaying the public concern. In the inquest we have into Mark Duggan—and I need to be careful, because it is continuing—we are only exercised by the death, but it is idle to forget that the riots took place as a result of that death. Now, the public concern that surrounds the death does not just deal with how it is that Mark Duggan came to die. There is an argument for the allaying of public concern to deal with it rather wider than the inquest would ordinarily do. That is not a question for us, I know, but it is a matter that could be taken into account by a Minister.

Lord Soley: Also you used the phrase just now “utterly failed” for an inquest. I understand the sensitivities, but were you talking about the Duggan one or were you talking about—

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Ashley Underwood: I was talking about Rodney.

Lord Soley: The Rodney one. Why did it utterly fail?

Ashley Underwood: Because there was material that the coroner could not see.

Lord Soley: That was it, no other reason?

Ashley Underwood: And everybody agreed he had to see it if he was to conduct an article 2 compliant inquest.

Lord Soley: That is your argument for using the Act itself?

Michael Collins: That was the argument, yes.

Lord Soley: Okay, thank you.

Baroness Stern: Can we just probe that a little bit? There was evidence that the coroner could not see and that led us down a different path to somebody who could see it?

Ashley Underwood: Yes.

Baroness Stern: Could you say a bit more about that? Not about what it was but the process.

Ashley Underwood: There were two stages to that process. The first is the retired High Court judge was entitled to see this particular intelligence under the particular statute, and importantly, so could counsel. Usefully, under the Act, counsel is defined as including solicitors. Judi is my junior counsel, as well as my solicitor, so we could both see this material. We spent 12 months fairly solidly negotiating line by tortuous line with the intelligence-holders an outcome by which that intelligence could be made public without transgressing the statute. That is how it worked.

Baroness Stern: Could you say a little more about that? We have it somewhere, but if you could put it on the record.

Ashley Underwood: I know you do, but even with all the protections in Parliament, I am very loth to talk much about this type of intelligence. It is, simply, under a statute, not available for public use in a way that reveals the source of the intelligence, and it is simply not available for a coroner.

Lord Trimble: Was this a bit of evidence that was reclassified as restricted?

Ashley Underwood: Yes. This is what Mick refers to as something that, as a result of our logistic process, if you like, we could downgrade the classification of, yes.

Baroness Stern: To a layperson, it would mean you rewrote it to make it usable?

Ashley Underwood: Yes.

Baroness Stern: That is very helpful, thank you.

Ashley Underwood: Rather to our surprise, to everyone's satisfaction, as it turned out.

The Chairman: Can we move on then to costs? Baroness Hamwee.

Q259 Baroness Hamwee: We have covered an awful lot of ground on cost, I think. On keeping the costs down, I ought to ask you if there is anything else that you want to say that you feel we have not heard from you in questions. Your paper was extraordinarily helpful, thank you very much.

Michael Collins: Thank you. What I would say is that in the Azelle Rodney inquiry, the solicitors for the family were very concerned about the hourly rates for all the legal elements within that, especially the paralegal costs. He had a look around various websites to see what other inquiries were paying and there is a huge variation between different inquiries. I think we are by far the lowest payer, which makes me feel sorry for some of the team, but the point is there should be a

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body of work to have a think about this across the board and ensure that there is consistency in the payment rates. That is one thing I would say.

Another thing that I think is important, and we have touched on this before, is going for a process that is fit for purpose, but is as good value for money as possible. That takes quite a bit of thought and quite a bit of discussion and obviously the lawyers in the team can explain what is absolutely necessary and what is not necessary. I think we have had a very effective working relationship from that point of view. If they come to me and say they need certain things, we talk about it and if it is necessary, then we procure it, and the MoJ have been very good about the budget for that.

One of the other problems with Azelle Rodney was that there was not a full scoping exercise at the outset, but the departments concerned, the MoJ and the Home Office, fixed a budget and very quickly it became clear that the budget was inadequate and so constantly having to go back to the department and explain, “We need more money” is not very helpful. What we were able to do when we got involved in Duggan was use the experience that we had with Rodney and do a scoping exercise in the way I have described and we fixed the budget. We are coming in within budget. All the things that we expected have come to pass.

One surprise for me, because I have never worked with a jury before, is that the jury cost £120,000 for three months. People think it is cheap, but it is not. So you have the balance between having a jury in an inquest and having a report written at the end of an inquiry and probably the costs are not too dissimilar.

Baroness Hamwee: Going back to the suggestion that a department needs to own how this works, I just want to be clear, when you talk about the MoJ, are you including the Courts and Tribunals Service as a possibility within that?

Michael Collins: It is the same organisation, yes.

Baroness Hamwee: Yes. Could you foresee any problem if a sponsoring department were itself the subject of an inquiry in some way? Is there a possibility of conflict of interest?

Michael Collins: Yes, there is a possibility, and what I would say is that you need complete flexibility. I would not go so far as to say a custom-built IT system should never be required, as I said before, and I would never want a process that limited your options. I think each case needs to be considered on its merits

and because, as you know, the subject matter and issues can be vastly different—a very wide spectrum of issues—you need to consider without being hampered in any way what the best course of action is.

Baroness Hamwee: I was going to go on and ask about the main causes of the expense in the Hamill inquiry but Lord King may want to follow what I have just asked.

Q260 Lord King of Bridgwater: Thank you very much. You made the point, and this seemed an eminently sensible idea to me, of doing a very careful and thorough scoping of what the implications are before you rush into these things. Sometimes that just is not available. If I recall rightly I think Scott and the origin of the Scott inquiry was Alan Clark being economical with the actualité, Alan Moses then withdrawing that day from the case and I think John Major standing up the next day in Parliament, I think on the advice of Lord Butler and saying there would be a public inquiry. Is there the capability for high-speed scope? I think the implication when they started it was that nobody had really thought through all the implications of what they were getting into.

Ashley Underwood: We think so. We have discussed this at length between ourselves and we have read the evidence to that effect as well. The issue is how much you front load. You can be catapulted into having an inquiry. You can have the chairman set up and the establishment put in place but then you need to take a breath before you dash into calling evidence. Hutton is a very good example of sideways thinking, how to do this, where they had to rush into taking evidence

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but they did it in two stages, if I may say so very cleverly, knowing that the first stage would be very broadly itself a scoping exercise and then focusing down for the second stage. That is one way of doing it.

Another way is to say, “Okay, we have been established. We have been told we have to report very quickly but what we are going to do is spend a month getting the papers in, interviewing people, working out what criticism one person may have of another, going back to put that criticism to somebody before we call them, getting the IT sorted out, getting ourselves settled so we have some idea of what the issues are, and what criticism may be laid out before we get to a witness”. If I may say so, without being critical of something unduly, Chilcot failed in that. It jumped into calling witnesses without thinking.

Q261 Lord Soley: I would like to pin down how we can control costs a little and this is probably a question to Ms Kemish and Mr Collins really. What I would find helpful in a way is if we had from say 2005 the projected costs, i.e. what inquiries came in on budget, what came in under budget, what came in over budget and then some detailed breakdown of how you identify the costs of those that were particularly expensive and well over budget. Is it possible to have that?

If you know where you are coming in seriously over the budget you might be able to identify the problems that may have arisen before. The point has just been made about Chilcot that they did not anticipate or whatever, but we need to have some breakdown. It is an accountancy operation in a sense. What were the projected costs? Were we on budget or over budget? What was the cause of being over budget?

Judi Kemish: When I was on the Hamill inquiry obviously we had to send monthly reports to the Northern Ireland Office, and again there were breakdowns. Because of the Bloody Sunday inquiry people’s expectations were very high and so the Robert Hamill inquiry came in on the back of that. When I came into the Robert Hamill inquiry the premises were already organised, the IT system was in place. The IT system cost us an arm and a leg and it did not need to.

In terms of budgeting, if you are starting from scratch once you have the materials in and you can work out the issues and which bits of the materials may be susceptible to public interest, PII application, or a potential JR challenge, then in terms of the legal funding pot you can have a pretty good idea. You can think, “We might have two judicial reviews on that”, so budget accordingly.

In terms of the legal team, initially I think it needs to be very small and then it is like anything, once you have the materials and you know where you are going, how many witnesses you are going to call, then you can bring people in. I think front loading is important but I think also not to have a knee-jerk reaction. I think some chairmen arrive and they have this massive public outcry, so they bring in a huge team. I think it is better to have a core team. If, for example, you think, “We need another witness co-ordinator”, then you bring them in. In your budget you might have two witness co-ordinators. I do not think the budget is difficult. It is probably more difficult on the premises/accommodation side but Mick does that.

Lord Soley: But I am looking backwards. If we could identify those ones that cost well over and exactly why, and why that did not happen with other more successful ones, that would be useful to know. Sometimes it might be expense of lawyers or whatever. I do keep a list of lawyers I would pay not to defend me simply because it is a bit too expensive and other reasons. But there is a real problem for us as a Committee identifying the cause of the costs increases in particular ones as opposed to the ones that are coming in under budget or on budget.

Michael Collins: I agree with you. If it was possible to do that kind of comparison it could be very, very worthwhile.

Lord Soley: Who could do that?

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Michael Collins: Someone would need to be tasked with it and that would be for a government department somewhere to carry that work out.

Lord Soley: They could ask you to do it.

Michael Collins: They could ask us to do it. What I suspect though is that in my paper I mentioned setting that out during the scoping exercise, all the assumptions that are made across all the cost heads. It is only when you start from that basis that, when those assumptions need to change, you adjust the figures, and then you have an audit trail. This is just Civil Service best practice really in terms of planning and preparing.

Lord Trefgarne: Surely if you knew that answer in advance you would not need an inquiry at all.

Lord Soley: I think the difference is that some of them are coming in massively over budget and it is important we try and identify why. There may be a very good reason why one suddenly has to expand it but it would be identifiable. My problem is that looking at the various costs of some of these, some of them are massively high, some are very low, and with one or two exceptions you do not have a very clear explanation as to why. That is what I am after because you cannot control costs unless you know what is going on.

Ashley Underwood: It struck me that there is no science here in two ways. First, in my experience I have not seen any costing at the outset of an investigation except in the inquest where Mick has done that. Secondly, I have seen no actuarial figures, if you like, looking backwards because I do not think people set out assumptions in the first place and then set out the way in which they have developed and been tested. When you look back there is nothing to look at.

Q262 Lord Trimble: The question here is really on the issue of IT and whether you go for bespoke or off the shelf. I gather that your view is that you should start off with something off the shelf and then build up as and where necessary. The crucial thing is having an understanding of exactly what evidence you have and you then go from that. Understanding the evidence brings you back to what has been said earlier about scoping exercises, and I think that summarises everything that has to be said on the question.

Ashley Underwood: Yes. Lord Morris of Aberavon: I think we have traversed this ground a little already, but holding it down to a statutory inquiry as opposed to a non-statutory inquiry, are you aware whether any statutory inquiry costs would have been different if it had been non-statutory and vice versa?

Ashley Underwood: I think Rodney would have been cheaper if it had been non-statutory because of the whole rule 13 nonsense. That is one where we did not need the powers, I think.

Lord Morris of Aberavon: We have had criticism already on rule 13. Do we need it at all? Would common law not suffice?

Ashley Underwood: It would. I think it is a complete waste of space. In fact, it is much more than a waste of space; it is a huge waste of money and effort.

Lord Morris of Aberavon: I am old enough to remember somewhat before the Act, but having said that, that is the crucial way that the law has developed, the common law issue of fairness.

Ashley Underwood: Yes.

Lord Morris of Aberavon: It does not need anything else.

Ashley Underwood: Absolutely not. In the Robert Hamill inquiry we were lucky to be able to convert to the 2005 Act and not be caught by the rules bizarrely. We did not use rule 13. We did front loading. We worked out from witnesses what they may have said critically of one another. We put that criticism to the other witness before they were called. Letters were written to people, Salmon letters as we used to call them. I put criticism to people to their face in the witness box. Cross-examination was allowed. There was no need after that, we did not write any so-called

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Maxwell letters bar one odd one but we certainly would not have done anything that would have been called for under rule 13.

Lord Morris of Aberavon: We can abolish rule 13 and you would not lose any sleep?

Ashley Underwood: I would rejoice.

Lord Morris of Aberavon: Thank you very much.

The Chairman: Can we move then to the central secretariat? We have covered some of this. Lord Woolf?

Q263 Lord Woolf: I think we already have covered quite a lot of this, Lord Chairman, but I wonder if we can get some help. I follow on from Lord Soley's question. I think what Lord Soley's was saying was that there should be a continuous process of looking at what has happened with certain inquiries in a generic way and seeing whether there are lessons to be learnt, and then absorbing that. Can I just say this to you: do you think there is any likelihood of the funding for that ever to become available? It is now nearly 20 years ago when I did an inquiry on the courts—and I re-emphasise the need for that matter—and as it happened last week I turned up to an inquiry into the Jackson report and was asked what is being done about research as to the consequences of what is being proposed. Nothing had been done in respect of my inquiry and there was no funding for what Jackson was doing.

If we are not getting funding for the courts who are sitting every day in different parts of the country to gather that evidence, do you think there is any realistic hope of getting funding to carry out these sorts of things in respect of inquiries?

Michael Collins: For me it is another value-for-money question because there is so much money involved in inquiries generally, and even a modest saving would pay for it many times over.

Lord Woolf: I entirely agree with you, but with the Ministry of Justice in the state they are now, how would they look at the recommendation that we provide?

Michael Collins: There is no doubt that the Ministry of Justice are extremely short-staffed and under considerable pressure as are most government departments. I have needed extra support and a deputy and they have not been able to supply one so I have used paralegals to fill the gaps where I can. Whether they would agree, I am not sure but I think a case could be made.

Lord Woolf: It is worth making it.

Michael Collins: Yes, I think so.

The Chairman: Lord Soley, did you want to come in on this?

Lord Soley: Only to say it depends what you are trying to do. If you had an ongoing rolling thing that would probably be, I think, quite expensive, although it may or may not be. I am not sure that you are looking for finding out how it is that we are getting the cost issue so wrong. In a way you need to photograph what has happened so far to say, "This is what you should do. This is what you should not do".

Michael Collins: Absolutely. I can give you an example in Rodney. Rodney is now going to come out at about £2.5 million. The original budget was fixed at £1.3 million by the MOJ. The main reason for the overspend was because of the length of time it took and the pragmatic solution and all the work that was involved in that. The longer it goes on the more it will cost. We could not have foreseen that at the outset.

Lord Soley: That is the key, is it not? What are the costs that you can sensibly foresee and then can you have an explanation after the individual inquiry as to why you did not spot that in advance? That is the problem in a sense because otherwise we have an inquiry we think is going to cost £2 million and it costs £30-odd million and you say, "Well we did not know about that" or, "We did

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not know about this”. There may be good reasons for it but unless you know what the reasons are it is a bit hard to explain it to the public who are actually paying for it.

Michael Collins: But it is a constant learning process so what I have learnt to do is to be very defensive and pessimistic and plan for the worst.

Ashley Underwood: It comes from working with us.

Judi Kemish: I would like to say, my Lord, after Azelle Rodney we sat down particularly on costs and worked out where we went over budget and why and that forms part of a paper. Maybe there should be a central repository for those lessons learnt papers.

Lord Woolf: Did you do that on your own initiative or was that at the request of the department?

Michael Collins: Own initiative.

Q264 Lord Woolf: If one had a pattern of requiring that sort of action after each inquiry at least you then would have the views of the people who conducted the particular inquiry recorded. But there is no pattern of that happening at the present time, is there?

Michael Collins: The Cabinet Office do ask the secretary of an inquiry to submit a lessons learnt report at the end of the process, and essentially the paper I have produced for you is my paper to the Cabinet Office.

Lord King of Bridgewater: Just a very simple point. You have given us this excellent note. Is it required reading in the Ministry of Justice?

Michael Collins: Generally, no.

Lord King of Bridgewater: Do you not think it would be sensible if it was circulated widely and, as soon as anybody is thinking of having a public inquiry, this piece of paper will drop into their lap?

Michael Collins: Azelle Rodney has not finished yet, because there is still an ongoing JR, but as soon as it is fully finished that paper will go to the Cabinet Office and they are in the lead policy-wise.

Lord King of Bridgewater: But the points in here, people should be aware of them, they should have them now.

Michael Collins: Absolutely, yes.

Lord King of Bridgewater: We could have a public inquiry next week, you never know what the next scandal is coming around the corner.

Lord Trimble: Lord Chairman, do you think we should go to the Cabinet Office and ask for all the lessons learnt papers to be provided to us?

The Chairman: Yes.

Lord King of Bridgewater: It is a commendation of your paper, but it seems to me there are some scandals contained within here and some abuse of public funds, which you can see could just as easily happen next week if someone is not alert to it.

Ashley Underwood: I think one of the reasons why we all thought it was a good idea to have a scoping exercise at the beginning, whether you have a separate department for that or whether you have one person in the Ministry of Justice doing it, is that you have a starting point to relate back to when you see the lessons learnt. So the Cabinet Office will have a whole load of lessons learnt papers but they will not be able to relate back to a proper budget because there will not have been a proper budget. So there will not be an explanation of why somebody went over budget. There will be a lot of defensiveness about why it costs so much, but it will not actually be geared to specific issues.

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Lord Morris of Aberavon: Who in the Cabinet Office, and at what level, would respond to this?

Michael Collins: I have a contact in the office.

Lord Morris of Aberavon: It says it all Lord Chairman.

The Chairman: Our clerk has noted this request, Lord Trimble, so we will no doubt return to that theme. Can we move on? Baroness Hamwee, terms of reference.

Baroness Hamwee: Yes, and among the lessons learnt may, in some cases, be that the terms of reference were not appropriate. You have referred to this already. You talked about the need to consult and as you spoke I wrote down, “heads of steam, loss of confidence, process takes over”. Just on that, I wondered: are there occasions when those who feel affected, who will become probably core participants, might never be satisfied? Are we aiming for perfection that cannot be achieved?

Ashley Underwood: Theoretically that must be possible. I have to say our experience is echoed by the experience you have had in hearing from victims; that they tend to be remarkably dignified and reasonable. We have come across extremely fraught situations that have led to inquiries and inquests and yet we have found it entirely straightforward to deal with people who have extremely reasonable expectations. So although I never say never and it may well be unrealistic in some cases, actually no, I think all of our experience would be if you have consultation you will get a decent result about terms of reference.

Q265 Baroness Hamwee: Thank you, I just wanted to clear that question up. I come back to one of the more basic ones perhaps, which is the role of the chairman’s panel, if there is a panel, in the terms of reference. The provisions that we have now, which give the responsibility to the Minister, is that the right way to go about it? Should there be more consultation with the chairman’s panel, or should the chairman be able to request a change in the terms of reference?

Ashley Underwood: We think the statute is flexible enough, it allows consultation. It is more the mindset. The mindset at the moment is that the terms of reference will be set somewhere mystically in Government. They will be pretty much imposed on the chairman who will say, “Fine, that is it, that is all I do”. They tend to set off fairly blinkered after that. If the mindset were changed to, “Well let us wait and see for a few weeks until we have actually spoken to the NGOs and so on, and keep an open mind before we start calling the evidence”, then the statute covers it perfectly well.

Baroness Hamwee: So the mindset, both that of Government and of the chairman—I think somebody used the word naïve about the chairman, I do not think in a pejorative way but sympathetically—is that they should be prepared to say, “Well, that is fine but can we come back and look at that”?

Judi Kemish: There may be political pressure to have draft terms of reference to be able to be announced pretty quickly. I think as long as the public, family and media, the wider world, knows what is going on and there is an explanation, that people are generally satisfied with that. It is just that openness and the transparency aspect are so important.

Lord Soley: I have a very quick question for Ms Kemish. You are an accredited mediator. Is there any role for mediation within the inquiry system, or would that just muddy the water?

Judi Kemish: I think all the team members are mediators in a sense because you are working with different groups, different stakeholders. I think you just become a mediator through your work on an inquiry or an inquest. It is like anything, you just gain experience and the team stay together because they all enjoy working with different types of people.

Ashley Underwood: I know you have had evidence about chairmen or counsel to inquiries seeing witnesses and so on, and certainly that is something we have done in spades. We make it our business to go and talk to people and we spend hours a day mediating between teams about

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questions to be asked, about witnesses to be called, about what will work, and so it is very much that sort of process.

Lord Soley: Between teams but not witnesses individually?

Ashley Underwood: Sometimes with witnesses, yes.

Lord King of Bridgwater: Just one thing, it is a bit of a recap but there is a very interesting sentence that I had not seen here, which says generally, “Minister of Justice has just completed some significant work to try to stem the flow of requests”. Is this for judicial reviews?

Ashley Underwood: Yes, that is right.

Lord King of Bridgwater: I left the path, and I am sorry. I was on another path completely.

The Chairman: Lord Trefgarne, do you want to move on to counsel?

Q266 Lord Trefgarne: I was going to ask about the position of counsel for the inquiry. Most people think that counsel for the inquiry is a good idea. In one case the divisional court did not agree with that view. I think my view is that counsel for the inquiry is a good thing, but we also need to avoid the situation where a counsel for the inquiry takes the whole thing over, dragging the chairman floundering in his wake. What would your views be on that?

Ashley Underwood: I think it is a position of huge power which has to be used incredibly carefully. Again, you have had some evidence that would regard it as ludicrous that any counsel could take most chairmen over and I think that is right. Most chairmen will run the thing and counsel do the nuts and bolts. But, nonetheless, the way in which counsel to an inquiry can make somebody’s life hell always has to be kept in mind.

Lord Trefgarne: Counsel for the inquiry, like all lawyers, are acting on instructions from someone, and in inquiries in most cases it is the chairman.

Ashley Underwood: Exactly.

Lord Trefgarne: The chairman can stop that line of inquiry and go on to something else?

Ashley Underwood: Yes.

Judi Kemish: I think it is working as part of a team with the judge. There are times when the judge wants advice and therefore we would give him advice, and there are times when you can offer advice and he could say, “No, I want it to be run this way”.

Lord Trefgarne: Counsel for the inquiry are almost always very senior QCs who are, frankly, some of them, a bit prima donna-ish.

Ashley Underwood: Lots of us are, yes.

Lord Morris of Aberavon: Can you remind me, did Chilcot have a counsel to the inquiry?

Ashley Underwood: No.

Lord Morris of Aberavon: I thought not.

Ashley Underwood: I remember Sir Stephen Sedley’s evidence to you about it making him weep when he read the transcript of the questioning there.

Q267 Baroness Stern: Can we move on—we are still in the legal area—to legal representation? We have heard quite a lot of evidence on this. Which participants of an inquiry, in your view, should have representation—all of them, some of them—and, if so, on what basis would it be decided?

Ashley Underwood: We have an approach to this that we have now used three times, which is that where, having worked out in advance what people are likely to come in for what sort of

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criticism and how realistic that is, we thought that those people who are likely to be adversely affected by the process, and who could be better able to defend themselves if they were legally represented should be legally represented, but nobody else should be.

Baroness Stern: A bit more definition perhaps?

Ashley Underwood: People who are likely to be criticised, the victims, people who are particularly vulnerable. Again, because there is a head of steam, very often an inquiry will be the end of a train of events such as internal investigations. For example, in Hamill we had a quite senior police officer who had had a nervous breakdown by the time he came to us. Now he needed to be treated with great care and it turned out he was represented anyway but we would absolutely have made sure he was. Mick made sure, for example, counselling was made available to someone in the last inquiry we did. As I say, this is the sort of thing you need to be very careful of because these are very powerful animals capable of causing huge damage if you are not careful.

Judi Kemish: Also in terms of awarding funding, I think sometimes people feel that you have to fund somebody for the whole duration of the inquiry, whereas often you can work out that those witnesses may criticise this person and therefore this person needs to be represented when they are giving evidence, and so forth. So you can parcel it up and give somebody limited funding for up to 10 hours of representation over a two-day period, and they can always apply to extend. If you have a stringent cost protocol which people sign up to before funding is awarded, then that does help and section 40 kicks in at that point as well.

Michael Collins: Can I just say as well on that point that the initial contact with any witness is hugely important. It needs to be done empathetically and very carefully. If you mess that up you have a real problem.

Lord Trefgarne: I would just like to say that, drawing on my own experience, I find your remarks refreshingly reassuring.

Lord King of Bridgwater: The question about the representation for the victims seems to me quite a difficult issue. I attended, as an observer, the Bloody Sunday inquiry when it was in Central Hall for the period it was there, and if you have a look at the room I got the impression—I do not know if anybody can correct me on this—that every one of the people who had been sadly killed on Bloody Sunday seemed to be legally represented. Somebody may have made some effort to say, “Do you not have a common interest, could you not have one chap to represent you all?” Quite clearly, it appeared to me to add enormously to the cost of that inquiry. Was that correct? Do you try to get one person to represent people who appear to have an absolutely common point of concern and deal with it that way?

Judi Kemish: In the Hamill inquiry, all the police officers bar two were represented by one group of lawyers. So there was a QC, he was not there all the time; there was a junior counsel; a solicitor, and there may have been a paralegal for that team. They represented all the police officers bar one or two. Where there was a significant conflict of interest, they had to be separately represented. You are the ones awarding the funding so you can lay down the conditions.

Lord King of Bridgwater: So sorry to interrupt, but I have the impression that it has probably been said to them, “Would you like to have your own representative or would you be happy to be represented by somebody on behalf of you all?”, and I think people then said, “Why not have our own?”

Ashley Underwood: Yes, quite so. The opposite approach was taken by Dame Heather Hallett in the 7/7 inquest and Sir Brian Leveson and they dealt, if I may say so, spectacularly well with large groups of victims, who were given one representative.

Lord Morris of Aberavon: Was the Londonderry inquiry so generous because there were various conflicts and everybody wanted to be represented and might not be reflected in the one that Dame Heather Hallett did?

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Ashley Underwood: Yes, there are so many factors in Bloody Sunday. The first was that it is the antidote to Widgery. You have heard arguments about whether a bad inquiry is better than no inquiry or a limited inquiry is better than no inquiry. A counterblast to that is Widgery was regarded as a whitewash and in order to stem what flowed from the perception, rightly or wrongly, that it was a whitewash, you have to have a dramatically long, highly detailed, very expensive inquiry. As Lord Morris said, one of the reasons for multiplicity of representation may have been the bitterness and divisiveness that attended that.

Q268 Baroness Hamwee: You talked earlier about when you were starting out meeting witnesses, helping them with things like how to get hold of documents, that sort of thing. I just want to understand what the limits of that assistance are in your view because I can see that for witnesses who are not represented—and generally there would be no particular need for them to be represented—it might not have occurred to them that there is something that they could ask for. There might be some documents somewhere. Is there a role for counsel to the inquiry or the chair to be pursuing that sort of thing, or what?

Ashley Underwood: It is the team.

Baroness Hamwee: It is the team.

Judi Kemish: It is having an easy website that people can click on quickly. You have to have as much information on your website as possible and to make it accessible so witnesses can click on and think, “Yes, I confirm that is the day. That is how I get there”. You can cover a lot like that.

Baroness Hamwee: I can see that for the practical things but wonder about things that would rather merge into legal advice.

Ashley Underwood: What we have done in three goes now is work out which document relates to an individual, who may become involved or affected by it, and we give all those documents to that person. If we think they might possibly need legal advice, we tell them that. We have witness co-ordinators who we take great care to pick and are very empathetic, and they deal face to face with these people. So, yes, the line between that and legal advice, where legal advice may be necessary, is very fine, but you have to judge it case by case.

The Chairman: There has been a fair demolition job done on rules. Lord Woolf, is there anything else you want to pursue on rules?

Lord Woolf: If I may just clarify this.

The Chairman: Yes.

Lord Woolf: I understand your view on this. You point out that in the Act there is a requirement for fairness, which is an overriding guiding principle, but even if that was not in the Act it would be something that the common law would require. Bearing that in mind, is it your view that you should not need rules, assuming you have a team who are properly experienced or properly instructed as to how to conduct an inquiry?

Ashley Underwood: Yes, I entirely agree. I think the rules are wholly unnecessary.

Lord Woolf: There you go. That was my only question.

The Chairman: Right. Lord Soley, recommendations.

Q269 Lord Soley: Yes, leaving aside the question of the chairman who is a serving judge: do you think there is any case for the chairman of an inquiry to be involved in the implementation of the report recommendations?

Judi Kemish: This is quite topical because in Azelle Rodney the chairman made recommendations and he has been waiting for a report from the IPCC and the Metropolitan Police Service as to whether they have implemented them. He has had a response back but I think, in his view, he felt,

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suddenly because his position was functus, he could not then write angry letters or say what is happening about my recommendations. So I think if there could be a period after the report has been delivered, for example, three to six months, when people report to him on the status of the implementation of the recommendations, that may help. But you have to have some sort of timetable, otherwise sometimes things just float away.

Lord Soley: Lord Bichard, who is not a judge, and therefore it is perhaps easier for him in those circumstances, did stay involved in the recommendations that he made on Soham. Was that a good model or one you would not recommend?

Ashley Underwood: I was very struck by his evidence, particularly in light of our own experience of recommendations and the degree to which they may have been followed. The difficulty under the Act is that once the chairman has told the Minister that he has fulfilled his terms of reference, that is the end of the inquiry. So whether it is a judicial chairman or not, under a statutory inquiry it is finished and there is no scope for that at all. You then have to find some other model. What we wondered was whether, as part of the setting up, the letter of appointment to the chairman could contain an undertaking by the sponsoring department that the sponsoring department within X months of receiving any recommendations would either implement them or write to the interested parties telling them why it has not.

Q270 Lord Soley: That is an interesting model. I am grateful for that suggestion. One of the other ones that has been suggested is that a Select Committee of the House could look at the recommendations. There would be a requirement perhaps in law for the Minister concerned, if it was a Minister—and of course it would be a current inquiry; Piper Alpha was for private industry—or for some mechanism in which they would need an explanation as to which recommendations have been put into effect and which have not been put into effect and why. Because there is, as I understand it, and correct me if I am wrong, a varied record of inquiry recommendations, some with a good history of putting into effect the recommendations and some with a poor record of putting them into effect.

Ashley Underwood: I think all we can say is there is a lack of teeth for this and that is a real problem.

Lord Woolf: I must say I find difficulty in this idea put forward by a distinguished witness in this inquiry. The person who conducts the inquiry has an ability to make recommendations and he is in a very good position to make recommendations. The fact that it comes from a responsible source, whether the chairman is a judge or otherwise, does not alter the constitutional position. But if you are appointed by a Minister, he is under no obligation not to reject the recommendations. To say that they are going to give a power to a chairman to act independently of the department, do you see any legal way that that could be appropriately done?

Ashley Underwood: No, and that is why I am being cautious. All that I think we can legitimately say is that there are no teeth and that is a problem. How one addresses it, I would respectfully say, is not something that we are competent to comment on.

Lord Woolf: No, a Select Committee of this House can decide to look into the matter and make criticisms but it cannot give authority to a chairman of an inquiry to implement it. I think it is wholly inappropriate for anybody who is a chairman of an inquiry to do what our witness said he did. He got away with it because nobody would challenge him, but it is unconstitutional; it is inappropriate. The Divisional Court, if there had been an application for judicial review, would have told him to stop. That is the reality.

The Chairman: The question is, “Do you agree?”

Lord Woolf: Do you agree, yes.

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Ashley Underwood: I agree with the legal basis for the chairman—certainly now under a statutory inquiry, let alone constitutionally under a non-statutory inquiry—for the chairman to go beyond his terms of reference and enforce his own recommendations.

Lord Soley: I think the key point here is not that you want to make a Minister or a private company do what the inquiry says, because the inquiry might be wrong.

Ashley Underwood: Exactly, yes.

Lord Soley: It often is, I have to say, but you want some explanation if there is a problem.

Ashley Underwood: That is our point.

Lord Soley: That is right, and that is where a Select Committee can do it.

Ashley Underwood: Exactly, either implement it or explain why not.

The Chairman: Okay. I think we may move on to our concluding question. Lord Trimble.

Q271 Lord Trimble: Has the Act succeeded in securing confidence in inquiries from those closely involved and from the wider public? I have a follow-up question.

Judi Kemish: I do not know whether it is the Act that secured confidence. I think, obviously, if you have a transparent process, the inquiry will be successful whether it is under the Inquiries Act or another Act. We have found the Act to be very useful in the Robert Hamill and the Azelle Rodney inquiries. I think protocol is important, explaining why decisions have been taken. We have talked about that. The cost section is very helpful.

Ashley Underwood: Yes, I think the Act facilitated a change of mindset and, if I may say so, I hope that something like the approach in Scott would never now be repeated. That is part of the shift of mindset. I think the Act is simply part of the history of that shift.

Lord Trimble: Right, okay. The question was framed in terms of those closely involved with the wider public but I am going to add here the view of foreigners. I am thinking here of the Litvinenko case and Theresa May's letter where she said one factor that she looked at in deciding whether or not to have an inquiry was that there was a foreign element here. The foreign element would never believe that an inquiry set up by a Cabinet Minister, where the Cabinet Minister chooses the chairman and has the power of controlling the evidence, was independent. Do you have a view on that?

Ashley Underwood: I certainly have. All of our experience suggests that nobody ever doubts the independence and fairness of a properly run inquiry. An improperly run inquiry is going to run into all sorts of difficulties. Just take perception: look at the detainee inquiry chaired by a most respected and respectable judge. It utterly failed to get the confidence of the NGOs and the victims not because of anything he did but because of the way it was set up, its terms of reference, the surrounding circumstances by which intelligence was to be dealt with. That could be regarded as a failure because of that and as no fault at all of the chairman. On the other hand, you can have complete confidence, and I am sure that would be worldwide confidence.

Lord Trefgarne: However brilliant the inquiry and however well conducted, there is always going to be somebody who says, "The whole thing is whitewashed and a waste of time and money".

Ashley Underwood: Yes, that is a risk.

Lord Trefgarne: Yes, it happens every time somewhere.

Judi Kemish: I agree with you, my Lord. You cannot please everybody but I think a lot of people jump on board if your process is fair to everybody—victims, witnesses. Fairness is the golden rule.

The Chairman: Okay, I think we are there. Thank you very much. We have had 1 hour and 40 minutes of your time.

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Judi Kemish: Thank you.

The Chairman: Thank you very much for giving it. Thank you very much.

Ashley Underwood: Thank you.

Michael Collins, Judi Kemish and Ashley Underwood QC – Written evidence

1. This is a response to the call for written evidence, and is made by ASHLEY UNDERWOOD QC, JUDI KEMISH and MICHAEL COLLINS.
2. Ashley Underwood QC is a barrister in private practice. He was Leading Counsel to the Robert Hamill Inquiry, and to the Azelle Rodney Inquiry. He is currently Counsel to the Mark Duggan Inquest. Additionally he has advised a number of Government Departments on inquiry matters.
3. Judi Kemish is a solicitor employed by the Government Legal Service. She was seconded as the Solicitor and the Secretary to the Robert Hamill Inquiry. She was seconded as the Solicitor and also Junior Counsel to the Azelle Rodney Inquiry. She is currently seconded as the Solicitor to the Mark Duggan Inquest. She has also advised in relation to other inquiries, and has organised a number of information-sharing sessions among government lawyers in relation to inquiries.
4. Michael Collins is a civil servant with the MoJ. He was seconded as Secretary to the Azelle Rodney Inquiry and is currently seconded as the Secretary to the Mark Duggan Inquest.
5. The Robert Hamill Inquiry was established under Northern Irish legislation, but converted to an inquiry under the 2005 Act. It was set up in a similar way to the Bloody Sunday Inquiry, with its own hearing centre, technology supplied by independent contractors, and the like. The Azelle Rodney Inquiry was set up using MoJ and Court Service premises and technology. The Mark Duggan Inquest was the subject of considerable debate about whether it should have been an inquiry under the 2005 Act. In the event, it is being run similarly to the Azelle Rodney Inquiry, using MoJ and Court Services premises and technology.
6. This submission sets out the unanimous views of the authors, based on their experience as set out above as well as innumerable discussions they have had with others involved in public inquiries and similar investigations.

Issue 1

7. We believe that the sole function of a public inquiry is to address public concern, with a view to allaying it, either by showing that it was misplaced or, if justified, by exposing wrongdoing and making recommendations.
8. The first principle we believe should underlie the use of public inquiries is that a matter of public concern has been identified which cannot be allayed by lesser means such as investigation by an established regulatory body. The second principle is that the responsible Minister should be prepared to appoint a panel which will enable the concern to be allayed – in some cases only an independent judicial figure would do. The third principle is that the Minister should be prepared to agree terms of reference with the panel which it believes will be adequate to enable it to address the public concern.

Issue 2

9. No provision of the 2005 Act specifically reflects those principles. It does, however, provide an adequate mechanism for putting them into effect.

Issues 3, 4 and 5

10. The Act leaves the decision whether to establish an inquiry solely to the Minister. Once the inquiry is established the Act itself is not prescriptive about how the panel goes about its functions, subject to overarching duties such as under sections 17 and 18. However, the Rules are prescriptive – in our view overly so. We deal with that under Issue 17 below. The role of the courts under the Act is solely supervisory, and is subjected to a tight timescale of 14 days for a judicial review challenge. While the Minister has powers to curtail the inquiry and restrict publication, that itself would be subject to supervision by the courts. We believe, subject to our comments on the Rules, that the result is a fair balance.
11. We cannot see any realistic alternative to the functions referred to in Issue 4 being exercised by Ministers. In the final analysis, the recognition, and response to, public concern, is a matter for the executive, subject as it is to oversight by the legislature and by the courts.

Issue 6

12. We are not in a position to judge whether any inquiry was established in the absence of adequate public concern, nor whether any inquiry was refused despite public concern. However, we are conscious of at least two events over which there has been public concern which would have led to public inquiries but for a fear on the part of Government that they would expose intelligence issues. In our experience fears of that sort are exaggerated, as intelligence is capable of being managed under the 2005 Act (e.g. the pragmatic solution in the Azelle Rodney Inquiry which resulted in all evidence being heard openly).
13. We have no personal experience of any inquiry being unnecessarily set up so as to deflect or defer criticism.

Issue 7

14. Theoretically, yes. However, Parliamentary and judicial oversight is a powerful check on that.

Issue 8

15. The involvement arises in four ways. Firstly, the judiciary is capable of requiring an inquiry to be established, in judicial review proceedings. Secondly, the Lord Chief Justice recommends judicial chairmen of inquiries. Thirdly, judges and retired judges often chair inquiries. Fourthly, the judiciary provides oversight by way of judicial review and human rights challenges to inquiry processes.
16. We believe that is an appropriate degree of involvement, subject to one matter. In our experience, prior to an inquiry being established, the Lord Chief Justice and those judges or retired judges who are to be appointed as chairmen are not given adequate information about the issues, timescale commitment and obligations which it will entail. We recommend that before any inquiry is set up it is subjected to a scoping exercise designed to assess what the public concern is, what terms of reference may be required in order to allay it, what type and extent of evidence is likely to be needed, and how long it is likely to take to gather and receive that evidence. The exercise should address any significant difficulties, such as the existence of intelligence evidence. The outcome should be made available to the Lord Chief Justice and to any prospective chairman prior to an appointment being made.

Issue 9

17. We believe that the inquisitorial approach, led by Counsel to the inquiry, is the best model. The alternatives are to adopt an adversarial approach or to have the questioning led by the panel. The adversarial model is not suited to discovering the truth, and would add stress to what is almost inevitably a charged atmosphere of public concern. Having the panel lead the questioning would tend to give rise to an impression that it has made its mind up about some issues. Further, without the meticulous preparation and mastery of the materials that is expected of Counsel to the inquiry, matters may be overlooked. Finally, because Counsel to the inquiry is able to discuss the evidence with witnesses and other lawyers involved, he or she is able to discern what evidence may be capable of agreement. It follows that we believe that lawyers acting for the inquiry generally make the appropriate contribution.
18. We have more mixed views about the contributions made by lawyers representing those complaining or complained against. That role is by its nature either aggressive or defensive, and some lawyers are incapable of fulfilling it positively so as to aid the inquiry to allay public concern by demonstrably airing all the evidence. In our experience, those lawyers with a public-law background are best able to advance their clients' interests while assisting the panel.
19. It is easy enough for people to represent themselves provided that the inquiry team makes provision for that. We have experience of appointing team members dedicated to witness handling and witness support, which proved successful.

Issue 10

20. Recent inquiries have tended to be cheaper and quicker than older ones. We believe that results from an attitude change in general, largely stemming from a desire not to be seen to be making mistakes said to have been made by Bloody Sunday.
21. By using existing Government premises, technology and the like, the administrative costs of an inquiry are radically slashed. The mindset that an inquiry needs to hold its hearings and produce a report within a reasonable time has led to greater efficiency. In our experience it would now simply not be acceptable for an inquiry to take an inordinate time and to waste money.
22. The Act was a clear statement of intent which underpinned that change of attitude and in particular Section 40 is an extremely helpful provision which permits the Chairman or the Minister to limit costs.
23. The phrase used almost universally by those involved in inquiries is “reinventing the wheel”. When an inquiry is established it needs offices, office equipment and administrative staff. Decisions need to be taken about Counsel, about finalising the terms of reference, obtaining the evidence, and making arrangements for a hearing. We have had experience of having done those things from scratch, and conversely we have also done them as an existing team, moving from one inquiry to another. We strongly recommend that
 - a. wherever practicable, core members of an inquiry team are picked from those with inquiry experience and, ideally experience of working with each other. This is an issue about which we could say a good deal;

- b. premises, office equipment and supply contracts should, wherever possible, be provided by the sponsoring department out of existing resources. The cost of provision from the private sector can be shocking;
- c. a dedicated sponsoring department for inquiries would be invaluable. In our experience the MoJ has been faultless in sponsoring an inquiry in a disinterested way but with full support;
- d. in any event, some provision should be made to retain and use the experience of those civil servants who have successfully brought an inquiry to a conclusion. Very often those who have been seconded to an inquiry are simply returned to their department after the report is published, and their experience and expertise is lost. At the very least they should, if prepared to do so, be regarded as the first choice for further inquiries.

Issue 11

24. Curtailment for lack of progress would be a disaster. Inquiries are generally only resorted to when everything else, such as regulatory oversight, has failed. They are, by definition, set up as a result of public concern. They should not be permitted to fail if at all possible, but the power to curtail is probably necessary, for two reasons. Firstly, in the event that an inquiry is failing to make progress then curtailment may be the lesser of two evils. Secondly, the existence of the power may be salutary. Having said that, we believe that if an inquiry is subjected to a proper scoping exercise before being established, and if the panel is fully informed before being appointed, the potential for unacceptable cost and delay will be much reduced.

Issues 12 and 13

25. In our view an investigation capable of allaying public concern does not necessarily have to be a full inquiry under the 2005 Act. Sometimes only a public hearing before a judicial figure, with full powers of compulsion will do. In other cases, particularly where technical issues such as building design and safety is concerned, public concern may be met by a largely paper exercise for which no powers of compulsion are necessary. Those occasions would provide justification for setting up an investigation otherwise than under the Act.
26. We can think of another occasion. That is, where everyone concerned appreciates that intelligence considerations mean that not all the evidence can be heard fully in public. Provided that there are satisfactory guarantees of disclosure we can conceive of hybrid investigations that are largely in public but which do not need to be underpinned by the Act. However, by satisfactory guarantees we mean protocols which deal both with full disclosure to and by the inquiry and which are satisfactory to everyone concerned. We are not aware of that having been achieved to date.
27. We acknowledge the success of the Hillsborough Independent Panel. However, it is an example of a lengthy investigation which led to a further investigation (in this instance new inquests) when it would have been swifter and more economical to move straight to a public inquiry. It is not easy to see the purpose of establishing a review that is likely to be a staging post for a further inquiry.

Issue 14

28. In our experience the degree to which an inquiry secures the confidence of those interested in it has nothing to do with the provisions of the Act and everything to do with whether the panel and the inquiry team are seen to be acting fairly and thoroughly. We do not see how matter of approach can usefully be legislated for. It will depend on

the adequacy of the terms of reference and the attitude of the panel and of the inquiry team. We believe that a proper scoping exercise prior to the establishment of the inquiry, and use of inquiry team members with a proven track record, will enable confidence to be fostered.

Issue 15

29. This issue goes to the heart of a vexed question of which we have considerable experience. The question is, if there is a choice between learning the truth in an inquiry and securing justice through the courts after the inquiry, which is preferable? It is generally thought that this is a real choice, and that the preferable course is to learn the truth at whatever cost to subsequent proceedings. For that reason inquiries often secure an undertaking from the Attorney General, to the effect that evidence given or produced by a witness to an inquiry will not be used against him in any subsequent prosecution. The alternative to such an undertaking may be to warn a witness that he need not answer questions in the inquiry for fear of incriminating himself.
30. We believe that the choice is not necessarily that stark, and that it is entirely possible to learn the truth and for subsequent proceedings to take place under the usual rules of evidence. However, we think that to make the inquiry evidence admissible elsewhere would tend to inhibit the evidence given in an inquiry. If the panel were given the power to decide at the outset of the inquiry whether it was prepared to take its evidence under those conditions that may be fair to the witness but it is unlikely to instil confidence in others.

Issue 16

31. We have no direct experience of the adequacy of implementation, but we think it would be prudent to institute a mechanism for policing them. Creating the ability of the panel to reconvene could achieve that in some cases. An alternative is to impose an obligation, on the party who should implement the recommendations, to report on their progress to other interested persons within a specified time. That would permit those persons to enforce the recommendations by judicial review.

Issue 17

32. The Rules are excessively prescriptive.
- a. Rule 9 requires an inquiry to obtain written statements from all witnesses. That is too inflexible. For some witnesses there will be no need for a statement. In other instances it would be desirable to have an enforceable right to interview the witness prior to the hearing. The better course would be to replace it with a power to make such order as the Chairman considers necessary to obtain information from prospective witnesses. The power needs to be enforceable.
 - b. Rule 10 is unnecessary and restrictive. In our experience it is honoured more in the breach than the observance. Those who are appointed to chair public inquiries should be capable of regulating questions, and should be trusted to do so in the way that, for example, Coroners are. The Rule should be revoked. No replacement rule is needed, as Section 17 requires the chairman to regulate proceedings efficiently.
 - c. Rule 13, together with the supporting rules dealing with the obligation of confidence, is manifestly too complex. A well-conducted inquiry will give notice of prospective criticism at various stages not catered for in those rules, but their mandatory nature requires repetition. Further, they inhibit flexibility. In inquests there is a simple provision requiring fair notice of criticism. That is sufficient and workable. In our view the same approach should be adopted under the Act.

Issue 18

33. It is important that the public is given access, or provided with the opportunity to have access to all the materials and evidence made public during the course of the Inquiry. Further, it assists the public inquiry to understand its obligations and promotes good practice. All materials archived need to form a complete record to preserve the integrity of the inquiry. There is the facility under the FOIA for a time delayed release for ‘closed material’ comprising highly sensitive materials (ultimately based on materials with a protective marking of CONFIDENTIAL or above, or covered by the Data Protection Act (eg addresses of certain witnesses) and other FOIA exemptions. These are sufficient under the FOIA and do not need to be enlarged upon.

34. Having regard to the purpose of the Public Records Act 1958 and to the Inquiry’s obligation under section 18 of the 2005 Act, it is important that the Inquiry team draws up a Records Management Policy in the initial stages of the inquiry. This policy document would outline the way in which the inquiry intended to treat documents, and set out the process for preservation of the following categories of records, that would generally be archived at TNA. Such categories would include protocols created by the inquiry to regulate its conduct, advices given by Inquiry Counsel in relation to its conduct; certificates of full disclosure by those who provided documents to the inquiry; all documents provided to the inquiry which were used in evidence and which were not subject to a restriction notice, witness statements, all written submissions and transcripts of oral submissions.

Michael Collins – Supplementary written evidence

1. I have been asked to provide a paper, in advance of giving oral evidence to the Committee on 20 November 2013, covering the following:
 - i. How to have a full and satisfactory inquiry at a cost closer to £2.2m than £33m;
 - ii. How to keep expertise in inquiries alive;
 - iii. How to avoid every new inquiry re-inventing the wheel; and
 - iv. How to best manage the public inquiry process to ensure quality and value for money.
2. The views and opinions in this paper are my own personal views based on my experience of working as Secretary to the Azelle Rodney Inquiry and Secretary to the Mark Duggan Inquest. These views and opinions are not made in any official capacity. Any policy issues that arise will fall to colleagues at the Ministry of Justice and Cabinet Office to address, if they are requested to do so.
3. As you know some colleagues working with me currently also have experience of working on the Robert Hamill Inquiry for the Northern Ireland Office (NIO). It has been helpful discussing with them how arrangements for the Hamill Inquiry differed from the Rodney Inquiry. Unfortunately expenditure information is not available for the Hamill Inquiry to allow any detailed comparison of costs and to assist with any lessons learned issues for future inquiries.
4. In addition, comparison between these two inquiries is not comparing like with like. The Azelle Rodney Inquiry took place instead of the inquest (which failed because sensitive information could not be seen by the Coroner or the jury) whereas the Hamill Inquiry was far more significant given the background to the troubles at that time. Nevertheless, comparisons might throw up some issues worthy of consideration and also provide a contrast between the different issues that were in play politically, operationally and logistically.
5. Any comparisons made between Duggan and Hamill are for illustrative purposes only. Also I would have liked to have checked the accuracy of my comments about the Hamill Inquiry with the NIO, but have not had an opportunity to do so. Therefore this information needs to be used with care.
6. Following discussions with colleagues I have set out below my thoughts about the issues and comparative methodology/costings between the Rodney Inquiry and the Hamill Inquiry, where that is possible.
7. Question 1(i): How to have a full and satisfactory inquiry at a cost closer to £2.2m than £33m?

7.1 Initial planning and liaison with the sponsoring department. As soon as a decision

is required about whether a public inquiry should be held, I believe ministers will be assisted greatly in that decision if they had a 'realistic estimate' of how much it might cost, how long it might take to report and issues that might be exposed as a result. To achieve this experience shows us that there is a requirement for a team with appropriate knowledge and experience to carry out a scoping exercise, to the fullest extent possible at that time, in order to assess the following:

- i) The Case: key issues (e.g. details/history of the case, number of documents, security rating of documents and exhibits, complexity of law, ECHR Art 2 compliance, public interest immunity, intelligence, national security, likelihood of judicial review, the need for security clearance of all personnel involved and to what level? etc).
- ii) Manpower: size of the team, roles to be filled and expertise required (e.g. Chairman, counsel, solicitor, secretary, paralegals and administrative support team) including where/how they can be recruited.
- iii) Information Technology (IT): system requirement i.e. is joining an existing government department IT system possible/desirable? What kind of document management system will be necessary? Is a bespoke system necessary? What security rated material will the IT system need to hold etc?
- iv) Forensic Science and other expert evidence: Is there a requirement for experts (e.g. pathology, gunshot residue, blood spatter etc)? Is a reconstruction required and if so, what is involved and how much might this cost? Is there CCTV analysis required? Animation graphics? Maps and routes produced and highlighted etc?
- v) Office Accommodation: office space for staff, documents and exhibits (including cupboards and racking etc). Other equipment required? (e.g. shredders, scanners, photocopiers, printing facilities etc).
- vi) Hearing Room: what type of space is required for the hearing? How many legal teams? Is a courtroom required? Will any witnesses probably be granted anonymity? What security regime will need to be in place? Are rooms required for witnesses away from the public areas? Will there be a panel? Judges clerk? Court Clerk? Usher? Are security arrangements adequate?
- vii) Timetable: produce a realistic first draft.
- viii) Costs: produce a realistic first estimate.
- ix) Risk assessment: produce a realistic first draft.

7.2 This process may, depending on circumstances, take a few hours or up to a week or more if extensive reading of materials is required to examine all relevant factors/issues. All assumptions should be logged and the process should be reviewed and carried out again, as often as is necessary, once a decision is made to hold a public inquiry. In this way the public inquiry will be starting from a position of relative certainty in respect of agreed assumptions so that information and costs can be adjusted appropriately in a timely way.

7.3 Under the current arrangements trying to deliver an inquiry without this detailed scoping exercise will inevitably lead to inclusion of some inaccurate information and will

usually, to those not closely involved, look like the costs and timetable are spiralling out of control when the truth is that the inevitable costs were simply not appreciated when setting the budget and timetable. Even after carrying out this process, there will inevitably be issues that could not be anticipated and some contingency planning at that stage would be helpful.

7.4 If implemented, this scoping exercise should reduce the risks of damaging public confidence in the inquiry process by, for example, announcing a timetable early on (even giving a start date for the hearings), before all the facts are known and then having to announce a delay before (or very shortly after) it has begun. I think it should be a matter of principle that dates etc are only announced when there is sufficient confidence (and this threshold should be high) that dates can be met.

7.5 In both the Hamill and Rodney Inquiries, as far as I am aware, no-one attempted in the early stages to look at all the key issues to put together realistic timeline and costs in the way described above.

7.6 Another problem with not knowing enough of the facts and issues at the outset, is that discussions to identify a suitable Chairman, Secretary, legal team and administrative team will be based on misleading assumptions in terms of both the skills and experience required and the time commitment expected from the team. For example, if all involved are expecting the inquiry to be over in, say, 18 months but for perfectly valid reasons it continues on for far longer, people may have to leave. Changes to key, high performing personnel at any stage of the inquiry could at best be unwelcome and at worst lead to increased costs and delay.

7.7 Without this initial ‘scoping’ exercise I believe officials may be risk averse and draw together a larger team than is strictly necessary to try to ensure progress is made as quickly as possible so as not to appear dilatory. Simply throwing money and resources at this issue without a thorough understanding of the requirement is far from ideal.

7.8 Example I

In Hamill there was the immediate appointment of a large team before there was any computer system in place which meant the team were not as productive as they should have been in the early stages. This was compounded by the fact that the computer system was custom built, costing around £6.35m, and was therefore not available for some considerable time. Costs included the operational IT costs for the hearing (including transcription). Also there was a delay of over a year while the terms of reference were agreed, which happened after the lawyers for the interested parties were instructed and engaged and resulted in ‘retainer’ payments to the legal teams which were costly. Subsequently the team shrank considerably to the size it probably should have been initially, but by then money had been spent. In Rodney, the MoJ, I believe, made an early estimate on overall costs and timetable. An overall figure of £1.3m was agreed between the MoJ and the Home Office (as costs were to be shared) and the Chairman agreed, in complete ignorance of the issues that would come into play regarding intelligence, that the Inquiry would report about 10 months later. In the event Rodney lasted 3 years end to end largely because of the need for the ‘pragmatic solution’²⁰ to

²⁰ The pragmatic solution required the majority of Metropolitan Police Officer statements to be re-drafted to reveal the intelligence gathered as part of covert operations without revealing the source of that information. This meant that statements contained minor redactions and did not compromise existing legislation. There were high level discussions between lawyers working for the information owner and the Inquiry team to ‘gist’ certain documents so that they could be made public.

intelligence issues. This pragmatic solution proves that it is possible for hearings to be completely open and in public even though sensitive information exists. Had it been possible to take that approach at the outset, the overall timetable and costs would have been reduced significantly.

7.9 In the Rodney Inquiry, following an initial conservative assessment of timescale and costs the departments involved became concerned when the higher than expected costs and longer timetable were exposed. As set out above, these developments were not really an overspend or overrun but merely a recalculation of the budget and timetable required when the extent of the issues became apparent.

7.10 Decisions made by the Chairman are, in fact (when the Chairman is a judge) and in effect (when the Chairman is not), judicial decisions and it may be inappropriate for the administration to try to curtail expenditure that the Chairman/judge thinks is necessary to fulfil his terms of reference (e.g. second opinion on forensic science results, the need for a reconstruction of an event etc). The suggestion at 7.2 above, about logging all assumptions and conducting, in effect, a rolling review of plans should help significantly in identifying where plans have changed and the justification for it.

8. Use of existing Government Resources and facilities.

8.1 It is essential that suitable premises are used for the office accommodation and the hearings. The use of commercial premises should be avoided on cost grounds (unless there is absolutely no viable alternative). It makes good financial sense to make use of existing, purpose built courtrooms and the Ministry of Justice is ideally placed to assist any public inquiry with this issue.

8.2 Similarly, existing government offices should be used with all the supporting infrastructure that goes with that including: IT systems, security vetting of key personnel, website build, press office, departmental colleagues who provide access to ministers if required, access to existing contracts at preferential rates, graphic design and assistance with the final report production, access to finance systems, laying a report before parliament etc.

8.3 Access to government resources should not be limited to the sponsor department(s). Whenever something needs to be procured a public sector organisation somewhere will almost certainly have negotiated the best possible price and these arrangements should be used wherever possible (e.g. in Rodney we asked forensic science firms to charge the same rates as the police services pay and achieved significant savings overall; and legal aid rates applied to lawyers etc).

9. Information technology (IT).

9.1 In my experience IT suppliers will be looking out for public inquiries that are being set up and they will make an approach to provide 'state of the art' IT that they say you simply cannot do without. This might include systems to scan, search, annotate pages of evidence, store and retrieve documents and prepare legal bundles. Much is made of the search capability of these systems and also a neat file sharing arrangement where the core participants are able to print off their own file bundles because they have secure access to their own documents electronically in a computer network set up by the supplier with passwords etc. Of course, every component of the system costs money.

The more documents in the system, and the higher the number of core participants, the more it costs.

9.2 Having an ‘in-house’ inquiry team that can identify what is relevant and important at the outset will save time and money. Reliance on expensive IT may not help. For example, no matter how good the IT system is there is no real substitute for the team reading all the evidence produced so that an assessment of relevance and importance can be made - this should be coupled with the design and introduction of a methodical, logical and meticulous file plan so that documents can be grouped appropriately. Expensive search systems can be helpful in some circumstances but it is important to consider this from a value for money perspective and we have found in Rodney, that the benefits of understanding exactly what evidence you have leads to a better quality outcome, including significantly less risk of something important being overlooked. In the Rodney Inquiry, where existing desk-top computers were used on the MoJ platform serviced by ATOS under the MoJ contract, no additional costs were incurred at all other than the standard cost of 8 desk top computers.

9.3 In Rodney, at a time when there was a high volume of papers rated as CONFIDENTIAL because of the intelligence material, there was a requirement for a network of laptop computers capable of holding CONFIDENTIAL rated material. It was only when the pragmatic solution was implemented that the rating dropped to RESTRICTED and the MoJ network was suitable for storage etc. On the advice of MoJ IT Security we approached an MoJ contractor appointed to, amongst other things, build appropriate laptops to the specification required at a fraction of the cost of bespoke sourcing outside Government.

9.4 Transparency is very important. A good website is vital to ensure relevant documents are available on-line and with agreed protocols etc to reduce argument. For example, transcripts from the hearings should be uploaded to the website the next day and if everyone knows this will happen, pressure from the press and others is reduced. The website on Rodney and Duggan was built by the MoJ Communications Directorate at no extra cost to us. Once built, the system allowed the inquiry team to upload documents, exhibits and notices themselves without any third party costs or involvement. This allowed us to have complete control of the website - deciding what would be published, and when, which was positively received by the press and the public.

9.5 LIVENOTE²¹ which costs in excess of £1k per day, does not provide good value for money. As long as the transcripts are placed on the website promptly the following day this should be sufficient for the needs of the press and the public. Also, we have found LIVENOTE to be very distracting – with people in the hearing room focused on the screen rather than listening to the evidence. This will need to be a value for money decision based on need but there has to be a very good reason to have it.

9.6 EXAMPLE 2: In the Hamill Inquiry existing tenders within the Northern Ireland Courts Service were used for bespoke design of an IT platform. The final system ended up costing in the region of £6.35m (cmhansard/cm100407) and any changes to the system based on a ‘request for change’ contract clause, with changes made at significant expense. The system produced was fit for purpose but the contract had no flexibility in terms of the timing of delivery. This resulted in the system being put in place before it could be

²¹ LIVENOTE is almost instantaneous sub titles displayed on TV screens around the hearing room and beyond. This is carried out by a team of stenographers engaged specifically on this task.

used fully (i.e. it could not be delayed) and with a significantly longer rental period than was envisaged at the outset.

10. Graphic design and printing.

10.1 MoJ provided free graphic design services. Getting support from the private sector would have cost approximately £35k. Also, with the help of ‘printing’ suppliers to the MoJ, we were able to set up a very simple system so that the Print Services provided to the MOJ were used by the Rodney Inquiry to burn DVDs rather than print thousands of pages of evidence to save resources. There were some costs associated with printing, as some legal teams preferred hard copies of documents, but this was a very cost effective model compared with getting an external printing supplier to provide these services and, as mentioned above, makes good use of existing contracts within Government.

11. Attitude of the Inquiry team

11.1 It is important that the inquiry team build good relationships with victims and NGOs – as well as all the other core participants. The inquiry team must be ‘on no one’s side’ but their own, the sole purpose being to get to the truth and fulfil the terms of reference. Other core participants, at one time or another, may want the same things as the inquiry team, but it’s important to remain impartial throughout. This requires flexibility, good communication and excellent interpersonal skills.

11.2 Treating people in this way significantly reduces the risk of JRs and may also do away with the need for witnesses to be represented by a lawyer. The MoJ has just completed some significant work to try to stem the flow of requests for JRs. The inquiry team should provide suitable support to witnesses so that they feel comfortable giving evidence. The inquisitorial approach is also very important. There is no need for aggressive cross examination. The purpose is simply to find out the truth and the questioning techniques should reflect this.

11.3 Example 3: To save costs in Rodney, we also carried out our own reconstruction of the vehicle stop – purchasing used vehicles for around £1k each, identifying a suitable private venue away from the public and with minimal expert involvement. We also looked after the cars as if they were our own rather than ask a garage to supply and keep vehicles on our behalf which would have been very costly. At the reconstruction, we also drove the vehicles ourselves and the experts simply marked out the road with white lines, to recreate the positions of key vehicles. The experts videoed the process so that extracts could be used at the hearing. An actor was hired for the day, who was broadly the same size and weight as Rodney. Other experts played the role of a firearms officer who fired the shots, having purchased a replica Hechler and Koch G35 carbine for about £200 and borrowing other kit (e.g. ballistics helmet and body armour) from the MPS.

12. Question 1(ii) - How to keep Expertise in Inquiries alive?

12.1 In my view, the appointment of the inquiry teams should be managed by a central operational team (see 13 below) with relevant experience. Appointments to key roles in any new inquiry should be based on the collective skills and experience that team will bring to the inquiry. For example, if the deputy Secretary has certain experience that the Secretary does not (or vice versa), this should not be a problem as collectively the team has the relevant skills and experience.

12.2 I would suggest that succession planning be introduced. We must maximise the use of these skills and experiences and it simply makes no sense for this expertise to be lost - only for someone new to come in and start from scratch. Learning by trial and error is expensive and inefficient. Learning from mistakes is always a good thing to do but not if government money is wasted on issues of national importance.

13. Question 1 (iii): How to avoid every new inquiry re-inventing the wheel?:

13.1 In my opinion there needs to be a small operational inquiries unit that is there to offer guidance, support and a degree of oversight of all public inquiries and any high profile inquests (such as Duggan). This unit would sit beneath the current policy structure already in place which does not need to be changed. Mentoring should play a part in this - and this applies to the Chairman, the lawyers and the secretary. This should be light touch but could include discussion of options for any significant decision that affects costs (e.g. choosing an IT system/platform, use of experts etc).

13.2 This operational unit should be headed by experienced civil servants and a lawyer (Government Legal Service -GLS) who could then instruct counsel and a small team of paralegals, following approval from policy colleagues, to ensure that any new inquiry gets off to a flying start even as the specific inquiry team is being selected. This team could carry out the scoping exercise mentioned above. This team might have a role at the time a public inquiry is being considered by ministers. I am sure it would be helpful, when making the decision about whether a case merits a full public inquiry to know how much it might cost, how long it might take to conclude and an appreciation of issues that will be exposed.

13.3 The operational team would also have a role throughout the life of an inquiry - possibly in carrying out some quality assurance routines to ensure fitness for purpose and value for money.

13.4 This operational unit could sit in a number places (e.g. Cabinet Office, HMT, MoJ etc) and there are pros and cons to all of these. Therefore I don't think it matters too much how the funding and hierarchy are arranged as long as it delivers the benefits and improvements required. One option that I know does work from personal experience, is to have the unit based in Her Majesty's Courts and Tribunal Service (HMCTS) premises in London as an NDPB of the MoJ. One of the key issues, especially if the Chairman is a judge (or retired judge), is to have access to the judiciary, the Lord Chancellor and HMCTS infrastructure in terms of judges rooms, security, courtrooms, court clerks, ushers, office space, basic IT and e-mail, access to MoJ web designers and graphic design teams etc. This unit could also have oversight of press office support, contracts for Electronic Presentation of Evidence, forensic science and other contracts that need to obtain the very best rates possible across government.

13.5 In most cases (and in the Rodney Inquiry) I suspect that using MoJ press offices in this role would be inappropriate but this is one of the issues the unit can advise upon on a case by case basis. A new inquiry may well want their own press officer and this can be arranged on a call-off contract to save costs. This unit should also be able to set up some training events for inquiry teams to facilitate learning and best practice.

14. Question 1(iv): How to best manage the public inquiry process to ensure quality and value for money?:

14.1 Many of the issues set out above should contribute to improving the quality and value for money of public inquiries. In particular ensuring that valuable expertise is used well and pays dividends quickly is key. In addition there is a need for the smallest viable team of personnel. The team should not, unless it cannot be avoided, be outsourced to a firm of solicitors and/or set of chambers as this usually results in a very costly model over the life of an inquiry (the GLS will need to stand ready to deploy resources). In Rodney, Ashley Underwood QC was engaged to work for a significantly reduced hourly rate and his hours were usually capped at 40 hours a week. Counsel is excellent value for money and has provided invaluable advice to the Chairman throughout.

14.2 The solicitor and junior counsel to the inquiry, Judi Kemish, is an in-house MoJ lawyer currently on loan from the Criminal Appeal Office. She is salaried and gets no overtime regardless of how many hours she works. Her total pay cost is the equivalent to that of a senior government lawyer which is exceptional value for money.

14.3 I am (as Secretary) on secondment from the MoJ and I am paid a Band A salary. The support team is made up largely of paralegals who work for Counsel. They are not contracted and are on an hourly rate of £25 per hour. We hire and lay off paralegals as workload demands. The crucial thing is that we have a core group of paralegals that have worked with us throughout (providing much needed continuity), plus another group of more transient paralegals, brought in or laid off as workload or activities demand. In this way we are not 'carrying' resources through the troughs in workload waiting for peaks in work to develop.

14.4 One advantage of a small team is that everyone is aware of what's happening and can make decisions quickly and cost effectively. Inquiries with large teams appear to devote half a day every week to formal internal meetings simply to let everyone know what's happening.

14.5 Reading the full bundle of documents and getting a thorough understanding of the case is key – regardless of how daunting a task this may seem. This approach simply would not work if there was turnover of key staff as the learning curve on an inquiry is steep and training new staff is a drain on resources. The team therefore have to be as lean as possible while retaining key skills, knowledge and experience to deliver value for money. Excellent leadership and management of the team is required to ensure they do not leave and that people cope well with the inevitable pressures and that they remain motivated and loyal. In today's work market it is possible to hire people with the appropriate skills and abilities and this has been a major factor in keeping costs down.

Michael Collins
November 2013

Committee on the Administration of Justice – Written evidence

1. CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. CAJ welcomes the opportunity to provide Written Evidence to the Select Committee on the Inquiries Act 2005. CAJ notes that the Select Committee was set up on 16 May 2013 primarily with the task of conducting post-legislative scrutiny of the Act but also to consider law and practice relating to inquiries into matters of public concern. The Committee is due to report by 28 February 2014. Among the matters covered in the call for evidence are the role and powers of Ministers within the Act.
3. CAJ concerns in relation to the Inquiries Act 2005 centre on the manner in which the Act provides for unprecedented interference at practically every stage of the inquiry by a government Minister despite the very actions of the Executive tending to be the focus of the inquiries. It is our view the Act can prevent truly independent inquiries taking place in conflict with ECHR requirements. Similar concerns have also been articulated by the UN Human Rights Committee,²² the Northern Ireland Human Rights Commission²³, Mr Justice Cory²⁴, and Mr Justice Deeny²⁵ and will not be further rehearsed in this submission. Our views are further elaborated on in our original 2004 briefing for Parliament on the then Bill.²⁶

The introduction of the Inquiries Bill

4. It is worth reflecting on the context in which the legislation was introduced. The UK, in an International Agreement with Ireland relating to furthering the implementation of the Belfast/Good Friday Agreement, had committed the UK to holding public inquiries into “serious allegations of collusion by the security forces.” The commitment was made in relation to a number of cases should such inquiries be recommended by a judge of international standing appointed to investigate them.²⁷ Accordingly Mr Justice Cory

²² “...the Committee is concerned that instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the government minister who established an inquiry to control important aspects of that inquiry.” UNHRC (Committee Concluding observations on the UK) CCPR/C/GBR/CO/6/CRP.1 21 July 2008, paragraph 9.

²³ “The 2005 Act made it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented subordination of the inquiry process to the control of Government ministers at every stage...” Northern Ireland Human Rights Commission *Submission to UN Committee on the International Covenant on Civil and Political Rights* (ICCPR) (93rd Session 7-25 July 2008) paragraph 18.

²⁴ “...it seems to me that the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation”, Justice Cory correspondence to US Congressional Committee 15 March 2005. [Available at: <http://www.patfinucanecentre.org/cory/pr050315.html> accessed September 2013.]

²⁵ “...one has to ask whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent.” *In the matter of an application by David Wright for Judicial Review of a decision of the Secretary of State for Northern Ireland, High Court of Justice in Northern Ireland, Queen's Bench Division, 22 December 2006 NIQB 90* [41].

²⁶ CAJ Preliminary Commentary on Proposals in the Inquiries Bill 2004 [Available At <http://www.patfinucanecentre.org/pf/inquibill/cajcomm.pdf> Accessed September 2013] and press release ‘End of Public Inquiries as we know them’ at <http://www.caj.org.uk/contents/452>.

²⁷ Weston Park Agreement (UK-Ireland) 1 August 2001, paragraphs 18-19.

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produced his Collusion Inquiry Reports and recommended UK inquiries into the deaths of Pat Finucane, Billy Wright, Robert Hamill and Rosemary Nelson. It is following this in 2004 that the Inquiries Bill was introduced. The Committee in the evidence it has received has already had the opportunity to reflect on the rushed and irregular circumstances of the introduction of the legislation.²⁸ It is reasonable to conclude that the Act was introduced in response to concerns about where the collusion inquiries may lead.

The decision to hold an inquiry

5. In general the decision to hold or not hold an inquiry, currently vested in the Minister, is a matter of significant controversy, as recently demonstrated by the Secretary of State for Northern Ireland's decision not to hold an inquiry into the Omagh bomb. It is the view of CAJ that rather than leaving the matter to political decision by the department which has the greatest interest in the matter, clearer guidelines to the circumstances requiring the establishment of inquiries should be compiled by a group of international legal experts and consideration given to options about the decision being taken elsewhere.
6. In relation to the Cory Collusion Inquiries it is also notable that, rather than give undertakings not to use its powers under the Act, government ultimately reneged on the commitment to hold the Pat Finucane Inquiry, and were from the outset unwilling to hold the inquiry under other legislation.²⁹ The other inquiries have taken place and produced reports (save that of Robert Hamill which awaits the conclusion of legal proceedings). The Hamill and Wright Inquiries, but not the Nelson Inquiry, were both converted to the Inquiries Act 2005.³⁰ CAJ has monitored these inquiries.

Does the existence of the powers afford Ministers undue leverage?

7. As well as looking at actual incidents when Ministers can or have used their powers the Committee may also wish to consider the extent to which the very existence and risk of the use of wide ministerial powers of intervention is a chill factor over the independence of inquiries. From the outside it is difficult to determine the private level of contact by the Secretary of State or their representatives with an inquiry team, but this is a matter the Committee would be in a position to question Ministers on.

The power to appoint the inquiry panel

8. As well as the concern that a Minister may 'lean on' inquiries there is also a potential conflict of interest created by the Minister appointing the inquiry chair and panel members. This can lead to perceptions, heightened by previous experience in Northern Ireland, that a Minister will appoint persons who effectively do not require 'leaning on' as they are already unduly sympathetic to the Executive.

The Power to issue restriction Notices and Orders

9. Under the Act Restriction Notices (Secretary of State) and Restriction Orders (Chairperson) can be issued. CAJ is aware of six Restriction Orders during the Hamill and Wright Inquiries, mainly to prevent the publication or disclosure of particular evidence

²⁸ The Select Committee on the Inquiries Act 2005, *Evidence Session No. 1* 25 June 2013.

²⁹ 'Habits of Mind and "Truth Telling": Article 2 ECHR in Post-Conflict Northern Ireland, G. Anthony, and Paul Mageean in Morrison et al (eds) *Judges, Transition and Human Rights* (Oxford University Press, 2007)

³⁰ The Rosemary Nelson Inquiry remained under the Police (Northern Ireland Act) 1998. The respective schedule applying to the inquiry has been repealed by the Inquiries Act 2005.

given to the Inquiry and one in the Hamill Inquiry relating to closed parts of the proceedings. The Committee may wish to explore the use of these powers.

The Power to set the Terms of Reference

10. A number of significant issues have arisen in relation to Ministers' use of powers to set the Terms of Reference of an Inquiry. In the Robert Hamill Inquiry the Secretary of State excluded analysis of the role the Director of Public Prosecutions (DPP) from the Terms of Reference. The Inquiry requested this be added but the Secretary of State rejected the request on the basis of the DPP's decisions having been reasonable.³¹ The Hamill family sought a judicial review seeking scrutiny of the decisions.³² The family further claimed that there was potential bias in the decision of the Minister.³³ Justice Weatherup upheld the family's complaint that the test applied "did not correspond to the test of public interest" under s15(6) of the Act. The Secretary of State still declined to extend the Terms of Reference but now stated they could be interpreted as allowing limited scrutiny of DPP decisions insofar as they shaped the RUC investigation, but precluding the Inquiry from examining the merits of the prosecutorial decisions themselves.³⁴ In the Rosemary Nelson Inquiry, which was not conducted under the Act, the Secretary of State did amend the Terms of Reference to include 'the Army or other state agency' in its list of possible actors.³⁵
11. One of the most significant issues in relation to the Cory Collusion Inquiries, established further to the international agreement relating to "serious allegations of collusion" by the security forces and recommended by Cory on the basis of evidence of collusive acts, was the decision of the Secretary of State not to include 'collusion' in the Terms of Reference of any of the Inquiries.
12. Furthermore the Billy Wright Inquiry Report indicates the Inquiry Panel was conscious of the 'significance' of the Secretary of State for Northern Ireland having emphasised his view that Judge Cory's definition of collusion was 'very wide'.³⁶ The Panel subsequently adopted a much narrower definition of collusion, which required an 'agreement or arrangement' between state and non-state actors, and which would exclude matters such as the state 'turning a blind eye' from the definition of collusion. Representations from the family that the Inquiry follow the Cory definition of collusion were considered but rejected by the Inquiry Panel who justified the decision by stating that "we must have primary regard to our Terms of Reference" as well as indicating such matters could still be covered by the inquiry without consideration of them being 'collusion'.³⁷ The Inquiry subsequently concluded that there had not been 'collusion'.³⁸ It is not clear if the Secretary of State or his representatives sought to otherwise influence the Inquiry as to

³¹ "[My independent Counsel's] advice was that the decisions taken by the DPP and his staff were reasonable; that there was no basis for suggesting there were additional steps that should have been taken; and that the case was assessed both objectively and professionally. I have, therefore, concluded that in all the circumstances there are no justifiable grounds to extend the terms of reference." 'Woodward decides against extending Hamill inquest terms of reference,' *NIO Latest News* (20 March 2008).

³² An Application for Judicial Review by Jessica Hamill [2008] NIQB 73.

³³ One of the advisors to the Secretary of State, David Perry QC, had also been involved in the original prosecution decision. 'Inquiries Update', *Just News*, CAJ (July/August 2008) page 4.

³⁴ 'Terms of Reference Decision by the Secretary of State for Northern Ireland,' *Robert Hamill Inquiry Press Notice 013* (5 November 2008): <http://www.roberthamillinquiry.org/press/13/>

³⁵ 'Secretary of State Announces Changes to the Terms of Reference for the Rosemary Nelson Inquiry' *Rosemary Nelson Inquiry Press Notice 05/02*(24 March 2005): <http://www.rosemarynelsoninquiry.org/press-notice/2/>

³⁶ Billy Wright Inquiry Report, paragraphs 1.23-4.

³⁷ As above, paragraphs 1.33-1.34.

³⁸ As above 16.4.

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the definition of collusion it adopted but this may be a matter the Committee wishes to explore.

Control over the publication of the report

13. A further outworking of the above approach is also seen in the Secretary of State, rather than the panel or Parliament, being able to deliver and give first reaction to the final report of an Inquiry. In relation to the Rosemary Nelson Inquiry the Secretary of State in delivering the report was able to, in effect, emphasise a finding of no collusion despite on further examination the report containing detail of a range of collusive acts. Whilst the Rosemary Nelson Inquiry was conducted under other legislation the Inquiries Act 2005 legislates for such an approach with s24-25 providing that the Inquiry must deliver their report to the Minister and that it is the Minister, unless he or she decide otherwise, who is to publish the report.

Rt Hon Lord Cullen of Whitekirk KT and Rt Hon Lord Gill – Oral evidence (QQ 190 – 201)

Transcript of evidence taken before

The Select Committee on the Inquiries Act 2005

Inquiry on

INQUIRIES ACT 2005

Evidence Session No. 8

Heard in Public

Questions 190 - 201

WEDNESDAY 30 OCTOBER 2013

10.10 am

Witnesses: Rt Hon Lord Cullen of Whitekirk KT and Rt Hon Lord Gill

Members present

Lord Shutt of Greetland (Chairman)

Baroness Hamwee

Lord King of Bridgwater

Lord Morris of Aberavon

Lord Soley

Baroness Stern

Lord Trefgarne

Lord Trimble

Lord Woolf

Examination of Witnesses

Rt Hon Lord Cullen of Whitekirk KT and Rt Hon Lord Gill

Q190 The Chairman: Good morning to you both. Welcome to our meeting and thank you for coming and joining us. We have an early start. We have several questions, which I know you are aware of. This session is open to the public. A webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If after this evidence session you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us. Please introduce yourselves, just for the record. If there is anything you want to say in opening remarks you are welcome to do it at this stage and then we will move on to questions.

Lord Cullen of Whitekirk: I am Douglas Cullen, Lord Cullen of Whitekirk. I am a former Lord President of the Court of Session. During my time as a judge, I chaired three public inquiries arising

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out of considerable loss of life. These inquiries were held under various pieces of legislation, one of which I think is still extant, namely under the Health and Safety at Work Act. I also was a co-chairman of a further inquiry under that Act.

Lord Gill: I am Brian Gill. I am the present Lord President and I was the chairman of the inquiry into the ICL disaster in Glasgow, which reported in 2009. In my previous life as a member of the Bar, I had a fairly extensive practice in public inquiries.

The Chairman: Thank you very much indeed for that. If I can kick off, most inquiries prior to the 2005 Act, and 10 of the 14 inquiries so far under the Inquiries Act 2005, have been chaired by serving or retired judges. What criteria do you think Ministers should apply in deciding whether or not a judge should chair an inquiry? How generally could the appointment process be improved?

Lord Cullen of Whitekirk: The criteria are really a matter for Ministers to decide, so in a sense one is looking into what may be in their minds. I imagine that the choice might tilt in favour of a judge, depending on the scale of the inquiry, perhaps the sensitivity of the issues that it is required to deal with and the question of whether any particular expertise was called for on the part of the chairman of the inquiry.

Lord Gill: I think on the whole judges are well suited to appointment as inquiry chairmen because they have experience of taking a mass of information and reducing it to some logical order and to getting to the heart of the matter and identifying the issues that the inquiry should consider. On the whole, the use of judges over the years in major public inquiries has been beneficial.

The Chairman: Do either of you think that there is a problem with the number of judges and their day job?

Lord Gill: I think there always is, because someone has to fill the gap while they are away.

Lord Cullen of Whitekirk: I think there is a problem in the sense that taking a serving judge away from his work involves some loss of expertise and resources. If one turns to the question of the method by which judges are appointed, there is certainly something to be said for making it a requirement that before a serving judge is appointed to take an inquiry the head of his court should consent to that, rather than merely be consulted. I recall that on one occasion Lord Woolf and I talked on this subject during the passage of a Bill. The Bill did not turn out the way we had hoped, but a change might be made in that respect.

Q191 Lord Morris of Aberavon: Ministers search for independence when they look for someone to chair an inquiry, and expertise in finding facts. Such persons are in short supply, but is there not a danger of involving our judges in quasi-political matters where they are in danger—or the judiciary is in danger—of being tarred by the involvement of a judge in a particular inquiry? Judges are not the only ones, we have been told, who conduct inquiries. There are hundreds of planning inquiries where there are people with expertise who seem to make the system work. Is there a danger in involving judges?

Lord Gill: Some inquiries may be suited to other types of chairmen. Maybe in an inquiry on a specifically scientific topic, for example, it might be thought best to appoint someone with scientific expertise. I do not see any difficulty over that. I am not suggesting that only judges should be chairmen of inquiries. On the other hand, when politics come into the matter, no judge would wish to be involved in an inquiry that had a political content. That would be your worst nightmare, I would have thought. I read the evidence of Sir Brian Leveson to this Committee and I thought he put the point rather well.

Lord Trefgarne: My Lord Chairman, I am wondering whether the problems to which you have referred and to which Lord Morris has referred could not be eased if instead of appointing serving judges we select from recently retired judges, but perhaps there are not sufficient numbers of them.

Lord Cullen of Whitekirk: I doubt whether there would be enough, and there is always a danger that with retirement, powers begin to abate. The point that Lord Morris mentioned is possibly covered again by this question of the head of the court backing up a judge who is reluctant to be involved because of the type of issues he is going to be asked to deal with. After all, the whole reason why we involve judges—I suppose the main reason—is their independence and impartiality and the perception of that. If that is going to be damaged in a particular case, that is an important point.

Lord Soley: It seems to me that judges are important because of their forensic skills and the independence. The other question, which follows up from your last answer, Lord Gill, is whether they are the best people when it comes to formulating policy recommendations or ideas of how to make recommendations on what should happen. In other words, that is the political bit.

Lord Gill: In an inquiry, the role of the chairman is certainly to make recommendations, but the chairman does not make these recommendations off his own bat. He has heard a lot of evidence of the pros and cons and then usually makes a decision as to what would appear to be the best way to deal with whatever the problem is. In the inquiry that I did in 2008-09, there was very little controversy over the recommendations and so to that extent my job was fairly straightforward. On the other hand, if there is controversy over the recommendations, that will all be set out in the report.

Lord Morris of Aberavon: Is there a line that should be drawn as to whether you should ask the Lord Chief Justice or his equivalent to allow a judge to take an inquiry? Senior members of the Bar presumably should be able to do the same job. Should you involve the judiciary and is there a line that should be drawn that you should not ask the Lord Chief to allow a judge to serve?

Lord Cullen of Whitekirk: I personally would draw the line at serving judges. Drawing the line would not involve the Chief Justice getting into the question of whether a member of the Bar should be involved.

Lord Morris of Aberavon: That is not the question, sorry.

Lord Cullen of Whitekirk: I beg your pardon.

Lord Morris of Aberavon: The question is: is there a line that should be drawn whereby a judge should not be asked to do the inquiry, where there are, on the other hand, members of the Bar, distinguished experts in their field, who could be asked and would give the same kind of independence? Is there a no-go area?

Lord Cullen of Whitekirk: Members of the Bar obviously share with judges that element of independence, of course they do. There is nothing I or Lord Gill would say that you could not employ some person other than a serving judge if they had the right qualities and the case was appropriate. As for the employment of a serving judge, I would not draw any distinction between what a Chief Justice should be involved with or not. It is entirely a matter for him or her.

Q192 Lord Woolf: I am addressing my question to both of you. With your experience in conducting different inquiries or appearing before different inquiries, can you help us as to whether the Inquiries Act 2005, in your view, sets a helpful standard or whether there are other regulations where we should look for guidance on the parameters under which inquiries act? I know that Lord Gill preferred proposals and propositions for his inquiry. Did he do that because he felt that there was not enough guidance provided by the legislation?

Lord Cullen of Whitekirk: I cannot comment very much on the 2005 Act, never having had to use it. So perhaps Lord Gill should start and I may have some comments to add.

Lord Gill: I thought the 2005 Act worked very well in the inquiry that I did. I think the legislation is good legislation. It is well drafted and it strikes a pretty good balance between the need for expeditious and efficient conduct of the inquiry and the need for thoroughness. I would not

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propose any significant amendments to it, except perhaps one that I may come around to later, but I think the merit of the Act is that it leaves a great deal of discretion to the chairman of the inquiry as to the detailed procedural handling of the inquiry. That is ideal because no two inquiries are the same in terms of their subject matter or complexity, and that degree of discretion and flexibility is essential.

Lord Woolf: Arising out of your answer, can I ask for your help as to whether you think it is best, if it is a judge who has been appointed, for him to be appointed alone, perhaps with assessors to assist him, or do you think it is better that you have a panel, of which the judge is the chairman?

Lord Gill: I would prefer in all cases that the chairman should act alone. If you have access to expert advice, that advice should not come through the medium of an assessor or a member of the panel. It should come through the use of an expert as a witness to the inquiry. There are two reasons for that. The first is that if you have an expert witness to the inquiry, he is seen to be detached from the decision-maker and that instils confidence in the core participants. The second reason is that if an expert is seen to be an assessor at an inquiry, the parties always wonder what evidence he is giving to the chairman when they retire into closed session to discuss things, whereas if he is a witness everyone knows exactly where they stand.

Lord Cullen of Whitekirk: My view is a bit different. For a start, I would not be in favour of any rule for there being a panel of a number of chairmen acting together. I see no need for that and I see it causing complications. As regards assessors, I do not share the misgiving that Lord Gill has had about assessors, since it is made perfectly clear that they are not a source of evidence but a form of assistance to the chairman in going about his work. For example, they will help him to put a setting for the evidence, give him a sense of what may or may not be significant. They may help him to some extent in putting questions and they may also help him in putting together parts of the report where they are peculiarly qualified to help. That is not to say that it is easy to find assessors. Sometimes it is extremely difficult, but if you can get good assessors they are invaluable, as far as I am concerned.

Q193 Lord Morris of Aberavon: Before 2005, the Act that we are dealing with, Ministers had no power for a specific inquiry other than a non-statutory inquiry, unless it was allowed by a particular piece of legislation. Now we are in the period after 2005, we have had non-statutory inquiries and inquiries under the Act. What would be your advice: should one aim only to have them under the Act or would you see a place for non-statutory inquiries as well?

Lord Cullen of Whitekirk: I personally would be in favour of leaving it open to Ministers to select a non-statutory inquiry. I do that because of my sense that there is an enormous range of possible subjects that inquiries may have to cover. In some cases, a Minister may take the view, quite legitimately, that there is no need to involve the relative formality of a public inquiry, and possibly in other cases where a public inquiry of a statutory kind would be inappropriate. As a purely hypothetical example, supposing one was to think of setting up an inquiry to look into a breach of security. There might be great difficulties in running a 2005 Act inquiry for that kind of supersensitive subject. So I would be inclined not to eliminate the possibility of a non-statutory inquiry and to leave it open, because one cannot forecast what may turn up.

Lord Gill: I agree entirely with Lord Cullen on that point.

Lord Trimble: The substantive provisions of the 2005 Act are the same for England, Wales and Scotland, although the Act does make a passing reference to Scotland. Do you think there is a need for any specific provisions relating to Scotland, or are there any particular circumstances there that are not adequately covered by the Act?

Lord Gill: No, I do not. I think it is a perfectly good structure that is useful in inquiries on both sides. The legislation indicates that there are some verbal differences in some of the sections, but to the best of my knowledge they have no practical significance.

Lord Cullen of Whitekirk: I have nothing to add to that.

Q194 Baroness Hamwee: Can we turn to terms of reference? We have had suggestions that the terms of reference might helpfully be subject to review after an inquiry has been running for a little while. We have also heard that maybe there is some haste to announce them. Ministers tend to announce the terms of reference at the same time as naming the chair, so there has clearly not been a lot of time for the chairman to be involved. We have also heard that maybe interested parties might be consulted. I am sorry, I have put that in a rather amorphous sort of way, but we would be glad of your comments on whether what happens now is right and whether there should be more flexibility and some change.

Lord Cullen of Whitekirk: I certainly would not be in favour of excluding Ministers from the opportunity to extend a remit. When the chairman gets down to work he may well begin to realise that there is something that is next door to what he was asked to do in the first place and that cries out for scrutiny, but the terms of reference are too tightly drawn. I would expect him to go to the Minister and say, “Please extend the remit”, within reason, of course.

Lord Gill: The setting of the terms of reference is one of the key features of an inquiry. In my view, it is essential that the terms of reference should be as tightly drawn as is reasonable in the circumstances. In that way, you control the scope of the inquiry, you keep control of costs and you keep control of length. If it should prove later on that there is an issue that urgently requires to be considered, it is open to the chairman to apply to the Minister to extend the terms of reference suitably. I would certainly advise against the idea that you fix the terms of reference while the inquiry is under way. That really is the road to ruin.

Baroness Hamwee: Fix or amend?

Lord Gill: Certainly you can amend them, if appropriate.

Baroness Hamwee: Amend, okay. You would not exclude amending?

Lord Gill: Certainly not.

Q195 Baroness Stern: Can I declare an interest, in that my husband was a panel member of the Billy Wright inquiry? My first question is to Lord Gill, but then I have a series of supplementaries, which I hope you will not find too unexpected. Lord Gill, you are clearly a fan of the 2005 Act and you said in your actual report that the Act increased the efficiency of inquiries. In reply to Lord Woolf, you gave us a hint of why you are a fan of the Act by saying that it enabled a balance between speed and fairness. I think you said that. Are there other aspects of the 2005 Act that you would like to make sure that we take note of? We are here to consider the Act, after all. Could you say a bit more to help us in making those judgments?

Lord Gill: I think there is a gap in the Act that could usefully be filled by legislation, and that is the introduction of a statutory duty of confidentiality. To run an inquiry efficiently, it is essential that all the information that is available to the chairman of the inquiry should be made available to the parties at the earliest possible stage. There is no point in running an inquiry where evidence is sprung at various stages by various parties. You have to have everything out in the open at the earliest stage. This means that information that is at that stage confidential has to be disclosed to the parties.

In my own inquiry, I disclosed all the evidence to all the parties at quite an early stage and I took written undertakings of confidentiality from the legal representatives. Almost immediately, one of the legal representatives broke the undertaking. You will find it at page 168 of my report. The whole story is set out there. There was no sanction available for that. My feeling is that if there was a statutory duty, an undertaking of confidentiality would be taken seriously and there would be the possibility of sanctions for breach. The danger is if you do not have that, there will be this business of holding information back, which simply prolongs the inquiry and wastes a lot of time.

Baroness Stern: Thank you. Is there anything else you want to say about how the Act is an improvement?

Lord Gill: It is an improvement for two reasons. One is that it gives the chairman the power to run the inquiry efficiently, as he wishes it to be run, and does not leave the chairman at the mercy of the parties. The second point is that it makes absolutely clear now that a public inquiry is an inquisitorial process and not adversarial. The bane of inquiries in my professional lifetime has been the instinct of every lawyer to treat an inquiry as an adversarial process. Lawyers tend not to take readily to the inquisitorial approach to things and I think the Inquiries Act of 2005 has made a huge advance in that regard.

Lord Cullen of Whitekirk: Perhaps I can comment on the use of the expression “at the mercy of the parties”. As far as I am concerned, my public inquiries were never conducted on an adversarial basis. They were conducted in order to try to get to the truth of the matter. For example, I would set the agenda, I would say what subjects were to be inquired into, I would decide what witnesses were to be heard, and I would determine when questioning had to stop. As far as I was concerned, that served the interests of finding out the truth without getting tangled up in preparations for a forthcoming court case.

Baroness Stern: Lord Gill, I think it is right that your inquiry was quite short, by the standards of inquiries, in the sense that it opened on 2 July 2008 and the report was in the public domain on 16 July 2009. I hope I have that right. Was that quite difficult to achieve and, secondly, is there any issue at all about whether that time was sufficient for the core participants to feel that justice had been done?

Lord Gill: My inquiry was much smaller in scope than, for example, Lord Cullen’s Piper Alpha inquiry, and the two simply cannot be compared. I was able to do the inquiry with only, I think, 29 sitting days because the bulk of the work was done as a paper exercise in which I asked the parties to give me a clear written statement of what they were trying to get from the inquiry. It required common single representation of all parties with a common interest, full disclosure of the evidence by all parties in advance, and a series of procedural protocols that left no one in any doubt as to how matters were to be dealt with. So, although there were a fairly small number of sitting days, a great deal of the work of the inquiry was done simply by the exchange of information. We only heard evidence on matters that appeared to be contentious, so there was no need to hear evidence that was simply there to be read.

I also think that in that way you avoid the problem that Lord Cullen has referred to. It is a very serious problem and it is that the focus of the inquiry can be skewed if there are civil claims in the background. You have to be very careful to make sure that the inquiry is not led off into a dress rehearsal for a court case.

Q196 Baroness Stern: Can I finally push you a little further about the purpose of inquiries? We have a paper from Robert Francis QC, who says, quite interestingly, that the purpose of inquiries is to find out the truth and identify where failure has happened, but also that there is a need for reconciliation and recognition. Since both of you have been responsible for inquiries that are about loss of life where quite a number of people have been killed, how far do you take into account this other function of the inquiry, the need for reconciliation, the need for people to come to terms with what has happened and to see that the state has recognised the harm? How does that fit comfortably with the efficiency, the inquisitorial system, having a short number of sitting days, and the need to be economical with money and so on? I would be very grateful for comments on that.

Lord Cullen of Whitekirk: Although I was commissioned by a Minister to conduct an inquiry such as the Piper Alpha inquiry, I was very conscious that the inquiry, its work and the outcome were being very closely attended by those who had suffered and of course were represented before the inquiry. That inevitably has an effect on the way in which the inquiry is conducted and how much scope is given. Of course, it is a balance between getting to the truth and getting to a situation

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where people feel that the inquiry has been thorough and fair, and it is very difficult to achieve. There is no perfect answer and that has to be solved as you go along. But you are quite right; this is a very important factor for inquiries of the sort that I have been involved with, as well as Lord Gill. There is a balancing exercise to be carried out, but there comes a point when you maybe have to stop the evidence and say, “That is not of any assistance to me. We will move on”.

Lord Gill: I think you will find it is a common feature of inquiries where there has been loss of life that the next of kin will say that they just want to know what happened and what caused it and they would like to be sure that it will not happen again. When the inquiry begins, you will always find people who feel that they are being kept in the dark and wonder whether the chairman of the inquiry has been sent in to cover up. This is the natural feeling for some people, who are indignant at the way in which a relative has lost his life.

My view is that when you are putting together an inquiry team to help you as chairman, one of the most important things, apart from enthusing them for the work of the inquiry, is to ensure that they take special care to be sensitive and helpful towards the next of kin and the victims, and effective liaison with the families is one of the keys to success in an inquiry.

Baroness Stern: Could you say a little more about how you do that as an inquiry chairman?

Lord Gill: You have to make it clear to them at the outset that everything is coming out in the open, that nothing is being held back and that everything that they want to know, to the extent that it can be known, will be brought out. I think it also helps if you speak to them directly, person to person, just to let them know that all you are there to do is to help to get to the truth.

Lord Cullen of Whitekirk: Certainly I find it helpful to have meetings with the bereaved and possibly the injured—mostly the bereaved—before the inquiry gets going, so they have a chance to see what I am like and they can put questions to me and we can discuss how the inquiry is going to be carried out.

Baroness Stern: That is very helpful.

Q197 Lord Morris of Aberavon: I think your help would be invaluable on this score. Given the need for fairness and taking the victims into account, to what extent is there a problem about controlling the width and length of an inquiry and the cost? Nobody in their senses thought the Londonderry inquiry would have gone on year after year. Certainly I did not, as a law officer at the time.

Lord Cullen of Whitekirk: I do not think one can begin by clamping a cost limit on the inquiry, because that is simply going to be counterproductive and will create an extremely bad impression for those who are intimately involved. But as far as I am concerned, cost is controlled by the manner in which the whole exercise is conducted, by some of the things that I mentioned earlier. They would include, for example, insisting that those who have a similar interest are represented by only one formal representation, and normally I have not had a problem with that. As I have said earlier, controlling the scope of questioning and so on—I do not want to repeat what I said earlier—is the way I would seek, and did seek, to make sure that matters were kept under control. Also there are things like time limits for cross-examination and a timetable for witnesses once it becomes clear where we are going, because as you start you do not know where you are going. It is a voyage of discovery and the inquiry may take a fresh turn at any stage. But you try to establish a timetable and stick to it, and make sure that people are left in no doubt that the inquiry involves keeping good timing and that they are expected to turn up on time and so on.

Lord Gill: It is also important to remember that Section 40 of the Act enables the chairman to give a carefully structured determination on legal costs in advance of the hearing. This is a very useful power to have, because if you decide what the rates will be for the lawyers who are taking part and if you make that announcement in advance, having obviously consulted them, it avoids disappointment at a later stage if they have had expectations of greater fees. In my own inquiry, the

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lawyers for the families had made an initial fee proposal, which I think worked out at about £1.5 million. At the end of the day the cost for junior and senior counsel and solicitors was, I think, in the order of £80,000 in total. It is important to get a grip of costs fairly early on, and if the inquiry is run effectively and there is no wasted time, you are getting value for money all the way through.

Lord King of Bridgwater: You made a comment about next of kin and said, “All we want to do is get at the truth so we can know the truth”. That, of course, is not true because in some cases it is for them the preliminary to seeing whether they can establish financial claim of one sort or another for negligence. In what way are you sensitive, in conducting those inquiries, that you are preparing the ground for what will then be a substantial amount of litigation thereafter?

Lord Cullen of Whitekirk: It is inevitable that what turns up in the inquiry will be material that could lead to the founding of a claim. There is no way around that. On the other hand, of course, it is the inquiry chairman’s conclusion in regard to what he heard, and the actual evidence given at the inquiry may perhaps be of use as well. That is inevitable, but the whole point is to avoid what I think Lord Gill referred to as the skewing of the process so that it serves a different purpose rather than its true purpose of inquisition.

Lord King of Bridgwater: But were you sensitive in coming to making your report of the issue that you might be providing ammunition for substantial litigation so that you were more careful in what your comments were?

Lord Gill: Certainly some of the findings that I made in my inquiries were plainly significant in relation to the civil claims. I understand that in some of the civil claims that are still going through the court, claimants are referring to some of my findings. That is inevitable. I do not see that that can be avoided.

Q198 The Chairman: There is a question I would like to put to Lord Gill. You helpfully suggested that we have a look at Appendix 4 of your report, and I have done that. I have read the history of the inquiry. In that, when you were set up there were four bullet points, one of which was to report as soon as possible. I understand that. You also sent us several documents in connection with procedures, legal representation at public expense, travel and subsistence expenses, compensation for loss of time, witnesses, witness statements. Indeed, I think there are as many as 47 pages. To what extent, when you produced those 47 pages, did that delay putting the show on the road? Having done it, did you think that you were putting those on the shelf for future inquiries? Is there any sense or evidence that having done that work, they have been lifted by people who have been conducting other inquiries?

Lord Gill: To answer that last question first, I am not aware of what use has been made of these protocols in other inquiries, although I would hope that they may have been of some value to other inquiry chairmen. As for the drafting of them, that was all the work of one person, Jillian Glass, who was the solicitor to the inquiry, who is here today actually. I think you would agree that it is a magnificent piece of work. It was done very quickly and the drafting of it did not delay the inquiry in any way as far as I was concerned.

The Chairman: A further point about that, I notice—and I have read this history—that you do not refer to the clerk of the inquiry. I would have thought getting that right is very important indeed and I do not see a reference to that there. Did the clerk just drop into your lap or what?

Lord Gill: Ms Glass was the solicitor to the inquiry and she effectively ran the office, and ran the inquiry too, I would say. I was given her assistance by the Treasury Solicitor’s office.

The Chairman: In making the hiring?

Lord Gill: Yes.

Lord Woolf: Was she a member of the Treasury Solicitor’s Department?

Lord Gill: Yes.

Lord Woolf: Excuse me for interrupting.

The Chairman: That is fine.

Lord Gill: She had experience of previous inquiries and brought all that experience to bear in advising me. Of course we also had a secretary to the inquiry and a small team of about four other people who attended to the preparatory work. One other thing I could say is that an effective website is also a huge benefit in a well run inquiry. It is a medium of communication with the parties and it also enables everything to be on the record.

Lord Woolf: Do you know, Lord Gill, whether the material that you have made available to us is now made available as a matter of course in subsequent inquiries in which at least the Treasury Solicitor is involved?

Lord Gill: I am not sure of that. Do you mind if I get some help here? Yes, it is still on the inquiry website.

Lord Woolf: On your inquiry website?

Lord Gill: Yes.

Lord Woolf: But there is no routine—

Lord Gill: Not so far as I know.

The Chairman: Do you feel it is important that if tomorrow the phone rings and someone is appointed to conduct an inquiry, there is a shelf that you can go to for certain basic information and it is there, and indeed there are people on the shelf too?

Lord Gill: Yes, I think that would be useful. I think it would. These could be easily adapted to the circumstances of other inquiries in the future.

Lord Woolf: Lord Cullen, would you make any additional comment?

Lord Cullen of Whitekirk: No, nothing to add to that.

Lord Woolf: Do you believe the powers that you had and the information you were given on the duties in relation to the inquiry were adequate?

Lord Gill: Yes, I do. I did not encounter any difficulty in recovering information.

Q199 Baroness Stern: This question is about the rules, and first off perhaps I will ask Lord Gill. The Inquiries (Scotland) Rules 2007 set out in great detail what the chairman must do and may not do, and some of our witnesses have particularly criticised Rule 12 in the Scottish Rules, which is Rule 13 in the Inquiry Rules 2006, requiring the sending of warning letters. Do you find the rules unduly prescriptive and would you have preferred the flexibility of the 1921 Act and earlier regulations?

Lord Gill: We issued warning letters. The only party who demurred to the warning letter was the HSE. It did not get the warning letter and I think it resented that. But the point about the HSE was that the criticism that I made of it in fact was criticism that was in effect set out in its own evidence to me. So I took the view that it was well aware of its shortcomings in dealing with the matter, having regard to its own statement to the inquiry. I do not think there was any particular difficulty with the warning letters in the ICL inquiry, and I do not believe that one should be sending letters that set out in minute detail all that you are about to write. As long as you make the person aware, in general terms, of the nature of the criticism that will be made, in my view that is sufficient.

Baroness Stern: Is there anything else about the rules you find unduly constricting or problematic?

Lord Gill: Not really, no.

Lord Morris of Aberavon: You make the point that in general terms the rules are sufficient, adequate and work. It is the use of them that can make them unduly prescriptive if somebody goes into too much detail.

Lord Gill: Yes, I think so.

Q200 Lord Trefgarne: We have already touched on the question of the length of inquiries and the cost that arises from extended inquiries. Do you think there would be value in having an evaluation or scoping exercise somewhere near the start of the inquiry to help estimate the length and maybe cost?

Lord Cullen of Whitekirk: From my own experience I am rather sceptical about this. If I take Piper Alpha as an example, there were two parts to the inquiry. The first was to find out what happened and the second was to make recommendations for the future for the saving of life and prevention of similar accidents. As the first part of the inquiry unfolded, it became obvious that there were a number of possible starting points for consideration of recommendations that might fall into Part 2. I could not tell until we got into them where we were going. It is only as one gathered the information that one could see where it might lead. To take an example, I did not imagine for a moment that when I started off I would be recommending a change in the type of offshore safety regulations or that I would be recommending that there should be a change in the regulator from the Department of Energy to the Health and Safety Executive. All these things became clearer as I went along. If I had been asked at the beginning, “How long is this inquiry going to last?”, I would have found that very difficult. I might have taken a shot at Part 1 but Part 2 would be a matter of doubt. I appreciate, of course, that one can start with a scoping exercise that would then be amended, but there may be a question as to whether it is worth while doing it in the first place. So, for my type of inquiry I am a bit sceptical about the utility of that.

Lord Gill: Lord Cullen’s inquiry was much more extensive and wide-ranging than mine was. I entirely accept what he says in relation to an inquiry of that kind, but in a more tightly focused inquiry I think there is value in having that exercise carried out at a very early stage.

Lord Trefgarne: Thank you for that. Just recalling what you said earlier, you do not rule out the utility for having the facility to change the terms of reference, for example, should that become necessary during the course of your work?

Lord Gill: Yes, I agree with that.

Lord Soley: In the Soham inquiry the chair returned to the inquiry some six months later to see what progress had been made on the recommendations. It was chaired by Lord Bichard, who is not a judge. Could you tell us in what circumstances you think it is right for a chairman to return to see how much progress has been made on recommendations and how much of that is coloured by whether it is a judge or not, particularly the circumstances in which he should revisit it?

Lord Gill: Once the inquiry chairman has reported, that is the end of it as far as the chairman goes. His job is done, and I would not wish to be involved in any follow up. The implementation of recommendations is an entirely different exercise. That is for the politicians and the Executive to do.

Lord Cullen of Whitekirk: I agree entirely with that. I think it is peculiarly inappropriate for a serving judge to be asked to undertake this. I think Sir Brian Leveson said as much when he was giving evidence to this Committee.

Lord Trefgarne: In the plainest terms.

Lord Cullen of Whitekirk: In the plainest terms. So I would be in his camp. But more generally, I think it is very awkward. It is rather standing the process on its end for the reporter to become the inquisitor of the ministry or the industry or whatever it is, saying, “Now, what are you doing about this?”. I did notice that Lord Bichard—I know he is giving evidence later today—wrote a

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supplementary report that had yet more recommendations. After that he stepped back out of it, as he put it. I would have stepped back right at the beginning. I also had a particular reason in my own case for stepping back because I do not think it is a wise thing for chairmen of inquiries to start giving commentaries or making public statements about their reports. The report should speak for itself and once that is done he folds his tent and goes away.

Q201 Lord Soley: Do think there is a problem about recommendations of inquiries generally not being put into effect and therefore some disquiet both for the people who participated and the general public in that they are failing to deliver?

Lord Gill: I can only speak from my own rather limited experience. The recommendations of my inquiry, to the best of my knowledge, have all been implemented in the safety regime for the LPG industry.

Lord Soley: Do you accept that there is a view that says in most inquiries that is not necessarily the case? I understand what you are saying about yours and, having looked at them, I think you have a clear success record.

Lord Gill: That is why I am not going to do any more.

Lord Soley: But can I put it to you that there are other inquiries where, through no fault of the chairman, things have not been put into effect and that does undermine their usefulness to some extent? Is that right?

Lord Gill: I am sorry, I do not think I can help you on that. I just do not have the background knowledge to express a view.

Lord Cullen of Whitekirk: It is one thing for recommendations to be accepted or rejected. It is another thing for them to lie on the shelf, and I think that is what you are talking about. I have no personal experience of that. I can only say that that is a matter to be pursued at parliamentary level. I know that some authorities, some agencies, publish updates on what they are doing—in particular the Health and Safety Executive, I think—but that is not, of course, generally the case. I suppose an inquiry chairman could recommend that Parliament be updated from time to time as to progress with a recommendation. That is purely a recommendation. That is not making the inquiry chairman into the inquisitor.

The Chairman: Surely it is somebody's job, is it not? When you say you fold up your tent, it is no satisfaction to you if you have folded your tent and nothing happens. Surely it is somebody's job, and is it perhaps not your job, to say just before you write the final paragraph of the report, "It is somebody's job to do something about it. I really would like to think that somebody takes this on and lifts it and does something about it".

Lord Cullen of Whitekirk: I can only say that in my experience it has been unmistakable from a particular recommendation to whom or what body it is directed.

Lord Soley: I think this is a very important point because there is some dissatisfaction, not necessarily with your inquiries. I do think that an inquiry into the health service, for example, is rather different to an inquiry into Dunblane. One is very specific and the other is a very large organisation and so on. What I am looking for here is whether there should not be something that says in law, not in the inquiry necessarily, that the body concerned, be it the NHS, the Government or a local authority, has a legal duty to report on progress made on each recommendation of the inquiry after a certain period of time. In effect, that is what Lord Bichard did with Soham.

Lord Cullen of Whitekirk: What would you do, I ask in response, about recommendations made to an industry? One would, I suppose, have to find out from some leadership organisation within the industry what response they would give. It is quite difficult to work it out in those circumstances.

Lord Soley: But you agree the principle?

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Lord Cullen of Whitekirk: I can see the sense in that, I certainly can, but it is quite important to make sure that you have the right target.

Lord Trimble: What I was going to say was along the lines that Lord Soley has just pointed out. I was going to suggest that one possibility would be to amend the legislation so as to require the sponsoring Minister to formally respond to each of the recommendations, or it could take the form of authorising Parliament to do something along these lines. That might make it easier so that you would not be putting the responsibility on to the chairman of the inquiry, but trying to create a mechanism that brings things back. This is something that we could come back to.

The Chairman: Are there any further questions, colleagues? Thank you very much indeed. Thank you for coming along and making the journey south to meet us.

Disaster Action – Written evidence

1. What is the function of public inquiries? What principles should underlie their use?

1.1 The words of Lord Justice Clarke (from the *Thames Safety Inquiry* Final Report into the sinking of the *Marchioness* pleasure boat) concerning the investigation of disasters are particularly relevant to Disaster Action:

‘Both the public at large and those intimately concerned have a legitimate interest in ascertaining the truth of what occurred. To my mind that is an important purpose of such an inquiry, although another important purpose of any inquiry (whether public or not) is to enable lessons to be learned which will minimise, or even eradicate, the risk of a similar casualty happening in the future.’

1.2 In Disaster Action’s view the two primary purposes of inquiring into disaster as described by Lord Justice Clarke go to the heart of the matter: establishing the truth in the interests of all concerned; and minimising the risk of future similar disasters. This view was echoed by the President of the Queen’s Bench Division in the recent case of *Chong Nyok Keyu, Loh Ah Choi, Lim Kok, Wooi Kum Thai v Secretary of State for Foreign & Commonwealth Affairs, Secretary of State for Defence* [2012] EWHC 2445 (Admin).

‘In appropriate cases, inquiries can and do serve [the purpose of establishing the truth about contested events] but the goal of establishing the truth about contested events is especially important – and especially likely to justify the substantial and other resources which an inquiry inevitably involves – when that truth can cast light on systemic or institutional failings, the correction of which would be likely to reduce the prospects of a repetition.’

2. To what extent does the Inquiries Act 2005 reflect those principles?

2.1 The Act reflects the need to investigate events that have “caused public concern”. This statutory trigger for setting up inquiries is vague and, in our view, leaves too wide a discretion to the minister concerned. We have experienced too many occasions when ministers have refused to set up inquiries, decisions which have turned out to be very seriously wrong later (see below). It may be that ministers should have some guidance as to when “public concern” arises.

3. Does the Act achieve the right balance between the respective roles of ministers, Parliament, the courts and inquiry panels themselves in making decisions about inquiries?

3.1 Leaving such important decisions in the hands of a single minister can be problematic, although the minister can be judicially reviewed. This, however, in our experience, often does not take place simply due to the fact that the victims of the disaster do not have the financial resources to do so.

4. In particular, is it right that ministers should have the power to set up, or not to set up, an inquiry, to set its terms of reference, appoint the chairman and members, suspend or terminate the inquiry, and restrict the publication of documents?

4.1 The experience of Disaster Action members is that there is an arbitrary and inconsistent approach to decision making around inquiries by ministers. Examples include the review of the evidence from the 1989 Hillsborough football stadium disaster ordered by the then Home Secretary Jack Straw in 1997. The response of Prime Minister Tony Blair that emerged through papers made public by the 2012 Hillsborough Independent Panel review was “Why, what’s the point?” This underlines the issue at hand. We are not aware of whether the 2005 Act sufficiently protects victims and the public against such an approach.

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4.2 The outcome from Hillsborough demonstrates the need for a full, fearless and independent inquiry to be held almost as a matter of course following a major incident. It is not clear, however, whether the discretion still allowable to a minister under the 2005 Act would ensure that such an inquiry would take place if a similar incident were to occur today.

Judicial review of the minister's decision

4.3 A minister who decides, in particular, not to set up an inquiry, or who decides to set up an inquiry with narrow terms of reference, may be perceived as acting out of political self-interest. The action, or lack of action, of such a minister can be judicially reviewed, but this can be so financially prohibitive that the interested parties, who are usually the victims of the disaster, will have no recourse. It has been shown that a campaign by family groups over many years, and through many changes of government, is the only way to achieve what should have occurred in the first place.

4.4 Following the conclusion of the inquest into the 7 July 2005 London bombings, a number of bereaved families made a legal challenge to the government's decision not to hold a public inquiry. This challenge was withdrawn when it was understood that it was likely to fail, in the interests of not causing further distress to all concerned. In our view the bereaved should not be put in a position where they have to mount such a legal challenge. See <http://www.guardian.co.uk/uk/2011/aug/01/7-july-bombings-public-inquiry> for more on this.

Scotland

4.5 Since devolution, a difficulty of division of responsibility between the UK government and the devolved administrations has emerged. In the case of the 1988 Lockerbie bombing, successive foreign secretaries and other cabinet ministers have refused to order a public inquiry on several grounds, including after the implementation of the 2005 Inquiries Act. Since the late 1990s these grounds have included that the disaster was considered 'too long ago'. This is clearly arbitrary.

4.6 Secondly since devolution, the UK government has maintained that the decision whether to hold an inquiry into Lockerbie is a Scottish government responsibility. Yet given that the aircraft took off from Heathrow airport (where it is said that the bomb was loaded into the hold) and other national as well as international ramifications, in the families' view this should not be purely a Scottish government decision. Lockerbie would appear to 'qualify' for an inquiry under section 1 of the Act. However, government resistance to the holding of an inquiry remains steadfast. It should be noted that immediately following the bombing, the then Secretary of State for Transport Cecil Parkinson told the families that a full inquiry would take place; this statement was later withdrawn without explanation.

5. Should other persons have any of these powers in addition to or instead of ministers?

5.1 It is clear from the Hillsborough disaster that it could be appropriate in some cases to make use of specially convened independent panels.

6. Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but ministers declined to set one up? Are there cases where an inquiry has unnecessarily been set up to deflect or defer criticism?

6.1 It remains the case that the biggest loss of life in peacetime in the twentieth century in the UK – the Lockerbie bombing - has not been inquired into through public inquiry. Yet many of the facts and circumstances related to the disaster remain unknown. We therefore suggest that it is in the public interest for such an inquiry to be held. The assurance in a letter of 26 April 1995 from Michael Meacher MP to Pamela Dix underlines the difficulties that have not been resolved by the Act:

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'I believe that there should be an automatic decision to hold a public inquiry whenever there is a serious transport accident. This is the key principle under which all future transport accidents should expect to be investigated... I believe we will institute (a public inquiry into Lockerbie) on coming into power.'

These commitments were then set aside when the Labour party was elected to government in 1997.

7. Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?

7.1 The potential political ramifications of the outcome from any inquiry may mean that ministers are reluctant to order one when it is thought that they, or the government, might come in for criticism or worse.

7.2 Any failure to set up such an inquiry will adversely affect public confidence in ministers' conduct and impartiality generally.

8. Is the degree of involvement of the judiciary in inquiries appropriate?

8.1 Our experience is that experienced figures from the judiciary generally have contributed very positively as chairs of an inquiry, for example, Desmond Fennell QC (Kings Cross), Lord Justice Sheen (Herald of Free Enterprise), Lord Cullen (Piper Alpha), Lord Justice Clarke (Marchioness).

9. Do lawyers acting for the inquiry or representing those complaining or complained against make an appropriate contribution? Is an inquisitorial or an adversarial process more appropriate for argument before inquiries? Is it easy enough for people to represent themselves?

9.1 An inquisitorial rather than adversarial process is appropriate, because the aim of the inquiry is to establish the truth of the events that occurred. To the bereaved or survivor from a disaster, however, the process can feel adversarial, particularly when it is clear that the company or government department involved in the multiple deaths have briefed their own lawyers.

9.2 Although bereaved people have represented themselves, sometimes with success, this is not easy and normally relatives will need to be legally represented. All other parties involved in an inquiry will be represented, and in our view it could put the bereaved and survivors at a considerable disadvantage not to have access to a lawyer. This raises the question of how such representation is funded, and whether it should be automatic in any major disaster inquiry.

10. Some inquiries set up before the Act was passed were both lengthy and inordinately expensive. An aim of the Act was to make inquiries briefer and less costly. Has it achieved this? If not, what could be done to improve this?

10.1 The most expensive Inquiry was the Bloody Sunday Inquiry, which, it is clear, is unlikely to be repeated. Conversely, potential cost has been used as a primary reason not to hold a number of inquiries, for example into the events which led to the Lockerbie bombing. Whilst we accept that government resources are not infinite, cost should be a consideration which is very low on the list of factors for the minister to take into account. This does not always appear to have been the case.

11. Inquiries are often asked to report by a particular date, and often fail to do so. Should there be a power to curtail an inquiry's proceedings? If so, exercisable by whom?

11.1 No. Once an appropriate chair has been appointed, there should be no further interference from the minister. The chair should be trusted to act responsibly and carry out the necessary investigations without coming under pressure to curtail the inquiry.

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12. Is it right that ministers can and do continue to set up inquiries otherwise than under the Act? Is there any justification for this?

12.1 The availability of non-statutory inquiries enables ministers to set up inquiries in a more flexible way than under the 2005 Act, and should be preserved on the basis that often it is better to have an inquiry than no inquiry. The non-statutory inquiry can be converted into a statutory inquiry, if appropriate. This allows for a minister who is hesitant to err on the side of having an inquiry.

13. Is there a role for independent reviews to be established otherwise than under the Act (like the Hillsborough Independent Panel)?

13.1 It is clear that the work of the Hillsborough Independent Panel was invaluable in establishing what happened to many of those who died. Failures in the inquest process have been important in other disasters, including the Marchioness disaster, although, in that case, the Clarke inquiry established the facts and no independent panel was needed. Perhaps independent panels should be set up when it is clear that the normal processes have failed.

13.2 It is unfortunate, however, that this should only have occurred when the bereaved or survivors have been willing and able to sustain exhausting and costly campaigns over decades.

14. Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?

14.1 The Act has succeeded in clarifying the position of ministers who have to make decisions. There remain doubts about the future consistency of ministerial approaches to the decision making process.

15. Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?

15.1 It is inevitable that most, if not all, inquiries will make findings of fact that are unfavourable to certain parties. However, the inquiry is less likely to establish the truth if the witnesses are aware that what they say may be admissible in a criminal court. In our experience, finding out what really happened to those who died or were involved in a disaster is of paramount importance.

15.2 It may be that part of the proceedings could be heard in private where there is the potential to incriminate individuals. In our experience, a criminal trial process is likely to be narrowly focused and therefore in many instances have not uncovered all the facts. Prior to the Lockerbie trial ministers used the potential for prejudicing the criminal proceedings as a reason not to hold an inquiry; when the trial concluded it was used as a reason not to hold an inquiry because ministers took the view that sufficient information and evidence had emerged from the trial. This was far from the case, given the trial's narrow remit (i.e. to present evidence relating to the possible conviction of the two accused).

15.3 That civil or criminal proceedings should take place in order to hold those responsible to account is also important. This may, however, come at the expense of the truth or, for example, in civil proceedings, without any of the facts being aired in public when the company involved is prepared to pay damages but not accept liability.

16. Are the recommendations made by inquiries adequately implemented? Should there be a procedure for an inquiry to reconvene to consider this?

16.1 Over the period of DA's existence a number of inquiry reports have made significant recommendations, many of which have not been acted upon. One example is the Fennell report into the 1987 King's Cross underground fire. A number of significant recommendations concerning internal and external communications by the emergency services made by Mr Fennell had not been implemented by the time of the 2005 London bombings.

Disaster Action – Written evidence

No response to question 17.

18. At present, certain inquiry records become subject to the Freedom of Information Act 2000 after the inquiry has ended. Should an inquiry's record be kept confidential after the inquiry has concluded? How else might the interface between the Inquiries Act 2005 and the Freedom of Information Act 2000 need to be changed?

18.1 In our view, inquiry records should not be subject to the Freedom of Information Act 2000 after the inquiry has ended. This is with a view to ensuring that any lessons from an inquiry are learned and, most importantly applied as well as recommendations that might impact on public safety being implemented.

Disaster Action- Written evidence Appendix I

Extract from UK Families Flight 103 19 July 2002 Letter to Foreign Secretary Jack Straw

19 July 2002

Rt. Hon. Jack Straw
Foreign Secretary

Dear Mr Straw

Investigation of Major Disasters

I am writing on behalf of UK Families Flight 103 with a proposal concerning the future investigation of disasters. As the subject directly concerns other Cabinet ministers and the Prime Minister, I have copied this letter to the Rt. Hon. David Blunkett and to the Rt. Hon. Tony Blair.

One of the greatest causes of dissatisfaction concerning Lockerbie has been the fact that the onus has fallen on the families to ensure that all aspects of the disaster are fully investigated. As you are aware, this has necessitated years of lobbying successive governments, involving liaison with the Scottish Office, the Crown Office, the Home Office, the Foreign & Commonwealth Office and the Department of Transport.

The experience of the Lockerbie families reflects the norm, rather than the exception, for relatives and survivors following a disaster. Whilst every disaster presents a unique set of circumstances for those investigating it, the principles relating to investigation should remain the same.

The 1987 Sheen report into the Zeebrugge ferry disaster sets out a key principle concerning disaster investigation:

‘In every formal investigation it is of great importance that members of the public should feel confident that a searching investigation has been held, that nothing has been swept under the carpet and that no punches have been pulled.’

Since the late 1980s, in order to achieve that ‘searching investigation’, families have often been left with no option but to spend years lobbying those in a position to make a decision concerning how a disaster will be inquired into.

We wish to propose that a flexible, open framework for the investigation of disasters should be set up. One possible approach could be the creation of an independent ‘disasters ombudsman’, whose role would be to decide upon the nature and extent of an inquiry after events where issues of safety, culpability or national and/or international significance arise following a disaster. Families and other interested parties should have a single point of contact to put their case for an inquiry.

The proposal is supported by Disaster Action, a charity whose members are all survivors and bereaved people from disasters. The members represent a range of man-made disasters, including Zeebrugge, the M1 air disaster, the Marchioness, the Clapham, Southall and Paddington rail crashes, and British families bereaved by the 11th September attacks in the United States.

Alun Evans and Lee Hughes CBE – Oral evidence (QQ 129 – 151)

Evidence Session No. 6

Heard in Public

Questions 129 - 151

WEDNESDAY 16 OCTOBER 2013

12.20 pm

Witnesses: Lee Hughes CBE and Alun Evans

Members present

Lord Shutt of Greetland (Chair)
Baroness Buscombe
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Lee Hughes CBE and Alun Evans

Q129 The Chairman: A warm welcome to the inquiry to you both. Would you like to introduce yourselves for the record? If there are any introductory remarks, make them at this stage.

Alun Evans: I will go first. Thank you very much. My name is Alun Evans. I am currently Director of the Scotland Office but prior to that I was secretary of the detainee inquiry from 2010 to 2012. That was a judge-led Privy Council inquiry chaired by Sir Peter Gibson. Prior to that, in 2001-2002, I was secretary to the foot and mouth disease lessons learned inquiry set up by the then Prime Minister and chaired by Sir Iain Anderson, who is a Scottish-born businessman. I was also secretary to the foot and mouth inquiry of 2007-2008, looking at the more minor outbreak in 2007 to see how well the lessons learned from the earlier inquiry had been applied. I have been secretary for three separate but non-statutory inquiries. I have not had experience of statutory inquiries, unlike Lee.

Lee Hughes: I am Lee Hughes. I have been secretary to one non-statutory inquiry, the Hutton inquiry in 2003-2004, two statutory inquiries, the Baha Mousa inquiry and the Al-Sweady inquiry. I have also been the secretary to the inquest into the death of Diana, Princess of Wales and Dodi Al Fayed, which was run along the lines of an inquiry although it was in fact an inquest. I retired in January of this year from the civil service but I should say that since my retirement I have been acting as secretary to the inquest into the death of Alexander Litvinenko and I have recently been appointed as secretary to the Daniel Morgan Independent Panel.

Q130 The Chairman: Thank you very much indeed. If I can start with the first question, it seems that there are several sorts of inquiries in terms of the people who are presiding over them. There are those with a single chairman and no side members and no assessors. For the detainee inquiry, the chairman had two side members, and then Sir Brian Leveson had six assessors. What are the advantages and the disadvantages of the way in which these inquiries are run?

Lee Hughes: My preference would be to have a single-person inquiry but to deal with issues where side members or assessors can bring different aspects to the inquiry by means of expert evidence. That is what we did in the Baha Mousa inquiry, for example. The chairman considered whether he should have a side member or an assessor to look at military issues, for example, because that was rather a large part of the findings of the inquiry, but felt that by having a fourth module—we had the modular system in that inquiry—in a seminar style considering recommendations, he could ensure that the evidence that assessors or experts could bring could be heard in public and could be challenged in public. That transparency was an important part of the process.

I do accept, however, having said that my preference is for a single-member inquiry, that there will be some situations where either the public or the participants in the inquiry would demand some sort of representation on the panel. I accept that there will be some situations of that kind.

Alun Evans: My experience is that it is much easier to run an inquiry if you only have one person to deal with and presumably you get on reasonably well with that person. When Sir Iain Anderson chaired the foot and mouth inquiry he told me he would not have done the inquiry if he had had to run a panel because he felt that the disadvantages, if there was a disagreement among the panel, outweighed the benefits of the consultation that you can have with fellow panel members. Sir Peter Gibson, when he chaired the detainee inquiry, certainly welcomed the advantages of having two separate Privy Councils with whom to consult on some of the detailed issues. But had it ever come to a disagreement, of course the chairman's "vote" is what is decisive.

If you look at some of the other inquiries—Lord Butler's inquiry into weapons of mass destruction or Sir John Chilcot's inquiry into the Iraq war—they had panels of five different members. The balance seems to be whether or not you get greater expertise by having the spread of four or five experts around the actual table where decisions are made or, as Lee says, you bring in experts for specific areas in which you want to focus. I tend to favour the latter.

Q131 Lord Soley: The Act requires the Minister to consult the chairman before setting the terms of reference. It has been suggested that it would be better if we did not set the terms of reference right at the beginning but allowed the inquiry to proceed a little way before doing that. I think it was the Centre for Effective Dispute Resolution that also argued that there should be discussion previously with potential stakeholders as to what the terms of reference should be. Do you have a view about that? Would it be better to consult and let the inquiry proceed a little way before setting the terms of reference or do you think they ought to be set right at the beginning?

Alun Evans: I am extremely sympathetic to that position. As I have said, my experience is only of non-statutory inquiries, not statutory ones, but in both the foot and mouth inquiry of 2001-2002 and the detainee inquiry of 2010-2012 we had the type of period you describe where, for three months before the formal start of the inquiry, there were discussions between the chair and the secretary and the Government representatives. In both of those inquiries as well we informally consulted groups of relevant stakeholders and only once we had got a near agreed set of terms of reference did we then formally launch an inquiry. As a result, I found the terms of reference much more robust, much less open to challenge and, as a result, much more helpful to completion of the inquiry, although the detainee inquiry was never completed for other reasons.

Lee Hughes: I think it is good practice for the terms of reference to be discussed by the major stakeholders before the inquiry is announced. That is what happened on both the Baha Mousa inquiry and the Al-Sweady inquiry. For example, the legal representatives for the Iraqi claimants in those inquiries were involved in the discussions on the terms of reference. I think it is a matter of

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good practice that that is done. I do not think there is anything in the legislation that prevents that happening.

What I would be slightly concerned about is starting an inquiry with no framework, no terms of reference at all. As the secretary to the inquiry, one of your tasks is to make sure that the inquiry follows the terms of reference. If you have no boundaries, I am not quite sure how you would fulfil that. There is the power, of course, to seek an amendment to the terms of reference if you do not get it right first time and there is experience of that happening. But I just think it is good practice to do as you are suggesting.

Lord Soley: Am I paraphrasing you correctly to say that you would prefer the parameters to be set fairly early on but then have some adjustment as the inquiry proceeds, presumably with a time limit for that?

Lee Hughes: Yes. With time limits I am not so sure. If I can refer to the AI-Sweady inquiry, there was a proposal to change the terms of reference quite a long way in—18 months to two years into the inquiry—because of a specific event. There was a judgment in the European Court of Human Rights, which it was felt might have affected the terms of reference. We went through the whole procedure, that went to judicial review, of deciding whether or not to change the terms of reference. But in normal circumstances, I think if you had, say, provisional terms of reference and you wanted to change them, you ought to do that within the first six months.

Lord Soley: Would your preference go to cover the length and cost of the inquiry in an earlier scoping exercise?

Lee Hughes: In my experience, the first thing that you do is to look at the terms of reference and the evidence you have initially and try to scope out the inquiry. One of the early actions is usually to produce a list of issues that the inquiry is going to investigate. Part of the job of the secretary is to turn all that into some kind of timetable and preliminary budget, not least because I think the relevant Secretary of State will be asking for it.

Alun Evans: I agree strongly on that final point. One of the things I think the Government has learned from the experience of inquiries over the last 10 years is that some of the inquiries were set off with very open-ended timescales and, as a result, open-ended costs. I would not say it is universal but now with both statutory and non-statutory inquiries there is often a target time limit to report written into or around the times of the terms of reference. I think that is a good discipline for the people doing the inquiry.

Q132 Lord Trimble: Your last sentence there brings up an issue, which I think I would look at. What views do you have about non-statutory inquiries as opposed to statutory inquiries, about what is appropriate for one or appropriate for the other? Indeed, is it appropriate at all to have non-statutory inquiries after there has been major legislation laying down procedure for inquiries?

Alun Evans: I should say I am probably slightly biased, having worked with non-statutory inquiries in the past. There is, as you say, a statutory basis but in cases where Government or anybody else wants to find out, in as short a time as possible, the causes for a big problem—foot and mouth is a good example—the flexibility provided, in my view, by a non-statutory inquiry allows Government to get the answers often much more quickly and in possibly a less adversarial way than if you have a full public inquiry.

The balance of evidence, in a way, is that often non-statutory inquiries do not have, rightly or wrongly, the same public recognition as being a fair, totally independent, above the board inquiry into the hurt or the harm that has been caused. Personally, I think that is overwritten because the inquiries I have been involved with, although they have been non-statutory, have been just as independent and just as rigorous as any other one. But there is a balance to be made by the person setting up the inquiry, whether they choose to give it statutory basis or not.

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Lord Trimble: Wait a minute. A choice as to whether it has a statutory basis or not. We can legislate, but then you say the legislation is optional. It does not have to be followed.

Alun Evans: No, I did not say that it is optional. I said there may be occasions where, because of the nature of the incident or event that you are looking into, one needs to have a quicker or a less lengthy inquiry into finding. Let me give you an example. For the foot and mouth inquiry, which I chaired, the Prime Minister at the time, Tony Blair, was absolutely adamant he wanted to find out what went wrong as quickly as possible and in as robust and rigorous way as possible. Had he set up a public inquiry—although it was before the Act was in place—it was likely it would have taken well over the three or four years of the Phillips BSE inquiry. He took a decision, rightly or wrongly—but I can see why he took it—that he wanted the answers as soon as possible. We delivered a report within nine months of the terms of reference being announced. That report laid the basis for future disease control in this country and helped the next outbreak of foot and mouth disease. I do not think it was any less independent or rigorous than a statutory or a public inquiry would have been but it was certainly a lot quicker.

Lord Trimble: You are saying we draw a distinction between a public inquiry that proceeds lawfully in accordance with the Act and other inquiries that are not public inquiries or are not in any way bound by it. Coming back to business, you are treating the legislation as optional, that you use the legislation where you want to and you would ignore the legislation where you think you would rather prefer to proceed in a different way.

Alun Evans: All I am saying is, in my view—and certainly in the Government’s view as I can see—not every incident that needs an inquiry has to be a statutory inquiry under the Act. That is only the point I am making.

Lord Trimble: Maybe we should have an amendment to the Act saying that this Act does not have to apply if the Government does not want to follow it.

Q133 The Chairman: How long do you think that your foot and mouth inquiry would have lasted had it been under the Act?

Alun Evans: That is a hypothetical question, but I am absolutely clear that, given the tensions and sense of injustice in some parts of the rural community in 2001, had that been a public inquiry and had it been as it is now with core participants and a full legal challenge on either side, there is no way it could have been done within a year, and I suspect probably at least three or four times that.

Q134 Baroness Buscombe: Looking at the issue of the scoping exercise at the start of an inquiry to help estimate the length and cost, who is under the cosh to think about the length and cost at the beginning? Is it yourselves acting as secretary to the inquiry? Take the Al-Sweady inquiry as an example. Mr Hughes, you mentioned that lawyers to the Iraqi claimants wanted to change the terms of reference. Who was paying for those lawyers?

Lee Hughes: The lawyers for the Iraqi claimants were being paid by the inquiry.

Baroness Buscombe: By the British Government, by the British taxpayer?

Lee Hughes: Yes. Eventually, yes, it was indeed.

Baroness Buscombe: They have no interest in concerning themselves as to how much it costs.

Lee Hughes: Their role as lawyers for the claimants is to look after their clients, of course, so you are correct in that sense. But it is the chairman’s responsibility, statutorily, to have regard to the costs of the inquiry and it is the secretary, under the Inquiries Act, who has the responsibility of accounting for that expenditure to the Secretary of State. There are influences within the inquiry itself where we have to look at the costs. In that particular instance, I produced a paper for the Secretary of State and the chairman that set out what the cost of extending the terms of reference

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would be and what the effect on the timescale would be. That was one of the factors in the Secretary of State deciding he was not going to extend the terms of reference.

Baroness Buscombe: I know that you have stepped down from the inquiry now but in practice, in general, would you, as a secretary to an inquiry, perhaps partway through—for example, Al-Sweady, which most of us attended one morning, has already cost probably over £16 million or £17 million and we have not got to the heart of it yet—send a note to the Secretary of State to say, “This is how much it is costing so far. Are we happy?”

Lee Hughes: It does not quite work in that way, but there were, and I am sure still are, regular discussions between the secretary of the inquiry and those in the sponsoring department who were providing the funds. As secretary or as chairman we do not have a carte blanche simply to write cheques. We have to go and—

Baroness Buscombe: No, I just wanted to know the line of communication.

Lee Hughes: The secretary is, I will say, in the unique position—it may be the chairman is in a similar position as well—of having responsibility to the chairman to deliver the inquiry but also to the Secretary of State as accounting officer, in effect. You have that twin role that you have to fulfil.

Q135 Lord Morris of Aberavon: I gather from your evidence that you believe there is a valuable role for both a statutory and a non-statutory inquiry. When a Minister has to decide what he should have, I presume the Cabinet Office is the lead department. On that basis, do you believe there should be a better focus of material and persons in order to give guidance to a Minister on the setting up of an inquiry?

Alun Evans: Better guidance from whom? From the Cabinet Office or—

Lord Morris of Aberavon: Yes. There must be a lead department in Government. Are you the lead department?

Alun Evans: I am not now, but the expertise in inquiries lies within the Cabinet Office. Some departments have had more experience than others of setting up inquiries—the Ministry of Justice—so they have expertise. But there is a small unit within the Cabinet Office that does have expertise on the mechanics of setting up an inquiry, the role of secretary, how you put the budget together, IT, communications and so on, and also, to pick up your first point and Lord Trimble’s point, the prior decision of whether or not it should be statutory or non-statutory. To give the limited experience that I have had on the detainee inquiry, there were clearly discussions, before my time, between Cabinet Office and the Ministry of Justice and central Government, including the Prime Minister, as to whether or not that should be a statutory or non-statutory inquiry. They firmly decided that it should be a Privy Council-led non-statutory inquiry.

Lord Morris of Aberavon: That is a Cabinet Office role?

Alun Evans: The Cabinet Office would have advised the Prime Minister in that case.

Q136 Baroness Hamwee: I think you have possibly already partly answered this. Is there a case for a dedicated unit, either in the Cabinet Office or the Ministry of Justice, not just to advise but perhaps to set up inquiries?

Alun Evans: I agree entirely—and Lee can give his views—but as well as doing that, to learn the lessons of how to run a good inquiry and prevent having to re-create the wheel at the start of each inquiry. I think we do it better in Government now but we certainly used to do it extremely badly 10 years ago.

Q137 Lord Woolf: How would you like to see it work?

Alun Evans: The things that people have already said about being absolutely focused on the legal basis for the inquiry and why it is being set up in the way it is, being clear with the chairman and the

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secretary and appointing them early enough to make sure they can identify issues like terms of reference, communications, engaging with stakeholders, ensuring there is a clear, what I would call, project plan for delivery of it.

One of the things I would be very strongly in favour of is making sure that the resources were cleared and staff were provided to be the workforce of the inquiry. One of the most irritating and difficult tasks that I had in my three inquiries—I suspect Lee would have the same—was getting hold of sufficiently good people at short notice and bringing them out of departments to put them into an inquiry team, bringing them up to speed, their HR needs, the learning process. At the end of my inquiries, we had well-functioning secretariats who then dispersed and the lessons were not learned. I do not know if you agree.

Lee Hughes: Can I say, first of all, that on a number of occasions I have recommended that the Ministry of Justice take on responsibility for the delivery of public inquiries, not necessarily whether one should be set up but the actual delivery. With this reinventing the wheel issue, even on the inquiries I have done, it is very dispiriting two or three years down the line to do another inquiry and find that everything you set up before has been dismantled and you have to do it all again. It is quite wasteful of public money just to go through the procurement exercise to get your IT in yet again, whereas if you had one department responsible for delivering the inquiries you could get call-off contracts arranged and that kind of thing. We are not talking about billions of pounds here but we are talking about millions, so there are great savings to be made.

In terms of guidance, I know the Cabinet Office does have some guidance. I do not know how well it is promulgated to people. At the end of every inquiry I have done I have written a secretary's report that goes off. I do not know what happens to them. I think there is a great deal of opportunity for improving that aspect of the lessons learned from running a public inquiry, for example. I think there is scope there.

To me, the right place for delivering public inquiries is probably the Courts and Tribunals Service, irrespective of whether it is a judge in charge. The facilities that that organisation has around the country would be very useful if public inquiries are held and if they had the responsibility then I am sure it could be factored into their court usage time or whatever.

Q138 Baroness Hamwee: I cannot remember but are they not undergoing some changes? Anyway, you are broadly saying under the Ministry of Justice umbrella.

Lee Hughes: Yes.

Baroness Hamwee: Can I just extend this? Does the corporate learning that might be made available extend to what are sensible terms of reference, that type of area beyond—I do not want to downgrade them—the mechanics?

Lee Hughes: There are two different kinds of guidance. The Cabinet Office itself would have the overall policy guidance and I think certainly their guidance, if it does not, ought to be covering things like terms of reference, how to frame them and that kind of thing. The secretary's report at the end of an inquiry might say, "Our terms of reference could have been better phrased and if we had had this we could have done this" and that kind of thing. But all that learning does need to be pulled together.

Baroness Hamwee: I think you may have implied the answer to this, but is it well enough understood in other departments that there is this source of knowledge and experience to go to?

Lee Hughes: I do not think it is.

Alun Evans: I certainly do not think it is. The worry I have is that an issue will arise somewhere in another department, which has not been through the type of inquiries that the Ministry of Justice has, and they will start again from scratch. It seems to me it is very important that if there is a new inquiry called for in the Ministry of Defence or Defra or whatever, that at a very early stage the

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learning process is integrated into that department. I am not sure that the Government is that good at doing that at the moment.

Baroness Hamwee: Can I push this—you may resist answering this—one stage further to ask, do you think that Ministers who are under pressure to agree to establish an inquiry are always necessarily well enough informed about the ramifications of such a decision?

Alun Evans: I am quite happy to answer that question. I am sure they are not always well enough informed.

Baroness Hamwee: I have asked the MOJ officials and they would not—

Alun Evans: But setting up an inquiry is often a very helpful short-term thing to do. The important thing, from my point of view, is to make sure that if one assumes it is necessary, there are properly focused terms of reference and there is a proper timescale for delivering the type of report or lessons that will be of benefit and prevent whatever the issue was from happening again, hopefully.

Lee Hughes: I know from my own experience that they are not. I will not name names but I think it is very clear that they are not always.

Lord Richard: Is the Cabinet Office guidance on setting up inquiries a public document and, if so, can we see it?

Lee Hughes: You would have to ask them.

Alun Evans: Yes, the short answer is I do not know but, having read it, there is no reason why it should not be so.

The Chairman: Our clerk tells us that we have it.

Lord Richard: If we have it, we have it.

The Chairman: Can we move on to cost, Baroness Buscombe?

Q139 Baroness Buscombe: Yes. I think, Lord Chairman, that our two witnesses have already touched on this issue of cost, as indeed I have. The cost varies enormously between different inquiries so a major element is the premises. Some like Hutton have used a courtroom at the Royal Courts of Justice, while others like Al-Sweady have large purpose-built premises. I suspect we might know your answer in advance from what you have just been saying to us, but do you feel this is justified?

Lee Hughes: I have run a public inquiry and a major inquest at the Royal Courts of Justice and I received nothing but help and assistance from the senior management of the Royal Courts of Justice, whether on the administrative side or on the judicial side, in setting those up. When I came to set up the Baha Mousa inquiry, one of the buildings at the Royal Courts of Justice was out of action and they simply did not have room for us, so that was not an option at that time. We had to set up the hearing centre, which I think you have seen, at Finlaison House. I think we have done very well on costs on that in that it was set up for Baha Mousa. When Al-Sweady came along, I was able to persuade the Ministry of Defence to extend the lease on that building and to continue to use that hearing centre for Al-Sweady, and also to extend all the contracts. There was quite a bit of cost saving. I estimate about £2 million less costs for Al-Sweady because we did that. My understanding is that at the end of Al-Sweady that hearing centre is to be vacated, probably because the Ministry of Defence does not have any use for it any more. It does seem a bit of a shame, but there we are. That is the situation.

I am now setting up the Alexander Litvinenko inquest, if I may refer to that. It so happens that I know Michael Collins who is now running the Mark Duggan inquest and we were able to agree. In fact, initially, we thought that Litvinenko was going first but legal challenges have caused the timetables to be reversed. We have worked together so that we are using the same equipment in the same premises at the Royal Courts of Justice for those two inquests, but we have done that

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because we happen to know each other and we were working together. There needs to be a more formal arrangement for these things, which is why I do think it goes back to having some of these—

Baroness Buscombe: It goes back to the previous question in a sense. If there was a focal point for all of this, then there could be an in-built sensible approach, lessons learned and memory in terms of what works and what does not.

Lee Hughes: Yes, indeed.

Q140 Lord Richard: Who decides where the inquiry is going to take place?

Alun Evans: On the whole—and correct me if I am wrong—it is up to the chair of the inquiry, working with his or her secretariat team, where it is and that decision can add to the cost, particularly if you want very bespoke or expensive premises to do that. For the secretariat functions of the inquiries I have been involved in, we have always used Cabinet Office premises, which means it is not adding much cost. For the hearings for the detainee inquiry, although the formal hearings did not start, we would have used the Queen Elizabeth II Centre, which was a hearing location for the Chilcot hearings into the Iraq war. But the import of your question is entirely right. This is something that can be planned for in advance. The other cost that you did not refer to, which does tend to be higher in statutory inquiries, is the legal costs, particularly if you are hiring counsel.

Q141 Baroness Buscombe: Yes, which is something that has concerned this Select Committee. It is something we have been asking others. In fact, the supplementary question to this, or additional question to this, is about staff and also there is the issue of legal costs as well. Again, I am assuming, going back to the previous response to the question about having one focal point for all of this, that could make a difference, or do you think legal costs are—

Alun Evans: I am a slight sceptic on this but I have to be careful how I tread because most judges—

Baroness Buscombe: You do not have to be too careful.

Alun Evans: Most judges who tend to chair inquiries, in my experience—and it is not extensive—prefer to have permanent QCs working for them. If you also have a statutory inquiry, that can add to the legal costs, as we have seen before, particularly if you have core participants whose legal costs are handled. In the detainee inquiry, we had a permanent QC and a permanent junior. That is quite expensive. In the other example I gave of a non-statutory inquiry, when we had that foot and mouth inquiry, the chairman was absolutely adamant that he did not want permanent access to counsel. When there was an issue that came up, for example when we were judicially reviewed, we hired a counsel for the length of time that it was needed. We had access to a solicitor throughout. It certainly kept that cost down and I would not say it meant there was any less rigorous style of questioning. Another example is that the Iraq inquiry has not used counsel and some people said they should have done for the questioning.

Lee Hughes: I think if you are looking at the Inquiries Act inquiries, you do need counsel. I am a great believer in having counsel to the inquiry leading and focusing the questioning of witnesses. The biggest cost in an inquiry is the length. If you can keep the inquiry shorter, you save money. There are various ways you can do that but one of them, I think, is having counsel to the inquiry taking the major responsibility for the questioning of witnesses, and that does help, and the sensible use of IT. IT costs can seem high but if you get the right IT system in, you save an awful lot of court time and that keeps the costs down.

Q142 Lord Trefgarne: Just following on the point, is it presumably the case that when an inquiry is decided upon, whether it be a statutory inquiry or a non-statutory inquiry, somebody decides upon a budget for the inquiry and the accounting officer of the department concerned will approve or disapprove that?

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Lee Hughes: In my experience, that is part of that first scoping exercise of the inquiry after it is set up. You get your list of issues. The chairman and counsel, the legal team, look at the list of issues, the secretary produces a budget from that and we go back to the department and say, “This is what it is going to cost”. The department may have thoughts about what that would be but until you do that exercise, you will not get a sensible budget.

Lord Trefgarne: Once the inquiry starts, there is a budget to which they are supposed to be working and very often over run it, I dare say.

Alun Evans: For the non-statutory inquiries I have been involved in, the Cabinet Office has set the budget for the year and we have had to work within that.

Lord Trefgarne: And that is that?

Alun Evans: And that is that. But I have never been in an example—maybe Al-Sweady is an example, the Saville inquiry certainly was—where there was not an open-ended budget but it certainly increased and continued year on year.

Lee Hughes: I would certainly say there was not an open-ended budget but you have to, in some respects, follow the evidence. The Baha Mousa inquiry, which has finished, came in pretty much within budget. I think it was £500,000 more; £14 million and we originally budgeted £13.5 million, so it was not too bad. It was not too far out, given that you do not know at the beginning what your task is.

Q143 Lord Trefgarne: Are there standard rates for senior counsel or do we just pay them whatever they demand?

Lee Hughes: The Attorney General has a range of fee rates that apply to QCs and junior counsel.

Lord Trefgarne: So there are standard costs?

Alun Evans: It is a standard rate and there is some negotiation.

Lee Hughes: But the inquiry itself is only responsible for its own counsel and any it funds. For example, on the Baha Mousa inquiry—and I think it is the same in the Al-Sweady inquiry—we funded the legal representation for the Iraqi claimants, so we can set those rates. In both of those inquiries, you had the Ministry of Defence obtaining legal advice for its employees, either the civil servants or the armed forces. We, as the inquiry, have no control over or no idea of what they are paying. That is a matter for the Ministry of Defence.

Lord Trefgarne: That was the cost of the inquiry.

Lee Hughes: But it does not come in under the cost of the inquiry that we, as the inquiry team, are responsible for. It is an additional cost to the department but we have no control over that. It may be that we should but we did not.

Lord Trefgarne: You should. Just one final point, the IT system is an important part of all this. We were told about an inquiry in Northern Ireland where £6.35 million, no less, was spent on the IT system, which was apparently tailor-made for the occasion but not very skilfully procured, I suspect.

Lee Hughes: I have always bought off-the-peg solutions, something that is being offered, not bespoke. There are enough evidence databases around for it to be a competitive market.

Alun Evans: In my experience, we have always used the Cabinet Office systems or extensions of Cabinet Office systems. In the case of the detainee inquiry, it was essential, given the secure nature of the material we were dealing with, that it was on a Cabinet Office server. Although in theory there could have been a criticism that that was not independent, nobody made that criticism and I think it was the only sensible and cost-effective way to do it.

Alun Evans and Lee Hughes CBE – Oral evidence (QQ 129 – 151)

Q144 Baroness Buscombe: I think it is important for the public record to know or have an idea—for example, the Leveson inquiry had a leading counsel and three other counsel over 10 years’ call—about how much they would charge, not those individuals but a Queen’s Counsel, for example.

Lee Hughes: The Attorney General’s panel rate for QCs is between £180 and £250 an hour. For junior counsel, it is less. £120 to £150, I think, is it not, for a first junior?

The Chairman: Sorry, what was the second figure?

Alun Evans: £120 to £150, I think.

Lee Hughes: Roughly, yes.

The Chairman: Just so we know, is this £180 to £250 and the £120 to £150 for a seven-hour day? Is it seven and a half, eight, or can it be an 18-hour day?

Lee Hughes: It is an hourly rate. There is usually a cap placed at eight hours a day.

Alun Evans: One thing I would add on that is that in my experience, while the counsel and juniors would work long hours—they were extremely hardworking—they were not always doing legal work. In my view, some of the tasks that they did could have been done by a cheaper civil service employee. What one needs them for is the forensic scrutiny and cross-examination, once you reach the interview sessions. You do not necessarily, in my view, need them as much for the pre and post work.

Lee Hughes: I think the usual practice is that the solicitor to the inquiry should be keeping very close watch on the work that counsel are doing and has to approve the hours and the nature of the work that they undertake.

Q145 Baroness Buscombe: For example, there were many months delay while obtaining evidence in the Al-Sweady inquiry prior to the commencement of taking oral evidence. Would the QCs be paid during that time or not?

Lee Hughes: I know from the time when I was the secretary to the Al-Sweady inquiry that both the leading counsel and the second counsel worked relatively few hours, but we had a junior counsel, who was working away on the statements and the detail, who was on a lower rate, and we used her a great deal more. In fact, what I agreed with the Secretary of State—the eight-hour day, 40-hour week cap—was combined for the three counsel, so we had 120 hours in total and the bulk of it was done by the junior at a cheaper rate, because that was better and most cost effective.

Q146 Lord Soley: You have covered some of this about the costs but I just want to be clear of your views. Mr Hughes, you seemed to imply that counsel is always necessary. There is an argument that says counsel increases the costs and lengthens the inquiry. I am puzzled as to whether you think that counsel is always necessary or should we be a bit more specific? Maybe in an inquiry like Leveson, where there is a criminal aspect in the background, it might be necessary, but in other situations it might just get in the way of a good inquisitorial process by the judge, or whoever is in charge, and counsel advising?

Lee Hughes: I can only speak from my own experience. All of the inquiries that I have been involved with have been inquiries into quite serious matters, which are criminal offences, so I think the use of counsel to the inquiry is justified.

Lord Soley: You have just said they are criminal. Are you saying it is necessary where there is a possible criminal implication but not otherwise? Is that what you are saying?

Lee Hughes: I think what I am saying is I have not had experience of the softer inquiry—this may be something Alun will have a better view of—so I cannot say for certain. I can see the argument you are making. I do not feel qualified to give an answer.

Alun Evans and Lee Hughes CBE – Oral evidence (QQ 129 – 151)

Alun Evans: My experience supports the argument you are making, Lord Soley. I think there are a number of inquiries where often counsel is used where it is not necessarily appropriate, and, indeed there are times when you would want different forms of expertise. Going back to my experience of the foot and mouth disease, we hired a couple of short-term experts on economic matters and on statistical matters of disease growth. That is not something that a QC would necessarily have brought expertise on if you had paid them vast sums.

Q147 Lord Soley: Do you feel there is a lack of clarity in this decision-making process about when we should have counsel involved in one inquiry and when we should not?

Alun Evans: I do, but I think the starting point should be that an inquiry, whether it is statutory or non-statutory, should have access to the best experts in the particular field in which they are dealing. There may be times, particularly if you are going to have a series of hearings, where that should be a QC working with the chair. There will be other times when you want completely different forms of expertise, which may not be as expensive as counsel and they will certainly be for less time in attending.

Q148 Lord Soley: Do you think we always get that decision-making process right as to whether to have counsel?

Alun Evans: Personally, I think we normally get it wrong.

Lord Soley: Yes, that is what I thought. It has been said a number of times that the purpose of these inquiries is to get to the truth but in fact, as one of our previous witnesses said, there are other reasons for having it too, not least the need to hear the victims of any situation. Is it not true that there are times when victims leave feeling dissatisfied because they have not felt able to speak in the way that the counsel felt they ought to speak?

Alun Evans: I agree very strongly with that. I am sorry to go back to my experience of foot and mouth disease, but we did two things. One was we had a series of hearings where we questioned, not with counsel, a whole range of experts and people who had been affected. The other thing we did was a series of tours around the country to the areas most affected and held small meetings, public meetings, anything, to give people a chance to express their concerns, express their feeling of utter hurt and devastation. From the comments we got back, that was very helpful in what one might call the healing process. Although there were many people at the time who wished that the foot and mouth inquiry had been a public inquiry, at the end of it nobody came back and said, “We have not had the chance to make our views heard”.

Lord Soley: This is a slightly leading and final question, so if you do not want to be led you will not be. It does seem to me, as someone who has come to this very recently, that there is a case for starting to ask much more fundamental questions about when an inquiry needs counsel and when it needs other people and, secondly, how much weight we give to enabling witnesses to leave an inquiry feeling they have been heard.

Alun Evans: I agree with that analysis. I would not call it leading but it probably did come from what I said.

Q149 Lord Richard: I just want to follow this point. You say there are certain inquiries where you need counsel and certain inquiries where you do not need counsel, and you want greater clarity where that dividing line comes. Which sort of inquiries do you think do need counsel and which sort do you think do not need counsel?

Alun Evans: Lee probably has slightly more experience from the statutory end, but I think where there is more likelihood that there might have been criminal acts committed, you will want someone who has that type of forensic examination. I think where you might not want it so much is where you are trying to get to the truth of something, where having the adversarial type of

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cross-examination that you might get from counsel may cause people to be less forthcoming about what they did and why they did it.

Lord Richard: Do you think that having counsel there necessarily implies it is adversarial?

Alun Evans: Not necessarily, but it can end up with the people being questioned also having their strong legal panels advising them what to do.

Lord Richard: Maybe, but the actual inquiry itself surely is inquisitorial not adversarial. Certainly that is the mass of the evidence we received.

Alun Evans: I would hope so, yes.

Lord Richard: That is right, is it not?

Alun Evans: It is, yes.

Lord Richard: If it is right, I go back to the question I was asking you before: which ones do you want to be with counsel and which ones do you want to be without?

Alun Evans: I do not necessarily think it is either or. I said there are times, in my view, where inevitably you would want to do most of the questioning, or possibly all of the questioning, by counsel. There are other types of events and forms of gathering evidence that do not require counsel and, indeed, without counsel may yield more useful information from the people being questioned.

Lee Hughes: If I may add, I think there will be inquiries where a lot of the circumstances surrounding the inquiry are legal issues. As I say, all of the three inquiries I have been involved with have been investigations into deaths. In that kind of situation, having counsel to the inquiry leading the questioning—which I think can be very inquisitorial and not adversarial because counsel to the inquiry is leading the questioning but is not running a case and is not a legal representative for either the witness or anybody else—can be a valuable way of eliciting information. Where you are looking at perhaps more policy-orientated, if that is a fair description, it may well be that a different kind of approach would work.

Q150 Lord Woolf: I noted that earlier on in this session it was said that experience with the court service was very helpful when you are setting up an inquiry. Is that because they have background knowledge of running courts?

Lee Hughes: I think I was trying to make exactly that point, that that knowledge is helpful in setting up public inquiries.

Lord Woolf: We also have a system now of tribunals. Tribunals are the equivalent of a court service and are meant to deal with things much more closely to an inquisitorial process than the ordinary courts. They have learned a great deal and they are much more efficient now, I am suggesting as a premise for your answer. What I was wondering about is that as we have so many inquiries now, should we not—perhaps as part of the tribunal service—have a special body, the public expense of which would be justified, to use and keep the expertise that somebody like yourself acquires, because you have conducted a certain number of inquiries, and they are not going to do more than provide a support service?

Lee Hughes: This is what I have been advocating for a number of years. I was not necessarily trying to be prescriptive as to who it is. The point I was saying is that the Ministry of Justice runs courts and tribunals. That is closely linked to public inquiries, so why not vest somewhere in the Ministry of Justice the responsibility for the delivery of public inquiries and use that expertise?

Lord Woolf: Yes, and then they could keep rules under review, as happens with the courts, and every now and again we find the rules are not working in the courts as well as they should be and so we change the rules. But there is nobody who has that responsibility for the inquiry structure in the same way.

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Lee Hughes: Not in the same way. I think the Ministry of Justice does have responsibility for the inquiry rules but not in quite the same way as you say for the court rules.

Q151 Lord Woolf: I am sure you know that there are advocates of the rules and there are people who criticise the rules. Mr Ashley Underwood and the Rodney team have been recorded as being critical of rules 9 and 10, which specify various detailed matters, and they said that the rules are too detailed. Do you think, in your experience, that that is so and they would benefit from a more flexible approach?

Lee Hughes: Yes. If you want me to be more specific, I think there are a number of administrative things that the rules over-specify and make far too complicated. Can I just give one example, which is the payment of expenses? The two inquiries I have done recently were sponsored by the Ministry of Defence. The easiest thing we could have done was to have paid all the expenses under the Ministry of Defence's arrangements for expenses but we could not. So we had to devise a whole system that was compliant with the rules and it just drove everybody mad, I think, trying to deliver that.

The other big change I would want to make—and I am not sure whether it requires a change to the Act or the rules, certainly to the rules—is to allow the inquiry itself to take statements from witnesses if it wants to. This certainly has been a problem where you ask for a statement and it comes through, having been taken by the solicitor for the witness, and it is not adequate. We ask the witness to come in so that the inquiry can take a statement and the solicitors refuse, saying, “No, we will do it”, and you have to go through iteration after iteration until you get anything useful. I know there is the fall-back position. You call them for oral evidence and you take the evidence orally, but it just takes a lot of time. If there was a power—that does not have to be used for every witness—that was capable of being used so that the inquiry team could take the statements, that would be good.

Alun Evans: If I may add very briefly, one of the things I would go back to is what the purpose of the inquiry is, and always the purpose is to come out with useful recommendations or lessons learnt. To do that, in my view, it is best not to have a too prescribed and straitjacketed procedure that you have to follow but rather to work on general principles, such as to act fairly to most participants in the process. I think you are more likely to get a more efficient and quick, tailored result if you use that type of approach.

The Chairman: We have had a very long session this morning. I have promised colleagues that we will endeavour to finish at 1.15 pm and I think that perhaps is a convenient time for us to finish. If there is anything else on the rules particularly that we have not gone into in as much detail as we might have done, if you would like to write to us that would be very helpful. Otherwise, thank you very much indeed for coming and giving your valuable time and giving your evidence to us.

Eversheds – Written evidence

Background

1. This is a response to the Select Committee’s public call for written evidence of views on the law and practice relating to inquiries into matters of public concern and in particular inquiries under the Inquiries Act 2005 (the “Act”).
2. Eversheds are an international law firm with a specialist practice in public inquiry work, led by partner Peter Watkin Jones. Eversheds has acted both as solicitors to public inquiries and represented core participants at and before public inquiries – both before and after the 2005 Act. These inquiries include the Bloody Sunday Inquiry, the Shipman Inquiry, the Rosemary Nelson Inquiry, the Mid Staffordshire NHS Foundation Trust Public Inquiry and the Leveson Inquiry.
3. The information provided is Eversheds’ initial views on the issues set out in your call for evidence. If you require any further detailed views or information on the issues discussed, please feel free to get in touch.

Issue 1

4. We believe that the overarching reason for establishing a public inquiry could be summarised as fulfilling two main functions. First, to establish the truth about a matter of public concern and to provide accountability to the public in a way that litigation would not – to find out what happened, why and where responsibility may lie (but without making any legal determinations as to liability). The second is to make recommendations so that lessons can be learned for the future. If the predominant reason for the inquiry is the latter, there are more likely to be compelling reasons to expedite the public inquiry. If the matter is simply the former, the need for haste can be diminished.
5. In addition, for members of the public affected by the subject matter of the inquiry, it can also provide them with a valuable healing process and ensures that public confidence is restored in whatever area of failure is under consideration (in a way that mediation could never do, as suggested by some).
6. In terms of principles that underlie their use, we would prioritise public accountability and the need for the public, and possibly Government, to learn from past events. Their administration should be done with transparency, fairness and proportionality.
7. We believe that the key to any public inquiry is that it, and the decisions taken about establishing the inquiry, should be just that – public and accountable. Therefore transparency of the processes and procedures adopted and the decisions taken by the sponsoring department, chair, etc, are imperative (this would include, for example, transparency around the appointments process, transparency around why an inquiry is statutory or non-statutory, transparency of intended timescales, timely publication of relevant evidence etc). Government departments (and sponsoring departments) need to be fully cooperative with an inquiry when established, in a way that perhaps has not always happened.
8. Proportionality at all levels is paramount - costs versus a thorough investigation versus desired timescales. That was the achievement of the 2005 Act. We refer to proportionality further in response to Issue 10.

Issue 2

9. Section 17 of the Act does require the chairman to act with fairness and with regard to the need to avoid unnecessary costs when making any decision as to the conduct of the inquiry. However, there is nothing in the Act that deals with transparency and accountability of the appointments process, both of the chairman and the inquiry team.

Issues 3, 4 and 5

10. As the Select Committee will no doubt be aware, many interested parties hotly contested the proposals contained in the Inquiries Bill which saw an increase in the power that a Minister could wield in respect of the operation of a public inquiry. It was the view of Rights Watch (UK) that ‘The powers of independent chairs to control inquiries has been usurped and those powers have been placed in the hands of government Ministers’ and ‘The Minister’s role is particularly troubling where the actions of that Minister or those of his

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or her department, or those of the government, are in question.’ Particular disquiet was expressed on the ministerial ability to effectively declare the disclosure or publication of some documentation ‘off-limits’ to the public, on consideration of a range of issues said to be in the public interest. These are legitimate questions to raise. They were also raised at a judicial level. They have not as yet proved to be problematical in practice, though at some stage they will doubtless do so. We do feel that having created an independent inquiry, it should be under the chairman’s control rather than the control of politicians; Parliament may wish to retain a residual power to terminate a public inquiry.

11. We accordingly believe that there are certain tasks where it may be inappropriate for an individual Minister to have the unilateral power to act, for example in terminating an inquiry, to help remove any potential inference that there is political influence over the outcome of an inquiry. In practice, we cannot envisage many situations where a Minister would wish to exercise such discretion to terminate an inquiry, given the public scrutiny of such an action and the potential accusations of a cover up, but we believe this is a power more properly exercised by Parliament after full debate.
12. However, we believe the issue is not about whether or not Ministers should have the power or discretion to set up, or not set up, an inquiry, but rather ensuring that there is transparency in the way that an inquiry is created and conducted. Consideration should be given when establishing terms of reference for liaising with relevant victims who may have valuable input on the formulation of the terms of reference.

Issue 6

13. This is a very difficult question to answer in light of the fact that: a) there is no transparency in the decision-making process conducted by Ministers / Government when deciding to set up, or not set up, an inquiry and the public is often not fully apprised of the reasons behind a particular decision being made; and b) there is no prescribed set of criteria for setting up an inquiry against which this can be tested.
14. There are clear instances in the past where Government has been reluctant to establish inquiries, and has often done so under protest. Clearly costs considerations have been paramount. There are cases where much time and money has however been wasted in seeking to avoid the creation of a public inquiry, where there would have been public benefit, in our view, in establishing an inquiry promptly, with the additional benefit of lessons being learned earlier. The Mid Staffordshire Inquiry is an example where lessons could have been learned sooner had there been a greater willingness to create a public inquiry from the outset. Other cases where there is continuing debate of the need for an inquiry include Deepcut and Finucane; in both cases, had public inquiries been established much earlier, they would doubtless have been completed by now. On occasion, Article 2 inquests have been established where the public interest in our view might have been better served by public inquiries. The cases of Litvinenko and Hillsborough are often cited as such examples.
15. As to whether or not inquiries have been set up unnecessarily, we believe the test for this is the success or value of the inquiry’s recommendations and their subsequent implementation and we refer to this in further detail in response to Issue 16.

Issue 7

16. There is undoubtedly a conflict of interest that exists in such circumstances, given the power to set up an inquiry rests solely with a Minister.

Issue 8

17. To date, the majority of inquiries established under the Act have been conducted with a serving or former judge at the helm, or a very senior counsel. One can understand this rationale – judges are experienced in analysing and digesting large volumes of evidence, and reaching conclusions based on that evidence. Extracting information from witnesses, determining facts, dealing with issues such as confidentiality, FOIA, DPA, immunity from suit issues, conducting proceedings and hearings in a fair and transparent manner, and promoting and protecting the principles of natural justice (and bearing these in mind at all times) are all second nature to someone with legal training.
18. There has been some debate over the years as to whether or not appointing a judge to chair an inquiry is always the right approach. One might say that a chairman who has a strong administrative and legal team behind them will be less likely to need legal training or experience in order to fulfil their brief. On the flip side, any lack of knowledge or experience in a particular field can be counteracted by appointing suitably

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experienced inquiry panel members or assessors to assist the chairman. A legal team could clearly be a support to any non-legal chair, but arguably this would slow down the process and increase the burden on, and the costs of, any legal support.

19. Our view is that a judge or senior QC would invariably be better than appointing a non-legal chair due to their ability to analyse and digest evidence and to compile reports. They will of course have access to relevant experts, either as co-panellists or as assessors.
20. The current lacuna in the system is that once an inquiry chair has completed their terms of reference, such experience (and that of his / her co-panelists / assessors) is lost. There is no forum for retaining the lessons learned in running a public inquiry with a view to conveying that knowledge and experience to subsequent inquiry chairs. The same is true of those who provide inquiry secretariat teams and legal teams. Every inquiry reinvents the wheel, which is wasteful and expensive.

Issue 9

21. We believe that an inquisitorial process is the most appropriate approach for a public inquiry. An adversarial approach does not encourage cooperation, or create an atmosphere where evidence can be given freely and openly. The adversarial approach involves each party trying to prove and argue a pre-determined case and eliciting evidence to that aim. However, a public inquiry is not a court of law and it does not determine liability. It is not a forum for advancing arguments, but rather one for getting to and exploring the truth. We believe that this can only properly be achieved using an inquisitorial approach.
22. We do not believe that it is truly inquisitorial for an inquiry to allow or encourage witnesses or core participants to provide their own evidence. This is often done in an apparent attempt to save costs. This however is not the outcome. It encourages all witnesses and core participants to obtain legal advice they may not need if there is no realistic prospect of that witness or core participant facing criticism. Additionally, evidence provided on that basis invariably is what the witnesses want to say, which may well not be what the inquiry needs to know about. Lawyers representing those complained about will naturally adopt a defensive approach, protecting the best interests of their client (as it is their duty to do). They will provide the information asked of them and no more. Indeed the inquiry, without taking the evidence itself, cannot know the breadth of areas on which the witness can help and it is wrong to make assumptions that the inquiry knows the right questions to ask or documentation to seek when the process after all is inquisitorial, and the inquiry accumulates knowledge and information as it progresses.
23. Analysis of the major expenditure on past inquiries will, in our view, reveal that often there has been a huge burden of legal costs incurred by witnesses who did not require legal representation and where there was never any prospect of such criticism materialising as the inquiry progressed.
24. In our view therefore, a public inquiry should do its own work in establishing the evidence if it is to be truly inquisitorial, effective and serve the public interest.
25. The contribution of the lawyers for core participants should be to assist the inquiry and its staff and not be to provide evidence that could be viewed as counter-productive to the inquiry's progress. We consider that one role of the inquiry's lawyers is to establish a cooperative and effective working relationship with core participants and their legal representatives. This is key in order to assist the work and smooth running of the inquiry.
26. We consider that individuals can represent themselves before public inquiries (and we have seen this work in practice). This does however usually involve an extra level of witness support being provided by the inquiry's lawyers, and we think it is appropriate that the inquiry's lawyers does so in such circumstances.

Issue 10

27. We believe that the Act has introduced a focus on reducing the length and expense of public inquiries. There are recent examples of inquiries being conducted efficiently and effectively both in terms of costs and duration. Long gone are the days of inquiries leaving 'no stone unturned', with chairs and legal teams seeking to adopt a proportionate approach to the depth and breadth of an investigation, versus the careful costs-budgeting and timescales within which it can be achieved.

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28. **There is however still a way to go and we consider that much can be done. Whenever an inquiry is announced, as stated above, invariably it involves a ‘reinvention of the wheel’, rather than learning lessons from previous inquiries and applying them to the next. For example, drafting new inquiry protocols rather than having a precedent set of protocols to refer to, establishing new procedures for engaging with witnesses and core participants, setting up new IT and database systems for managing evidence and witness liaison rather than looking what has worked well (or not so well) on previous inquiries and using that experience.**
29. **We consider that IT systems is an area where real costs and efficiency savings can be made. In our experience, IT systems, both for documentation storage and review, as well as for managing witnesses and correspondence, are the lifeblood of an inquiry. An inordinate amount of time (and costs) can be spent by the chair, counsel to the inquiry, the inquiry’s lawyers, and core participants and their legal representatives in managing the IT issues, and dealing with documentary evidence.**
30. **The IT systems should have the ability to manage the gathering, taking, analysis and use of evidence, manage communications between the chair, counsel, core participants and witnesses, including allowing annotations on particular documents to be electronically shared. They should be used to manage the publication of evidence to core participants and the redaction or restriction of confidential material, and support the production of documents and live evidence during the hearings. Bespoke systems also have the potential to do very much more, such as run reports on the progress of the inquiry/evidence gathering process, schedule interviews/hearings, coordinate this with witness files and email accounts, create bundles of evidence for counsels use, establish a separate platform for core participants, analyse all oral, written and documentary evidence by issue, witness, date range etc to allow the report writing process to be as smooth as possible. Well designed and managed IT systems can drastically reduce the costs and increase the efficiencies of an inquiry. In our experience, making do with existing systems simply because they have been used before is not enough and leads to tremendous inefficiencies during the inquiry process, causes delay and increases costs. What public inquiries need is a bespoke system, set up for the purposes of an inquiry, which can be rolled out on any ongoing basis, with personnel that are experienced in using and managing such systems, i.e. no reinvention of the wheel.**
31. **As explained in our response to Issue 9, in past inquiries, the unnecessary level of legal representation for core participants and witnesses has created a huge costs burden. Adopting a truly inquisitorial approach will, in our view, reduce costs.**

Issue 11

32. We consider that introducing a power to unilaterally curtail an inquiry’s proceedings would undermine the entire purpose of establishing an independent inquiry and would fetter the discretion of the chair to conduct the inquiry as he / she sees fit (subject to fairness and cost considerations), as currently set out in the Act. A court of law would not be curtailed for lack of progress and in the same way we consider such a power inappropriate in the context of a public inquiry.
33. An alternative mechanism to address any perceived lack of progress of an inquiry could be to introduce a power / process whereby regular updates are required to be delivered and explanations given for any delays, with clear milestones set down for the remainder of the proceedings, which the inquiry could seek to achieve.

Issue 12

34. What inquiries under the Act offer is an independent inquiry, conducted in a public arena, and underpinned by legislation that can compel witnesses and organisations to provide documents and evidence. There is an argument to say that compelling witnesses to attend/provide evidence can create an environment that makes them more reluctant to speak out. The counter argument to that would be that many witnesses may not voluntarily speak out (for example, against an employer or colleagues), for fear of repercussion, and therefore compelling them to attend may actually provide them with an opportunity to tell their story. Of course, the power to require witnesses to attend or provide documents does not have to be exercised as a matter of course. We understand that during the Leveson Inquiry, witnesses were summoned to provide evidence via the Section 21 procedure under the Act as a matter of course, whether they were willing to voluntarily give evidence or not. Arguably this creates an adversarial environment from the outset, where

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witnesses may not feel comfortable being open and frank in the giving of evidence. Our experience has been that an inquiry should not exercise these powers unless necessary.

35. The legislative framework under which a public inquiry operates also makes the inquiry accountable to the public in a way that a non-statutory inquiry cannot.
36. There will however be circumstances where a non-statutory inquiry may be more appropriate. For example, in circumstances where reliance on the cooperation of witnesses or organisations may not be key, where the information needed to investigate is already to hand and where in depth investigation is not necessary. However, the major issue here will be whether a non-statutory inquiry will satisfy the relevant public concern. If not, there may be an argument to say that the purpose of the inquiry is pointless.
37. We have read the oral evidence of Professor Tomkins given to the Select Committee on 10 July 2013 and believe that his suggestion that there be a rebuttable presumption that an inquiry should be established under the Act is worthy of some consideration.

Issue 13

38. See response to Issue 12.

Issue 14

39. We consider that the key to engendering confidence from the public is twofold. First, by ensuring the integrity of the inquiry's work in adopting fair and transparent processes, and thoroughly investigating the issues set down in the terms of reference, but in a proportionate manner. This will rely on the ability and experience of the chair, counsel, and legal and administrative teams involved with the inquiry to ensure this happens, and public confidence is more likely to be achieved if the inquiry is truly inquisitorial in the way that it has conducted its business. Secondly, by ensuring that the recommendations made are implemented and we refer to this further below in our response to Issue 16.

Issue 15

40. This issue goes back to what is the function of a public inquiry. An inquiry is not a court of law and it does not determine liability. If it were, or if evidence was to be admissible in future civil or criminal proceedings, we believe that this would inhibit the openness and willingness of witnesses to give evidence. We also believe that this would increase the desire for involved legal representation of witnesses / core participants, given the potential personal repercussions. There would be good arguments for witnesses to say that they should be afforded the opportunity to put forward their own case, cross examine witnesses and defend any criticisms, leading to a more adversarial model and no doubt increasing the duration of the inquiry and costs.
41. As explained in our response to Issue 1, we consider that an inquiry's function is to get the truth and learn lessons for the future. In order to get to the truth, depending on the circumstances, it may be necessary to offer witnesses immunity from suit in order to encourage the giving of open and honest evidence and ensure that valuable recommendations can be made.

Issue 16

42. In our experience, the Act does not ensure that recommendations are adequately implemented. The recommendations of an inquiry are non-binding, and possibly for good reason, but other than facing potential public criticism, there is no recourse if Government fail to implement recommendations or fail to explain their reasons for non-implementation.
43. The consequences of this can be seen quite starkly if one compares the recommendations made by the Bristol Royal Infirmary Inquiry to that of the Mid Staffordshire Public Inquiry. Arguably, if the recommendations from Bristol had been fully implemented, many of the issues and failures that were identified ten years later during the Mid Staffordshire inquiry would not have occurred.
44. Inquiry chairs no doubt feel personal responsibility to ensure that their recommendations are implemented. There are examples of inquiry chairs who have voluntarily sought to impose procedures by which the implementation of recommendations is monitored. The chair of the Mid Staffordshire Public Inquiry, Robert Francis QC, made a specific recommendation that the organisations to whom the recommendations were relevant should announce to what extent they intended to implement the recommendations and publish in

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annual reports their progress in relation to planned actions. Robert Francis also invited the House of Commons Select Committee on Health to consider incorporating into its reviews the performance of organisations accountable to Parliament as regards the recommendations. We are also aware that Lord Bichard, seemingly of his own volition, conducted a review of the recommendations from the Soham inquiry six months after the conclusion of the inquiry. Other chairs have adjourned their inquiries, rather than completing the terms of reference, thus enabling them to have an ongoing, authoritative voice on the implementation of recommendations.

45. Clearly therefore, in practice, chairs of inquiries do not feel that there is adequate procedure to monitor the implementation of recommendations.

Issue 17

46. We would agree that the Inquiry Rules 2006 are too prescriptive. Section 17 of the Act gives the chair of an inquiry the freedom to determine the procedure and conduct of the inquiry as he / she sees fit (subject always to fairness and having regard to costs). However, the chair is then shackled by the overly prescriptive provisions in the Rules. For example, Rules 13 to 15 afford the chair very little flexibility (and practical and logistical difficulties) when sending warning letters.
47. If the intention behind the legislation was to provide chairs with the freedom to conduct inquiries as they deem appropriate, bearing in mind the subject matter, scope, public expectation, relationship with core participants, costs etc, then the express provisions as to the procedures to be followed should be removed. In our experience, the Rules have proved largely unnecessary.

Issue 18

48. There may be many good reasons for an inquiry to justify restriction of inquiry records, such as very real concerns about national security, confidential subject matters such as physical or sexual abuse or protecting rights of whistleblowers. However, it is difficult to envisage a situation where all of a public inquiry's records can be argued to be confidential in nature and therefore should not be disclosed, particularly bearing in mind the purpose of a public inquiry and the intentions behind the Freedom of Information Act 2000 ("FOIA").
49. In our experience, the operation of the FOIA as against the Act has created real practical and legal issues for public inquiries. We have set out below a brief note of the potential issues that can arise:
- During the course of a public inquiry, whilst the inquiry itself will not be subject to the FOIA, public bodies who may be involved or interested in the inquiry (not least the inquiry's sponsoring department), will themselves hold documents relevant to the inquiry's work (e.g. correspondence with the inquiry, documents that have been disclosed as evidence, draft witness statements etc) and those bodies will be susceptible to FOIA requests. Whilst there are a number of exemption to prevent disclosure (e.g. if the documents are held solely for the purposes of the inquiry, confidentiality, DPA issues), the inquiry does not have control over responding to the FOIA request, and whilst it is best practice, the inquiry does not need to be consulted. Disclosure of information in this way could well create problems for the inquiry's work.
 - Section 32(2) of the FOIA and the provisions concerning "documents placed into the custody of an inquiry" is particularly unclear.
 - Once an inquiry has ended, the exemption under section 32(2) of the FOIA no longer applies and the inquiry's documents will be placed into the hands of public bodies who are again susceptible to FOIA requests. Therefore, information can at that stage be subject to disclosure under FOIA (subject to any exemptions which might apply). From a very practical perspective, the inquiry's records will be placed in the hands of individuals who were not members of the inquiry team, do not have intimate knowledge about the inquiry's documents and who may not appreciate the extent of confidentiality issues or other disclosure concerns. This therefore requires a very rigorous process of labelling to be followed prior to archiving the information. There is no prescribed process that sets out how this should be managed. There is therefore a real risk that material which ought to remain confidential is disclosed on the basis of a purely technical application of the FOIA.
 - There are of course a number of exemptions that apply to restrict disclosure of information, but many of these are qualified exemptions, and as time moves on, the strengths behind these exemptions versus the public interest test becomes outweighed, and disclosure becomes more likely.

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50. In *Kennedy v Information Commissioner (EA/2008/0083)*, the Tribunal and the Court of Appeal recommended that the Charity Commission (and presumably other public bodies with statutory powers to hold inquiries) should put in place a set of rules governing disclosure during the course of an inquiry in the same way as CPR 5.4 applies to the disclosure of court documents which are covered by their own FOIA exemption. This may be worthy of consideration.

Robert Francis QC, Lord Bichard and Professor Sir Ian Kennedy – Oral evidence (QQ 202 – 229)

Robert Francis QC, Lord Bichard and Professor Sir Ian Kennedy – Oral evidence (QQ 202 – 229)

[Transcript to be found under Lord Bichard](#)

Robert Francis QC – Written evidence

Introduction

1. As I have been invited to give evidence to the Committee I thought it might be helpful in advance of that to offer some observations based on my experience of the workings of the Inquiries Act.

2. I am a barrister in self employed practice at the Bar of England and Wales having been called to the Bar in 1973. I took silk in 1992. I am a Recorder and am qualified to sit as a deputy High Court Judge. I specialise in medical law, including clinical negligence claims, professional disciplinary issues, healthcare regulation, medical treatment decision and mental capacity, and other medico-legal and ethical issues. I have appeared in a number of inquiries as counsel for interested parties and have also chaired other inquiries, most recently both Mid-Staffordshire inquiries. I contributed to the discussions which resulted in the recent recommendations on public inquiries produced by CEDR.¹

3. I am grateful to the Committee for its invitation to give evidence during their review of the working of the 2005 Act. I believe that public inquiries are likely to remain a feature of the governance of this country when serious issues of public interest arise and other less elaborate means of resolving the relevant issues are thought to be inadequate. It is important that the processes available are rendered as effective as possible. Therefore I hope it is helpful to offer some observations, based on my experience, about areas in which improvements might be considered to the inquiry process. I have not sought to answer each of the issues raised in the Committee's call for evidence, but those points on which it appeared to me I could offer the most pertinent views based on my experience.

The purpose of public inquiries

4. The outcomes required of a public inquiry vary according to the subject matter but they include:

- establishing the facts leading up to a matter of concern

¹ Public Inquiries – Proposals for a Design Rethink, Mackie, (December 2012) Centre for Excellence in Dispute Resolution https://www.cedr.com/docslib/Public_Inquiries_-_Proposals_for_a_Design_Rethink_-_December_2012.pdf

- determining the explanations for and causes of things which have gone wrong
- identifying those responsible for deficiencies or performance failures
- establishing the lessons to be learned from what has happened
- making recommendations intended to correct the deficiencies for the future.

5. Less often considered is the need for reconciliation and recognition – what has been described by Jason Beer QC² as “catharsis” and less attractively by others as “moving on” or “closure”. Lord Woolf has been reported as remarking that

The public must have an opportunity "to be heard" during inquiries into decisions effecting local communities, such as whether to build a new road or runway. The cathartic effect of being heard is a very important part of the inquiry.³

6. A particular challenge in this regard for inquiries is the lack of recognised tools for reconciliation or mediation in connection with inquiries, whereas in civil litigation there are now recognised processes which are supported by the availability of accredited practitioners and court rules encouraging their use. Any inquiry exploring the use of such techniques at the moment would be running the risk of experimenting with untried techniques. Yet in the absence of such methods inquiries may not be able not achieve resolution for and between those affected by the subject matter.

The decision to set up a public inquiry and the power to do so

7. Under the Inquiries Act the power to call a statutory inquiry resides solely the Government. There is no unconditional right to a public inquiry, although one may be necessary to fulfil the state’s obligations under the Human Rights Act. Lord Justice Clarke was able to state baldly in his report into the sinking of the Marchioness:

No member of the public has a right to a public inquiry. Whether such an inquiry should be ordered will (as ever) depend on all the circumstances of the case. It will depend on where the public interest lies. The public interest is of course not the same as the interest of the public⁴

8. In spite of this, decisions not to hold inquiries, or to limit their scope, are being challenged by applications for judicial review particularly in areas engaging Articles 2 and 3 of the European Convention on Human Rights and the obligation to investigate certain

² *Public Inquiries*, Beer et al, (2011) OUP para 1.07

³ *Public Inquiries – A Proposal for a Rethink* [above] page 14

⁴ Thames Safety Final Report (2000) (Cmnd 4558) para 5.1. See also *R(Persey) v Secretary of State for Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794

categories of death and unacceptable treatment.⁵ The type of investigation required will vary with the circumstances, but to satisfy the obligation the investigation must be:

- Independent
- Effective
- Reasonably prompt
- Involve a sufficient element of public scrutiny
- Involve next of kin to an appropriate extent⁶

9. However there remains a judicial reluctance to order inquiries. In a recent case⁷ the court refused to order the Secretary of State to set up a full blown over-arching public inquiry because, among other reasons:

- Its likely length
- Difficulties in finding “the right tribunal” with the necessary experience and capability who would be ready and willing to take on the responsibility
- Cost
- Duplication of the lessons learnt from previous inquiries and overlap with current ones

10. These are difficulties which often lead governments to be reluctant to set up inquiries, and yet it ought to be possible in a statutory system to ensure that an inquiry can be held while avoiding these problems.

11. Subject to the reviewing jurisdiction of the courts the power to set up a public inquiry remains in the hands of government. While Parliament can hold ministers to account for not holding an inquiry it cannot force them to do so. In considering the Inquiries Bill in 2004 the Public Administration Committee considered whether there should be a Parliamentary means of triggering a public inquiry when ministers had refused to do so, and recommended that Parliament consider this.⁸ While it is obviously a matter for Parliament to decide whether it wishes to legislate for such a power, it would need to consider how an inquiry ordered by Parliament was to be funded and supervised. If ministerial powers to order inquiries are capable of being judicially reviewed it might be thought that a better course would be to list factors it is considered Ministers should take into account in deciding whether or not to hold a statutory inquiry rather than to create a

⁵ See *Osman v UK* (1998) 29 EHRR 245 para 115; *McCann v UK* (1995) 21 EHRR 97, para 193; *Edwards v UK* (2002) 35 EHRR 487 para 69; *Jordan v UK* (2001) 37 EHRR 52; *Salman v Turkey* (2000) 34 EHRR 425; *R (Gentle and others) v The Prime Minister and others* [2008] 1 AC 1356, [2008] UKHL 20; *R ((L (A Patient)) v Secretary of State for Justice* [2009] 1 A.C. 588, [2008] UKHL 68; *R. (on the application of Mousa) v Secretary of State for Defence* [2011] EWHC 3304 (Admin)

⁶ *R (Wright) v Secretary of State for the Home Department* (2001) EWHC Admin 520, [2001] UKHRR 1399 para 41; *R v Secretary of State for the Home Department ex parte Amin* (2003) UKHL 51

⁷ *R. (on the application of Mousa) v Secretary of State for Defence* [2013] EWHC 1412 (Admin)

⁸ Government by Inquiry Report of the Public Administration Select Committee, January 2005 HC 1315 para 222

new Parliamentary power to order inquiries to be set up. Judicial review should offer a sufficient opportunity to challenge perverse or unlawful refusals.

12. When a disaster occurs, or a scandal erupts a demand for a public inquiry often follows. Almost equally often this demand is initially resisted, usually with a lesser form of investigation or review being suggested. The reasons for such resistance are many, including justifiable concerns about costs, and the length of time likely to be taken.

13. Sometimes there will be good reason for other processes to be undertaken before a decision can be taken whether or not to set up a public inquiry: there may be criminal proceedings to consider; other investigations may prove to be sufficient and so on. However it is surely in the public interest served by the holding of an inquiry which should be the first consideration. Issues of cost, time and so on can then be addressed by ensuring that both are deployed proportionately. There is an assumption, albeit based on experience, that public inquiries are inevitably very expensive, long in duration; there are other ways to protect the public purse than to use cost as an obstacle to setting up an inquiry which would otherwise be beneficial to the public interest. Reference to other investigatory mechanisms as an excuse for not holding an inquiry can be misleading. There are almost always other mechanisms in play but unfortunately they can merely delay a decision to hold a necessary inquiry while not providing any form of satisfaction for those aggrieved by the disaster in question.

14. Given this background it might be worth considering whether there should not be a standardised procedure for ministerial consideration of a demand for a public inquiry, while not fettering government discretion to set up an inquiry of its own motion. Such a procedure could oblige the minister to give reasons for refusing an inquiry, or defining its scope more narrowly than an interested party requests and allow for these reasons to be offered to Parliament for scrutiny. This might allow for a wider debate on the merits of setting up an inquiry than what is possible through an application for judicial review.

The need for guidance

15. In 1991, when the Tribunals of Inquiry (Evidence) Act 1921 was the relevant legislation, the then Lord Chancellor issued guidance⁹ in relation to the setting up of inquiries after disasters which made it clear that the responsible Minister had the final responsibility for deciding the form of the inquiry, and, by implication, whether there should be an inquiry at all. The paper identified the public interest concerns arising out of a major disaster that had to be considered, and gave guidance about the use of judges as chairmen

16. More recently in 2001 the Cabinet Office issued guidance, oxymoronically classified as “restricted” and therefore largely unseen in the public domain, or certainly by

⁹ Disasters and the Law: Deciding the Form of Inquiry (16 May 1991) a restricted document first placed in the public domain in the Thames Safety Final Report (2000) (Cmnd 4558) Annex D: see R (Wagstaff v Secretary of State for Health [2001] 1 WLR 292 (QBD))

this inquiry chairman at any relevant time.¹⁰ In 2006 the Cabinet Office stated that its Property and Ethics Team acted as a “central source of advice on best practice on issue relating to public inquiries.”¹¹

17. The Department of Constitutional Affairs in responding to a consultation on the draft Inquiry Rules suggested that DCA guidance on the Act would be forthcoming, albeit this appeared to refer to the procedure to be adopted rather than for the initial decision on setting up an inquiry.¹²

18. It is understood that the issue of further guidance is under consideration. It is suggested that comprehensive and regularly reviewed guidance would be very helpful to newly appointed chairmen and their teams. Such guidance should be in the public domain.. Inquiry panels and teams should not be expected to reinvent the wheel on every occasion an inquiry is set up. To be obliged to do so is likely to lead to unnecessary inconsistency and administrative delay

The selection of a chairman and panel

19. The Inquiries Act 2005¹³ gives the Minister setting up the inquiry the power to appoint the chair, and, after consultation with that person, members of the panel. Inquiries may be and not infrequently are, undertaken by a chair sitting alone. While it would be unwise to apply a blanket rule to the issue of whether or not an inquiry chairman should be provided with a panel, in general I suggest a single member panel is the better option.

20. A multi-member panel offers the advantage of a wider range of expertise, and skill which might not easily be found in one individual. There may be inquiries in which it is important that different interests are seen to be represented.

21. However, a multi-member panel has a number of potential disadvantages. These include the following:

- There may be difficulties in recruiting people of the appropriate calibre if they are required to sit through a prolonged period of public hearings.

¹⁰ *Guidance on Inquiries*, February 2001, Cabinet Office [quoted in Beer (above) page 315. The Permanent Secretary of the Home Office informed the Select Committee on Public Administration in November 2004 that this was being revised with a view to the compliance with the requirements of the Freedom of Information Act as from January 2005: *Memorandum by Mr John Gieve CB, Permanent Secretary, Home Office* <http://www.publications.parliament.uk/pa/cm200304/cmselect/cmpublicadm/606/4111102.htm>

¹¹ Departmental Report 2005, Cm 6543 (June 2005) Cabinet Office page 45 para 2.94

¹² *Draft Inquiry Procedures (UK Inquiries) Rules – response to Consultation*, DCA, (17 August 2008) pages 9, 17

¹³ Sections 3-7

- While differing perspectives and expertise may enrich an inquiry, the involvement of a multi-member panel in the deliberations and drafting leading the final report can prolong the process.
- There are usually better and more flexible ways of providing an inquiry with relevant expertise, such as expert evidence and expert assessors.

22. With regard to whether the chair of an inquiry needs to be a lawyer, again it would be unwise to prescribe an invariable rule. Some very successful inquiries have been led or conducted by non-lawyers. However a legal background offers experience in the forensic examination and analysis of evidence, as well as in conducting proceedings of varying types. While these skills can be provided by the legal support team it is desirable in most cases that the inquiry is led by a person who possesses them as well.

23. Many inquiries are chaired by sitting or recently retired members of the senior judiciary. In the case of current judges such an appointment deprives the courts of a working member and adds a cost burden to the administration of justice. However there will always be inquiries where the demand for unimpeachable authority, independence and integrity is such that only a judicial appointment is appropriate. It is suggested that it would be better to reserve the use of the resource represented by the judiciary to those inquiries which are of such a character as to demand that level and type of authority.

24. In appointing a chair and panel members the Minister must have regard to the need to ensure that the inquiry panel (considered as a whole) has the necessary expertise to undertake the inquiry, and a balance (considered against the background of the terms of reference) in the composition of the panel, taking into account the assistance of any proposed assessors.¹⁴ No appointment should be made of persons who have any direct interest in the matters to which the inquiry relates or any close association with an interested party, unless that person's impartiality could not reasonably be regarded as being affected.¹⁵

25. Subject to those restrictions there are no minimum qualifications required, no training and no independent element in the selection process. Unlike appointments to judicial office, there is no application process or independent assessment of the merits of any candidate, and no transparency in the relation to the decision.

26. No statutory procedure is laid down for selection of appointees, unless it is intended to appoint a member of the judiciary in which case the Minister must consult the senior judge of the relevant court system.¹⁶ While this has the advantage of allowing maximum flexibility of choice, and speed of selection in a field where the circumstances giving rise to inquiries are infinitely variable and the demand for speed may be strong, it has the disadvantages from the public interest point of view that there is no open attempt to look for the best man or woman for the job, and that the appearance of independence

¹⁴ Ibid section 10

¹⁵ Ibid section 9

¹⁶ Ibid section 10

may be compromised. What was described by the Public Administration Select Committee in 2004 as a “jaundiced view” was put forward by Lord Heseltine:

Reach your conclusion and then choose your chairman and set up the inquiry¹⁷

27. The Salmon Commission considered whether Parliament should be involved in the appointment but rejected this on the ground that good candidates might be deterred by the prospect of appearing before a Parliamentary Commission, and this view was endorsed by the later review leading up to the Inquiries Act.

28. It is not entirely clear in most cases why it is essential for the appointment of a chairman to occur before the announcement of the intention to hold an inquiry although no doubt a long drawn out selection competition might be undesirable. Better qualified and available candidates unknown to the Minister and his/her advisers may be revealed by a more open and staged process.

29. The absence of any requirement for training broadens the choice, but in general those appointed to chair public inquiries are unlikely to have undertaken this role before. Until recently there was not even a textbook on the subject, and it has been a matter of surprise to many chairmen to find that they were not offered any general guidance about how to set about what is inevitably a formidable task. While some gaps in knowledge can be filled by diligent study of past inquiry reports and legal authorities, there is little available to give a novice immediate assistance on the practical detail of how to set up and run an inquiry. While each inquiry is likely to have different requirements, there are likely to be common problems which could be more swiftly solved with readily available common practical solutions. The development of training for holders of most forms of judicial office through the Judicial College shows that training and procedural templates are not inconsistent with rigorous independence.

30. Because the need for inquiry chairmen is sporadic and unpredictable it is probably impractical to devise a panel of suitable candidates, or a routine course of training such as is available for judges. However a relevant department, such as the Treasury Solicitor, Cabinet Office or the Ministry of Justice, could be tasked with creating a full and up to date briefing pack for appointees to include the relevant law and a summary of relevant legal authorities, plus guidance on where resources inevitably required can be located. Such a briefing should be in the public domain to promote the required degree of transparency.

Initial contact with Inquiry chairman

31. It is inevitable that initial meetings are required between the relevant Minister and the newly appointed chairman. From the outset he or she has to be consulted on the terms of reference, and it is likely to be necessary for him or her to understand the context which has led the minister to set up the inquiry. However, in cases where ministerial conduct or the performance of the sponsoring department is likely to come

¹⁷ Government by Inquiry [above], para 70

under scrutiny, considerable care needs to be taken over ministerial and departmental contacts. A clear and mutual understanding of the independence of the inquiry is essential.

32. As the inquiry process is intended to be transparent any briefing should probably be required to be a matter of public record. The publication of the briefing pack suggested above might resolve this issue. It would also assist transparency if the chairman was in a position to be supported by an independent inquiry secretary even at this early stage.

Assessors

33. In a statutory inquiry both the commissioning Minister and the chairman have the power to appoint one or more assessors to assist the inquiry. Such an appointment should only be made of persons who appear to have expertise which makes them suitable to undertake that role.¹⁸ There is no further express provision as to how assessors are required to perform their role, which is therefore a matter for the chairman to determine, under the general power to regulate the procedure of the inquiry.¹⁹

Therefore while assessors may be asked to sit at inquiry hearings this is not obligatory if not required for the performance of their role. They may be asked to advise the panel on any matter within their expertise. Given the breadth of possible involvement it would be prudent for the inquiry written procedure to make clear what the role of each assessor is. A particular issue is the extent to which any advice offered by an assessor should be made public. In my inquiry I appointed different panels of assessors to advise me on the evidence as it emerged and on the recommendations I was minded to make, I am not aware of the power to appoint assessors being used in this way before, but I found this way of proceeding very beneficial.

34. Any guidance should address the procedures for appointing assessors, and the nature of their role and how it can be performed.

Terms of reference

35. The terms of reference will be set by the Minister commissioning the inquiry. Good practice requires that the chairman and, if appointed, the panel, are consulted before these are finalised. In the case of an Inquiries Act inquiry such a consultation is mandatory.²⁰ The matters to be addressed in such terms of reference are

- (a) the matters to which the inquiry relates;
- (b) any particular matters as to which the inquiry panel is to determine the facts; (c) whether the inquiry panel is to make recommendations;
- (d) any other matters relating to the scope of the inquiry that the Minister may specify.

¹⁸ Ibid section 11

¹⁹ Ibid section 17

36. Getting the terms of reference right is vital. If the scope of the inquiry is set too narrowly then it may not achieve the desired aims and may not engender public confidence. Set too widely the terms of reference allow a disproportionate and over costly inquiry. Given the understandable concerns about costs [see below] it might well be desirable for terms of reference to set out any specific requirements in this regard thought to be appropriate.

37. Understandably there is a desire for inquiries to report promptly. This leads in some cases to a requirement that a report is produced in a specified period of time. It is suggested that it is unwise for any time limit to be expressed in absolute terms as it is almost invariably impossible to predict at the outset how long the process will take. An inquisitorial process is not like adversarial litigation in which the issues and the evidence can often be known either at the outset or shortly afterwards. On the other hand concern is rightly expressed at the length of time some inquiries take. Therefore consideration could perhaps be given to requiring a regular progress report to be given to the Minister and through that channel to Parliament. A requirement for interim reports can on occasion be useful but it should be borne in mind that the time and resources taken up in preparation of interim reports can actually add to the delay of the final conclusion. In particular it is difficult at an interim stage to be confident that all relevant evidence has been received. If further evidence comes to light later, it may be necessary to reopen issues addressed in the interim report and perhaps acted on.

38. The demand for a public inquiry after a disaster is often fuelled by a desire on the part of victims or the public at large for those held to blame to be “brought to account”. It is often not properly understood how limited are the powers of an inquiry to achieve an outcome in this regard which is thought to satisfy such demands. An Inquiries Act inquiry is expressly prohibited from making a determination of civil or criminal liability.²¹

An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability.

39. But this does not prevent a report being drawn up in a way that allows inferences to be drawn:

(2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

40. Therefore inquiries can, and often do, make trenchant adverse findings about individuals and organisations. Thus the Shipman inquiry made express findings that Dr Shipman had committed a large number of murders. What they cannot and must not do is to determine a final outcome, such as a determination that an individual has committed a criminal offence, or has been guilty of breach of a contract of employment or other duty justifying dismissal. However findings of fact taken together with recommendations can make the position clear, although no such finding or recommendation is legally binding on any party.

41. The terms of reference can play a part in facilitating public understanding of the possible range of outcomes of an inquiry and to dampen expectations that particular sanctions against individuals will be determined by it. It would on occasion be helpful to go further so that the terms of reference expressly state whether it is part of the inquiry's task to pass any, and, if so, what type of, judgment on individuals and organisations.

42. Given the importance of getting the terms of reference right, it is open to question whether this can be satisfactorily undertaken under the pressure which almost invariably accompanies the setting up of an inquiry. The consultation with the Chairman takes place before he/she has had any chance to undertake more than a very cursory consideration of very limited material. The consultation is therefore likely to be effectively limited in the main to procedural issues. In some cases it might be more constructive to defer finalising terms of reference to a later date to enable the Chairman to consider the issues involved in more depth. Alternatively the terms of reference could empower the chairman to seek a change in them in the course of the inquiry. In some cases it might be prudent to provide for a review of the terms of reference following a period of consultation with interested parties.

Appointment of the Secretary, Solicitor and Counsel to the Inquiry

43. Secretaries to inquiries are generally found from within the sponsoring department. This has the advantage that the appointee will bring to the inquiry an in-depth understanding of the workings of the department. The disadvantage is the danger of a public perception that the department is able to exercise covert influence on the inquiry. My experience of two inquiries, one non-statutory and one statutory, suggests to me that any such perception would be wholly ill founded: the ability of dedicated civil servants to undertake this sort of role while exercising rigorous independence is worthy of great admiration. However it has to be considered whether it would not be prudent where the sponsoring department is to be scrutinised by the inquiry for the secretary to be found from elsewhere. There is indeed no absolute reason why the secretary should be a civil servant at all, although I for one would regret the loss of professional understanding offered by the present arrangements.

44. While in some cases the Treasury Solicitor may be able to provide the solicitor to the inquiry, this will not always be appropriate. Even where this is the case the Treasury Solicitor can provide invaluable assistance with the preliminary steps required for the setting up of the inquiry. This department's experience in inquiries would allow it to be a repository for the knowhow and resources needed for this purpose. It appears that the appointment of an outside solicitor is required to be compliant with EU tendering rules. This may be capable of being avoided where a sufficient choice is available from a pre-approved panel. However pre-arranged panels will often provide too restricted a choice because, for instance, of conflicts of interest in relation to the subject-matter of the inquiry. The EU requirements where applicable can impose significant delays on the achievement of this important appointment, and it is respectfully suggested that this apparent obligation is reviewed. Both solicitor and counsel to the inquiry act as legal

advisers to the inquiry panel as well as undertaking many other tasks, and it is suggested that the freedom of choice allowed to the panel should be as unfettered as possible. It is absolutely vital to the efficient running of an inquiry that the panel has absolute confidence in the legal advisers retained.

45. In my view counsel for the inquiry is likely to be a necessity in virtually all Inquiries Act inquiries. The seniority and number of counsel required will vary according to the subject matter, but the skills possessed by experienced leading counsel are essential in the leadership of the process of obtaining and preparing the evidence, as well as the advocacy required in public hearings. It is almost inevitable that legal challenges will arise in the course of an inquiry requiring swift resolution. Chairmen require immediate and unconditional access to authoritative advice. In connection with these. Counsel also are likely to have a crucial role to play in the warning letter process. It goes without saying that counsel to the inquiry must command the total respect and confidence of the inquiry chairman. It follows from that, in my view, that the choice of counsel should be in the hands of the chairman alone, although he/she, particularly if not legally qualified, may well wish to take advice on the matter.

Core participants/interested parties

46. In an Inquiries Act inquiry the chairman has a discretion to designate core participants at any time during the inquiry. In making that decision the chairman must have regard to whether

- The person played or may have played a direct and significant role in the matters to which the inquiry relates
- The person has a significant interest in an important aspect of the matters to which the inquiry relates or
- The person may be subject to explicit or significant criticism during the inquiry or in any report.²²

47. Not all persons who come into these categories have to be made core participants and a designation could be made of persons who come into none of them. Consideration can be given to designation of persons who apply or through the chairman's own motion.

48. Core participants have certain advantages accorded by the legislation:

- They may appoint a legal representative who must be designated as their recognised legal representative, unless the chairman directs that there should be joint representation.²³
- They or their recognised legal representative may make an opening and a closing statement.²⁴

²² Inquiry Rules 2006 [SI 2006/1835 rule 5

²³ Ibid rules 6, 7

costs.²⁵

49. In practice, core participants are likely to have earlier access to the evidence that is to be placed before the inquiry than others. Further, because they are present, better informed, and where appropriate, legally represented, they are better placed either to ask questions of witnesses to the extent permitted by the inquiry's procedure, or to make representations to counsel to the inquiry about the examination by him of witnesses.

50. In many inquiries the range of possible core participants could be very large. For example every victim and bereaved relative could in theory apply for separate core participant status, as could each person who might be subject to criticism, however trivial. If all were granted that status individually the inquiry could become unmanageable. It is here that the power to require joint representation becomes invaluable in that those who have common or similar interests can and probably should be required to be jointly represented.

51. There is a case for scrutiny of the involvement of public bodies in inquiries. Some will have played a central part in the events under investigation and the inquiry will be greatly assisted by their active and close involvement. Others may apply for core participant status in order to be present, when perhaps an occasional attendance by an observer would suffice. The published costs of public inquiries do not include the costs of attendance by government or other public bodies and there is a case for these being scrutinised more closely than has happened in the past. The 2011 guidance offers no direction to government departments or other public bodies about the considerations involved in deciding whether to apply for this status. It is suggested that these are areas where public accountability could be better established in the rules.

Gathering the evidence

52. An Inquiries Act inquiry has power to take evidence on oath and to summon witnesses and require the production of documents.²⁶ Failure to observe such a notice can lead to a report to the High Court which may take such action as if the breach had happened in proceedings before it.²⁷ The need to make such referrals to the High Court could in theory seriously delay the progress of the inquiry and is not suited to dealing with what a court would regard as contemptuous behaviour in the face of the tribunal, such as disruptive behaviour by someone attending the inquiry, or a refusal to answer questions. Given that most Inquiries Act inquiries will be chaired by persons of authority and seniority, supported by experienced legal advisers, it would arguably be more helpful for the necessary powers to deal with contempt to be given directly to the chairman.

²⁴ Ibid rule 11

²⁵ Inquiries Act 2005 section 40

²⁶ Inquiries Act 2005 section 21

²⁷ Ibid section 36

evidence to produce it but the burdens of the vast quantity of material which may be unloaded uncritically on an inquiry by government departments and the like. In cases with a heavy load of documentation to be collected an efficient, effective and useable document management system is essential. With regard of choice of documents to be offered for disclosure a cooperative dialogue between the inquiry team, core participants and those holding the material is likely to be more productive than leaving the choice entirely to those in control of the documents. Equally this is a process requiring oversight by the senior leadership of the organisations concerned if serious omissions are to be avoided. This is an area where public guidance to officials would be very helpful. Failure to offer comprehensive, manageable and ordered disclosure of the relevant material can cause undesirable delays in the progress of an inquiry.

Public access to hearings and the evidence

54. There is a presumption that Inquiries Act Inquiry hearings are in public.²⁸ Restrictions may be placed in public access to evidence or hearings at the discretion of the chairman or, in some cases, the Minister by means of a “restriction notice”.²⁹ If it thought to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest.

55. In deciding whether to issue such a notice regard must be had to

- (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
- (b) any risk of harm or damage³⁰ that could be avoided or reduced by any such restriction;
- (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
- (d) the extent to which not imposing any particular restriction would be likely– (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

56. The resources that may have to be devoted by public authorities and inquiries to disclosure issues can be considerable. It may be necessary to undertake laborious and time consuming procedures to ensure that appropriate redaction are made before documents are disclosed to the public, even in relation to mundane details such as irrelevant and private contact details.

57. The presumption in favour of evidence being given or disclosed in public is a strong one. At common law a tribunal may undertake a balancing exercise which takes into account any subjective fears of the witness, the impact on their health, and any other factors which might make it unfair to require the witness’s identity to be exposed, against

²⁸ Ibid section 18

²⁹ Ibid section 19

³⁰ “harm or damage” includes: (a) death or injury; (b) damage to national security or international relations; (c) damage to the country’s economic interests (d) damage caused by disclosure of commercially sensitive information.

the effect of this on the fairness of the inquiry proceedings. Anonymity on the grounds of a risk to life invoking the mandatory protection of Article 2 against a real and immediate threat to life should only be granted if the risk would be caused by or materially increased by the giving of evidence without anonymity.³¹ The evidence in support of such a decision, or a decision to excuse a witness from answering a summons might be subject to a restriction notice.

58. Clearly this is a complex area in which the law will seek to accommodate the competing interests of individuals who seek excusal, privacy or anonymity and the public who will require the greatest possible transparency.

59. A non-statutory inquiry is able to deal with such matters more simply. Its discretion to keep evidence out of the public domain is likely to be wider. As a result such inquiries can often be completed more expeditiously and economically than a statutory inquiry. On the other hand there can be a difficulty in retaining public confidence in the process if they are kept in the dark about the evidence that is being considered.

60. The work required in deciding what material should not be placed in the public domain is laborious and requires the closest cooperation between the inquiry and the relevant public bodies. The burden involved is one which needs to be borne in mind when evaluating the time likely to be taken by an inquiry.

The conduct of hearings

61. In an Inquiries Act inquiry generally only counsel or the solicitor to the inquiry and the inquiry panel may ask questions.³² The exceptions are:

- The chairman may direct that the recognised legal representative of the witness may ask that witness questions
- Where a witness other than a core participant has been questioned and given evidence which directly relates to the evidence of another witness, the latter's recognised legal representative may ask for permission to question the witness.
- A core participant's recognised legal representative may also ask permission to question a witness who has given oral evidence

62. A practice along these lines, or even more restrictive, is followed in many non-statutory inquiries. It has the advantage that less time is taken in what could be a very burdensome and probably uninformative cross-examination of witnesses by multiple interested parties. It is an approach which does not inhibit challenges to the credibility of a witness or his/her evidence. However there is a danger that all the issues thought relevant by the core participants may not be adequately taken into account unless great care is taken to ensure that they have open access to counsel or the solicitor to the

³¹ Re Officer L, [2007] UKHL 36; [2007] 1 W.L.R. 213. See also R. (on the application of A) v Lord Saville of Newdigate (Bloody Sunday Inquiry) [2001] EWCA Civ 2048, [2002] 1 W.L.R. 1249

³² Inquiry Rules 2006 rule 10

inquiry with regard to the issues they want to see examined. The inquiry advocate is not under any obligation to put questions to address such issues, but should be in a position to explain decisions taken about this. Disputes can be referred to the panel. For this sort of procedure to work well it is important that sufficient advance notice is given of evidence to the core participants and for reasonable notice to be given to inquiry counsel of issues participants wish to see raised. This can be required by procedural protocols designed by each inquiry, but it is surprising that there is no template in existence [to the writer's knowledge] which could be applied by all inquiries.

63. One problem inquiries can face is of not knowing what relevant evidence is to be given later about an issue to which the current witness is to testify. In an ideal world statements from all witnesses will be available before the oral hearings commence, but the demands of time may mean this is not possible. However if written statements are not obtained as early as practicable the risk is increased of having to approach witnesses who have given evidence to deal with new points arising.

Warning letters

64. Before the Inquiries Act the recognised practice in relation to individuals who might be criticised by or at an inquiry was generally that contained in what was known as the “Salmon Principles”.³³

65. They assumed an adversarial model. They required anticipation on the part of the inquiry of criticisms that might be made, potentially resulting in suggestions being put which would not in fact be pursued, or a very laborious preliminary process to identify potential individual criticisms. According a right to cross-examine witnesses was likely to prolong proceedings. The Public Administration Select Committee recommended that the use of the Principles be reviewed.³⁴ By that time most inquiries were only using them in a modified form. Under the 2005 Act substantial modifications were made. In

³³ Report of the Royal Commission on Tribunals of Inquiry (the Salmon Commission), 1966 Cmnd 1315; Effective inquiries – A consultation paper produced by the Department for Constitutional Affairs, 6 May 2004, CP 12/04, DCA. The Salmon Principles were:

- (i) Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
- (ii) Before any person who is involved in an inquiry is called as a witness, he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
- (iii) (a) He should be given an adequate opportunity of preparing his case and of being assisted by his legal advisers.
(b) His legal expenses should normally be met out of public funds.
- (iv) He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
- (v) Any material witness he wishes called at the inquiry should, if reasonably practicable, be heard.
- (vi) He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

³⁴ Report [above] page 82

particular the role of counsel for interested parties in examining witnesses was severely curtailed. With regard to warnings of potential criticisms a code was inserted in the rules. In summary:³⁵

66. The chairman may send a warning letter to:

- any person he considers may be,
- or has been subject to criticism
- or about whom criticism may be inferred from evidence that has been given
- or who may be subject to criticism in the report

67. The letter must state what the criticism or proposed criticism is, contain a statement of facts the chairman considers substantiates it, and refer to the evidence supporting those facts, or where relevant the evidence from which an inference of criticism can be drawn

68. No “explicit or significant criticism” may be included in the report unless

- The person criticised has been sent a warning letter
- And has been given a reasonable opportunity to respond to it

69. Mutual obligations of confidence in relation to the contents of the letter are owed by the each member of the inquiry team and the letter’s recipient and his/her recognised legal representative. The person to whom it is owed, i.e. the chairman and the recipient, may waive each of these obligations in writing. This means that both must waive the obligation before the contents of the letter cease to be confidential

70. The panel’s obligation of confidence ends on signing the report, and all others’ obligations on the publication of the report.

71. A breach of the obligation is actionable as a breach of confidence.

72. These rules give rise to a number of challenges for inquiries and those who participate in them:

- Inquiries are often an evolving process; therefore warnings sent out early may turn out to be erroneous or unnecessary; those sent out later may mean the recipient has remained in ignorance of a potential criticism until after an opportunity to challenge the evidence has passed.
- The burden of preparing warnings, and considering responses in anything other than the simplest of inquiries can be very considerable. It can be a significant contributor to the length of an inquiry

- Difficult judgments have to be made about what is a “significant” criticism. What may appear insignificant to the inquiry may be extremely important to the individual.
- Those entitled to warnings include corporate entities. In most inquiries those entities likely to be criticised will be represented at the inquiry and will be following its proceedings closely. In such circumstances it is arguable that the entity, or any individual who is a core participant and legally represented is in as good a position as the panel to detect potential for criticism and address it without the need of a warning notice.
- The obligations of confidence refer only to the contents of the warning letter, yet if these are to be confidential the fact of the letter being sent needs to be confidential as does the content of any response, because disclosure of these is likely to lead to disclosure of the content. To disclose that there has been a letter and a response without disclosing the nature of the content of both could lead to damaging and inaccurate speculation.
- There is no obligation on the inquiry to inform recipients of warning letters what the determination has been on any notified potential criticism. To do so would be to invite endless rounds of submissions and run the risk of satellite litigation. However the first time the recipient learns whether the criticism has been upheld is on receipt of the published report, or in any short period of pre-publication access. By this time any remedy or demand for review is of little practical benefit.

73. Given these issues it may be worth considering whether the requirement to issue warning letters should be reviewed, at least in relation to legally represented core participants.

The report

74. It is the duty of the chairman of a statutory inquiry to deliver to the Minister a report setting out the facts determined by the panel and its recommendations and may contain anything the panel considers relevant to its terms of reference. This may include any recommendations it sees fit to make even if not required to do so by the terms of reference. Therefore while the commissioning Minister might in theory inhibit an inquiry by not inviting recommendations in the terms of reference, the panel cannot be stopped from making them.³⁶ Of course that does not mean that there is any obligation to adopt them.

75. The 2011 guidance makes it clear that the Secretary to the inquiry should be able to “support the chair in drafting the report of the inquiry, advising on structure and content.” There is nothing wrong in this concept, but its existence emphasises the need for all members of the inquiry team to preserve a rigorous independence from the

sponsoring department. The precise involvement of the team in the drafting process will vary but whatever it is, it must be absolutely clear that the report is solely that of the panel.

Publication

76. The report of an inquiry under the Inquiries Act must be published – by the Minister, unless he/she requires the chairman to have this responsibility.³⁷ Publication by the chairman clearly has the advantage of absolute transparency: the public know precisely what has been handed to the Minister. It is to be hoped that all reports are sufficiently fair and reasonable for this not to be a problem. However it is possible to envisage circumstances in which a report contains material damaging to individuals or organisations which is either perverse, not supported by evidence or is outside the terms of reference. There appears to be no practical check on this. A statutory inquiry panel has immunity from suit in respect of anything done in the course of the inquiry in good faith and enjoys the same immunity in relation to defamation as if the inquiry were court proceedings, i.e. an absolute privilege.³⁸ If this were not enough, the Minister must lay a statutory inquiry report before Parliament either at the time of publication or as soon as reasonably practicable thereafter.³⁹ Usually formal publication takes place by the report being laid before Parliament at which point it attracts Parliamentary privilege. In theory it might be possible to mount urgent judicial review proceedings before publication, but the circumstances in which this would be practical are likely to be very limited. In any event the damage is already done.

77. These are difficulties which are inevitable if interested parties are not given an appropriate length of time to consider the report in draft before it is published. In practice access by core participants to reports before publication is restricted to a few hours of a “lock-in” under stringent conditions of confidentiality. The difficulty with granting a longer period is that the contents of the report would be likely to be selectively and non-attributably leaked in an attempt to gain some media related advantage. However as there is the possibility of significant injustice being caused to individuals and organisations, it may be worth considering whether some more extensive post publication remedy to require correction of the report might be beneficial, or perhaps alteration of the warning letter regime considered above..

Recommendations

78. Neither the Act nor the rules lay down any form in which recommendations should be presented. While an inquiry may make recommendations there is no obligation on anyone’s part to implement them. The likelihood of this happening properly depends on the cogency of the case in favour of them, the nature of their reception by those affected

³⁷ Inquiries Act 2005 section 25

³⁸ Inquiries Act 2005 section 37; Defamation Act 1996 section 14

by them, the political will to accept them, and the availability of any necessary resources. Recommendations can range from the general requiring further work on detail to the very specific.

79. The implementation of recommendations is therefore far from guaranteed, even where those to whom they are addressed accept – or appear to accept them. A study of the fate of inquiry recommendations makes grim reading for inquiry panels. For example it was said of mandatory homicide inquiries that

There is no evidence that inquiries do much more than duplicate the findings of their predecessors.⁴⁰

80. It is all too easy for a report to be met with an “action plan” which sets out an intention to implement recommendations in a sufficiently vague manner for it to become difficult later to establish whether anything effective has been done. There is no requirement for those to whom recommendations are addressed to say specifically whether recommendations are accepted in whole or in part or to specify the reasons for such decisions. Such deficiencies can to some extent be cured by the report itself setting out a framework for reviewing the response, but it is often undesirable, impracticable and inappropriate for the inquiry panel itself to be asked to undertake some form of continuing supervisory role. In the case of reports which have to be or are laid before Parliament, it could itself determine on a procedure for reviewing progress on recommendations for holding to account those responsible for implementation.

81. There may be a case for adding a statutory requirement that the sponsoring Minister reports to Parliament on progress in implementing any recommendations until such time as he certifies that the process is complete.

The cost of inquiries

82. It is a commonplace that public inquiries are lengthy and expensive. The Mid- Staffordshire NHS Foundation Trust Public Inquiry cost £13,684,000.⁴¹ In its 2005 report into public inquiries, the House of Commons Public Administration Select Committee observed that up to that time the average cost of a public inquiry was £7 million, the total, disclosed by the Government being £300 million between 1990 and 2004.⁴² The predicted costs for the then ongoing Bloody Sunday Inquiry were estimated at £14 million; it is now known to have cost £192 million.

83. Lord Woolf was recently reported as being critical of both the cost and length of that inquiry:

⁴⁰ Towards an Audit of Inquiries, Eastman N in *Inquiries after Homicide*, Peay J (1996), Duckworth page 170

⁴¹ Figure to March 2013 <http://www.midstaffpublicinquiry.com/inquiry-costs> [viewed 4 September 2013]

⁴² Government by Inquiry, Public Administration Select Committee HC51-1, , 21 January 2005 para 124-128
<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpublicadm/51/5107.htm#a17> [viewed 4 September 2013]

The peer said he believed Lord Saville felt it was vital everyone had their say.

“He was meticulous in that and very praiseworthy, but proportionality is very important and I just do not myself accept that any inquiry that took as long and involved the expense of the Saville Inquiry has not got things wrong,” he said.

“I’m sorry to seem critical of an individual I admire, but that was what happened. How do you absorb all the information you have heard and record it even if you read and re-read it?”

“It took a huge amount of time to do the report, everybody got a mention in the report who did anything, but the report is one which I doubt there is anybody in this country who has mastered the whole of the contents. It is beyond the capacity of a mortal individual.”

He added: “They regarded themselves as having the ability to disregard expense.”

Belfast Telegraph 24 May 2012

<http://www.belfasttelegraph.co.uk/news/local-national/bloody-sunday/probe-peer-raps-cost-of-bloody-sunday-inquiry-28752728.html>

84. The costs and length of inquiries are very variable. In 2010 the Ministry of Justice published a table⁴³ showing the costs of various inquiries. These ranged from less than £1 million to the aforementioned £192 million.

85. Under the current rules it is noteworthy that there are few controls on the powers of a statutory inquiry to spend money. There is no statutory provision for even an indicative budget to be agreed with the chairman or panel, and it is in practice the responsibility of the sponsoring department to pay the costs incurred.⁴⁴ The current ability of the sponsoring department is limited for both legal and political reasons. The legal powers are:

86. The Secretary of State may suspend an inquiry pending any other investigations or proceedings.⁴⁵ This may avoid the duplication of effort but does not stop the inquiry permanently and does not provide for any budgetary control.

87. The Secretary of State may by notice to the chairman bring an inquiry to an end, but only after consulting the chairman. The notice must specify the reasons for this decision and be laid before Parliament.⁴⁶ It would be very rare for it to be politically acceptable for a minister to bring an inquiry to an end in this way for financial reasons. Such a step would in most cases be interpreted as an interference in the independence of the inquiry and, given that the purpose for setting it up persisted, would defeat that purpose. Those who had demanded the inquiry in the first place would be likely to seek judicial review of the decision. For these reasons if no other, this section would in most cases be too blunt an instrument if used merely to control costs.

⁴³ Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005, October 2010, Cmnd 7943, Ministry of Justice, page 23-24 <http://www.official-documents.gov.uk/document/cm79/7943/7943.pdf> [viewed 4 September 2013]

⁴⁴ The 2011 guidance contains an expectation that inquiries will have budgets, plans and accounts and advocates “a strong working relationship between the inquiry and the department.

⁴⁵ Inquiries Act 2005 section 13

⁴⁶ Ibid section 14

88. The Minister can control the remuneration of the inquiry panel, its assessors, secretariat and lawyers as well as other assistants as he is given the power to determine such remuneration.⁴⁷

89. The Minister may also set out conditions and qualifications to be met for the payment of expenses, including legal representation incurred by those “attending, or otherwise in relation to, the inquiry“ by the inquiry chairman.⁴⁸ Therefore it is quite acceptable for a limit on legal costs and witness expenses to be imposed, presumably subject to a requirement that any such restriction is reasonable and not arbitrary. So long as any such conditions are met the chairman is not further limited in the awards that may be made to witnesses, as the Minister must pay the expenses awarded.⁴⁹

90. The Minister is entitled to serve a notice on the inquiry that in his opinion it is acting outside its terms of reference. If this is done he is not obliged to pay any costs incurred in relation to any matters specified in the notice after service of it.⁵⁰

91. Apart from any limits imposed by the powers mentioned:

The Minister must meet any other expenses incurred in holding the inquiry, including the cost of publication of the report and any interim report of the inquiry (whether or not the chairman has responsibility for arranging publication).⁵¹

92. It follows that the inquiry is in theory unrestricted in what it can spend on “any other expenses”. In practice there are two constraints. Firstly budgets are prepared by the inquiry secretary and discussed with the sponsoring department. Secondly the publication of an inquiry’s costs is likely to serve as some form of brake on unjustifiable expenditure.

93. It is suggested that it might be prudent for a requirement to be inserted in the Terms of Reference which required the inquiry to inquire into the matters referred only to an extent which was proportionate and justifiable by the public interest. That might allow intervention by the Minister should it appear that the inquiry’s expenditure was out of control. While no analysis has been made of terms of reference for public inquiries, there was certainly no such restriction in the terms of reference of the Mid-Staffordshire inquiry, and it is not thought there has been in any other public inquiry.

Archiving of the Public Inquiry Record

94. What happens to the materials gathered by an inquiry when it closes? The National Archives publishes guidance on the archiving of the inquiry record.⁵² It sets out

⁴⁷ Ibid section 39(1)

⁴⁸ Ibid section 40(1), (2), (4). General criteria and procedural requirements are set out in the Inquiry Rules 2006 rules 21-34

⁴⁹ Inquiries Act 2005 section 39(2)

⁵⁰ Ibid section 39(4), (5)

⁵¹ Ibid section 39(3)

⁵² <http://www.nationalarchives.gov.uk/information-management/projects-and-work/roles-and-responsibilities.htm> [viewed 4 September 2013]

the responsibilities of the various parties. It is the duty of the chair of a public inquiry, as a person responsible for public records

to make arrangements for the selection of those records which ought to be permanently preserved and for their safe-keeping.⁵³

95. In a substantial inquiry this is a complex task. There is no obligation to archive all material, only that which is considered ought to be preserved. The full list of material generally to be retained and recommended periods of retention are set out in guidance.⁵⁴

Documents not to be retained permanently are generally held by the sponsoring department. In practice it appears that the National Archive wishes to limit the quantity of hard copy documentary material it receives. Where the transcripts and witness statements and other relevant material are contained on a web site the Archive will ask for a finalised version of this as the principal point of reference. The National Archive emphasises that effective planning of electronic document storage arrangements at the outset of an inquiry can save time and resources at its conclusion, and offers technical guidance as to how this can be achieved.⁵⁵

96. In the course of an inquiry a wide range of confidential material may be received by it. Some may be evidential material made subject to restriction orders, but there may be other documents which are of a more administrative nature but also confidential. The nature of any restriction to be applied to disclosure should be made clear at the time of transfer. The Freedom of Information Act and its exemptions apply to records transferred to the National Archive.⁵⁶ Therefore information provided to an inquiry in confidence breach of which would be actionable may be subject to an indefinite exemption from disclosure, and personal information about a person who is a data subject may be withheld for the lifetime of the data subject.⁵⁷

97. It may be wondered whether this process of selection is necessary. What may be of interest to historians decades into the future may be completely different to the perception of today. An examination into whether the inquiry was in fact an adequate inquiry might require consideration of a wider range of documents than is currently considered should be preserved. On the other hand if documents are to be stored which are confidential or should not be disclosed for the time being in the public interest, it is important that the inquiry chairman is consulted on applications for disclosure, and that provision is made for informed decisions to be made about this, even after his or her demise.

⁵³ Public Records Act 1958 as amended section 3

⁵⁴ Retention Schedule for Records of Inquiries, 2012, National Archive

<http://www.nationalarchives.gov.uk/documents/information-management/retention-schedule-for-records-inquiries.pdf> [viewed 4 September 2013]

⁵⁵ Technical Guidance for Inquiries and Inquests, 2011, National Archive

<http://www.nationalarchives.gov.uk/documents/information-management/technical-guidance-for-inquiries-and-inquests.pdf> [viewed 4 September 2013]

⁵⁶ Access to Public Records, 2012, National Archive page 7b

<http://www.nationalarchives.gov.uk/documents/information-management/access-to-public-records.pdf> [viewed 4 September 2013]

⁵⁷ Ibid page 14; Freedom of Information Act sections 40, 41

Robert Francis QC – Supplementary written evidence

In the course of giving evidence yesterday to the Committee it was suggested to me that in the course of my first Mid-Staffordshire inquiry- which as you know was not set up under the Inquiries Act 2005 - I had asked the then Secretary of State for Health, the Rt Hon Andy Burnham, to turn my inquiry into a statutory inquiry and to extend its terms of reference, and that he had refused my request. I was, I confess, somewhat taken by surprise by this suggestion and as a result may not have given as clear an answer as I would have liked. Therefore I would be grateful if you would draw this letter to the attention of the Committee as I hope it will clarify the position as I recall it.

Reference was made yesterday to a statement made by Mr Burnham's successor, the Rt Hon Andrew Lansley, to the House of Commons on 9 June 2010. I have now had the opportunity of reading the passage in full from Hansard 9 June 2010 column 338. Mr Lansley said:

"The shadow Secretary of State must know that at the beginning of last September (2009) Robert Francis came to him in the midst of his first inquiry to raise the issue of the legal base for that inquiry and the question of whether it should be brought under the Inquiries Act. He wanted the terms of reference to be extended sufficiently widely to ensure that at that stage he could have looked beyond the question of what happened, to the question of why the primary care trust, the strategic health authority, the NHS in general, and other organisations, did not intervene earlier and in a better way. On 10 September last year (2009), the then Secretary of State did not agree that that should happen, but had he done so the first Francis inquiry could have achieved much earlier what the second will now have to do."

I can confirm that I met Mr Burnham on in early September 2009. At that meeting I conveyed to him the views that had been expressed to me by representatives of Cure the NHS, the Stafford patients' group, that the inquiry should be held under the provisions of the Inquiries Act 2005 and that its terms of reference should be broadened. I passed on the views of Cure the NHS because I took the view that the terms of reference did not allow me to conduct the broader investigation for which they were contending. At this stage I had received no evidence and was relaying the views of Cure the NHS not any conclusions of my own. I was therefore not in a position to, and did not, make any request to the Secretary of State of my own about either matter. Mr Burnham made clear it to me that he would be prepared to consider giving the inquiry statutory powers to compel the cooperation of witnesses should I conclude there was a compelling case for such powers to be granted to me. This in fact repeated what he had said in the original ministerial written statement announcing the inquiry on 21 July 2009 [first Inquiry report volume I Appendix 1 page 422]:

Should the Chair of the inquiry consider that it is necessary to have the power to require witnesses to attend, as Secretary of State, I have the power to convert the inquiry into an inquiry under the Inquiries Act 2005.

With regard to the terms of reference Mr Burnham maintained his previously expressed view that it was unnecessary to expand them. Mr Burnham confirmed both these points in a letter dated 10 September, which was included in my report [Volume I Appendix 2 page 424], and is described briefly in the body of the report [Volume I page 29 Introduction paragraph 3]

In the course of the first inquiry I received some evidence about the role played by external organisations, as set out in section H of the report, starting at page 371. I concluded [volume I page 415] that

there is a need for an independent examination of the operation of each commissioning, supervising and regulatory body, with respect to their monitoring function and their capacity to identify hospitals failing to provide safe care.

I recommended [recommendation 16] that the Department of Health should consider instigating an independent examination of these bodies. I reported that I had received many demands that there should be a public inquiry one element of which should be such an investigation. However, I did not consider it was appropriate for me to suggest that an Inquiries Act inquiry was the only way in which those issues could be addressed [Volume I page 415 paragraph 53]

On 24 February 2010 [Hansard 24 February 2010 column 311] Mr Burnham informed the House of Commons that he had decided to accept this recommendation and had asked me to conduct a second non statutory inquiry with terms of reference enabling the extended investigation I had recommended. Following the general election Mr Lansley announced to the House on 9 June 2010 [Hansard 9 June 2010 column 333] his decision that the inquiry would be conducted under the Inquiries Act.

I hope this clarifies the sequence of events.

31 October 2013

Rt Hon Lord Gill and Rt Hon Lord Cullen of Whitekirk KT – Oral evidence (QQ 190 – 201)

Rt Hon Lord Gill and Rt Hon Lord Cullen of Whitekirk KT – Oral evidence (QQ 190 – 201)

[Transcript to be found under Cullen](#)

Herbert Smith Freehills – Written evidence

Introduction

1. We are responding for Herbert Smith Freehills LLP, a leading global law firm with some 2,800 lawyers worldwide. Our disputes resolution practice is acknowledged externally to be number one in the UK and Asia.
2. Of particular relevance in this context, our administrative and public law team is recognised at the forefront of law and practice in the field, in all areas of public law, contentious and non-contentious, including judicial review, governmental and other inquiries, regulatory action and disciplinary proceedings involving public bodies. We have extensive experience of advising businesses across an extremely broad range of sectors.
3. We have advised clients in relation to numerous inquiries over the years, including a core participant in the inquiry into the culture, practice and ethics of the press, an inquiry set up under the Act, chaired by the Rt Hon Lord Justice Leveson.
4. We provide our views below on certain questions asked by the Committee, based on our experience in practice so far as we are able to in light of our confidentiality obligations to our clients. We have focussed on questions where we believe that our responses may best assist the Committee in its work from this perspective, rather than on the more policy-focussed questions.

Question 6:

"Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but ministers declined to set one up? Are there cases where an inquiry has unnecessarily been set up to deflect or defer criticism?"

5. We make the general observation that sometimes inquiries appear to be set up in haste, as an immediate rather than a well-considered reaction to the events that trigger them. This can result in greater costs for those participating, as it can result in terms of reference that are wider than necessary or are insufficiently formulated. In our experience, this can in turn make consequential steps in the inquiry (including requests for information and witness evidence) more burdensome than what seems proportionate to the inquiry.

Question 9:

"Do lawyers acting for the inquiry or representing those complaining or complained against make an appropriate contribution? Is an inquisitorial or an adversarial process more appropriate for argument before inquiries? Is it easy enough for people to represent themselves?"

6. The answer to the first limb of this question depends to a large extent on the nature of the inquiry and the composition of the inquiry team. Generally speaking, inquiry team lawyers with whom we have dealt have been appropriately helpful and responsive on day-to-day enquiries.

7. However, it has on occasion been frustrating to deal with inquiry teams insofar as it has been felt that they have not properly engaged with the contents of correspondence, submissions or documents / information provided, including in their formulation of statutory requests for documents / information and evidence and warning notices under rule 13 of the Inquiry Rules 2006 (the '**Rules**'). This leads to inefficiencies and increased costs as it has often necessitated repetition of correspondence and submissions and required engagement with questions or issues which have already been addressed, or which are premised on an incorrect understanding of relevant facts that has already been corrected.
8. In addition, whilst we appreciate that inquiries run to fixed timescales and so must set deadlines with their ultimate reporting date in mind, it is nevertheless important that deadlines imposed on parties are reasonable and that adequate advance notice of upcoming events is given where possible. In our experience, inquiries often place a heavy time and administrative burden on those who are the subject of requests for information / documents and evidence. The amount of work needed to be done in order to comply with a request and / or the resourcing constraints on a party is sometimes not understood by the inquiry team. Furthermore, short or no notice of upcoming matters that may entail significant work can make it difficult at a practical level to plan resourcing needs.
9. Particularly in inquiries where there are allegations of wrongdoing / misconduct against specific people, organisations or sectors, we believe that lawyers acting for those complained against or those complaining can make a valuable and appropriate contribution to an inquiry's work. This is in helping to ensure that the inquiry acts within its terms of reference and in accordance with the requirements of public law and (where applicable) the Act and the Rules, including the essential requirement of fairness. It is also in facilitating the efficient production of information / documents and evidence to the inquiry.
10. As to which of an inquisitorial or adversarial process is more appropriate for argument before inquiries, in our view this depends on the subject matter and nature of the inquiry. While we would generally regard an inquisitorial approach as appropriate, in some cases an adversarial approach may be more suited to the inquiry's task of establishing the relevant facts and making relevant and appropriate findings and recommendations.
11. In this regard, it is an important feature of inquiries under the Act that the panel has no power to rule on or determine any person's civil or criminal liability (section 2(1)). However, this does not prevent an inquiry panel from finding facts or making recommendations from which liability may be inferred (section 2(2)). This is notwithstanding that an inquiry has considerable freedom over its own conduct and procedure, including in relation to what evidence it seeks, which witnesses it calls, the questioning of witnesses and the standard of proof to be applied to evidence. As such, in our experience, the testing of evidence before an inquiry can be significantly more limited than the testing of evidence in civil proceedings with the consequence that the inquiry is not in the same position as a court in relation to fact finding. This can be unfair and unnecessarily damaging to participants, particularly where allegations of wrongdoing / misconduct are asserted with the protection to the witness making the assertions of absolute privilege, but without the protection to the target of the allegations of proper testing or the opportunity for his / her advocate to cross-examine the particular witness. We therefore see a risk in inquiries that

sometimes it can be too easy for allegations to be asserted without a credible or adequate evidential base, relative to the opportunity for the target of the allegations to rebut them. In such circumstances it is important that the inquiry panel should pay due regard to submissions made by the targets of allegations, including both submissions which directly undermine the allegations asserted with countervailing facts and submissions which call the credibility of the witness making the allegations into question.

12. Accordingly, our view would be that flexibility on whether a particular inquiry is conducted in an inquisitorial or adversarial manner is important.

Question 10:

"Some inquiries set up before the Act was passed were both lengthy and inordinately expensive. An aim of the Act was to make inquiries briefer and less costly. Has it achieved this? If not, what could be done to improve this?"

13. We make the general observation that effective planning and organisation has a key role to play in helping to reduce the costs of inquiries, not only in terms of the public purse, but also from the perspective of participants. The chairman of an inquiry is under a statutory obligation in any event to have regard to the need to avoid any unnecessary cost (section 17(3)). In our experience, the difficulty with this obligation is that it is prone to uncertainty and subjective interpretation in terms of what it means in practice. It can also, in practice, be difficult to enforce in light of the large degree of latitude given to the chairman to take a view on what is "necessary" or "unnecessary". However, in circumstances where what constitutes "unnecessary" will often differ both between and within inquiries on a case-by-case basis, we anticipate that it could be counter-productive to be more prescriptive about relevant considerations for the chairman to take into account in fulfilling his or her duty to have regard to the need to avoid any unnecessary cost. Instead, we suggest that this duty should be elevated to an obligation on an inquiry's part not to cause unnecessary cost to public funds, witnesses or others (including core participants), having regard to factors including the burden and proportionality of any requirements imposed or requests made by the inquiry and / or any steps taken by it (for example, the issuing of warning notices under rule 13 of the Rules, in light of the recipient's right to respond).

Question 14:

"Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?"

14. In our view, confidence stems predominantly from the way in which an inquiry is conducted rather than the existence of the Act. It is helpful to have the Act and the Rules to set the parameters of an inquiry and its associated powers since this provides something concrete to point to in addition to the case law which establishes the common law principles applicable to the conduct of inquiries. However, the reality is that an inquiry is able to conduct itself with a wide margin of discretion and

as such, there is a high hurdle to overcome to challenge it legally through judicial review in the event of a dispute. This makes it all the more fundamental that an inquiry not only acts in accordance with the requirements of the Act, Rules and public law, but is seen to be balanced and fair in its approach. In inquiries triggered by public pressure which target a particular sector this is particularly important to secure the confidence also of that sector. In this regard, it is important to those that are the targets of criticism to feel assured that the inquiry is reading their submissions and evidence and taking account of it. For example, when it comes to warning notices a recipient should not be tasked with responding to criticisms that are not relevant to him or her, or which do not take account of evidence that he or she has submitted that rebuts the criticisms, without also understanding the inquiry's position on the evidence and why it is making the criticisms put forward.

Question 15:

"Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?"

15. The current legal position is that the admissibility of evidence given to an inquiry in civil and criminal proceedings is subject to the rules of evidence in civil and criminal proceedings. At present this is against the backdrop of an inquiry panel constituted under the Act having no power to rule on or determine a person's civil or criminal liability (section 2(1)).
16. We would be concerned if section 2(1) of the Act were to be amended to change the current legal position as it is an important safeguard which recognises the differences between inquiries and court proceedings, including that inquiries determine their own conduct and procedure (including, generally, rules of evidence) and serve a different function than courts. In particular, the evidence given at inquiries is generally not subject to the same degree of testing as in adversarial court proceedings.

Question 17:

"The Inquiry Rules 2006 have been criticised, not least by the Ministry of Justice, as being too prescriptive and not allowing an inquiry panel sufficient freedom to regulate their own proceedings. Do you agree with this view? How might the Rules be improved?"

17. In our experience, the Rules, to a material degree, provide a framework which helps to give parties a picture of how an inquiry should move forward procedurally and what they should expect. Our main comments are in relation to the parts of the Rules dealing with warning notices. In particular, in circumstances where obligations of confidentiality in respect of warning notices end for the inquiry, when the report is signed, and for recipients, when the report is published (rule 14), inquiries should be conscientious and careful in the preparation of warning notices, adhering to the requirements of rule 15 in a way that gives the recipient sufficient information in order to make an informed and intelligent response.

Question 18:

"At present, certain inquiry records become subject to the Freedom of Information Act 2000 after the inquiry has ended. Should an inquiry's record be kept confidential after the inquiry has concluded? How else might the interface between the Inquiries Act 2005 and the Freedom of Information Act 2000 need to be changed?"

18. We agree that there are real concerns with the status of information that has otherwise been treated as restricted and confidential during the course of an inquiry, in particular information that has been given to an inquiry by core participants or other parties. In our view, such information should remain confidential in the hands of the inquiry and any public authority to which it is passed as part of the "inquiry record", although this should not operate to restrict the use by a core participant or other party of its own information which it has submitted to the inquiry.

Sir Jeremy Heywood, KCB, CVO, Secretary of the Cabinet – Written evidence

I have looked at the transcripts of your oral evidence sessions and note the concerns raised by some witnesses and the Committee about a lack of institutional knowledge around the practical aspects of Inquiries and in particular that cost and time may be wasted at the outset of Inquiries. I hope I can offer some reassurance on this point.

The officials and lawyers who comprise Inquiry teams are highly experienced and as you have heard during your evidence sessions, it is often the case that officials will have had experience in previous Inquiries. There have been a relatively small number of Inquiries under the Inquiries Act 2005 which means that the Cabinet Office and the Ministry of Justice have been able to provide detailed, hands-on and experienced advice to these teams on the practical aspects of Inquiries, taking into account the specific issues of the particular Inquiry and forging links between existing/previous Inquiry teams where appropriate.

The Cabinet Office Guidance for Inquiry Chairs, Inquiry Secretaries and Sponsor Departments is designed to be an internal “living” document which takes account of the varying experiences of Departments and Inquiry teams. It is for this reason that the points you make about lessons learned reports are particularly important.

Taking the points you raise in turn:

- **Does the Guidance (P43) constitute the current instruction to secretaries of Inquiries?** I can confirm that Page 43 constitutes the current guidance to Secretaries of Inquiries.
- **What steps are taken to bring it to their attention?** The Guidance is routinely shared with Inquiry Secretaries at the early stages of the development of an Inquiry, and the Cabinet Office underlines the importance of lessons learned, not least in seeking to highlight the experiences of previous Secretaries (and where appropriate putting those individuals in touch with each other).
- **Whether they furnish the Cabinet Office with ‘lessons learned’ papers, and if not, what steps are taken to ensure that they do so; and who is responsible for retaining these documents:** we agree with the Committee that lessons learned exercises can provide very valuable insights into the Inquiry process and in line with the evidence we will take a more pro-active stance to this in future, making clear to Inquiry Secretaries that a ‘lessons learned’ paper must be produced and sent to the Cabinet Office Propriety and Ethics Team at the conclusion of the Inquiry so that we can pick up any lessons to be learned and ensure we share best practice. The Propriety and Ethics team, which reports directly to me, will be responsible for retaining and acting on these reports.
- **What use is made of them when a new Inquiry is set up:** the Cabinet Office does actively share information across Inquiry teams, and as set out above, those involved in Inquiries often come with prior experience of Inquiries (either within Departments or as Secretaries). The Cabinet Office currently plays a facilitating role

in this respect – but we recognise that a more formal approach to lessons learned collation would enhance the insights gained.

- **What other assistance is given to Secretaries of new Inquiries when these are set up, in particular in relation to the practical issues listed:** both the Cabinet Office and the Ministry of Justice act as a stated point of contact for those involved in Inquiries at both the Departmental and Inquiry level. The Guidance provides initial steers for individuals on the key issues they are likely to encounter and may need to consider. At each stage, we would expect and encourage individuals to seek further guidance on such issues from the Cabinet Office and the Ministry of Justice, and relevant policy Departments. The Guidance is intended to act as a means of flagging key considerations, particularly in the early planning stages.
- **What steps you will be taking to improve the situation:** we do not underestimate the challenges faced by Inquiry teams and this is reinforced by some of your witnesses' accounts. Our task is to ensure that we provide effective advice and guidance on a range of set-up and handling questions throughout the life of an Inquiry in a way that will be helpful to those delivering Inquiries but also recognises the small number of Inquiries underway at any time. The Cabinet Office will continue to play a central role in providing such guidance – and agrees with the Committee that a more formal approach to lessons learned would enhance the support provided.

Lee Hughes CBE and Alun Evans – Oral evidence (QQ 129-151)

Lee Hughes CBE and Alun Evans – Oral evidence (QQ 129-151)

[Transcript to be found under Evans](#)

Inquest, Liberty and Rights Watch UK – Oral evidence

Evidence Session No. 10

Heard in Public

Questions 230 - 247

WEDNESDAY 6 NOVEMBER 2013

10.40 am

Witnesses: Helen Shaw, Rachel Robinson and Susan Bryant

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Helen Shaw, Co-Director, INQUEST, **Rachel Robinson**, Policy Officer, Liberty, and **Susan Bryant**, Rights Watch UK

Q230 The Chairman: Good morning. Welcome to the three of you and thank you for coming to give evidence to us this morning. I have a statement to make, which I do on all occasions. The session is open to the public and a webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session, you will be sent a copy of the transcript to check for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If after this evidence session you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us.

At this stage, I ought to declare an interest in that prior to going into the Government in May 2010, I was a trustee of the Joseph Rowntree Charitable Trust, which has grant-aided all three of the bodies represented here today. However, that is now three and a half years ago and it was the normal practice that we made three-year grants, so I do not think that I have anything outstanding on that—but I thought I ought to make it clear that I did have that earlier interest.

Would you introduce yourselves for the record? Then we will start the questions.

Susan Bryant: I am Susan Bryant, here from Rights Watch UK.

Rachel Robinson: I am Rachel Robinson from Liberty.

Helen Shaw: I am Helen Shaw, co-director of INQUEST.

The Chairman: Can you speak up? Some people have difficulty and the room is not as easy as it might be, so that would be helpful.

We did have written evidence from Liberty. Rachel Robinson, Liberty has spoken about the need for inquiries to be published. Do you think public inquiries play a significant and useful part in the government of this country? In your experience, what is the most effective form of inquiry and why would you say that?

Rachel Robinson: Absolutely, we think public inquiries play a very important part in governance. They serve a number of functions. One of those is to allow the public to feel that they are getting to the truth of a matter, to hold the state to account where there are allegations of wrongdoing or to allay suspicions if they are unfounded. Inquiries provide a lot of huge benefits, but they have to possess certain features before they can properly perform their function. The public nature of inquiries is a very important part of that and, while we have seen examples under the Inquiries Act that have had that feature, unfortunately we do not think that structurally the Act provides a guarantee that there will be that very necessary degree of openness.

Other features that are also very important prerequisites of effective inquiries are things like proper independence. While we have seen examples such as the Baha Mousa inquiry, which we believe was a very effective independent inquiry, we are not convinced that the Inquiries Act provides the guarantee that this kind of inquiry will take place.

The Chairman: You are saying that you think there should be some changes made to the Inquiries Act. Would you like to say what they are?

Rachel Robinson: Absolutely. We have elaborated a little bit on those in our briefing, but our core concerns are around the potential for the Executive to influence an inquiry once it has been set up. Our particular concerns are about provisions for ministerial powers to suspend or terminate an inquiry. We think that unfortunately that does cast a shadow over inquiries and over the work of the chairman of an inquiry.

The situation is similar with provisions around redactions of evidence, non-disclosure and excluding access to the inquiry. In relation to the public nature of an inquiry, we believe that there should be a presumption of public access to the inquiry. We are concerned about power to prevent public access or, if you like, the light-touch regime that does not create a presumption of public access. Those are some of the structural issues we have concerns about.

The Chairman: What is your view of inquiries not held under the Inquiries Act?

Rachel Robinson: Liberty firmly believes that an inquiry into allegations of human rights violations should be conducted under the Inquiries Act. We believe it provides protection. We do not believe that it goes far enough to guarantee the key features of an inquiry—the publicness and effective independence from the Executive—but we think that it provides useful protections and creates a better situation than the sort of ad hoc situation that existed before.

Lord Trimble: Just to follow on from something that you said there, do you regard inquiries held under the 2005 Act as genuinely independent?

Rachel Robinson: I think there have been examples of inquiries held under the Act that have strongly demonstrated independence, for example the Baha Mousa inquiry in which the Executive left the chairman to conduct the inquiry himself, but unfortunately we do not think that the Act guarantees that independence.

Q231 Baroness Stern: I should declare an interest in that my husband was a member of the Billy Wright inquiry and I am a trustee of the Civil Liberties Trust.

Liberty says in its very helpful evidence that inquiries are more inclusive and restorative than litigation. Could I ask all of you—because you all have a very profound experience of this—in what sense do they deliver inclusiveness and a restorative quality, what part of the procedure would you say brings that, how important is it and how would you want us to take that aspect into account when considering what we finally recommend?

Rachel Robinson: I will kick off. Absolutely, we think they are restorative. We think they provide a great deal of catharsis, potentially, for victims of difficult situations. When we compare them to an adversarial court process, they carry the possibility of not just getting to the truth but having a wide-ranging investigation and making positive recommendations for the future, so not just uncovering wrongdoing but also helping to make recommendations that can then be implemented and make real change. Again, I use the example of the Baha Mousa inquiry there. So, yes, absolutely, this is a crucial role.

In terms of promoting and furthering those aspects of the inquiry, I think it is important for public confidence and the actual effectiveness of the inquiry itself that the inquiries are both independent from the Executive and perceived to be so. We have the example—and I know this was not an inquiry set up under the Inquiries Act—of the Gibson inquiry and the fallout from that when very grave and deep concerns were expressed by many about the transparency, openness and independence of that inquiry. Ultimately, of course, the inquiry was discontinued for a number of reasons, but we would argue that was one of them. Then we find that we do not have public confidence and we find that, if anything, rather than allaying fears and suspicions where they are misplaced, we perhaps increase those fears and suspicions and certainly do not achieve the kind of outcomes we would like to see.

Helen Shaw: From INQUEST's point of view, there is an ultimate analogy with some of the public inquiries and some of the articles you can apply at inquests. We would agree with Liberty that a process that is non-adversarial can be more inclusive and restorative. Even predating the Inquiries Act, previous inquiries, for example the inquiry into the death of Zahid Mubarek, were the essence of that kind of process and looked both at the death and at the systemic issues that have subsequently been taken up throughout the prison service. One thing that is important about inquiries is not necessarily what occurs very shortly after them, but what occurs many years after; it is often the beginning of a process of policy change that ripples out way beyond the actual people who were involved in the inquiry. So we very much agree with that.

Also we think that one thing that is very important is the standing that the victims or bereaved families have in an inquiry. Often they are asking some of the most searching and difficult questions and performing a function in the wider public interest, so we would very much agree with what Liberty said about that.

Q232 Lord Morris of Aberavon: Some of your critical comments refer to the conduct of a particular inquiry and I have noted those, but could you summarise specific amendments that you would wish to make to the Inquiries Act?

Rachel Robinson: Yes. I may not have the sections here, but I can tell you exactly what effect I would like the amendments to have and I think that the precise sections are listed in our briefing. Our particular concerns are sections of the Act that do not have a tough enough approach to public access to the inquiry, so we would like to see the Act amended to provide for a presumption that there will be openness and inclusivity in inquiries. That is one specific change we would like to see.

We would like to see removed the power of Ministers to terminate or suspend an inquiry. We would like to see seriously looked at again provisions around the ability of inquiries to go into closed session. We think there are a number of events in recent times that have demonstrated that is not a necessary component of the process. We also have concerns about other residual powers Ministers have to exercise control over the funding and timing of inquiries. The details of all of this are set out quite specifically in our briefing, which I hope will assist the Committee, but those are some of the key areas of concern.

The Chairman: Baroness Stern, had you finished?

Baroness Stern: I felt that it would be useful to hear also from Susan Bryant, who has so much experience in this area, about how the inclusiveness and the restorative nature is important and what elements we should be concerned to preserve and maybe enhance.

Susan Bryant: I am grateful. We echo the concerns that have been articulated about the issue of transparency and openness. Another thing that we would like to talk about is highlighting the experience of individuals when a decision has been made not to order an inquiry. The Committee heard in very poignant terms from Christopher Jefferies about his experience and what potential there was for an inquiry to deal with a number of the problems that he encountered. One of the things he talked about was an understanding that when an inquiry is not going to be ordered there need to be reasons given why that is not the case. One thing that we would highlight as missing from the 2005 Act is any articulation of criteria to be suggested on that route. It is easy enough after the fact to make some vague account of what or was not taken into consideration, but it should ensure a greater level of independence and more faith.

Another question that the Committee will come to later this morning is the feeling of the greater public about whether or not they can rely on the inquiry to have established something useful and done something that made a contribution. I think that not knowing what the process was whereby that decision was made is incredibly problematic, especially when the decision is made not to hold an inquiry.

I will say one other thing in relation to transparency. A number of witnesses before the Committee have also highlighted that it must be a primary consideration, when deciding whether to do an inquiry and what kind an inquiry to choose, to look at what would be the best means of getting evidence, and how to get the most evidence from witnesses. Obviously the Committee will later come on to the distinction between statutory and non-statutory inquiries, but I would just highlight that from our perspective it is very important that we understand that we have the intention and the need to be open and transparent. As Liberty has highlighted, the public needs to see what is happening. We have to acknowledge its intention, along with the fact that the way of getting the best kind of evidence may not be put forward by the Government in an open and transparent way.

Q233 Lord Trimble: I come back to Liberty’s written evidence that discusses the relationship between inquiries and inquests. Would you like to comment on that?

Rachel Robinson: Yes. One of the concerns we tried to get across in our briefing was the power that exists in the 2009 Act for the Lord Chancellor to compel the suspension of an inquest and replace it with a public inquiry. To expand a little bit on that, our concerns are that under the Inquiries Act there are a number of provisions that will allow for greater secrecy in proceedings, exclusion from participation of family members and other elements of the Act that I have expressed concern about already.

Another concern we have is that in those situations, the inquest, should it be resumed later, is then essentially tied by the findings of the inquiry and potentially there are problems with the ability of an inquiry to get to the truth in the same way as an inquest can. That has been a long-standing concern of Liberty.

Lord Trimble: Your concern was the inquiry could be used to displace an inquest. Could I draw your attention to the Litvinenko inquest, where things happened the other way around? The coroner considered that he was not in a position to get to the truth and he wanted an inquiry, but an inquiry has not been set up. Do you have a view on that?

Rachel Robinson: Yes. I think there are two cases that it is important to talk about in this context, the Azelle Rodney inquiry and the Litvinenko case. In relation to Azelle Rodney, the only case where an inquest has been halted to allow for a public inquiry, what we later had in the recommendations of the chairman was a firm statement that it was not necessary to go into private session, which rather indicates to us that that the inquest could have been conducted and could have come to the truth of the matter.

In the Litvinenko case, we had the Government come out and say, “Look, we do not need to have an inquiry here. We can have this evidence considered in an inquest”. At Liberty we have been very firm about our position on the role of public-interest immunity, which is a very flexible way of ensuring that evidence which generates national security concerns is not placed in the public domain. We think that that tool is adequate to deal with concerns around national security, for example.

Helen Shaw: Could I add something, as I was very closely involved with the Azelle Rodney inquiry and all the things that preceded it after the death? Rachel is absolutely right about the fact that the chairman said at the end of the inquiry that he did not need to go into private session. One of the issues that led to there being an inquiry in that case was the fact that the evidence revolved around exploring Azelle’s death, and in order for there to be an article 2 compliant inquiry there would have to be consideration of evidence obtained under the Regulation of Investigatory Powers Act. Coroners are outside that legislation in being able to consider how to deal with that material.

I think everybody who was involved in representing the family felt at the end of the inquiry—although it was a very good inquiry and a very good substitute for an inquest—that it would have been preferable to have the inquest. We lost the jury in the inquiry, and that is very important in these kinds of deaths. If there were an amendment to allow coroners or, now that we have the Coroners and Justice Act, a cadre of senior coroners with the chief coroner to consider such material, we would not need to be looking to go down the inquiry route in relation to those kinds of contentious deaths.

We feel, as an organisation, that there may well be other deaths in the future where, while we still have the question of the admissibility of intercept unresolved, we will engage with that kind of evidence. A simple way to deal with that would be to allow the chief coroner or

a cadre of specialist coroners to consider that and then be able to use the method that was used, which was about adjusting the evidence so that the inquiry could proceed properly.

I think everybody who represents people at inquests is very keen that we continue to have inquests as the primary method of investigating any kind of contentious death like that.

Q234 Baroness Hamwee: You have all been talking about openness, public confidence and that range of things. Can I first ask about the management of inquiries and whether, in your experience, they are managed efficiently or where the variations are? I think we should start with some evidence from Rights Watch.

Susan Bryant: This is linked to another question that the Committee has submitted for our consideration and that has to do with costs and delay. I assume that is where your question is going.

Baroness Hamwee: I am not trying to make it go in any particular direction.

Susan Bryant: Our experience and our analysis of the way an inquiry would be managed relate only to those particular issues, in the sense that of course we do not have any interest in looking at them from other perspectives and for other reasons. The extent to which we have come into contact with questions about how they were set up and managed has been through issues that were brought to our attention because of the cost or the delay. I am happy to talk about this in more detail but, to be very brief, a number of the witnesses that have come before the Committee have highlighted that there is a sense that—the expression was used repeatedly—we were reinventing the wheel over and over again.

I would echo that from the perspective of our experience there seems to be no mechanism to learn from the experience of running and managing an inquiry, and that is somewhere where there is a great deal to be gained in future. I think a number of your witnesses who took it from a management perspective have some better ideas of how to address that, but our experience has been that it is frustrating because it contributes to the cost and the delay.

I am happy to come back to this later, but the costs and delay are so important to us as a human rights NGO. Frequently when we push for an inquiry on behalf of people who have come to us alleging human rights abuses and that inquiry is denied, more than ever the reason for denying it is again and again that inquiries cost too much money and take too much time. I think it is very important that we all respond to that with some very concrete answers on how to improve things. That is why I think management is very important; it has to address the issue of cost overruns.

Baroness Hamwee: I do not want to lose the particular ideas you might have that could bring down costs, but can I ask a question of all of you? Since the wheel is constantly being reinvented, does that hamper you in the support that you are giving to those who are calling for an inquiry, or indeed may become core participants, or does it make no difference? I might be barking up the wrong tree.

Susan Bryant: From our experience, the bigger problem has to do with what I was indicating earlier about the lack of criteria that are considered. That is the source of the most frustration, but another thing that a number of the witnesses before you have said is that the terms of reference are agreed very early on and there are some management issues that flow from those terms. To be certain whether or not the Committee wants to address that—

Baroness Hamwee: We are going to come to that in a minute, I think.

Helen Shaw: I suppose in a way it does hamper us, because it is quite difficult to advise families and their legal representatives on how to persuade the powers that be that there needs to be an inquiry. For example, we have been involved—as I know Baroness Stern knows—in working with a number of bereaved families around the death of children and young people in prison for a long time now, over 10 years, saying that the inquest system is very narrow and can only look at each individual death. There are some systemic issues that are outside the scope of the inquest and we think—as do a lot of other people, including the Joint Committee on Human Rights and the Justice Committee—that there maybe needs to be a broader look at this, but it is quite difficult to work with all the different families and their legal representatives to find a route through to get those things addressed.

I agree with Susan that it would help if there were a more streamlined way of approaching these inquiries: if there was a body of knowledge held somewhere about how they operate and who one contacts and talks to. It is a very bewildering and complex experience for members of the public who find themselves in situations that may merit an inquiry, and I think people can feel lost in a quite stressed kind of process.

Rachel Robinson: I do not have a great deal to add to that. We agree that learning from the experience of inquiries that have been very well managed and produced very useful and productive findings is a great start. I would also echo the point about concerns we have had in the past about government delays that have ramped up the costs and led to delay. They have avoided the promptness, which is such an important part of inquiries, and that reduces public confidence in the process.

Baroness Hamwee: Chairman, I do not know whether you want me now to go into any concrete examples of more efficient management or whether that might be something, if you can bear it, we could ask you to write to us about. I think it is up to the Chairman on that.

The Chairman: Yes, if you have some examples that would be helpful. I know Lord Trefgarne wants to come in, and so do Lord Richard and Lord Woolf.

Q235 Lord Trefgarne: You have all indicated that you would want to see ministerial power to curtail an inquiry, and maybe even to convene one in the first place, restricted if not removed. What do you say to the proposition that there are some circumstances—very few, I acknowledge—where the matters that might come up are of such high sensitivity and high secrecy that they simply cannot be revealed in a public inquiry, and only Ministers can know that and can have the power to control the dissemination of that information?

Rachel Robinson: The point that we have made in relation to being able to make evidence available is that certainly there should be a restriction on the current state of affairs in the Act, but what we have said in relation to inquests in other areas is that there are other ways of getting round this issue about security-sensitive information. For example, when it comes to inquests and the question about inquiries replacing inquests, what we have said is that public-interest immunity is a very important part of the process of ensuring information that is genuinely national security-sensitive, in very closely circumscribed circumstances, is not revealed.

But I think what this comes down to a lot of the time is whether we are willing to trust the chairman in these situations to conduct the inquiry and make determinations about sensitive information. These are similar arguments to those that Liberty has made in relation to closed proceedings in the civil law and we would argue that if we want to inspire public trust in the process we have to have confidence in the chairman to be able to make these difficult decisions.

Susan Bryant: I would only add that I think the 2005 Act does not anticipate such a situation, which is not to say that it could not come to be, but you will not be surprised to hear me go back to the criteria. I think the problem comes in that there may not be any predictable framework that is followed which would not entirely satisfy some of the people that Rachel is making reference to, but I think it goes a long way toward addressing the concerns that the wider public would have. I think you may be right that there are situations where that decision will be taken—in fact it is taken. I would say we are approaching that point already. Clearly that would not fall under the 2005 Act, but the question is whether that is something that the Government want to undertake without being referred back to some criteria, some standard that would be applied in that situation in order that the public can understand it.

Helen Shaw: I would echo that, and also just add something on the reinventing the wheel point. I know it was not an inquiry but in the 7/7 bombing inquest there were a lot of issues around the sensitivity of evidence and how to deal with that, and there was a pragmatic solution found in order for the inquest to be very thorough and to deal with the sensitivities of intelligence material. Likewise, in the Azelle Rodney inquiry, there was a pragmatic solution found within the proper procedure allowed for by the Inquiries Act to allow some very sensitive evidence to be referred to, but not disclosed, during the inquiry. Again, it is about how we make sure that we learn from previous experiences, and I would agree with colleagues that there needs to be a proper framework.

Q236 Lord Richard: I wanted to come back to something that Rights Watch said. When you were giving your answers a few minutes ago, you used the phrase that people would come to you and when inquiries are merited you would act. What criteria do you apply as to whether inquiries are merited or not?

Susan Bryant: The simple answer is that we do not have formulated criteria that we look at. When someone comes to us, it is very important to say that if we have, for example, a family member who is concerned about both the way the person died and the way the Government responded to that death, as Helen has indicated, there are times when one is concerned that it is part of a systemic failure. In a situation like that we would not automatically counsel someone that an inquiry is the only way forward and it has to be an inquiry that is public—absolutely not.

Lord Richard: That is what I am interested in.

Susan Bryant: Absolutely not. What we would do is go through what the different options are.

Lord Richard: In what circumstances would you say to somebody that you do not think an inquiry is merited?

Susan Bryant: What we do is lay out what the alternatives are, whether an inquest is appropriate, whether a civil action is appropriate, whether a criminal—

Lord Richard: What are your criteria for whether it should be an inquiry, a civil action, an inquest or something else?

Susan Bryant: It depends on a number of factors—

Lord Richard: On what?

Susan Bryant: —including what kind of evidence is available already that can be referred to and relied upon that would indicate which road is the proper one to take. It would also matter to us what it was that the family was trying to achieve. For example, in the Northern

Ireland context, if a family member is concerned about establishing the facts as much as possible about what happened and they are not concerned about who is held responsible, they are not interested in systemic issues, that is someone who would benefit from a truth recovery process. That would be arguably well outside the process of a public inquiry. As you will know, the Historical Enquiries Team has jurisdiction for those kinds of investigations and some of our clients have been very happy with the outcomes of those.

Lord Richard: Sorry, what truth recovery processes are you thinking of?

Susan Bryant: I am talking about the Northern Ireland context, where the Historical Enquiries Team, the HET, undertakes its own review.

Helen Shaw: Last year, three children died in prison, and we have been working with their families. One of the things that we asked the Government to consider was whether you could have an inquiry that incorporated individual inquests so that we did not have a situation where we have three separate inquests revealing similar issues but no way of drawing out that learning.

When people come to us, the issue is: do the questions get answers and is there a mechanism afterwards for whatever comes out of these very costly—emotionally and financially—processes that is in the public interest and for the public good? So we have been trying to be creative. That was not met receptively, but it is a way of thinking a bit more creatively about these different forums, rather than just saying every single individual death should have an inquest and then afterwards we can perhaps look at the broader issues.

Q237 Lord Woolf: The difference that immediately strikes you between whether it should be an inquiry or an inquest is that somebody's relative has died in the case of an inquest and they, as an individual, because of that, have traditionally had a right to find out the circumstances leading to that death by an inquest. There is no similar right to an inquiry, so I would have thought we would agree that an inquiry is not the first choice when there is a death.

Helen Shaw: I would agree. Also, it is not even a right, is it? It is that the state requires there to be an inquest.

Lord Woolf: Yes, because it is in the public interest and under the Human Rights Act there has to be an inquiry. But are you saying that if there is a case where there are wider concerns than that individual's death, it would be very convenient if you could combine the inquest, so as to deal with the state's concerns with the individual death, with an inquiry to look at the broader issues? Based on your experience, do you think that would be a very sensible approach to adopt in the appropriate case?

Helen Shaw: I think it would. It is not appropriate in all cases.

Lord Woolf: No, obviously.

Helen Shaw: I think it would. It would also be a more effective way of ensuring that the learning is gathered across experiences.

Lord Woolf: Take a rail disaster. There may be a number of deaths and, quite apart from the concerns of the individual relatives, there is a very real concern to ensure that the picture as a whole is looked at. If you divide it up, you are not going to get such a clear picture.

Helen Shaw: Yes.

Lord Woolf: On the other hand, it seems a terrible shame to lose the right of individual relatives in regard to a specific death.

Helen Shaw: Yes. What we would say is that there should be something where there is a part 1 that had the individual inquest and a part 2 that looked at the broader issues, because it is important that individuals and individual deaths are looked into in their own right.

Lord Woolf: But would legislation be necessary to do that satisfactorily?

Helen Shaw: Yes, because there are some issues that could not be addressed in an inquest. Even if you have an article 2-compliant, very good inquest, there are some issues that are outside the scope that can be addressed in an inquiry that cannot be addressed in an inquest.

Lord Woolf: And vice versa.

Helen Shaw: Yes.

Lord Woolf: If there is to be anything to replace the present Inquiries Act, at any rate you would see this as being a good opportunity to enable a comprehensive approach to be taken?

Rachel Robinson: The only thing that I will add to that is just a word of caution. Of course inquests are the primary way that the state fulfils its obligations under article 2, for example, which covers a death involving the state. This is why we have expressed concerns about provisions in the 2009 Act that allow for inquests to be displaced. That is something we do not want to see. What I should add is that in cases where it is argued that inquiries are going to have a role in this type of case, we would certainly want to see legislative change in terms of the provisions of the Inquiries Act to make sure that an inquiry can be article 2 compliant.

Susan Bryant: If you would permit me to echo that and to say that what I think was implied in Rachel's earlier comments was the fact that of course there can be, under the 2005 Act, an inquiry such as Baha Mousa that is compliant. The question is whether the way the 2005 Act is written mandates one that would be compliant, and the answer to that would be no. To the extent that you are looking at amendments, we would all be pushing for criteria to be added to the other things that we have said should be put the Act, whatever replaces the 2005 Act. Compliance should be in any new Act and not just something that relies on a very robust chair, for example.

Q238 Baroness Gould of Potternewton: Obviously, and it has been mentioned, the terms of reference are going to be crucial to the conduct of the inquiry. The Act requires the Minister to consult the chair before settling the terms of reference, but do you think that interested parties, victims' families, should be consulted about the terms of reference before they are set? I am not quite sure what that process would be, but from your experience perhaps you can all identify what that process should be, if you agree that should be so. Perhaps you could also refer to the point we made earlier about management problems that might occur because the terms of reference are not adequately written right from the start.

Rachel Robinson: I will defer to colleagues on the implementation because I know they have been more involved in individual inquiries. But from a broader perspective I can say that, yes, absolutely, we think there should be appraisals put for consultation with those parties who have been involved to have insights. We would expect that should be the case and, indeed, if we are going to have terms of reference that reflect the extent of the issues that should be interrogated by the inquiry then I would have thought that was very important.

Susan Bryant: A number of witnesses that have been before the Committee have highlighted the difficulties in doing what was described as a scoping exercise on the way to articulating the terms of reference. One of the witnesses suggested, as an alternative way of dealing with some of the concerns, a cooling-off period—I think that was the phrase that he used—after the terms of reference are initially agreed. From our experience in monitoring the Al-Sweady inquiry—which is currently under way so I will be quite circumspect in the comments that I make as a result of that—the way the terms of reference in that particular case have been dealt with, as you will probably know, is that the core participants were given an opportunity to feed into the terms of reference. That is a situation where that was undertaken.

But I would say from the perspective of the wider public interest, a big part of what else the Al-Sweady inquiry has tried to do is have a very public, very open inquiry that all would be welcome to attend. Great efforts, as you will know from having visited the premises, are undertaken to make it public. One of the things that they did, which was very clever, was that the chair at the beginning of the proceedings said, “These are the terms of reference. I will hear arguments relative to issues that have already come up”. What he did at the end of two days’ discussion about the terms of reference was say, “This is my preliminary feeling relative to where we are going, what the rules are, what we will and will not look at, but I am willing to revisit that at a later time if that is necessary”. I think that is the kind of flexibility that makes imperfect rules work in a pretty close to perfect way.

Baroness Gould of Potternewton: Do you think that the outline you have just given should be built into the legislation so that it always happens and it is not then just the choice of the chair to be able to do that?

Susan Bryant: Indeed I do.

Q239 Baroness Stern: I am going to have to go back a bit to what we were discussing about whether there is an inquiry and whether the right issues are chosen for inquiries. You have all, in different ways, argued for other matters that should have been subject to public inquiry that have not been and have campaigned to try to increase the number of inquiries. But I think it is right that in fact there have only been 15 under the 2005 Act. So my first question is whether you think those 15, when you look at them, were in fact the most pressing subjects that should have been inquired into or do you think there was some other element present in the selection of those matters for inquiry? Secondly, do you think there should be more inquiries under the 2005 Act because it is the best method there is? If so, where would you draw a line? There must be, I think you would agree, a line somewhere as to what matters are going to have the full panoply of a 2005 Act inquiry.

Susan Bryant: Liberty, in its submissions and this morning, has laid out in very clear terms what the potential is for conflict of interest. In answer to your question, I think we have to deal with that. The examples where there has been a public inquiry ordered—looking at Leveson or Mid Staffordshire—are very different situations where the wrongdoing of the Government is not essentially in the frame. That is not the central issue. From our experience and perspective, that perhaps is not a coincidence. When you look at the examples of the Baha Mousa inquiry and the Al-Sweady inquiry, another feature that they have in common is that they were forced upon the Government as a result of judicial ruling.

I am happy to talk about that at more length but that would be our view of what goes into the process of deciding whether or not there should be a public inquiry. That does, for the reasons already laid out, relate to concerns about independence.

Rachel Robinson: Perhaps I could just add to that. If the question is whether there are other circumstances in which we should have had an inquiry, both the inquiries that came out of the Iraq War—Chilcot and then Gibson—are very obvious examples of where we would have greatly benefited from an inquiry under the Act.

Q240 Lord Morris of Aberavon: I have read in the evidence the criticism of a Minister being the sole setter-upper, if that is the right word, of inquiries. We live in a democratic society. A Minister is appointed as part of the Government and the Government are responsible to Parliament. What other body could do the job better, given that some Ministers are better than others and wiser than others?

Rachel Robinson: The first thing to say from Liberty's perspective is that our concerns focus more on what happens when you set up an inquiry and how it is conducted, but of course our submission does address the issue of who sets up an inquiry. I think there are other potential models that we can look at. One example is a parliamentary committee, something more linked to the legislature than the Executive. But that would be another stage. Our main concern around independence is what happens when you set up an inquiry. When asked about who sets up an inquiry and who should have that role, a good thing to bear in mind is the fact that we have had—as I think we have all expressed in our evidence—some situations where we think political agendas have interfered with the decision on whether to set up a statutory inquiry or not.

Helen Shaw: I would echo that and also say that I think it is quite right that there is democratic process involvement, but what is difficult with a lot of the issues that we come across that may merit the call for an inquiry is that you are often asking the Minister for the department that may be under scrutiny in the inquiry to set up the inquiry, and that almost falls at the first hurdle. If there were to be something that was a bit broader than that—and we do not have a concrete suggestion, we are much more focused on the families than on what the outcomes are—I would agree with what Liberty said about looking at some alternative mechanisms that involve Ministers or Parliament but not necessarily the Minister in the department that may be under scrutiny.

Lord Morris of Aberavon: The Minister may be the one directly involved, or maybe his colleagues, and I presume from my experience that before an inquiry would be set up a Minister would consult with colleagues. In a modern democratic system he does not act alone, he consults. What better body would there be than in a democratic society for a Minister and his colleagues, all answerable to Parliament, to decide whether an inquiry should be set up?

Susan Bryant: I would have two responses to that. One is that the Ministry of Justice civil servants that were before the Committee were hampered in their ability to answer the questions that were put to them along these lines. I would be interested in what, if any, follow-up came as a result of that. It was indicated that they would be in a position to supplement their answers or, in fact, in a number of instances pointed the Committee toward needing to bring in other individuals who would be able to answer because they were somewhat constrained as civil servants. So some of the issues you are talking about are ones that I imagine we would all benefit from hearing answers to.

In terms of who would be in a position to play the role if it cannot be played at the ministerial Cabinet Office level, I would get back to the question of criteria before we even get to that point of who makes the decision. We have not agreed on the need to have criteria about the decision itself. An example is if a Minister was reviewing a request for an inquiry into the conduct of her own Ministry and there were criteria to consider that would

help her determine whether or not her conflict of interest was of such a serious nature that it ought to be referred outside for a second opinion, for a completely independent opinion, et cetera. I have not worked out the details of it. But we are not suggesting having a hard and fast rule that there should be another body that in all instances takes the question out of the ministerial and Cabinet Office level decision-making.

What we are suggesting is that there may be instances where that is appropriate, but I think the Government would be guided along the lines that you have suggested. The Government are, of course, in the unique and appropriate position to make those decisions but should be guided by certain principles.

Q241 Lord King of Bridgwater: I apologise that I arrived late. I shall read your evidence with great interest, the part that I have missed. Following up on what Lord Morris said about ministerial responsibility, the truth is we do not have unilateral, absolutely total responsibility without any recall by anybody. It is a democratic body. We have heard evidence already about the Mid Staffordshire inquiry where one Secretary of State decided not to have an inquiry, political pressure built up and the next Secretary of State thought it might be quite a good idea to have one, as you realise. It seems to me at the moment you are saying perhaps there ought to be another body and I cannot see who that is. I cannot also see what the appeal is against the other body because the whole ministerial set-up and the whole structure of Parliament and the Commons is itself really a court of appeal on any ministerial decision. I would have to say that often Ministers are jolly glad to set up inquiries, even in their own department, to take some of the immediate heat off them and have an inquiry without being absolutely quite sure—as anybody who has any experience of the Scott inquiry will know—where it was going to go or how it was going to turn out. Do you agree with that?

Rachel Robinson: We would argue with the proposition that there are cases where the right decisions have been made for all the right reasons by Ministers. All we wanted to say is that there are clear cases where there is a conflict between potentially uncovering wrongdoing in the Minister's department and having a public inquiry that is designed to achieve those ends.

What we are really saying is that we would like the Committee to look at other options in this context and see if there are other possible ways of doing it that perhaps tie the decision-making more closely to Parliament than to the Executive. That is just one suggestion of a way to do it, for example a parliamentary committee. That is just one tentative example. As others have said, there are other ways of perhaps avoiding conflicts as well, such as having more detailed criteria guidelines.

Lord King of Bridgwater: That implies a very deep faith in parliamentary committees. I think we have all seen select committees that get into pretty strange hands, with pretty strange chairmanships, and you will go from one set of problems to another, will you not, without much recall if it is a Select Committee, whereas a Minister can be called to the House at a moment's notice.

The Chairman: Colleagues, I am concerned about time. I have Baroness Hamwee, Lord Soley and Lord Woolf on this and we need to move on. If you find yourselves saying, "I agree, I agree", one response will do.

Baroness Hamwee: I wanted to ask a political question about perception. Can you tell me whether your answers are about perception and public concern or whether there are any

concrete examples where core participants or the public feels that a decision has been taken for the wrong reason? I am quite happy to wait for that until after the meeting.

The Chairman: Do you want to consider that later? Lord Soley.

Q242 Lord Soley: A brief point. Having been an MP in the past, telling people that a public inquiry is not justified in their case is often a difficulty when they feel a strong personal wrong or something has been done to them, but there are other ways of dealing with it. I do wonder if you are not, from your answer to Lord King's question, underestimating the degree of political discussion and argument that goes on when there is uncertainty about a future inquiry. In a way I would rather do that than go to the other extreme of having a committee that orders inquiries when they might not be beneficial to anyone and might undermine the credibility of public inquiries.

Rachel Robinson: I do not know how much I can add to what has been said before. Certainly my suggestion of alternative models is not a concrete one. I think if the Committee is to look at independence, to look at ensuring inquiries are set up when they are needed, we know that there have been examples in the past—certainly examples that Liberty would put forward, the Gibson example being paramount among them—where perhaps we would have liked to have seen a statutory inquiry and where we think that the decision around the scope of the inquiry that would have been set up was motivated by concerns around self-preservation. We have to give that example. All I would say is that there are clear issues around potential conflicts. They are not just abstract issues but ones that we think have manifested themselves, Gibson being a paramount example.

Lord Woolf: Do you think your concerns would be met if it was not the Minister whose department was being looked into who makes the decision? My suggestion would be perhaps that is a task that the Ministry of Justice might take on in the majority of circumstances. Would that help to get away from the idea that it is the Minister who is being inquired into who is in charge of the inquiry?

Susan Bryant: A number of the witnesses that have come before you have suggested that the Ministry of Justice play a bigger role relative to inquiries, getting back to the issue of not reinventing the wheel and how to build from what has been established. I would echo that. I was not suggesting that would necessarily be the case. I think there are many situations where a Minister would absolutely be able to review a request and analyse things in an appropriate way and come to the right decision. That is why I would be more in favour of looking at articulating criteria, assessing the level of potential interest, and only if it goes beyond a certain red level does that bring another process to bear. I think the evidence has been that in the overwhelming number of cases the Ministry that is subject is able to take that decision.

Q243 Baroness Buscombe: I should first of all declare an interest in that I gave evidence to the Leveson inquiry. My question touches on two points that to some degree we have already covered. One is the decision to establish an inquiry and the other is the question of setting up a body. Perhaps that body could be involved with both the decision-making and also the management of the inquiry. Susan, we understand Rights Watch said in the past, "The decision to establish a statutory inquiry could be taken by a decision of an appellate judge. There could also be a role for the Attorney-General, a decision of a parliamentary committee on inquiries or a statutory authority such as a permanent commission of inquiry or a quasi-statutory authority, such as a public trust commission". We have already been covering this to some degree. Also, you have suggested that Parliament could be restored

with the powers to approve or disapprove both the establishment and termination of the statutory inquiry, which of course takes us back to the 1921 Act. Just touching on that to some degree, without being repetitive, do you think there is a real case for another body? Could it be—this is the second half of the question in a sense—a body that may be in some way associated with the Ministry of Justice, for example, that could assist in the decision-making but also in the overall management? Earlier in our discussion today we have heard from you, Susan, about the issue of management. It is about reinventing the wheel; there is no mechanism, no experience to learn from in terms of managing an inquiry. Helen, you talked about a body of knowledge that does not exist. In fact Sir Robert Jay, when he gave evidence, said the trouble is that when they were looking at the first module of setting up an inquiry there was no experience to draw from. They had to have this new learning curve so they did not necessarily do it very well in that first module. I would appreciate your thoughts on that.

Susan Bryant: I think you are right to draw a distinction between the first part of your question that relates to the decision about the inquiry itself and then the second, which from my view is more straightforward, about how the inquiry is managed. I will deal with the more straightforward first. There is no question that there is scope to do that and it would make for greater efficiency and result in cost savings. So we are squarely behind that.

On the question about how the decision is taken, I do not mean to be awkward but it is difficult without knowing what process is currently undertaken. I think there is scope for the Ministry of Justice to play a role, but it is difficult to know exactly what form that would take without knowing what is currently the case.

Helen Shaw: I have nothing to add to what I said earlier.

Lord Trefgarne: Judicial review is sometimes seen as a solution to the problem, but it has been put to us that the trouble with that is that it is very expensive. Do you have any comment on that?

Rachel Robinson: It is going to become even more difficult to obtain and it is going to become even less of an effective remedy if recent proposals put forward by the Ministry of Justice are implemented. So, absolutely, judicial review is not the answer to defects in the system and certainly it is going to become harder and harder for people to access it as we see the changes that are in the pipeline.

Q244 Lord Richard: I want to come now to a situation in which a Minister has made a decision to set up an inquiry but he has decided to do so outside the Act. In what circumstances do you think he would be justified in setting up an inquiry outside the Act: an independent inquiry, a non-statutory one? Do you think there should be a presumption that if you are going to have a public inquiry set up by a Minister then it should be under the Act unless there are very strong reasons for doing otherwise?

Rachel Robinson: I think that would be a good start and what I can say with great certainty is that wherever there are human rights allegations involved there should always be a statutory inquiry if there is not an inquest. That is something I think we can say with confidence.

Lord Richard: Can you give me some concrete examples of where an inquiry has been set up outside the Act and you would look at it and say, “If it was set up inside the Act, so much more could have been done”?

Rachel Robinson: I think one example is Chilcot and another is Gibson.

Lord Richard: Why Chilcot? As far as Chilcot was concerned, surely everybody gave evidence to it that wanted to give evidence to it?

Rachel Robinson: When it comes to the kind of inquiries that involve issues of such intense public concern but also involve potential human rights violations, it is important that we have a process that benefits from the rigours of the Act. In that way we are more likely to get an inquiry that is compliant with our international obligations. That is something that we have consistently said.

Certainly we are not trying to say it is not possible to have an effective review process or investigation outside the structure of the Act, but there are fewer protections in place. We give the example of the Hillsborough Independent Panel as an example of a good and thorough review, but we would say that it is thanks to the dedication, thoroughness, professionalism and determination of those involved in the process rather than a sort of structural guarantee that we will get the right outcome and we will achieve the things that we want to see. I do not think it is possible to be prescriptive about all the cases in which we can or cannot or we must or must not have an inquiry, but to the extent that the issues raise human rights concerns we would certainly be firm on our position on that.

Helen Shaw: If I could just add in relation to the Hillsborough panel, it obviously did an amazing, important and very valued job but it was a lead-in to another process that will be the forthcoming inquest. Speaking with lawyers representing the families there and also involved in the panel in relation to the death of Daniel Morgan, there are concerns about moving towards that as a model because it is not an adequate substitute for an article 2-compliant investigation and does depend a lot, as Rachel said, on the relationships and trust victims and bereaved families have in the process.

Lord Richard: But that is not a non-statutory public inquiry, is it? That is an independent inquiry.

Helen Shaw: It is. I just said it as Hillsborough was mentioned.

Q245 Lord Richard: I thought it was virtually a one-off but I may be wrong about that. It is the distinction between the statutory inquiry and the non-statutory inquiry that the Minister has appointed. I am personally leaning in favour of having a presumption, but I am by no means convinced that a non-statutory public inquiry is necessarily as deficient as perhaps some people think it is.

Rachel Robinson: Certainly we would agree that it is not necessarily deficient. It is just that there are fewer safeguards in place to help us have confidence in the process.

Susan Bryant: There have been witnesses before the Committee who talked about non-statutory inquiries that conducted themselves in a very quick way and had to do so for health and safety concerns. There is no question that was the right decision, looking backward.

The other thing relative to the non-statutory versus statutory is when you talk about the Mid Staffordshire inquiry. One thing that I thought is probably worth reflecting is Andy Burnham's letter in 2009 in which he explains why he thinks non-statutory is the way to go. He says it is relative to issues of whether we can compel witnesses and compel the production of documents, which essentially are the biggest part of the difference between statutory and non-statutory from that point of view. What he says is that if we encounter problems then at that point we can change course. You will know, for example, there have

been inquiries such as Rosemary Nelson's inquiry that started off as non-statutory and changed to statutory. That is another possibility that needs to be taken seriously.

Lord Woolf: Do you have any concerns about the way counsel to the inquiry operates, assuming that he is doing his work competently? What I have particularly in mind is a way of avoiding too many counsel being involved in an inquiry for individual interests.

Susan Bryant: There have been instances where, when the agreed process was that the counsel would be the only person putting questions to individual witnesses, that did not work effectively, because some people's questions, which they considered very important, did not come across. That affected their confidence in the outcome of the inquiry.

When Mr Jay and Justice Leveson were before you, both of them recounted how they came to an agreement about how questions would be conducted. It was agreed that some questioning would be handled by counsel and some would be handled by counsel for the parties, and they struck a good balance. I think there is work to do in building on experiences that are effective, where the parties, and in fact the wider public, are satisfied with the outcome. We should learn from them and replicate them. Equally, there have been times when that was not the case. I would add to Rachel's comments about Chilcot. One of the biggest criticisms of Chilcot was, of course, that there was not an independent person putting questions to the witnesses. That fell to the chair, which raised its own concerns.

Lord Woolf: So flexibility is something you would be quite comfortable with?

Susan Bryant: And a close examination and analysis of what has and has not worked in the past.

Helen Shaw: From the point of view of whether it is an inquiry involving a death or a series of deaths, it is absolutely vital that there is, in addition to counsel to the inquest, counsel for the victims' families. There is good practice and models that can come from the inquest system but also, for example, in the Azelle Rodney inquiry there was a very important role played by counsel to the inquest being assisted by the questions that were asked by the victim's family. I agree with Susan that we need to be flexible, with that one caveat.

The Chairman: I think we will now move to the final questions.

Q246 Lord Soley: I want to turn to the recommendations of inquiries and implementing them. First of all, do you think there is a role for the chairman of an inquiry to continue to be involved and oversee the implementation and, if so, in what circumstances and under what constraints? Perhaps to save time, consider one of the other alternatives: a Select Committee of the House to look into the implementation some time after the event.

Rachel Robinson: I think the short answer to that is no, we do not think the chairman should be involved in implementing or monitoring recommendations made after the inquiry has concluded. That is really outside of the scope of the role of the chairman and raises constitutional issues about who has responsibility. A far more appropriate suggestion is along the lines of a departmental or thematic committee dealing with the issues raised. To have the function of querying whether recommendations are being implemented, of questioning relevant authorities about their approach to the recommendations on an ongoing basis, is a good way to approach implementation and oversight.

Lord Soley: But Lord Bichard in the Soham inquiry did stay involved and he thinks that was beneficial.

Rachel Robinson: I am afraid our perspective is as I have said. We think that a more appropriate route than the chairman being involved in this process would be to have a

parliamentary committee, perhaps with thematic responsibility, for example as the Health Committee has suggested in relation to the Mid Staffordshire inquiry.

Lord Soley: Do you think a Select Committee?

Rachel Robinson: Yes, perhaps. That is certainly one obvious way of doing it. For example, if it raises home affairs issues it could be the Home Affairs Select Committee, or health issues then similarly. That is one good way of ensuring that we keep the focus on the recommendations and that those with responsibility for implementing them or those who have it in their gift to implement them are effectively tested and questioned and asked to explain why they have or have not implemented certain recommendations.

Lord Soley: Views from others on that?

Susan Bryant: This is another situation where I think a level of flexibility is warranted. Lord Justice Leveson pointed out in his evidence to the Committee that the reason Lord Bichard's decision to hold jurisdiction for an additional six months did not cause the problems that Lord Justice Leveson articulated that he would have was because the duties were in the nature of public administration and there were situations such as that where it would be appropriate for the chair to remain seized and to oversee implementation. For the reasons that he put forward to the Committee, I think it is absolutely true that it would be problematic for a judge to maintain that role. We would support the suggestion that was put by Professor Tomkins, which was a bit more thought out and a bit more fleshed out relative to where in the committee structure it would fall.

Lord Soley: In the case of a judge it is clear, but Lord Bichard was not a judge.

Susan Bryant: Quite. I think the analysis still obtains relative to the role that he was playing moving forward, which was one relative to public administration. It was not just a question of whether or not he himself was a judge but also relative to the issues over which he had responsibility.

Helen Shaw: Again there are some analogies with what happens with the recommendations and reports that are made at the end of inquests. My colleague and I at INQUEST wrote a report last year on good learning from deaths in custody inquests where we looked at what kind of mechanism can be set up with the chief coroner to ensure that recommendations that have national application do not get lost. When we were talking earlier to your Committee about not reinventing the wheel in terms of how inquiries are set up, considering the outcomes as well ought to be part of that process if we are thinking about where the decision-making and the administration of inquiries is held. There is perhaps also an administrative role in ensuring that the right bodies are made aware of recommendations and that they are disseminated across inspectorate bodies, for example. We could certainly make some more information available to you if you want.

Q247 Lord Soley: The final question from me: do you think there is a problem about the recommendations being carried out? If you look across the public inquiries you have known, some are better than others. Overall, do you think there is a problem about implementation?

Helen Shaw: I was thinking about this the other day. I think there is but not in every case. As I said earlier, it is not always immediately obvious at what time after the inquiry has taken place you will see the effect. I was involved with the Human Tissue Authority that was set up after the Retained Organs Commission was set up following the Redfern inquiry into organ retention. It was quite a long time in terms of years before the good effects of those

inquiries were seen. One can get quite cynical about inquiries ending up on shelves, but I do not think that is always the case. It depends on what the subject matter is, I would say.

Susan Bryant: I would echo that, relative to the impulse that a non-statutory inquiry that then leads to a statutory inquiry has, by necessity, been a mistake. I do not think that is the case either. It evolves over time when we look back and say it is clear that a different decision could have been made, I think that is unfair. Often the progression takes a form that is a natural one and we can look back and see that it did take some time with the implementation relative to not just the concrete recommendations but the highlighting and bringing to the fore of the weaknesses in the regulatory system—for example, looking at NHS inquiries. That is a definite outcome.

The Chairman: I think we are there, folks. Thank you very much indeed for coming along and giving evidence to us.

Sir Robert Jay and Jason Beer QC – Oral evidence (QQ102- 128)

Sir Robert Jay and Jason Beer QC – Oral evidence (QQ102- 128)

[Transcript to be found under Beer](#)

Christopher Jefferies and Julie Bailey – Oral evidence (QQ 152 – 189)

Christopher Jefferies and Julie Bailey – Oral evidence (QQ 152 – 189)

[Transcript to be found under Bailey](#)

Stephen Jones – Written evidence

1. I make this statement to assist the House of Lords Select Committee on the Inquiries Act 2005. I am a solicitor in private practice and have considerable experience of involvement in Inquiries. I represented over 100 patients on the Personality Disorder Unit at Ashworth Special Hospital in the Fallon Inquiry which reported in 1999; I was Solicitor to the Royal Liverpool Children's Inquiry into the retention of organs at post mortem, which reported in 2001; and I was Solicitor to the Redfern Inquiry into human tissue analysis in UK nuclear facilities which reported in 2010. In addition I have acted as Solicitor to HM Coroner for Manchester in several inquests of particular sensitivity (2011 and 2012).
2. I refer to the Call for Evidence published by the Select Committee and would wish to focus on a limited number of the specific issues highlighted.

Issues 1, 2

3. The function of a public inquiry is to investigate without fear or favour significant issues of ostensible public concern; understand and explain the events which gave rise to that concern; and make recommendations to ensure the restoration of public confidence. It is critical that there should be transparency and that the State should be accountable to the public. On paper the Act reflects these principles; however, achieving those principles is reliant upon inquiries being established where appropriate; the conduct of the individual inquiry in question; and, most importantly, the enforcement of any recommendations made.

Issues 3, 4, 5, 11, 16

4. The powers that ministers have under the Act are of potential concern given the politicisation of inquiries. The first obvious area is the decision to establish an inquiry. The recent Leveson Inquiry into the Culture, Practices and Ethics of the British Press was sanctioned at some speed yet calls for an inquiry into the recent banking crisis have been met with resistance. Even more recently, note the request made by Sir Robert Owen, Coroner to the inquest into the death of Alexander Litvinenko, for an inquiry to be opened as a result of his concerns that the inquest would not satisfy the investigative requirements under human rights laws. That request was blocked by the Home Secretary. Whilst judicial review allows for the challenge of ministerial decisions, such a procedure is costly and cumbersome.
5. Concern extends beyond the decision to establish an inquiry. There is the potential for ministerial intervention to subvert the inquiry process. For example, to curtail an inquiry before it has obtained all the evidence it needs to reach informed conclusions is potentially foolhardy or even dangerous. In the Royal Liverpool Children's Inquiry the Inquiry came across additional collections of organs about which nothing had been known when its terms of reference were framed. Had the Inquiry been curtailed before that discovery then a full report would not have been produced and further new investigations would have had to be put in place, echoing one of the very mischiefs the Inquiry sought to address, namely the need for repeated funerals as parents received “drip feed” information over many months as to which organs had been retained from their children without their knowledge or consent at post mortem. Whilst the need for a prompt and speedy inquiry is obvious, there should equally be a recognition that time is often required by nature of the issues under review: so, in the Redfern Inquiry events dating back some 50 years were under investigation, not an easy task. To give ministers the power to truncate, withhold documentation or restrict disclosure or publication of evidence, risks diluting the avowed purposes of the Act.
6. Perhaps the way forward might be the creation of an independent body which itself would allow for the referral of a decision by a minister not to set up an inquiry. Such route would fall before any judicial review and would lead to a quicker decision being made. Such a body could also regulate an inquiry, much as the courts case manage litigation.
7. Similarly, such a body might have a role to play in the post inquiry period. My experience is that carefully thought out recommendations are not always

implemented: for example, in the Fallon Inquiry the primary recommendation was that Ashworth Special Hospital should close. That was obviously a potentially controversial recommendation but one no doubt made after careful and detailed consideration. Ashworth, of course, remains today. Powers could be made available to an independent body to review the implementation of an inquiry's recommendations; alternatively, powers should be available for an inquiry to reconvene to do likewise and/or allow the relevant State authorities to update the inquiry as to progress. Without the introduction of some post inquiry process, there is the risk of damaging public confidence. The perception would be that those recommendations which suit government will be implemented, together with those recommendations where the sheer weight of evidence/public comment is such that there is no option, but that others not falling into that category might be resisted out of expedience and/or political desire. A post inquiry process would ensure accountability and increase public confidence.

Issue 13

8. Independent reviews, such as the Hillsborough Independent Panel, should not become the preference but may have a role to play. Their powers are limited in relation to disclosure, summoning of witnesses, and remit in general. Moreover, there is no recourse for the report to be laid before Parliament pursuant to section 26 of the Act. However, the Hillsborough Independent Panel did uncover vital evidence, previously suppressed, and it is arguable that its role exemplifies the benefit that an independent body of the nature suggested in paragraph 6 above might bring to bear.

Issue 15

9. It is essential for public confidence that where an inquiry reveals wrongdoing such evidence should be admissible in civil or criminal proceedings. It is submitted that the concern that such a starting point might tend to inhibit the evidence given in an inquiry is an illusory one given the powers under the Act.

Issue 9

10. The inquisitorial process remains the most appropriate means of inquiry and is preferable to the adversarial approach. However, it remains important that interested parties are afforded the opportunity of proper representation. Counsel/solicitor to the inquiry cannot always appreciate the full extent and nature of an interested party's concerns without potentially compromising his independence and proper representation allows the inquiry to focus on all issues and achieve greater understanding. In the Fallon Inquiry, witness statements were initially taken by the Inquiry from some of the patients on the Personality Disorder Unit whom I was subsequently instructed to represent. Those statements (perhaps inevitably given the number of patients, their mental health issues and the inquiry's workload) were cursory and did not identify many key issues which only came to light as a result of the additional time and focus possible by virtue of the appointment of a legal representative to act for a specific client group.

Issue 18

- II. Good practice and public confidence demands that the public should be able to access the material relied upon by the inquiry to reach its views. Sufficient protection exists under existing legislation (Data Protection Act/exemptions within the Freedom of Information Act) to preserve confidentiality where appropriate.

Judi Kemish, Michael Collins and Ashley Underwood QC – Oral evidence (QQ 248 – 271)

Judi Kemish, Michael Collins and Ashley Underwood QC – Oral evidence (QQ 248 – 271)

[Transcript to be found under Collins](#)

Professor Sir Ian Kennedy, Lord Bichard and Robert Francis QC – Oral evidence (QQ 202 – 229)

Professor Sir Ian Kennedy, Lord Bichard and Robert Francis QC – Oral evidence (QQ 202 – 229)

[Transcript to be found under Bichard](#)

Rt Hon Sir Brian Leveson – Oral evidence (QQ 80 – 101)

Evidence Session No. 4

Heard in Public

Questions 80 - 101

WEDNESDAY 9 OCTOBER 2013

10.40am

Witness: Rt Hon Sir Brian Leveson, President of the Queen's Bench Division

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble

Witness

Sir Brian Leveson

Q80 The Chairman: Sir Brian, welcome to this Committee.

Sir Brian Leveson: Thank you very much.

The Chairman: I have one or two preliminary things to say. The first one though is: when you speak, speak up. It is that sort of room where Members have difficulties.

Sir Brian Leveson: Nobody previously has had difficulty hearing what I have had to say.

The Chairman: Delighted to hear that. This session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. This session is also being televised. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session, you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence or you have any additional points to make, you are welcome to submit supplementary evidence to us.

I have advised the Committee, prior to you joining us, that we are not in the business of asking you questions about the recommendations of your committee or any rival plans for implementation. We understand that you have another exciting day tomorrow on those sorts of things. What we are concerned about is the Inquiries Act, how it works and your experience within it. Of course, if you choose to raise things, that is your affair. It could well be that there will be things that touch on that and it is just bound to be the case.

If I can make a start, it is important, first, that you introduce yourself so that we hear your voice and it is there for the record, and say anything you want to say before I put the first question to you.

Sir Brian Leveson: Fine, thank you very much. My name is Brian Leveson. I am the President of the Queen's Bench Division as of last week. I have no comments to make in advance of any questions you would like to ask me.

Q81 The Chairman: We hope you enjoy the new role. Coming back to this point: 10 of the 14 inquiries so far under the Inquiries Act 2005 have been chaired by serving or retired judges. What criteria do you think Ministers should apply in deciding whether or not a judge should chair an inquiry?

Sir Brian Leveson: I think this is an extremely important question and turns upon what judges can offer in the conduct of an inquiry and what consequences there are of appointing a judge. What do judges offer? First, they offer experience of fact finding about past events. They are very used to listening to witnesses speak about past events and making up their mind about what happened. Secondly, they have the ability to deal with legal and procedural complexity. It is part of the regular diet of sitting in judgment in any jurisdiction. Thirdly, they are very used to running trials, running hearings, and avoiding unnecessary diversions and keeping focus. Fourthly, they are very used to analysing large amounts of data and making recommendations or, in court terms, decisions based upon evidence and competing legal considerations: in the context of my inquiry, the competing considerations of Articles 8 and 10 of the European convention. Next, they are also absolutely independent and publicly recognised as independent. That is what they offer. But there are real consequences in appointing a judge to conduct an inquiry. The first consequence is their absolute independence. For me, that meant I was only prepared to be involved on the basis that it was a cross-party appointment. Independence, for me, means and meant independence from government; independence, with respect, from Parliament; and independence subject only to the right of anybody affected to challenge my decisions in the courts. Indeed, there was the occasional judicial review, only one of which was a substantive challenge by the press, to decisions I made.

The second consequence of appointing a judge is that, under no circumstances, was it or is it appropriate for a serving judge to be involved in a political debate. It is why I have repeatedly said and made clear on 29 November that I would not participate in continued discussions about the subject matter of my inquiry. It is now for others to decide how to proceed and was from 29 November. I have made my recommendations. That is what they were. It is for others to pick them up and decide how best to go forward. I have thought about it. The only exception I can think of to that broad principle would be if there is an inquiry concerned with some aspect of the administration of justice. Now, I appreciate that the work the Lord Justice Jackson did on costs was not a formal statutory or, I believe, non-statutory inquiry. It was a review that he was asked to conduct by the judiciary, but it was entirely reasonable and appropriate that, once decisions had been made about the costs regime flowing from his report, he should be asked to implement them because he is a serving judge doing what

judges do, which is affecting the practice and procedure of the courts. Save for that exception, the administration of justice, a consequence of appointing a judge to conduct an inquiry is that he or she will not involve himself or herself in continuing “political” debate and I, of course, use that word with a very small “p”.

Those are the advantages and disadvantages. Therefore, as Ministers decide whether or not a judge should chair an inquiry, that is the framework within which they ought to consider the answer to the question.

The Chairman: You have made a very strong case for judges being appointed and I do see that, but is there a problem? Can we always spare judges to do this? There are other items of work for judges to do.

Sir Brian Leveson: I was not intending to encourage further appointments of judges for the very reason that you have identified. There are some common law jurisdictions where judges will not be appointed to chair commissions. Retired judges are frequently appointed, but not serving judges. You are absolutely right that they are an enormous drain on the resources of the judiciary. It bites into another issue as to who should have the final word, but I am absolutely not encouraging Ministers always to reach for judges to conduct inquiries because it takes them away from judging. I have said more than once that, when in court, I decide cases. Conducting an inquiry, I did not make binding decisions on anybody, save in relation to the conduct of the inquiry.

Q82 Lord Morris of Aberavon: I appreciate the strength of the case you have put for employing judges for this very important role, which is very valued by all of us, but may I put a contrary view? Is there a danger from the very fact of using judges for issues of a kind that you have been employed in? Who guards the guardians? We are familiar with that expression. I am old enough to remember Lord Scarman lecturing in Aberystwyth in the 1960s saying, “Trust the judges”, and he made a deep impression on me, but the moment his report was published he was involved in controversy. Indeed, a recent book described him, I am sure quite wrongly, as a “left-leaning judge”.

Does the very fact of using judges not undermine our perception of their independence when they become involved, unwittingly, in the controversy of the marketplace?

Sir Brian Leveson: I think there is a risk of that. I agree entirely with that and it depends entirely on the subject matter of the inquiry. Probably my inquiry is at the very edge of that and it is one of the reasons why I made my views clear in the report and then have said nothing more. It is also why I did something else.

The report is a very bulky document. I was determined that everybody should be able to see the evidence that I had received, the conclusions that I reached and the reasons for the conclusions that I reached. It is replete with footnotes cross-referencing to the witnesses, and even now you can go on the website and watch the evidence. I would say that if anybody wants to take a different view, they can watch the entirety of the inquiry, they can read all the written evidence that I received and they can reach their own view.

I reached a view. People are perfectly entitled to agree with me and they are perfectly entitled to disagree with me, but I agree with your point entirely. There is and must be a limit. That is one of the reasons why, had there not been party-political consensus for a judge to conduct the inquiry, I would be very surprised if the Lord Chief Justice would have been prepared to agree that a judge do it. I know his consent was not required, but if the Lord Chief Justice had said, “They would like you to do this, but I am not very happy about it”, I do not think I would have spent 18 months of my life conducting the inquiry.

Lord Trimble: Sir Brian, you mentioned the question of the independence of the inquiry and of the chairman, which I think is hugely important. Do you think it is wise, therefore, to have the chairman appointed by a Minister? Does the fact that the chairman is chosen and appointed by the relevant Minister not itself, to some extent, compromise the independence of the inquiry? You may note that that was one of the reasons given by Theresa May for not having an inquiry in the summer.

Sir Brian Leveson: It bites into a point that I was making a moment ago. At the moment, the Minister must consult the Lord Chief Justice if he or she wants a judge to conduct an inquiry, a judge below the Supreme Court. My own view is that judges would not agree to conduct an inquiry, and the judge has to agree, if that did not have the blessing of the Lord Chief Justice.

I do think there is real room for strengthening the Act to say that the appointment should only be with the consent of the Chief Justice or by the Chief Justice, provided the Chief Justice is sufficiently aware of the terms of reference. In other words, the Chief Justice knows who the judges are. He knows what their strengths and their weaknesses are. He is in the best position to decide, if it is appropriate at all, which I accept is not a given, who should best do the job. Lord Judge made a speech saying that if I was the wrong person to do the inquiry that I conducted it was his fault, not mine. I am not sure that was enormously reassuring to me.

Q83 Lord Soley: Can I first of all state an interest in that I gave written evidence to your inquiry? In your list of reasons for having a judge, I put it to you that, where there is criminal behaviour involved, as there was in this case—allegations of criminal behaviour by certain elements in the press that the management structures were either unable or unwilling to deal with—I can understand and I think strongly support the idea of a judge having oversight of such an inquiry because there are obvious risks to people involved in that. Where I am slightly more puzzled is when you get down to the standards, ethics, culture-type argument. There, it does not seem to be that a judge is necessarily the best person to deal with it. I wonder how much weight you would put on a judge being required to oversee this if there is criminal behaviour alleged or how much is it important to have a judge if it is culture, ethics, standards and so on.

Sir Brian Leveson: The allegation of crime provided legal complexity because I obviously could not prejudice the investigation of crime or the prosecution of anyone if prosecutions were commenced, as they have been. That required a deep understanding of precisely how far one could go and also, going on, an element of fairness because it would be quite wrong not to investigate the conduct of A, B, C and D because they were the subject of criminal investigation, but to look at E, F, G and H whose behaviour was less egregious but who therefore were not the subject of criminal investigation. There is a very important balance, which I think a judge with experience of the criminal law was best placed to reach.

When you are looking at the softer questions, the culture, practice, and ethics, I believe that judges hear evidence on soft topics and make decisions about such topics all the time. I am not saying that they are the only answer. I am not saying that you could not have had somebody else conduct the inquiry. The problem then becomes finding somebody who is not so fixed in their views that the inquiry does not achieve anything, because those with experience will obviously come to the inquiry with strong or less strong views that those who are involved in conducting the inquiry will not necessarily be able to unpick.

I started the inquiry with an entirely open mind. I had not been involved particularly with media law. I had acted for a newspaper many years before when I was at the Bar. I had tried

some cases, but it was not my field of law. I would have thought that was an advantage, but you could find somebody else, a group of Members of the House of Lords no doubt, who might offer another way forward. I do not rule out other people conducting inquiries, provided there is somebody who is able to deal with the procedural complexity and keep the thing on track, because there is a terrible risk of drift.

Q84 Baroness Buscombe: First of all, I should declare my interest as one who gave both written and oral evidence to the inquiry. If I could just refer back to the issue of independence from government, I absolutely accept, Sir Brian, what you have said in relation to your appointment, for example the appointment of existing judges and the reference to the Lord Chief Justice and the part that he plays in this, which I think is incredibly important. My concern is that as a sitting judge it is very important to avoid issues of politics. However, supposing, as in the case perhaps of Leveson, this inquiry—

Sir Brian Leveson: I am used to having become an adjective.

Baroness Buscombe: You are used to being called Leveson.

Sir Brian Leveson: I am used to becoming an adjective.

Baroness Buscombe: Sorry, it has been there in one's mind for a long time. What about the issue, though, that there were powerful political undercurrents that sparked off the inquiry in the first place and these powerful undercurrents are something that, as a sitting judge, one is unable to refer to or consider?

Sir Brian Leveson: I understand the point only too well, because I lived through it. I dealt with it by focusing very firmly upon the terms of reference and the cross-party support. I cannot emphasise strongly enough that had everybody not signed up to the inquiry and indeed the terms of reference, which were the subject of cross-party discussion, I would have been reluctant, if not more, to get involved. That there were enormous risks I was very conscious from first to last. How well I negotiated the pitfalls is for others to decide, but I take the point.

Q85 The Chairman: I think we have covered what would have been question 2 in that I think you have made clear what you think the position of the Lord Chief Justice should be. Can I just have one further question, which is: in general, do you think there are any improvements at all that could be made in the process of appointing a chairman of an inquiry?

Sir Brian Leveson: I can only talk about what happened in my inquiry, which was that I understand that the Prime Minister contacted the Chief Justice. The Chief Justice consulted with his most senior colleagues, and he has made that clear in his speech, knocked on my door at 8.20 am on a Monday morning and had a discussion with me. There then was a debate as to the way in which the terms of reference might be formulated and the way in which the inquiry might proceed, in which I was fully involved. I received great assistance from a representative of the Chief Justice, his then private secretary who later moved on to help me conduct the inquiry, and from other senior civil servants in negotiating my way in entirely unfamiliar territory. I think that worked as well as it could do.

Perhaps because it was the nature of the inquiry, the terms of reference changed a number of times as different people were consulted and bits tended to be added on rather than taken away, but I do not complain about that. I think the procedure worked quite well. I repeat: had the Chief Justice not positively wanted me to do it then, irrespective of the law, I would not have agreed to do it.

Lord Morris of Aberavon: What is the balance between having a chairman alone conducting an inquiry and a chairman with wing members? We have been told all but one of 12 inquiries set up under the 2005 Act have been by a chairman alone. From your experience—and we are asking you particularly from your general experience—should there be appointed wing members to assist the chairman or should he generally sit alone?

Sir Brian Leveson: The trouble with appointing members of a panel is that they are just as much conducting the inquiry as the chairman. You will always want the most able people to do these things and the most able people tend to have other responsibilities. If my six assessors had been members of the panel, they would have had to attend every single day. They would have had to have read every single piece of paper. They would have had to have played a full part in every single decision, including the decisions of law. I am not saying I would not have explained it and I am not saying I would not have been overruled, but the consequence would have been a massive extension of the time everything took.

I could do a lot of pre-reading. I could control the way in which the evidence developed. Had my assessors been members of the panel, then doubtless they would have had their own questions. As it was, they passed questions through to Counsel to the inquiry if they wanted to ask questions, both in advance and on those occasions they attended. They attended for those witnesses for whom they expected that they could add value and did not attend for other witnesses, but if they had been members of the panel they would have been members of the panel full stop.

One of my assessors was a former chief police officer and he attended every single day that I dealt with module two, which concerned the press and the police. He was less concerned, not unconcerned but less concerned, in other aspects of the inquiry and I made use of his expertise as a former police officer. Different people attended at different times. The snag about having a panel is they are all judges and they would have to attend all the time. I have no doubt at all that had my assessors been members of the panel and had to attend, I would have lost a number of them and I think their input would have been less valuable as a result.

Lord Morris of Aberavon: Sir Brian, I take fully on board the manpower implications of attendance and being party to decisions, but I have been along to the Chilcot inquiry once and they are all equal, it seems to me. They all seem to take part, and they all seem to ask questions. That seemed to work in that case. Would you lay down a rule or was it just preferable in your case, in your inquiry, that you conducted it alone?

Sir Brian Leveson: I felt the terms of reference of my inquiry were so wide and the time within which I was asked to report, which I then interpreted in a particular way that I am happy to explain, was comparatively limited. I have no problem about other people being there, but it would have extended the time taken, not just marginally but very dramatically, I think. We know about the illness and problems that Lord Saville had with the other members of his inquiry and they were both, I think, retired judges. One size will not necessarily fit all.

I do not believe the Chilcot inquiry had Counsel to the inquiry. I might be wrong about that. I have not studied how Sir John Chilcot conducted his inquiry. I was given a timetable. The Prime Minister asked that I report within a year. If that had been literal, from 29 July 2011 to 29 July 2012, I would have had to stop taking evidence in early April to get the thing put together and written and everything. I could not start until I had gathered evidence in. I could not start earlier than mid-November. I would only have had four months, including Christmas, to hear evidence and I felt that I simply could not start to do justice to the breadth of the terms of reference.

I interpreted my year, and I made this quite clear from the outset, that I would finish my evidence within a year of being appointed and I would try to produce my report within a year of starting the evidence. I missed that by two weeks and I am sorry about that, but that was to try to provide everybody else with sufficient time to think about what I said.

All these things are a balance and you have to decide for the particular inquiry that you are considering what works best for that inquiry.

The Chairman: Baroness Buscombe, I know there has been straying onto assessors, but did you want to lead on to that?

Q86 Baroness Buscombe: I wanted to ask Sir Brian a question, which in a sense leads into the question about assessors. It is to raise a point in relation to appointments to the inquiry panel. Of course, looking at the Inquiries Act 2005, one of the key crucial differences, in my view, between someone who is a member of the inquiry panel and an assessor is the requirement of impartiality. There is no requirement for impartiality on the part of an assessor, so one could have an assessor who has an extreme bias. According to the Act, that is entirely acceptable. Is that not a flaw in terms of the choice between someone who must be deemed to be impartial and someone who is somebody who might just be a so-called expert in a particular area?

Sir Brian Leveson: If you articulate the question in terms of bias, I understand the point entirely, but there is a range. Experts in particular fields are likely to have views. I say now, categorically—and to this extent I suppose I am revealing something that I have not previously revealed—I ensured each of my assessors did not have such a fixed view that they were not prepared to deal with the Inquiry on the basis of the evidence that came out, even though they were assessors not members of the panel. I accept that is not in the Act. I accept that entirely.

Equally, if they are assessors, however, I have been practising the law for over 40 years and I have developed, I hope, a reasonable ability to detect when people are providing an assessment based on evidence and using their expertise to explain why some line is appropriate or not and expressing a prejudice that is entirely unrelated to what has been happening and the evidence. If that had emerged from any of my assessors—and I say immediately it did not; they were absolutely scrupulous in how they approached all the issues that we had to address—I would have spotted it.

Of course, I made it clear that the conclusions were mine, but I did equally make it clear that if any of the assessors disagreed with the recommendations, I would publish that fact and I would explain why. I think there are two or three footnotes in my report that identify in relation to one assessor there were two areas of disagreement, and in relation to two others they did not think it was necessary to contemplate one of the areas of the report, but that was it. I made sure that they looked at everything so that they could give me a view and I would have put it in and, therefore, people can judge themselves.

The Chairman: There is just one question I have on this. You mentioned that the assessors only turned up when it was appropriate. Was there always an assessor present during the conduct of your inquiry or were there days when you were assessor-free?

Sir Brian Leveson: I am afraid, Lord Chairman, I cannot remember.

The Chairman: All right.

Sir Brian Leveson: They were seated in the front row, but the fact that they were not there did not mean that they were not following it because I had the great advantage that my inquiry was, in large part, live screened and certainly available on the website to watch. I am very conscious that some comment was made about assessors not being present. Their response was, “Yes, but that should not assume that I have not watched every minute of it”. I have no complaint or comment about the extent of their involvement.

Q87 Baroness Buscombe: Thank you very much, Sir Brian. I am moving on now more substantively to ask: what about assessors? You had a number of assessors to advise you. We would like to know what influenced your decision to have assessors and to ask for the appointment of those particular assessors. Although, if I may, I was certainly under the impression that the assessors were chosen in the first instance by a Minister. Perhaps that should be clarified.

Sir Brian Leveson: You are absolutely right.

Baroness Buscombe: Yes.

Sir Brian Leveson: The position was the assessors were in fact appointed by, I think, the Prime Minister or formally then by the Home Secretary and the Secretary of State for Culture, Media and Sport. What happened was: they were nominated, I believe, by the Prime Minister. I was asked for my views.

Baroness Buscombe: Yes.

Sir Brian Leveson: I was given a list of names of those whom the Government sought to consider. I was not given the choice: assessors or no assessors? This was how the Government decided they wished to proceed. Of course, you must recognise that I did not know any of these people personally and what happened was I said that I would speak to each. I had very lengthy conversations with each one, first of all to ensure they understood what was involved and, secondly, to ask them the question that I had identified, in answer to your previous question, so that I could be satisfied that I would be getting impartial views based upon the evidence and their experience. You are absolutely right.

Baroness Buscombe: Of course, this choice has to be made or maybe there is an alternative approach. The choice has to be made, in general, prior to the opportunity to read written submissions, never mind oral evidence that might expose something about an assessor, which, if one was not an experienced judge, one might not have had your ability to realise that person might not be entirely impartial.

Sir Brian Leveson: I understand the point. You may have noticed that I asked all the assessors to declare interests—you can go on the website and they are still there—and declare what they had done and what their experience was. There was indeed a challenge, you may be aware, to the question of the number of assessors. It is one of the first areas of challenge that I had to deal with.

In particular, there was a challenge to the fact that I did not have an assessor from a tabloid newspaper, although I asked most, if not all, or a large number—I have to be very careful—of the journalist witnesses or editor witnesses whether there was a difference between tabloid and broadsheet newspapers in this area. I do not think I ever heard anybody say there was, but I was able to assure people that my assessors were very conscious of the tabloid experience throughout the inquiry along with the different problems.

Baroness Buscombe: I think the panel would like to hear more about what the assessors do. In your case, I suppose we would say “did”. In general, on the role of the assessors, what value do they in practice bring? Do you believe that they are a valuable addition to the inquiry process?

Sir Brian Leveson: I will tell you what my assessors did. They helped me consider who we should ask to give evidence. In relation to the press and the public, some were obvious candidates but there were some who were not. They helped me decide who would be a balanced mix of witnesses to give a balanced series of opinions. The police officer helped me decide which chief constables would be best. I could not call all of them. They helped me decide who from the political spectrum, both from the journalists’ perspective and from the politicians’. Again, some were obvious. They then read the evidence that these people provided and suggested questions. Some questions were asked and some were not asked. That was a decision essentially made by Counsel, although sometimes I was involved whether I wanted to go down this line or that line. They then could help me or correct me about matters within their expertise, about how things happen, so that I could elaborate, get the evidence out, to make sure that I did not make a monumental blunder, although some people may think I made lots of them. That is what they did.

When it came to the report and the conclusions, I tested thoughts out on them. Ultimately, it was my decision. It was not their responsibility, but I tested ideas out. There were lots and lots of suggestions for regulatory reform. If you have read Part K you will know about them. Did this work for this reason, or that reason? They helped enormously in that regard. I hope they feel they played an important part to help steer me, but not to decide. That was my responsibility and I am not seeking to shirk it. Did I find them helpful? Yes, I did and I believe the report is better for their involvement than it would have been had they not been involved, when people would have said, “Well, what does this judge, who does not know a thing, know about anything?”

Q88 Lord Richard: If I could go on with the assessors point, because I am really quite interested in this. As I understand it from your evidence, what you are really saying is they were there to assist you on the practicalities. They were there to help you decide who you should call. They were there to point out the pitfalls in calling a particular person, from what you say, but they did not comment in the individuals’ evidence. That was not part of their function, as I understand it.

Sir Brian Leveson: They did not comment on issues of credibility.

Lord Richard: That is the point I was going to ask you.

Sir Brian Leveson: That was my decision. They were more concerned that I understood context. If I could give you another example, a couple of the areas to do with the press and politicians—and I am prepared to identify it: the whole analysis of the BSkyB bid—they did not see that chapter of my report. I believe that chapter of my report, which was fact-finding, represented absolutely what judges do. I felt that it would be unfair to them to ask them to comment because the fact-finding was for me.

Lord Richard: I understand that but, excluding that particular chapter, did they see a draft of your report before it was finalised?

Sir Brian Leveson: They saw drafts of most of it and could comment.

Lord Richard: Did they?

Sir Brian Leveson: Yes, there were comments.

Lord Richard: There were? I mean substantial comments.

Sir Brian Leveson: Yes, not just grammatical or typos. No. There were substantial comments. Do not ask me to identify them, because I simply do not remember. The process of getting this report out was enormously fraught. What happened was they would come into the office and read different drafts. It was a very iterative process. The report was put together by a number of people, although I was responsible for every single chapter. In other words, different people put together different parts of the facts. I made my views clear as to what I thought the appropriate findings of facts were—what I accepted, what I did not accept, where I was going—but then collecting the material together, putting the quotes in, was essentially the work of a large number of people, as no doubt happens with your Committee. At least, I would be surprised if it did not.

Lord Richard: It does.

Sir Brian Leveson: Then I saw a draft. I could then rip it to pieces and say, “No, that is not right. I do not want that. I want this, that and the other”. During that process, the views of different assessors on different bits of the report were fed in to the process of reiteration. Different assessors read different parts of the report. I cannot say whether everybody read everything. I would be very surprised if they did. All I can assure you is that I read every single word.

Lord Richard: Were they a lively group of assessors? Were they anxious to get involved?

Sir Brian Leveson: They were anxious to do all they could to help me in what I saw and they saw was a truly formidable task.

Lord Richard: When they saw the draft of your report, apart from the bits you did not show them, were they active then in saying, “Look, we do not like this bit; we do not like that bit”, all these things?

Sir Brian Leveson: It was not so much “do not like”. It was, “Did that quite fit with what happened?” You will remember there was this bit of evidence that explained this rather differently, I think. I am afraid you are now testing my memory of literally 12 months ago. I was working on that from first thing in the morning to early the next morning seven days a week, so I cannot take it much further.

Q89 Lord King of Bridgwater: I have three quick questions. You said that others wrote parts of the report. Is that the staff of your team who wrote it, not the assessors?

Sir Brian Leveson: No, not the assessors at all.

Lord King of Bridgwater: Were they seconded from the Ministry of Justice? Where did your staff come from?

Sir Brian Leveson: I have to be a bit careful when I say “wrote the report”. They wrote drafts of facts based upon conclusions that I was reaching. I had civil service staff from the Treasury Solicitors, from the Ministry of Justice, the Department for Culture, Media and Sport, the Home Office and the Cabinet Office. I also had the great benefit of members of the Bar and the contribution that Robert Jay and his team of barristers made to the drafting process was enormous, but all to my direction. I cannot emphasise that enough. I do not want anybody thinking—

Lord King of Bridgwater: The fact being that parts of it were written by other people, but it did not appear without your agreement in the final report.

Sir Brian Leveson: Correct, but the parts that were written were the factual collection of material. To give you an idea of the report, each chapter of each part of the report went through many, many iterations until I was happy with it and I rewrote, myself, chunks that I was not happy with.

Lord King of Bridgwater: Okay, I have that point.

Sir Brian Leveson: I am sorry if I am emphasising it. I am sure the Committee will not misunderstand me, but you will understand that I am concerned others might.

Lord King of Bridgwater: Yes, absolutely. On the role of the assessors, they prompted Mr Jay at times with questions that he might be asking as Counsel for the inquiry. Did they do that? Did they slip him notes as well saying, “You have just asked this question. Now ask him this”?

Sir Brian Leveson: It took a bit of time to get along the line, because they were sitting beyond the Treasury Solicitor.

Lord King of Bridgwater: But you did not object if they wished to prompt him?

Sir Brian Leveson: Not if they wanted to suggest questions. Then it was up to Mr Jay to decide whether he wanted to ask the questions.

Lord King of Bridgwater: That is very helpful. The last point is: did you have preliminary discussion about the choice of assessors saying, “You will need one or two journalists. What about a policeman? What about this?” Did you have an initial discussion about the topics or the areas that you wanted support from assessors? Were you offered more or were you just given six names and did you in fact end up with the six people who were offered to you?

Sir Brian Leveson: I think that the expertise was thought out by the Government, but I did not disagree with it. I was sent a much longer list of names with suggestions. Of course, I knew none of these people at all. I recognised one of the names very well who I thought would be admirable if she would do it. I just did not know anybody else.

Lord King of Bridgwater: The point I am getting at is: you were not told, “These are the six you ought to have”.

Sir Brian Leveson: No.

Lord King of Bridgwater: You had some choice and were able to use some discretion as to who you thought was most appropriate.

Sir Brian Leveson: Indeed, it went further because one of the original suggestions who I thought was content to do it then withdrew and the question arose as to who should replace that assessor. A number of suggestions were made from a slightly different expertise, which I did not agree with. I made my point clear and, in the event, somebody was appointed from the expertise that I felt would be of value. That assessor was indeed absolutely admirable.

Q90 Baroness Hamwee: Still on the assessors, did they all relate individually to you or did they ever work as a group? The picture that I am getting is that they were there for their particular technical, in the very broadest term, professional expertise and that was what you were looking to them for. Was there a dynamic? Did they ever operate as a group, as a committee?

Sir Brian Leveson: Yes, they did. We had regular meetings to check that everybody was satisfied from their perspective that we were going the right direction and to check where

we should be going. I cannot remember how many meetings we had, but we had regular meetings of the assessors.

Baroness Hamwee: They were more of a sounding board in a general sense?

Sir Brian Leveson: Absolutely.

Q91 Lord Richard: I want to turn to a totally different point, if I might, leaving the assessors. Do you think it is right that Parliament has enacted a statute giving inquiries the power to summon persons and papers, take evidence on oath and so on, but that Ministers should continue to set up non-statutory inquiries that do not have these powers: like the Iraq inquiry, the first Mid Staffs inquiry, the Detainee inquiry? It does seem to me that, if you have an Act, there should at least be a presumption that inquiries should operate in accordance with the Act rather than outside the Act. Do you have a view on that?

Sir Brian Leveson: I understand the point. The problem is that I am not in a position to advise on non-statutory inquiries because I have never conducted one and I do not know the circumstances. I suppose they can circumvent the need to consult the Chief Justice, although if it is going to be a serving judge they would have to because the Chief Justice is responsible for deployment. They would lose the power of compulsion, which was very important for my inquiry. People had to provide statements and people had to come and give evidence if I called them. I do not think that is so for non-statutory inquiries. There may be a greater ability to sit in private.

I am not in a position to advise. I agree with you as a general principle that, if there is a regime and the regime does not work for everything, maybe the statute ought to provide for an alternative mechanism or an alternative approach for an inquiry so that they are all regulated by law, but you have taken me outside an area upon which I am in a position to help you.

Lord Richard: In that case, I will not press you.

Q92 Baroness Hamwee: Can we go back to the terms of reference? You have talked about how your terms of reference were the subject of cross-party discussion and if you are able to help us beyond your own direct experience, I would be interested in that as well. The Act requires the minister to consult the chairman before setting the terms of reference. Does the chair have enough time to have an input? I will wrap up all the questions together. Should there be an opportunity for the chair to consult the stakeholders? Should there be a pause after a month or so of work for a review as to whether the terms of reference are the appropriate ones?

Sir Brian Leveson: Thank you. Section 5(3) of the Act permits a change to the terms of reference after you have started. I did discuss the terms of reference and made suggestions that were adopted within the language. In one sense, you are right: I was unsighted on the ramifications, but I think it was quite difficult in the context of my inquiry to do it any other way because one had to get on with it.

I am not particularly enamoured with the idea of taking stock after a month or so, because far too much has to happen. If it does not matter how long the inquiry takes then I suppose that is plausible, but if there is an imperative then it is rather difficult. What I had to do, and I had to do it immediately, was set out the four corners of my inquiry. In early August 2011, I had to get involved in the whole business of requiring statements, which itself was a very big job because you had to identify what you wanted the witnesses to deal with. The requests all

had to go out and people had to have a chance to respond. If, a month later, you change terms of reference then you have undermined the previous work you have done.

If there is no time sensitivity then everything can go in slower motion, but that could be built into what is presently within the statute. My problem is that it is very important to decide how to address a problem if you are not absolutely sure what the problem is going to be that you have to address. I think that probably Section 5(3) is sufficient.

Baroness Gould of Potternewton: If I can just follow that question, it has been suggested that there should be an evaluation or scoping exercise near the start of the inquiry, or even before we have got to the point of the start of the inquiry and even before the terms of reference are produced, in order to help estimate the length or the cost of the inquiry, the access and public concern, type of evidence and extent of that evidence. Do you believe that such a process would be helpful to do before an inquiry and would help the inquiry on its way? If so, who should be responsible for doing that scoping exercise? Should it be the judge that is in charge, should it be the Minister, should they both do it or should it be some outside people that take on that responsibility?

Sir Brian Leveson: I do not think you can scope it before you have the terms of reference. You need to know what you are talking about. Whether formally or not formally, I conducted just such an exercise. I had to cope with my timeframe, which the Prime Minister had set and which I adjusted in the way that I explained, and I then had to decide how to proceed. I very quickly decided that I would have briefing sessions, which I did, for the law and regulation, for essentially the assessors but also for the public to hear as well. I then had the seminars. There were three seminars in September 2011. Then I set the timetable for the hearings. I had to push back the start date because the core participants did not feel it was possible, and even Counsel to the inquiry did not feel my anxiety to get on with it could quite be met. I scoped how I would proceed. I would proceed in four modules: the press and the public, the press and the police, the press and politicians, and regulation. Having first had seminars, I was contemplating having seminars later but decided they were not necessary.

I also decided that we would put the questions on the website to encourage the public to respond, which they did, and, having done that, scoped the timing, broadly the timeframe, which we had to adjust as we got clearer as to the witnesses. We focused on the press and the public over August and then, while we were starting that evidence, we focused on which witnesses we would want for the press and the police, and then we focused on witnesses for the press and the politicians. All this was going on in parallel but to a scheme that I had—“preordained” sounds rather pompous—scoped.

Equally, I scoped the cost of it because I was extremely conscious of the public money involved. Indeed, civil service staff who were seconded to me negotiated a budget primarily with the Department for Culture, Media and Sport, but also the Home Office because of the police element, so that we knew broadly where we were. I am delighted to say that we undershot the budget by a very considerable margin, because I was very concerned about the cost to the public.

I think the chairman, whether it is a judge or not a judge, has to do it. He has to do it with the team that he has because, of course, that also had to be appointed and I had to approve the team that was appointed. Then the money has to be discussed with the sponsoring Minister. That all has to be resolved before you start, otherwise you cannot move through it; otherwise it just goes on and on and on and I was determined that this inquiry was not going to go on and on and on.

Baroness Gould of Potternewton: I think it is possible that that is not something that an awful lot of people would be aware of. How long did that process take before you got into the inquiry proper?

Sir Brian Leveson: I discussed how we might divide it up in July and early August and then refined the approach in September. We knew, I think, before the first hearing broadly how we were going to wrap it up. There was an argument about my decision to have briefings and seminars. The first ruling that I gave dealt with the challenge to that approach. That is the same ruling that dealt with the challenge to the way in which the assessors had been appointed. It was not set in concrete. The dates had to move, but I had a very good idea of how we were going to do it well before we started.

As regards how I was going to proceed, I can tell you that I spent a weekend in February fashioning out the contents page of the report, dividing into headings, sub-headings, parts. That went through many, many iterations, dozens, before we got to the final result, but I needed to visualise what I was going to produce because I felt it was only by visualising what I was going to produce that I could get it done.

Baroness Gould of Potternewton: I think that has been very interesting, very helpful. As a principle, is that what you would think should happen before any inquiry?

Sir Brian Leveson: I hope that it is not going to be my experience ever in the future. I would have thought it was a sensible way to proceed, without seeking to bind anybody in the future. I could not have done it any other way.

Q93 Baroness Hamwee: My question follows directly from that. Obviously, the rules did not hold you back in the style of inquiry that you wanted to run. Do you think that the rules should require any of this sort of process to be addressed?

Sir Brian Leveson: I think the great trouble about setting it all down in rules and statutes is that they then become very formulaic and very prescriptive. It is a later question, but possibly I can jump in and answer it now.

There is one rule that I think is far too prescriptive and which, if I had obeyed it to the letter, would have killed any prospect of doing the report in time and that is rule 13. That is to do with warnings. Let me make it very clear that the Salmon principles, which you have asked me about, I believe represent fundamental tenets of the common law and comply with the principles of natural justice. I would not junk them, as one of your previous witnesses suggested.

Rule 13 is the opportunity to give witnesses the chance to respond to possible criticisms and that is absolutely critical as a matter of pure fairness. I think it is rule 15 that required me to set out the potential criticism, the facts forming the basis of the criticism, and all the evidence. Had I done that in terms, I need never have finished because they were all very specific. I decided that I wanted to approach it in a different way and I invited submissions on that different way. I gave a ruling as to how I would proceed deliberately before I did the work so that, if anybody wanted to challenge it, they could go to the divisional court and challenge it. Nobody did.

I am very happy to share with you how I did it because you can see it in one of the appendices to my report. I directed generic criticisms or potential criticisms to all three major political parties. The best way of saying what I was concerned about, rather than fill the report with it all, was to set it out in, I think, appendix 5. There is a generic commentary and then, for each generic commentary, there is a reference to every single witness upon whom I relied in alphabetical order. If there was a criticism that Sir John Major had said,

“Yes”, then there is a reference to Sir John Major in the list and you can click on the hyperlink and read precisely where he said it. I believed I was thereby giving every witness the opportunity to see everything, but it did not set out the facts. It set out the generic criticism.

In some inquiries it might be easier to do that, but it was so wide-ranging that it would have taken me an inordinate length of time just to draft the document. It is in the public domain now that the Rule 13 letter to the press was 126 pages long—I did not put that fact in the public domain but somebody else has—to give anybody the opportunity to respond to anything, so that I was not taking people by surprise. Why was it essential to have that system? Because of the way in which the inquiry developed, I frequently received evidence that touched upon witnesses who had previously been called.

One way of proceeding would have been to recall the witness, and in one sense I could have done that. Then again, the inquiry would never have ended. What I did was give everybody the opportunity to respond and, if they wanted to say something new, I encouraged that to be put into a witness statement, which is then on the website. You will find on the website witness statements from witnesses who had given evidence who dealt with additional points.

Baroness Hamwee: Chairman, I am sorry, I thought it was a narrower question. I might have stolen other people’s thunder. I am delighted that it has opened that up, so thank you.

Sir Brian Leveson: I apologise to whoever wanted to ask that question.

The Chairman: Right, let us see if we can move on. I think it was Lord Morris who was starting on Salmon principles, if there is anything left, and inquiry rules; just so that you have the chance.

Q94 Lord Morris of Aberavon: While you have already touched on the Salmon principles, which I think many of us have lived with for a long time, there are two criticisms. First, do they tend to make inquiries too adversarial? Secondly, on the assistance on legal representation, we have had evidence from one person that they have outlived their sell-by date. Do you have any views in particular on those aspects of the Salmon principles?

Sir Brian Leveson: I think the Inquiries Act does a splendid job in making the inquiry inquisitorial, not adversarial. In my inquiry, some of the core participants had a bewildering array of legal expertise watching the inquiry, but their remit was very limited because of the provisions of rule 10 that the questioning came from Counsel to the inquiry. What the lawyers could do was suggest questions, which they did many times to Counsel to the inquiry, and if Counsel refused or declined to ask the question, they could make a submission to me that they be permitted to ask the questions. That happened as well.

It happened both ways, but it meant that the chairman was in total control. For example, I did not permit the newspaper representatives to question those who complained of being the victims of press misbehaviour. I did not permit them to question the witnesses because I was not prepared to allow a further go at them, but questions were submitted through Counsel and Counsel asked the questions. You will see, if you paid particular attention to the inquiry, some are rather more tendentious than others. That is where it came through.

Equally, there were witnesses whom the newspaper advocates did question and there were witnesses whom the victims or those who complained of press abuse asked questions. I was in complete control of that and the value of able lawyers was they knew the rules and they complied with them. Lawyers also pre-read all the witnesses’ statements and they could say if they wanted witnesses or did not want witnesses. If they did not want to ask other questions, it was also important to decide, “Is this witness to be called or can I just put the

statement into the inquiry record?” I could not possibly have conducted the inquiry without putting hundreds of statements into the inquiry record. I paid just as much attention to them as to the live witnesses.

Your other point was whether it needs lawyers. What is a lawyer going to say to that?

Lord Morris of Aberavon: He will say something about costs. I am sure he will want to be paid.

Sir Brian Leveson: I am afraid that I have no doubt that the inquiry cost the core participants a great deal of money. I believe that some legal expertise to understand the process and to be able to make submissions aids the conduct of the inquiry rather than thwarts it. When I wanted submissions on rule 13, the lawyers all understood what that meant and were all able to put in skeleton arguments and focused submissions. Litigants in person would not understand, and I have no doubt that it would have taken a great deal of time to unpick the points they wanted to make. I believe that having some lawyers there aids the process.

At one stage, it was thought there should be lots and lots of different representatives for the victims, for those who complained, and I was not going to have that. I had one team and the Act permits me to nominate one team if they cannot agree. In the end, they agreed. I was not going to multiply up the number of people who were participating, but I did feel it right that those who were paying for their own representation were. All the press groups that wanted to be represented were represented. The National Union of Journalists was represented. They had a junior barrister who did not come very often. I think the Queen’s Counsel came when Mr Murdoch arrived, but not otherwise or maybe once or twice otherwise. I may do him an injustice.

I do think there is a balance there to be struck, but I do not think that it is too adversarial. I think the process of the Act makes it inquisitorial and that may be one of the big differences between my inquiry and that conducted by Lord Saville where there was never-ending cross-examination. I say that with respect to those who were conducting it and not being critical of them.

Q95 Baroness Buscombe: I just wanted to touch very briefly on two issues: core participants, which I do not think we have touched on but Sir Brian has referred to, and also very briefly on whether it should be adversarial, inquisitorial or something else entirely like dispute resolution, something much more informal, which may reveal the truth. Of course, at the end of the day the whole point of an inquiry is to establish the truth, and the question remains after every inquiry: was the real truth established? The core participant point: am I right in suggesting that people put themselves forward to be core participants?

Sir Brian Leveson: Yes.

Baroness Buscombe: One of the concerns I have is that you have referred to core participants as opposed to others who gave oral evidence as if somehow the core participants have a different level of credibility.

Sir Brian Leveson: No.

Baroness Buscombe: Would you like to comment on that?

Sir Brian Leveson: They do not have a different level of credibility. They have a different level of involvement. By being a core participant, you get to see the statements in advance. You get to make representations about the statements. You get to ask Counsel to ask questions. You get to make submissions of law. You get to make closing submissions, and in

some cases you get to make opening submissions. It is a different level of involvement. It is absolutely no different level of credibility.

Baroness Buscombe: But if somebody who is core to the whole issue is not a core participant, are they less able to reveal what they believe to be the truth?

Sir Brian Leveson: Well, I hope not. I was very keen that Counsel to the inquiry, whoever was going to ask questions of any witness, met informally with that witness beforehand—I am not asking, but I hope it happened in your case, too—to discuss the evidence and the sorts of questions they would ask, and equally to receive any feedback. If any witness had been concerned that there were other things they wanted to say—of course, they had the chance to put what they wanted to put into their statements—then I would have considered it.

Nobody was disadvantaged only because they were a witness as opposed to a core participant, at least I certainly hope not, and anybody was free to put themselves forward as a core participant. There was one person who applied to be a core participant to all four of the modules and challenged my decision not to permit her to be a core participant in the divisional court on each occasion. I invited her to put in a statement in writing, but she never did. I encouraged anybody who wanted to be a core participant to put themselves forward.

Another core participant I rejected was somebody who wanted to open up a detailed incident, which would hijack the inquiry entirely. I will tell you what it was because it is the subject of a ruling. It related to the murder of Daniel Morgan and that is now the subject of an inquiry of its own right. I was concerned that if I said yes to that then the entirety of my inquiry would be taken up by looking at what was an extremely complex series of investigations.

Baroness Buscombe: That brings us neatly in a way, my Lord Chairman, to the question on the use of evidence and what is and is not admissible.

The Chairman: Is there anything that Lord Trimble wanted to bring in on inquiry rules?

Lord Trimble: I am quite content to wait for that.

The Chairman: It is under inquiry rules. Do you want to cover that now first, then it is out the way?

Q96 Lord Trimble: You mentioned the problems that you had arising from rule 13.

Sir Brian Leveson: Yes.

Lord Trimble: The view has been expressed to us that some other rules, particularly rule 9 and rule 10, are too prescriptive and that it would be much better if those rules were of a more general nature and left more discretion to the person conducting the inquiry. Do you have a view on that?

Sir Brian Leveson: I do believe that the rules should give the chairman latitude. Rule 10 on questions—I think that is the rule that deals with questions to the chair—has a value because it allows the chairman to control it. There is a discretion, because I could always say, “Yes, if you want to ask those questions ask them”. I had the latitude to say to Mr Jay, “Well, I think we should do this area slightly differently”. I was also able to use my discretion to use a technique that the Australians describe as hot-tubbing, which is to have more than one witness give evidence at the same time. Some of my experts in module 4 gave evidence together and some of the regional press gave evidence together. There is discretion and I would do nothing to limit the discretion of the tribunal.

Lord Trimble: You were obviously very much concerned to get things done as quickly as possible because of the time limits that had been set, and you have explained some of the things that you did to enable you to move as quickly as possible. Would there be any changes to the rules that would be desirable in order to shorten hearings and the expense involved?

Sir Brian Leveson: I cannot think of a change to the rules that would do that. The question was asked about scoping and planning, but whether that is a matter of rule or practice is an interesting question. I would not want you to think that the time that I took over the inquiry governed everything I did. It did not. I told you that I deliberately interpreted my brief in a way that allowed me sufficient time to do what I felt was necessary to do. If somebody had wanted me to take three years over it, I am not saying it would not have been possible. Not by me; I would not have done it.

The Chairman: I wonder if we now might return to the question on Counsel.

Q97 Lord Trefgarne: I should start by saying that I was a witness before Sir Richard Scott's inquiry many years ago and that did take three years, so we are not unfamiliar with the time that these things sometimes take. I am interested in the question of the appointment of Counsel to the inquiry; following on from that, how Counsel to the inquiry might conduct themselves; and how, indeed, Counsel for witnesses may conduct themselves. In fact, in Sir Richard Scott's—as he then was—case, his Counsel did, rightly or wrongly, come in for some criticism subsequently, although not from me certainly. Are you happy with the way that Counsel to the inquiry is appointed, which is I think by you, the chairman?

Sir Brian Leveson: Can I just add to an answer I have given before, which I have just remembered? I believe witnesses were entitled to their own lawyers. Even though you are not a core participant, when a witness came he or she was entitled to have a lawyer present and there were circumstances, I think, in which that lawyer could participate during that witness's evidence. I am just dealing with the question that Baroness Buscombe asked me.

On Counsel to the inquiry, I can tell you what happened with me. The Treasury Solicitor came to see me. He said, "These are the leading Counsel who the Government have confidence in, but you can discuss any names you want and I will make such enquiries as you wish". I saw the entire list of Queen's Counsel. I reduced that into a smaller list because I was looking for particular expertise. I then met a number of leaders because it was also very important that I had somebody I could work with. The relationship between the chairman and Counsel to the inquiry is very close and it should not be misunderstood. I was very content that I was able to appoint somebody, first, who I thought could do the job and, secondly, with whom I could work. In that assessment, I say immediately I was absolutely, totally and completely correct. It is difficult for somebody else to do it because you cannot do the chemistry thing and it is difficult for somebody else to know precisely how you want the inquiry to be conducted.

On other Counsel, I will tell you how that was done. I was not involved in initially choosing the juniors. I left that to Counsel to the inquiry. I left that to Robert Jay, but I then met his choices and he explained why he had made the choices he had made. They were to cover different expertise and they were made from different experiences and different grades of the Treasury Solicitor's framework and I approved each of the choices. We discussed beforehand what we wanted. We wanted somebody who had expertise in inquiries. We wanted somebody who had this sort of expertise, that expertise. We added a barrister who had a lot of experience of police work when it came to module 2. The process was entirely collusive. I think if the Act starts to be prescriptive you will get yourself into difficulty.

Lord Trefgarne: On whose instructions does Counsel to the inquiry act, on the chairman's instructions?

Sir Brian Leveson: Yes.

Lord Trefgarne: In the past, when I have asked who hired or for whom was he working, there has sometimes been less than clarity in the answer. You are clear that he is acting on your instructions?

Sir Brian Leveson: As far as I was concerned he was working for me and acting for me. I was not personally paying him.

Lord Trefgarne: I am glad to hear that. His line of inquiry would be one that you were looking for?

Sir Brian Leveson: Yes. I did not write his questions for him, but he had to know how I wanted the evidence to emerge. We discussed that because we had to ask the right questions for the statements that were made. It was entirely a collusive exercise.

Lord Trefgarne: You never stopped him on a particular line of inquiry, "Stop that; let us go on with something else", did you?

Sir Brian Leveson: Yes, I did.

Lord Trefgarne: Did you?

Sir Brian Leveson: Yes, I did. More than once, I said, "Move on".

Lord Trefgarne: I am very interested to hear that, because that was one of the issues that arose in the Scott inquiry.

Sir Brian Leveson: It did not happen often because he knew what we had to cover as well.

Lord Trefgarne: You had a good rapport with your Counsel, did you?

Sir Brian Leveson: I believe so.

Lord Trefgarne: I think that is good. What about Counsel acting for witnesses? Are you happy with the way they are appointed? I suppose it is a matter for the witnesses.

Sir Brian Leveson: It was a matter for the witness. The only area in which the chairman gets involved is if there are lots of people who want individual representation and he does not want lots of representatives; he only wants one set of lawyers. The law prescribes that he can identify who the lawyer is going to be. Equally, if you want public funding, the chairman has to approve that. I did approve some public funding but I was very careful with public funding.

Lord Trefgarne: Thank you for that. Do you think that having witnesses represented by Counsel makes the whole process perhaps too adversarial?

Sir Brian Leveson: It did not for me because, where the witnesses did have their lawyers present, the lawyers knew what I would permit and what I would not permit and nobody sought to go beyond that. There were times when I felt that the impression might be given that there was an adversarial contest going on between me and the core participants rather than between the core participants among themselves, but I believe that I was extremely well served by all the legal representatives, who worked extremely hard to the timetable I had set and within the parameters I set. I am not criticising any of them.

Lord Trefgarne: Did you allow Counsel to question other witnesses, other than the ones they were representing?

Sir Brian Leveson: I cannot remember.

Lord Trefgarne: Do you think they should or should be able to if they want to?

Sir Brian Leveson: I cannot remember what the law permits in that regard. If a witness had traduced somebody and that somebody wanted to challenge it, I would have hoped we learnt about it because, where we knew of conflicts, we did try to put the case. That has certainly happened many times in relation to core participants, many times, but whether a witness wanted to challenge something, I am not sure it happened.

I do know that the Press Complaints Commission was concerned that some of the evidence that I was given and that is in my report, some of the statistics, are factually in error. I cannot solve that now, not least because all the people who helped me have long since spread to the four corners, but I do intend to publish the concern expressed so that it is on the face of the record. I only knew about that after the report had been published, but I do intend to make that clear in fairness to everybody. I am not going to decide who is right, because I cannot.

Q98 Baroness Stern: Can I declare an interest in that my husband was a panel member of the Billy Wright inquiry? My question is about lawyers and the amount that is left to ask is very small.

Sir Brian Leveson: Is that good or bad?

Baroness Stern: Looking at the clock, I think it is extremely good, but perhaps I could just ask one thing. If you were to think more widely about an inquiry where, for example, people had died and families of people who had died were what you might call core participants, do you think they would be happy or you would be happy with the way you approached—very wisely, in view of your timeframe—the question of who could be represented and what the representatives could do and what they could not do? Would this work in all inquiries, this extremely strict and very economical and, I am sure, very effective method?

Sir Brian Leveson: It may not, because if I was investigating a death then I would be extremely sensitive to the legitimate concerns of the family of the bereaved. Therefore, I have no doubt that I would allow much greater latitude to those legal representatives. I think that is absolutely appropriate.

The problem sometimes may arise where the families do not speak with the same voice. Then one is going to get into terribly difficult issues of how one can proceed with the inquiry. There, Counsel to the inquiry might assist because they may be able to broker an approach that deals with the legitimate questions of both without twisting a knife into family problems. I do believe that the approach to inquiries after fatal incidents requires extreme sensitivity and adjustment to the approach. Nobody in the inquiry I conducted died, although as I say I declined to investigate the death of Daniel Morgan, for reasons which I have explained.

Q99 Lord Soley: You will be aware that the area you examined was pretty contentious, to put it mildly. You will also be aware that there have been many previous reports. As somebody who moved a Bill in the House of Commons back in 1990, I have watched progress move, at times, very slowly. I must congratulate you, by the way, on coming up with a better system than I came up with in terms of the distance between the appointments system and the panel.

My particular question to you does relate to how you take this forward. There have been previous reports, most notably Calcutt. Calcutt made one report on the press and then had to make a second report and still there was virtually no change. The question is: can you take things forward with a report? Lord Bichard reviewed the progress on the recommendations in relation to the Soham murders six months after he had completed the report. You might not welcome the opportunity of having another look at the progress that we have made, but it is relevant and, indeed, recent developments have suggested that, too. There is a question of whether the report that is done should just lie on the table and hope that someone acts on it or whether the report should have a continuing life and enable the chairman to say, “No, we need to look at this again to see what progress has been made on the recommendations made”, precisely as Lord Bichard did in the Soham case. Do you have a view about that?

Sir Brian Leveson: Yes, I do and it flows from one of the disadvantages I identified at the very beginning of this session in having a judge. Lord Bichard was an expert in the field. He was able to look at the regime and provide input. I am a serving judge. It would be absolutely inappropriate for me to come back into the question of my report or regulation of the press. I was given a job to do. It was to examine the facts and to make recommendations. I examined the facts. I set them out in what might be described as extremely tedious detail. I reached a series of conclusions, which was my very best shot. I have said all I can say on the topic.

Many people have asked me to give speeches, keynote lectures. They come in every week, and I am afraid that what I said on 29 November 2012 remains my view. I have done my best. It is for others to decide how to take this issue forward and it would be wrong for a serving judge to step into the political domain.

Lord Soley: If I may say so: it was a pretty good shot in my view, but it would be. What I am asking is not about a serving judge. If you look at what we did with Calcutt, there was Calcutt 1 followed by Calcutt 2. In other words, Parliament said, “It has not really moved in the direction we anticipated”, so we came up with Calcutt 2. We had another look at it because progress had not been made. In other words, public inquiries are not just about finding factual matters. They are also about making progress on the problems that are identified.

Yes, you may well be right: it is not a job for a serving judge. I understand that because it could, especially on this topic, put you right in the political firing line. But, if you look at the history of attempts to protect the freedom of the press but at the same time to protect the rights or citizens of this country and to get that balance right, it does not mean that we should not have a way of saying, “In future we need to make progress”, which did not happen with all the previous inquiries into the press.

Sir Brian Leveson: I quite understand. I think Sir David suggested that he would review it after 18 months. His idea was, “I do not think this is going to work but we will give it a shot and I will review it”. That would not have been open to any judge. I think that is, therefore, a potential disadvantage of having a judge conduct an inquiry: that he will not step into the politics at all, with a small “p”, and, therefore, maybe there does need to be somebody else. The problem I think is, in the context of the subject that I discussed, who that would be.

Lord Soley: If I may pursue this, because I do think it is a very important point. One of the reasons I think it was right to appoint a judge, as I indicated in an earlier question, is because criminal behaviour had been alleged. I think in that situation some people would be in difficulty if you did not have a legal expert in charge of the proceedings. On the other hand,

if you look particularly in the case of the press and the balance between freedom and responsibility of the press, there has very clearly been a need over the last 30 years or so to make progress and we have failed. We did fail. I am hopeful that what you have done will move it forward. If it does not, I do wonder how we are going to come back again, unless we are to have another 20 or 30 years of this nonsense.

Sir Brian Leveson: There is, I hesitate to say it, within the terms of reference another part to this inquiry. I do not know when anybody will consider that; certainly not at the moment, but that is not for me to say.

Lord Soley: You do not wish to comment on that possibility?

The Chairman: I think we ought to move on now and perhaps we can cope with this business of evidence and then conclude.

Q100 Baroness Buscombe: Sir Brian, at the heart of all of this is public trust in our current system of inquiries. This could be in relation to any inquiries because, of course, inquiries are set up for myriad different reasons, but the heart of all inquiries seem to be hurt that some have endured for one reason for another, in which case the public may say, “What is the point of a system of inquiry if, according to Section 2 of the Inquiries Act, an inquiry panel is not to rule on and has no power to determine any person’s civil or criminal liability?”.

In a previous session we have heard from Sir Stephen Sedley, who has said—Lord Justice Taylor’s findings at the first Hillsborough inquiry being an example—“I have felt that findings of an inquiry could be used as prima facie evidence in subsequent litigation.” In other words, even if the inquiry itself could not opine civil or criminal liability, maybe that evidence could be used towards subsequent litigation. Another example Sir Stephen Sedley has given is, “Nowadays, given coroners’ inquests are properly conducted and Article 2 compliant, there is no reason why their verdicts, particularly coroners’ jury verdicts, should not be evidence in a court of law.” Could you comment on that, please?

Sir Brian Leveson: I certainly would not want to comment on the latter part because I have not thought about it at all. As regards the former, an inquiry cannot determine criminal or civil liability. If it did, all the adversarial problems would just bounce back because everybody would have to have a chance to put their case because nobody should be condemned without that opportunity or certainly not be subject to a penalty in crime or potential award of damages in civil law.

As regards the admissibility of evidence, I believe that every word that was uttered in my inquiry would be admissible in a civil court. It has all been said on the record. It is available to be deployed. That is one of the reasons why I was so careful not to ask anybody any questions about phone hacking, which was the subject of the criminal investigation. It might be thought it was the elephant the room, but we were able to do sufficient around the subject to know exactly what was going on without having to deal with the issue of self-incrimination.

I went further than advising people about their right not to answer questions. I declined to permit questions about phone hacking to those who were under investigation because I felt that even to say, “I do not want to answer on the grounds it might incriminate me”, was itself prejudicial to them and I did not want to prejudice any of that which was then being undertaken.

Baroness Buscombe: Of course, phone hacking relates to criminal liability but, in the case of civil liability, is there a case for some inquiries perhaps to be allowed to determine civil liability, with the appropriate safeguards?

Sir Brian Leveson: I think the problem you then get is the adversarial system because then the consequence is that each side who might be affected will want to call their own witnesses. They will say, "I want to call X", or, "I want to cross-examine Y", whereas in my inquiry I decided who was going to come and give evidence. Inevitably in our system of justice, not in all systems of justice, our determination of civil liability is adversarial. That is how we do it. We can change it, but that would be a very dramatic change to the way in which we resolve disputes in this country.

Q101 The Chairman: Sir Brian, we have had the thick end of two hours of your valuable time and we are very grateful for that. Can I ask a final question of you: in general do you believe that the Inquiries Act and the rules provided you with adequate powers for the conduct of your inquiry and are there any changes that you would like to see made?

Sir Brian Leveson: No, I think the Act did provide me with adequate powers to conduct the inquiry in a way that was efficient and as effective as I could make it. The only time that the rules did worry me concerned rule 13, for the reasons that I have sought to explain.

The Chairman: Thank you very much indeed. We are very grateful to you for coming along. Thank you very much indeed for coming.

Sir Brian Leveson: Thank you very much indeed.

Liberty, Inquest and Rights Watch UK – Oral evidence

Liberty, Inquest and Rights Watch UK – Oral evidence

[Transcript to be found under Inquest](#)

Liberty – Written evidence

The purpose and importance of inquiries

1. Public inquiries are a key component of the constitutional and administrative justice system in the UK. Inquiries provide a means for the truth about an event or series of events to be reached by an independent and authoritative body, but in a manner which is more inclusive and restorative than litigation. The 2005 Act grants a power to establish inquiries where there is ‘public concern.’³⁹ Frequently, the acts or events that have given rise to concern will be the acts or alleged acts of state authorities. Public inquiries therefore play an essential role in holding state power to account.

2. Successful inquiries throw light on events that have given rise to public concern, and, where evidence of wrongdoing is uncovered, the publicity and recommendations they produce can bring about changes which will reassure the public that such acts will not be repeated. For example, the Baha Mousa inquiry (established under the 2005 Act) uncovered a range of failings in the culture and training of military personnel, and steps have been taken to revise and reform these since the inquiry’s report. Unsuccessful inquiries, by contrast, fail to inspire the confidence either of those involved or of the public at large, and indeed may damage public confidence further by being perceived as a whitewash. The abortive Gibson Inquiry into involvement in extraordinary rendition and torture by the UK government illustrates how a poorly-designed inquiry can further reduce trust in government, if its terms of reference and powers are so limited that it is unable to conduct an effective investigation into the events concerned.

3. Liberty is supportive of a strong statutory underpinning of inquiries, which will give inquiry chairmen the powers and independence to conduct rigorous, comprehensive investigations. Unfortunately, the Inquiries Act 2005, both in the legislative framework it establishes, and in the way practice has developed since, has not provided this. Liberty therefore welcomes this opportunity to scrutinise the Act and its implementation.

The Act

4. The Inquiries Act 2005 was intended to provide a model and a framework for future inquiries, which previously had only been established on an ad hoc basis using the prerogative of Ministers or Parliament. This framework conferred new, stronger powers on inquiry chairmen, for example, the power to require production of evidence,⁴⁰ which is backed up by a criminal sanction;⁴¹

³⁹ Inquiries Act 2005, s.1.

⁴⁰ Inquiries Act 2005, s. 21.

⁴¹ Inquiries Act 2005, s. 35(1).

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the power to take evidence on oath;⁴² and new offences of distorting or concealing evidence relevant to the inquiry.⁴³ When an inquiry is established under the 2005 legislation, these provisions have strengthened the ability of inquiry chairmen to conduct detailed, transparent and rigorous investigations, better able to uncover the truth.

5. The Baha Mousa inquiry (established under the Act), which uncovered serious disciplinary breaches and “corporate failure” on the part of the Ministry of Defence, demonstrates how the powers granted by the 2005 Act - where there is no inappropriate interference by Ministers - can allow inquiry chairmen to reach the truth about controversial events and promote Government accountability where otherwise there would be none. The 73 recommendations made by Sir William Gage also illustrate how inquiries can not simply point out, but also help to address failings in policy and practice.

6. However, the strength of the powers granted under the 2005 Act are badly undermined by numerous provisions of the Act which restrict public access to the inquiry and reduce its transparency, and which allow Ministers to suspend and even terminate an inquiry at will. These provisions are not conducive to the inherent function of a public inquiry; that it inspires confidence on the part of the public and the individuals involved. It is highly doubtful that an inquiry will succeed in allaying public concern if it is, or at the very least is perceived to be, lacking in independence from Government and if its proceedings and report are not open to the public.

Lack of Independence from Government

7. The Act puts a significant degree of potential control over the inquiry in the hands of the Minister concerned. Inquiries under the 2005 Act are established by the Minister⁴⁴ and the panel is appointed by the Minister.⁴⁵ However, more worryingly, the Act confers on Ministers powers to suspend or terminate inquiries, which could cast serious doubt on the degree of independence possible for an inquiry established under the Act.

8. Section 13 permits the Minister to “at any time, by notice to the chairman, suspend an inquiry for such period as appears to him to be necessary” for the purposes of “the completion of any other investigation relating to any of the matters to which the inquiry relates” or “the determination of any civil or criminal proceedings (including proceedings before a disciplinary

⁴² Inquiries Act 2005, s.17(2).

⁴³ Inquiries Act 2005, ss. 35(2) and (3).

⁴⁴ Inquiries Act 2005, s.1.

⁴⁵ Inquiries Act 2005, s.4.

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tribunal) arising out of any of those matters.” These broad grounds for suspension would therefore allow a public inquiry to be suspended and priority to be given to a huge variety of other investigations into “any of the matters” at which the inquiry is looking. These other inquiries need not be anywhere near as rigorous or independent as a public inquiry. For example, an inquiry could be suspended to allow an internal investigation by, for example, the Government department or agency concerned; or police disciplinary proceedings where the events under investigation include allegations of police wrongdoing. Similarly, the ability to suspend an inquiry pending the determination of civil or criminal proceedings would allow an investigation into large-scale structural or institutional failings to be suspended, while civil or criminal liability is fixed on a single individual. The criminal or civil liability concerned need not constitute the focus of the inquiry’s investigations but need only be “arising out of any of those matters” to allow suspension of the inquiry.

9. The Minister may also terminate an inquiry under the Act at will. Section 14 provides that an inquiry may come to an end on any date, before the inquiry has delivered its report or the Chairman has stated that it has fulfilled its terms of reference, which is specified in a notice given to the Chairman by the Minister. Unlike with section 13 suspension, there is no limitation on the reasons for which the Minister may terminate the inquiry, other than general public law principles. As with the power to suspend under section 13, there is only a weak obligation on the Minister to consult with the chairman before suspending/terminating the inquiry.

10. The Baha Mousa inquiry (established under the 2005 Act) illustrates that where an inquiry Chairman is left to exercise the powers granted under the Act independently and free from Government influence, inquiries under the Act can succeed in uncovering the truth and holding government to account. However, it is obvious that there is a risk that these provisions could seriously compromise the independence, and perceived independence, of an inquiry established under the Act. Any chairman of an inquiry established under the 2005 Act will be operating under the shadow of the Minister’s power of suspension and termination, which provide a clear temptation for the Minister to use these powers to put an end to an inquiry whose investigations or findings threaten to become embarrassing. Whether or not any chairman would feel such pressure, or any Minister would use these powers inappropriately, there is a clear conflict of interest, and the existence of these powers could compromise the perceived independence of inquiries established under the Act in the eyes both of those involved and the general public. The Act’s provisions thus risk undermining the very purpose of an inquiry, as stated by the Act itself in section 1, of dealing with public concern.

Lack of openness and transparency

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11. As mentioned above, one of the central purposes of inquiries is to uncover the truth about events which are causing public concern, which in turn may lead to reform of the institutions at fault; redress for victims; and perhaps even some degree of reconciliation among the parties involved. However, as with the provisions permitting suspension and termination of inquiries, the Act once again undermines its own objectives. There are a number of worrying provisions in the Act which restrict access to the inquiry and limit the evidence which can be disclosed or published. These provisions limit both the ability of the inquiry to ascertain the truth and to reassure the public.

12. The default position of the Act on public access to inquiry proceedings is disappointingly weak. Section 18 obliges the chairman merely to ‘take such steps as he considers reasonable’ to ensure that the public and press can attend the inquiry or see and hear a simultaneous transmission of proceedings, and obtain or view a record of evidence and documents. This weak obligation is then attenuated by a series of further provisions which carve out exceptions allowing access to inquiry proceedings and documents to be limited.

13. Section 19 permits restrictions on attendance at the inquiry, and on publication of documents or evidence given. These restrictions can be imposed by either the chairman of the inquiry, or the Minister.⁴⁶ The restrictions may be imposed for an extremely broad range of reasons. Restrictions must be “conducive to the inquiry fulfilling its terms of reference” or “necessary in the public interest”, having regard to certain criteria, including the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern; and any risk of harm or damage that could be avoided or reduced by any such restriction. Damage to national security and international relations, the economic interests of the UK; and damage caused by commercially sensitive information are explicitly included within the types of “harm and damage” that can justify the restrictions.⁴⁷ Given that previous public inquiries have frequently uncovered evidence which is at the very least embarrassing to Government, giving the Minister the power to restrict publication of inquiry documents creates a clear conflict of interest.

14. In addition to its inclusion in the general restriction provision in section 19, section 23 makes specific provision further restricting disclosure of information which may damage the economic interests of the UK. If the Crown, the Financial Conduct Authority, the Prudential Regulation Authority or the Bank of England submit that information ought not to be revealed because it risks damaging the economy, this information “must not” be revealed unless the panel is satisfied that the public interest in the information being revealed outweighs the public interest in avoiding a risk of damage to the economy.

⁴⁶ Inquiries Act 2005, s.19(2).

⁴⁷ Inquiries Act 2005, s.19(3)–(5).

15. Finally, the Act allows the inquiry to redact sections from its final report, where it is “necessary in the public interest,” having regard to matters including “the extent to which withholding material might inhibit the allaying of public concern” and “any risk of harm or damage that could be avoided or reduced by withholding any material” (again with harm and damage defined very broadly to include damage to national security, international relations, and the economic interests of the UK).⁴⁸ The self-defeating nature of these provisions is striking. Public inquiries are established to allay public concern or establish whether it is justified, often where wrongdoing (frequently by the State) has been concealed or not sufficiently investigated. It is entirely counterproductive if the wrongdoing or error that is uncovered is then suppressed by the inquiry established to investigate it and, if the public feel information is being withheld from them, risks further undermining public confidence in the inquiry system.

Inquiries established outside the 2005 Act

16. The Inquiries Act 2005 provides a framework for public inquiries, which includes the powers to summon persons, require production of evidence, and to take evidence under oath. However, Parliament did not exclude the possibility of Ministers establishing inquiries outside the Act when the legislation was passed. Arguably, there is a case for preserving the flexibility to establish an inquiry outside the structures prescribed by the Act. However, it is difficult to avoid the conclusion that, in practice, Ministers are choosing to establish inquiries into controversial events outside the Act in order to ensure that the inquiries will not benefit from these strong investigatory powers granted by the Act, thereby reducing the risk that evidence will emerge which is damaging, or at least embarrassing, to Government. For example, the Iraq inquiry (2009), the Detainee inquiry (2010) and the Mid-Staffordshire Hospital inquiry (2009) have all been established outside the 2005 Act.

17. The Detainee inquiry, for example, did not possess the strong investigatory powers described above, and which would have been automatically present had the inquiry been established under the 2005 Act. As constituted by the Minister, using his non-statutory powers, the inquiry was seriously deficient, to such an extent that Liberty and numerous other organisations and core participants believed that the inquiry was inherently incapable of fulfilling the UK’s human rights obligations. We believed its structure would make it impossible for the inquiry to get to the truth of the UK’s involvement in extraordinary rendition and torture or to ensure such abuses do not occur again.

⁴⁸ Inquiries Act 2005 s.25(4) and (5)

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18. Under its terms of reference and protocol (drawn up ad hoc by the Minister, rather than following the model provided by the Act) the inquiry lacked the powers to decide which documents or evidence to publish. While the inquiry could argue for publication, the Government has wide grounds for refusal and the final say rests with the Cabinet Secretary, who is of course answerable to the Government. While some documents may need to be kept secret for legitimate national security reasons, there should be a presumption in favour of openness with the final decision on disclosure resting not with the government but with an independent body, such as the panel themselves. Even given the problems with the Act's provisions, outlined above, if the Detainee inquiry had been established under the Inquiries Act, the proceedings and evidence would have benefited from a presumption (albeit a weak one) of public accessibility, and the panel would have had considerably more control over which documents and evidence should not be disclosed.

19. The Inquiry also prevented the meaningful participation of victims, their representatives and other interested parties. With the exception of the heads of agencies, all members of the security services would have given evidence behind closed doors, and there would be no opportunity effectively to cross examine or otherwise challenge that evidence. Those who were subject to torture, rendition or illegal detention and the groups who documented these abuses should surely have the opportunity to challenge the official version of events and those responsible for policy and its implementation.

20. The Detainee inquiry therefore provides a good example of how an inquiry which is limited in its independence and in its ability to uncover the truth will not inspire the confidence of the public or of persons involved, and will therefore fail in its chief objective of allaying public concern. In addition to a number of NGOs, the inquiry was boycotted by victims of rendition and torture, including Abdul Hakim Belhadj. Mr. Belhadj was unlawfully transferred to Libya where he was subjected to torture, and is now pursuing a claim against the UK Government in the civil courts.

21. Given these characteristics of the inquiry's design and terms of reference, it is difficult to resist the conclusion that the non-statutory path was chosen deliberately to limit the powers of the panel to uncover the truth, and to limit the access of the public to whatever conclusions the panel would reach. The purpose of such an inquiry therefore becomes little more than a cynical public relations exercise, to diffuse political criticism, and ensure that potentially embarrassing events or issues are kicked into the long grass until an anodyne or inconclusive report is produced.

The Inquiries Act 2005 and the inquest system

22. The Coroners and Justice Act 2009 radically changed the role played by inquiries under the 2005 Act, as it allowed them to be used as a substitute for an inquest. Liberty has long objected to Government attempts to introduce secret inquests, and secret inquiries masquerading as inquests, since they were first proposed in the Counter-terrorism Bill 2008. The Government was forced to abandon these plans in November 2008, but they reappeared in the Coroners and Justice Bill (now Act) 2009. Over the course of its rocky passage through Parliament, clause 11 of the Bill, which provided explicitly for juryless, closed inquests, was removed in the face of considerable cross-party opposition. However, it then became clear that the Government intended to use provisions in Schedule 1 of the Act to achieve secret inquests via the back door.

23. Paragraph 3 of Schedule 1 to the Coroners and Justice Act 2009 provides that a senior coroner *must* suspend an inquest into a person's death if the Lord Chancellor so requests on the basis that the death is being investigated by an inquiry under the Inquiries Act 2005. Paragraph 9 of that schedule provides that the inquest cannot be resumed until 28 days have passed from the day the inquiry was concluded or its findings published,⁴⁹ or until after related criminal homicide proceedings have been concluded.⁵⁰

24. These provisions allow the Government to cause an inquest to be superseded by an inquiry under the 2005 Act. As described above, the 2005 Act contains a number of broad provisions allowing the evidence and findings of such an inquiry to be withheld from the public. Most worryingly, paragraph 9(11)(a) provides that, where the inquest is resumed following the inquiry, the determination made by the inquest “may not be inconsistent with the outcome of” the inquiry under the 2005 Act which caused it to be suspended. The Government is therefore effectively able to replace a full and rigorous investigation into a controversial death, conducted by a coroner, in public and with a jury, with an inquiry under the 2005 Act which, as described above, can hear evidence in secret, can restrict public access to its proceedings and conclusions and which, by virtue of the significant degree of control held by Ministers, cannot be said to be fully independent of Government. Any inquest which follows then has its hands tied, as it cannot depart from the findings made by the considerably less rigorous, independent and transparent inquiry. Liberty believes that, where such a procedure is used to investigate a controversial death in which the State is involved, this may violate the Human Rights Act 1998 (HRA), as its procedures will not be compliant with the requirements of Article 2 ECHR, outlined below.

Article 2 of the Human Rights Act 1998

⁴⁹ Coroners and Justice Act 2009, Schedule 1, Paragraph 9(2).

⁵⁰ Coroners and Justice Act 2009, Schedule 1, Paragraph 9(4).

23. The standard by which any investigation of a death in custody must be measured against is the obligation laid down by article 2 of the HRA⁵¹ which protects the right to life. It is well established that “*wherever state bodies or agents may bear responsibility for [a] death, a procedural duty to investigate the death arises under Article 2*”.⁵²

24. The European Court of Human Rights in *Jordan v UK*⁵³ examined the state’s obligations under article 2 following a death in state custody. It held that the State must ensure the deceased’s family are provided with the truth; that lessons are learnt to improve public health; and that, if appropriate, criminal proceedings be brought. In particular, it held that an investigation into the death must be made on the initiative of the State (i.e. it is not sufficient to rely on civil proceedings brought by family members etc) and the investigation must be independent; effective; prompt; open to public scrutiny; and support the participation of the next-of-kin. The Court held that failure to meet these requirements will, in itself, constitute a breach of article 2. This position was confirmed by the House of Lords in *Amin*⁵⁴ which established that these requirements should not only apply where state agents were actively involved in the death of a person but also “*where the death was alleged to have resulted from negligence on the part of state agents*”.

25. In *Middleton* the House of Lords acknowledged that:

“*The European Court has also interpreted article 2 as imposing on member states a procedural obligation to initiate an effective public investigation by an independent official body into any death occurring in circumstances in which it appears that one or other of [article 2] obligations has been, or may have been violated and it appears that agents of the state are, or may be, in some way implicated.*”⁵⁵

Middleton also set out that:

“*there must be a sufficient element of public scrutiny of an investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved to the extent necessary to safeguard his or her legitimate interests.*”⁵⁶

⁵¹ Article 2 of the European Convention of Human Rights as incorporated by the HRA.

⁵² *R (on the application of Hurst) v Commissioner of Police for the Metropolis* [2007] UKHL 13 para 28.
⁵³ (2001) 33 EHRR 38.

⁵⁴ *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51

⁵⁵ *R (on the application of Middleton) v HM Coroner for West Somerset* [2004] UKHL 10, para.3.

⁵⁶ *Ibid.*

26. It is now well established that the primary way in which the UK fulfils its procedural duties under article 2 is by coronial inquests which are open to public scrutiny and the full participation of the next of kin of the deceased. In *Amin* Lord Bingham listed the purposes of an ‘article 2 compliant’ investigation:

1. to ensure as far as possible that the full facts are brought to light;
2. that culpable and discreditable conduct is exposed and brought to public notice;
3. that suspicion of deliberate wrongdoing (if unjustified) is allayed;
4. that dangerous practices and procedures are rectified; and
5. that those who have lost their relative may at least have the satisfaction of knowing that lessons learned from his or her death may save the lives of others.

27. Culpable and discreditable conduct cannot be brought to public notice in the absence of a public examination of the core facts surrounding the circumstances of a death. Neither can suspicion of deliberate wrongdoing be allayed. Similarly, it is difficult to see how lessons can possibly be learnt where core evidence is kept secret – it is even harder to see how relatives can be satisfied of this when they are denied crucial information about their loved one’s death.

28. While the European Court of Human Rights has not prescribed a single model for article 2 compliant investigations, the Court has stated in *Jordan v UK*, that the bare minimum requirements include “a sufficient element of public scrutiny” and the involvement of the next of kin “to an appropriate extent”. By way of example, *R on the application of Sacker v HM Coroner for West Yorkshire*⁵⁷ and *R on the application of D v the Secretary of State for the Home Department*⁵⁸ both confirmed that when an investigation had not been carried in public, the publication of a report was insufficient to make the procedure compatible with article 2.

29. In relation to the involvement of the next of kin, *Amin* found that “the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests”. Mr Justice Collins elaborated on this in the case of *Smith v The Assistant Deputy Coroner for Oxfordshire*⁵⁹ by saying:

“in an Article 2 case it will be difficult to justify any refusal to disclose relevant material. Where material is not just relevant, but goes to the core of the circumstances of a death, there can be no

⁵⁷ [2004] 1 WLR 796.

⁵⁸ [2006] 3 All ER 946.

⁵⁹ [2008] EWHC 694 (Admin), see para 37.

justification for denying either next of kin or the public generally the opportunity to scrutinise that evidence.”

30. It is therefore difficult to see how replacing an inquest with an inquiry under the 2005 Act, and allowing core evidence to be heard in closed session, could comply with the requirements of Article 2 ECHR. Executive interference and exclusion of the jury, family and public would seem to conflict with the requirements of independence, family involvement, public scrutiny and ‘learning lessons’ established in *Jordan v UK*.

Political interference in the inquest system

31. Political interference in the inquest system could have serious implications for public trust and confidence. These provisions give the Secretary of State unprecedented power to intervene in the investigation of contentious deaths. Where an inquest is taking place into a death, if the Minister establishes an inquiry under the 2005 Act, that inquest must be suspended, allowing the inquiry (with all the defects in its procedure outlined above) to conclude. Almost by definition the inquests to which these provisions would apply are likely to involve controversial or violent deaths. They would, therefore, give the Secretary of State a key role in the very inquests where the state’s actions are most under scrutiny.

32. If inquests take place behind closed doors in the form of secret inquiries it will be hard for bereaved families and the public at large to allay suspicions of any wrongdoing. Indeed, it may actually intensify suspicion of the State and their possible culpability. During the passage of the Coroners and Justice Act there was much speculation that the government sought to enact these provisions in order to avoid the type of public inquests that have proved politically embarrassing over recent years. A series of inquests have been highly critical of the Ministry of Defence over the deaths of British army personnel in Iraq and Afghanistan. For example –

a. Corporal Andrew Wright was killed in a minefield in Afghanistan in 2006. Assistant deputy Oxford coroner Andrew Walker was told that he would not have died if a helicopter with a winch had been available to extract him.

b. 14 RAF servicemen were killed when a plane blew up shortly after re-fuelling. Assistant deputy Oxford coroner Andrew Walker recommended that the entire fleet should be grounded.

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33. As well as the narrative verdicts that result from these inquests, information aired during these public inquests has been hugely damaging for the government's reputation. During one such inquest in 2008 a string of Hercules pilots and crew revealed that they did not know of the lack of explosion suppressant foam (ESF) in their planes and almost all had not even heard of ESF. One said he was 'astonished' another 'horrified' that they had not been informed about the availability of ESF. There is also already intense speculation that the secret inquest provisions were motivated by the desire to protect the US Government from embarrassing revelations about 'friendly fire' incidents.⁶⁰

34. Suspicions have also been aroused that these provisions could be invoked to deal with outstanding inquests into the deaths of people killed by British security forces in [Northern Ireland](#) during the Troubles.⁶¹ The Northern Ireland Human Rights Commission has expressed grave concerns about the potential for secret inquests to be applied to outstanding inquests:

"The extension of any element of the certified 'secret' inquests for historic cases in Northern Ireland would be viewed as very bad faith by the British Government and could seriously jeopardize progress on what is a very politically sensitive issue".⁶²

Whatever the government's underlying intentions, these examples clearly demonstrate the loss in trust and confidence that such measures invoke.

35. Liberty believes that the provisions allowing inquests to be substituted with an inquiry under the 2005 Act are unnecessary in practice. Coronial procedures are sufficiently flexible and well equipped for dealing with sensitive material. A judge can be appointed to lead the coronial inquest and Public Interest Immunity (PII) certificates can be issued if necessary.

36. The PII principles allow a balance to be struck between the requirements of justice and the protection of the public interest. If a Minister considers that disclosure of a document could harm the public interest he or she must sign a certificate to that effect. The coroner or judge then considers the issue – looking at the material in question if necessary – and balances the public interest in withholding the document against the interests of justice in disclosing it. PII does not operate to exclude entire categories of material. Rather the coroner or judge has to engage with the

⁶⁰ See Daily Telegraph "Government faces revolt over secret inquests" 14 March 2009 available at: <http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/4990965/Government-faces-revolt-over-secret-inquest-bid.html>

⁶¹ See The Observer "Inquests into Troubles Deaths to be Kept Secret" 25th January 2009 available: <http://www.guardian.co.uk/politics/2009/jan/25/northern-irish-troubles-inquest>

⁶² NIHRC Briefing for Committee Stage of Coroners and Justice Bill, February 2009 available at: [http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners_and_Justice_Bill_Briefing_to_House_of_Commons_Committee_Stage_\(February_2009\).pdf](http://www.nihrc.org/dms/data/NIHRC/attachments/dd/files/106/Coroners_and_Justice_Bill_Briefing_to_House_of_Commons_Committee_Stage_(February_2009).pdf)

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facts in question, weighing factors such as the relevance of the material concerned, its particular sensitivity and the interests at stake (including their seriousness). The judge must simultaneously consider a number of mechanisms by which material can still be disclosed, while maintaining a requisite level of confidentiality. If a coroner or judge decides that the nature of certain material requires some protection there are many more options available to him or her than simply refusing disclosure. These include, for example, allowing redactions and providing for the protection of the identity of witnesses. It is important to note that PII certificates and the withholding of certain evidence from a jury have been held to be article 2 compliant.⁶³

37. The recent conclusion of the investigation into the death of Azelle Rodney ably makes this point. On Saturday 30th April 2005, Azelle Rodney was shot and killed by an officer from the Metropolitan Police Service. An inquiry into Mr. Rodney's death was established over 5 years later, in June 2010, and reported earlier this month on 5 July 2013. The considerable delay to the full investigation into Mr. Rodney's death – and the UK's fulfilment of its obligations under Article 2 ECHR – was the result of concern on the part of the police that any public investigation of the death would require the disclosure of sensitive material, including intercept evidence which is not currently admissible in court proceedings in the UK.⁶⁴ It is the first, and so far only, instance of an inquest into a death being halted and replaced by an inquiry under the 2005 Act, in order that the provisions described above could be employed to allow evidence to be heard in closed session.

38. However, tellingly, in his final report, which concluded that Mr. Rodney's death had been an instance of unlawful killing, the chairman Sir Christopher Holland made clear that the Government's concerns had proved to be unfounded, and the inquiry was able to proceed without having to take evidence in closed session:

“At the outset of this Inquiry there was understandable concern that, if there was relevant intelligence that could not be made public in an inquest, it may have been forced to receive important evidence in closed session, preventing the public and Azelle Rodney's family from being sufficiently involved in the process. In the event it publicly received intelligence evidence, both from witnesses who were called in open and from documents that have been placed on the Inquiry's website. It received no intelligence evidence in closed session. That outcome was

⁶³ In both *McCann* and *Jordan* referred to above.

⁶⁴ Liberty has long argued that intercept evidence should be admissible in court, and that such a reform is preferable to the increasing tendency (evidenced most recently by the Justice and Security Act 2013) to allow judicial proceedings to occur in closed session. See Liberty, Inquest and Justice's joint briefing and draft proposed amendments to the Coroners and Justice Bill 2009 on the admissibility of intercept evidence.

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the result of replacing some extremely minor elements of the evidence with summaries, and of omitting some unnecessary elements of the evidence.”

39. The very operation of the 2005 Act itself therefore shows that, even in the case of a controversial and high-profile death, involving undercover policing and intercept intelligence, the Act’s provisions allowing evidence to be heard in secret are unnecessary. Azelle Rodney’s case was frequently cited by the Government as justification for the numerous attempts to introduce secret inquests, but as the inquiry’s report shows, this is merely yet another example of the State seriously overstating its need for secrecy in circumstances where it would help hide embarrassment, illegality and abuses of power.

40. Furthermore, it seems that even the Government is no longer convinced of the necessity of inquiries being substituted for inquests. On 4 June 2013, Sir Robert Owen, the High Court judge leading the inquest into the death of Alexander Litvinenko, wrote to the Lord Chancellor expressing the view that it “is plainly desirable that an inquiry be established under section 1(1) of the Inquiries Act 2005.” Sir Robert argued that certain aspects of the case, such as the culpability of the Russian State and the possibility that the UK authorities could have prevented Mr. Litvinenko’s death (including the extent of their intelligence-gathering operations in relation to Russia) could only be properly investigated if evidence were able to be heard in closed session.⁶⁵

41. On 17 July 2013, the Home Secretary replied, declining to order a public inquiry under the 2005 Act, despite the admitted presence of public concern. The Home Secretary argued, first, that Mr. Litvinenko’s death could be adequately investigated in open session and that it “would be perfectly possible to conduct an inquest aimed at answering the statutory questions without considering the sensitive material at all.” Second, the Home Secretary argued:

“...the material which cannot be considered in the inquest because of the operation of PII could only be considered by an inquiry if it were to sit in closed session. The reasons which led to the making of the PII certificate would apply with equal force to the decision whether to make a restriction notice or a restriction order under s19 of the Inquiries Act. Neither the material itself, nor the questions based upon it, could be made public or revealed to those who are currently designated properly interested persons. The report which followed an inquiry would have to be drafted, or alternatively published, in such a way as to exclude all reference to the sensitive material. The result would be that the inquiry would reveal publicly only what

⁶⁵ See letter of 4 June 2013 from Sir Robert Owen to the Lord Chancellor, available at http://litvinenkoinquest.org/wp-content/uploads/2013/06/Letr-to-SoS-re-inquiry-4-6-13-50095765_1-2.pdf

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the inquest would reveal publicly. The persons perhaps most closely concerned with the investigation, namely Marina and Anatoly Litvinenko, would learn no more from an inquiry than they would from an inquest.”⁶⁶

42. It is gratifying to hear the Government making the same arguments that Liberty and others have been making for the past 4 years on these issues. Liberty has always believed that the principles of public interest immunity (PII), sensitively applied, are more than adequate to allow a full investigation of sensitive issues, whether in inquests and inquiries or before the civil courts,⁶⁷ and allow a proper balance to be struck between the interests of open justice and national security. Liberty is equally encouraged to see that the Government recognise the problems that arise when inquests are carried out in closed session; namely that the public, and in particular the relatives of victims, will not be able to learn the truth about their loved one’s death.

43. Liberty believes that, given the above cases, it is no longer sustainable to argue that provisions allowing secret evidence are required in the Act. Both an inquiry chairman and the Home Secretary have stated, in cases involving politically-sensitive intelligence evidence, that the ability to hold inquiries into deaths in closed session are unnecessary and unhelpful. These arguments apply with equal force to public inquiries generally. Furthermore, given the damage caused to public confidence in the inquest and inquiry system which is caused by these superfluous provisions, their continued presence in the Act cannot be justified. Liberty urges the Committee to recommend that paragraphs 3 and 9 of Schedule 1 to the Coroners and Justice Act 2009 be repealed, and that the provisions of the 2005 Act which allow the restriction of public access to inquiry evidence, proceedings and publications are either repealed or significantly narrowed.

⁶⁶ See letter of 17 July 2013 from the Home Secretary to Sir Robert Owen, available at <http://litvinenkoinquest.org/wp-content/uploads/2013/07/130717-HS-to-Coroner-redux.pdf>

⁶⁷ See for example, Liberty’s briefings on the Justice and Security Bill (now Act) 2013, available at: <http://www.liberty-human-rights.org.uk/pdfs/policy12/liberty-hol-committee-stage-briefing-justice-security-bill-pt-2-cmp-june-201.pdf>

Dr Karl Mackie CBE and Rt Hon Peter Riddell CBE – Oral evidence (QQ 49 – 79)

Evidence Session No. 3

Heard in Public

Questions 49 - 79

WEDNESDAY 17 JULY 2013

10.40 am

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Hamwee
Lord King of Bridgwater
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble

Examination of Witnesses

Dr Karl Mackie CBE, Chief Executive of the Centre for Effective Dispute Resolution (CEDR), and **Rt Hon Peter Riddell CBE**, Director, Institute for Government.

Q49 The Chairman: Good morning, all. This is the third evidence-taking session of the House of Lords Select Committee on the Inquiries Act 2005. My name is David Shutt, Lord Shutt of Greetland. We welcome this morning Mr Peter Riddell, the director of the Institute for Government, and Dr Karl Mackie, director of the Centre for Effective Dispute Resolution.

I would like to just mention at this stage that the session is open to the public and a webcast goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If after the session you wish to clarify or amplify any points made during your evidence or have any additional points that you want to make, you are welcome to submit supplementary evidence to us. I would like to ask our witnesses to introduce themselves for the record and if there are any opening remarks that you want to make.

Peter Riddell: Yes, my name is Peter Riddell. I am the Director of the Institute for Government but the remarks I make this morning are in my personal capacity rather than on behalf of the institute as a whole, even though I am a director, based on my experience as a

member of the Detainee inquiry. Later I can perhaps explain the rather tortured saga of the Detainee inquiry, which has lots of relevance to your inquiry, but perhaps leave that to a later point.

Dr Mackie: I am Karl Mackie. I am chief executive of the Centre for Effective Dispute Resolution, as you say. It is normally known as CEDR by those who know the organisation, and perhaps if I just say a few words by way of context of why we are interested in inquiries.

CEDR was launched in 1990 with CBI support to promote alternatives to formal litigation proceedings and help people settle out of court more cost-effectively. We have been quite successful in that campaign proving that some changes in process can make a major difference to cost and experience of the process. So we currently provide mediation services in civil commercial disputes.

We also have a foundation arm which picks major projects for review where we think our design intelligence might add some contribution to the field. A couple of years ago we thought the public inquiry process was a useful public instrument to review and examine and with the assistance of Lord Woolf, who I have noticed is on your Committee, we have convened a small task force which has been looking at the public inquiry process and coming up with some draft recommendations for consideration for Government and others as to how it might be improved and taken forward in the future. We are at the stage of draft recommendations. We have had a symposium on public inquiries and we are in talks with Government about how our work might assist in the development of the public inquiry system.

The Chairman: Thank you for that. We have had apologies from Lord Woolf this morning, I am afraid.

Dr Mackie: Yes, I see he is not here.

Q50 The Chairman: Sorry about that. Well, if I may make a start, I think you have had some idea of the questions that we might put to you, but the first one from me is: do you think public inquiries play a significant and useful part in the management and Government of this country?

Peter Riddell: I am not sure about the management bit. I think if you look to the history—I was thinking about this when I was sent the question—of post-war Britain you would see it in either footnotes or occasionally, depending on the detail of the book, some of the inquiries marking those points, some being inquiries under the 2005 Act or equivalent, the 1921 Act before that, or more likely Privy Council inquiries like the one I served on or departmental inquiries. There is a whole gamut of them depending on the circumstances and so on. Yes, they have played a significant part and I think also in the development of policy in certain areas. They clearly have had a great influence, but one has to look at the reason they are set up. They are virtually all set up, the type of inquiry you are examining—as opposed to directly policy-limited ones like the one on Heathrow at present, a very different type of inquiry—in relation to some scandal and very big policy failure, so it is in response to that. Yes, I think they are significant.

If I can just say on the Detainee inquiry it was quite interesting that we were set up just over three years ago by the Prime Minister after what had been a running concern over the issue of the British residents—I am being careful because not all of them are citizens—who were in Guantánamo, over rendition, over feelings and a sense that not everything had come out. It was a manifesto commitment that William Hague had made from the Conservatives before the election. I cannot remember what form the Lib Dems had made it but they made

it, so it was a clear commitment then. There was then debate about the right format for it. In fact, we were set up in a very similar format to previous inquiries that covered secret intelligence. For example, Lord Butler's one on the use of intelligence after the Iraq war and also earlier the Franks inquiry into the Falklands and the late Lord Newton's inquiry into control orders and so on and, of course, the Chilcot inquiry, which was on a similar basis. It was a response to a public concern. What subsequently happened may be of interest later on to explain why it ran into problems.

Dr Mackie: I will just add to what Peter said. Obviously, just listening to him, there is such a variety of topics that are covered by inquiries so that one would have to look at particular inquiries to say "was there a real impact as a result of the inquiry process?" Certainly if you think about the inquiry process, it does provide a very independent, non-partisan, non-political look at key issues of public concern. It allows for quite a disciplined focus and review and examination of those topics. It does potentially—and this is one of the areas we are particularly interested in—allow for much more public engagement with the inquiry, with the review process, and obviously it can influence future action by government and others in terms of reforms that are necessary to deal with the concerns that originally were the subject matter of the inquiry.

Q51 Lord Trimble: You mentioned the characteristics of the inquiry's independence. I wonder if we could just probe that a little bit. Do you think that the inquiries, particularly under the 2005 Act that increased the powers of the Secretary of State with regard to inquiries and, indeed, with regard to your experience, too, of having the inquiry terminated by the Government, or at least the Government asking you to wind the thing up quickly, do you think that while we say that inquiries are independent, they are really independent? Are they sufficiently independent of government?

Peter Riddell: It is very interesting, that. When you are dealing with intelligence matters, as we were, we were constantly negotiating with the Government. We produced a protocol. Let me give a brief history of what went on. When it was sent up there were police inquiries into allegations—it was called the Hinton and Iden cases—that involved SIS and the security service, which the police were doing. We could not formally launch until police inquiries were ended on the grounds that you compromise the rights of anyone involved. We got an awful lot of existing evidence, existing files, from the agencies and from around Whitehall, sealed, cabinets full of them and all locked away. The problem was the police inquiries carried on. When we were set up there was a kind of understanding, but you never know because it is the police and the CPS, that perhaps by Christmas we might be able to get going and that would have meant probably a bit later. We passed over a year and nothing was happening. As I say, we were in a misting fog. All you knew was it would not be coming next week.

Then what happened was the allegations were made about rendition in Libya and it was fairly obvious to those of us involved that that would mean further police inquiries. From my personal point of view, why I resigned at the end of 2011 was nothing to do with disagreement or anything like that, it was purely that my current job came up and at the same time it was blindingly obvious that the inquiry would have to be called to an end. I talked to people at the top of Whitehall about it and duly three weeks after I quit or my resignation took effect the police announced further inquiries, and a week later Kenneth Clarke—and there is an interesting issue of sponsoring departments that you might want to explore because I think it is quite an interesting one—who was then Justice Secretary announced that the inquiry would be drawn to a conclusion.

However, he then asked the two remaining members of the inquiry—both of whom know I am appearing today, Sir Peter Gibson and Dame Janet Pareskeva; I obviously informed them I was appearing—to prepare a kind of interim report of the themes and concerns that had been seen from all the written evidence—there was masses and masses of it—that would be relevant to a further inquiry when the police work was completed. That was duly delivered in June last year, but there had been a number of legal difficulties, not least because the police were carrying out an inquiry. Indeed, the decision to terminate was done by mutual agreement. There was no sense of the Government imposing. Everyone involved in the inquiry realised we could not carry on. We had not been formally launched and if we had carried on now, three years later, we still would not have been formally launched, let alone—God knows when we would have completed. We were given a target of 12 months by the Prime Minister, but in practice most of us believed that was unrealistically short, because of taking evidence. It was not a question of imposing a close. Everyone recognised you could not carry on. We had a staff of 16 and we were very conscious of cost, a really important point. You could not keep people together. Everyone has their careers and things. We would have been in the same limbo now.

In theory, Sir Peter and Dame Janet are still in existence. It is somewhat shadowy since the interim report hasn't yet been published. One of the issues, and it is a very relevant one, and why some inquiries succeed and some do not, is it is very difficult to launch something—and this is something that Sir Brian Leveson discovered—while you have continuing police inquiries.

Dr Mackie: I think I would agree that the major political decision very often is the on/off switch: do you have an inquiry or do you not have an inquiry? For example, the recent Litvinenko decision apparently is very much a decision not to have an inquiry because of its political sensitivities. I think once you have appointed an independent chairman, and they tend to be judges in the case of public inquiries, you have then released the genie from the bottle in a sense and any political influence would have to be fairly covert in terms of departmental influence behind the scenes in the way the inquiry is run or the way witnesses are managed. But from the evidence that we have seen or heard, it very much takes on a life of its own, the inquiry process, and, therefore, can cause subsequent political difficulties in terms of recommendations and so on.

Lord Trimble: We are going to come back to the on/off switch again.

Q52 Lord Richard: Can I look at the on/off switch point for a moment? We have had some evidence from three people who are very prominent in this area: Mr Ashley Underwood QC, who practises at the bar and I think was counsel to the Robert Hamill inquiry and the Azelle Rodney inquiry and is currently counsel to the Mark Duggan inquest; from Judi Kemish, who is a solicitor; and Michael Collins, who is a civil servant at the Ministry of Justice. They say this, and this is what I would be interested in your comments on. They say, “We believe the sole function of a public inquiry is to address public concern, with a view to allaying it, either by showing it was misplaced or, if justified, by exposing wrongdoing and making recommendations. The first principle we believe should underlie the use of public inquiries is that a matter of public concern has been identified which cannot be allayed by lesser means such as investigation by an established regulatory body”. Now, if you agree with that, who decides whether there is such public concern that it needs to be allayed by a public inquiry and what is the process leading up to that?

Peter Riddell: It is entirely subjective.

Lord Richard: It is subjective in the minds of Ministers?

Peter Riddell: It is broader than Ministers, I think. I was very struck reading the transcripts of your first two oral sessions. I read Mr Underwood and his colleagues' written testimony. This is really about politics and public policy. The law is part of the process but it is not the reason. I noticed one of the witnesses described it as a kind of extension of administrative justice. I do not think it is that. I think this is essentially about politics and public policy. It is a subjective matter for Ministers to determine what the mood is. If you look at the setting up of inquiries, it is either, in the case of the one I was on, long-standing campaigns and concern and things going on, the observations of the current President of the Supreme Court in one case when he was then Master of the Rolls, and an appeal court case. All that built up. In other cases, one Baroness Buscombe is familiar with, setting up of Leveson, it was: how do we control the situation? A lot of that is in response to immediate outcry and the media, my old trade, plays a part in it. There is no absolute thing at all. If you look at the evidence for it, it is very seldom. It is a more subjective thing but I think the criteria used, it not being able to be dealt with in other ways, is crucial.

Dr Mackie: I would add I suppose one also has to distinguish between statutory inquiries and non-statutory inquiries. There is scope for setting up inquiries by private groups, which is probably not utilised as much as it could be, but when it comes to statutory inquiries that is very much Minister and department driven. Then the questions become what is driving their decisions? In some of the major inquiries, there have definitely been, for example, persistent family pressures. For example, the Hillsborough campaign over 27 years has led to various types of inquiry to review that particular matter. The Francis Mid Staffs inquiry was very much about families who were concerned about the way their relatives had been treated in the hospital. Their persistent campaigning and pressure helped the Department of Health and the Minister to initiate an inquiry. There is a combination of political influences, I think, that drive ultimately to the on/off switch: have an inquiry or not have an inquiry.

Lord Richard: But Hillsborough was not a public inquiry, was it?

Dr Mackie: There were elements of public inquiry in the early stages with inquests.

Lord Richard: But the crucial one was a private inquiry.

Dr Mackie: The final one, as it were, yes, that was a private inquiry but set up with some support from the Minister in terms of, for example, releasing certain papers from the 30-year rule and assisting the inquiry in terms of its terms of reference, but it was not a formal statutory inquiry.

Peter Riddell: Could I make a suggestion here? The people who I find are key—I have talked to some in the past in various hats—are Members of your own House, the five, I think it is, living Cabinet Secretaries. I do not know if you are going to hear from them, but they have usually been the key figures in saying what type of inquiry. The key point is we have to do something and it is the Cabinet Secretary and the Treasury Solicitor who are absolutely crucial people in this process of what are we going to do, what form is it going to be, and often done very hurriedly indeed.

Q53 Lord Trefgarne: Lord Chairman, my point was really covered by what has just been said. You referred to five Cabinet Secretaries in this House, as there are indeed. Lord Butler, one of them, said one of the four main reasons for a public inquiry is, "To provide a lightning conductor for the anger of the public and particularly those who have been bereaved or suffered personally", exactly what you have just been saying.

Peter Riddell: Absolutely, yes. Indeed, I think one of your clerks was at a public event I organised at the institute where Lord Butler, Lord Bichard and the secretary of the Leveson inquiry spoke, and that was one of the points Lord Butler made then.

Dr Mackie: I think there are a number of taxonomies of inquiries, but I use three headings, really, to help when thinking through for different purposes what kind of process is most helpful. The three I would use are investigation, reassurance and repair. If you think of those core purposes for inquiries, then they drive certain types of processes being more suitable for that purpose.

The Chairman: Lord Soley.

Lord Soley: It is a slightly different issue and I do not know if Lord King wanted to come back in.

Q54 Lord King of Bridgwater: As one looks at these issues about inquiries, what one, of course, is struck by is the extraordinary variety of entirely different subjects that have then subsequently found themselves the subject of an inquiry. What there certainly cannot be anywhere is some Civil Service Code or formula for what is appropriate for an inquiry. When you said that it is a subjective matter for the Cabinet Secretary, some of them arise from longstanding grievances that do not seem to be willing to go away and eventually somebody says, “We have to do something about this”. Others arise out of panic, like the Arms for Iraq inquiry where, when Moses withdrew, they collapsed the case. My understanding then was there was an urgent meeting to say, “What on earth do we do about this?” and Scott was set up, I think, in about a week. Would you agree with that, that there is simply no formula for what is suitable for an inquiry?

Peter Riddell: I would, absolutely, given the enormous variety of types of inquiry. If you look at where mistakes have been made, it is often predictably in the most hurried circumstances either on terms of reference or an expectation it has been done terribly hurriedly. What are we going to do? We have to say something in the House. There is a debate coming up. We have to make a statement about who can we find to do it and so on. I think that the hurry is often predictably the enemy of a good result. There were lots of problems. I can think of several. You mentioned the Scott inquiry, which is an appallingly written report. It was a shambolic report and it was a complete mess. Equally, parts of Leveson. I am not talking about the merits of regulation, that is a separate matter, but the non-regulatory bits are unreadable.

Dr Mackie: I think this is one of the core areas where CEDR has focused on, that although one cannot have strict rules because of the range of purposes for inquiries and the way inquiries evolve, certainly there is a lot more learning now about managing processes effectively and about using several processes to get a result. There is a lot more scope for training judges, for example, and others who might be chairs of inquiries in terms of the options that might be available to them; for example, even restorative justice elements in some inquiries between victims and alleged perpetrators. There could be far more scope for use of that. Let me just take as an example the Hillsborough tragedy. It goes back some time but if, for example, there had been more of a community dialogue between the supporters, their families, the grounds staff, the police, if someone had helped facilitate that kind of dialogue at the time rather than a more formal litigation process there might have been more openness and greater capacity for the truth to emerge than what happened through formal processes.

The same applies in other contexts: the BBC Savile inquiry, for example, where you have people who feel very strongly they are victims. You have to ask: what is the best process for there in a sense to be a process of catharsis with people who have been in that situation? It is not just about having a judge on a bench and having serial witness examination and cross-examination and then producing a paper report. There could be far more powerful things going on as part of the process of the inquiry. What we are looking at is really more of a guidelines approach rather than a rules approach: “Here are a range of options that intelligent inquiries can use that you can adapt to particular circumstances”.

Q55 Lord Soley: I am a new arrival on this Committee some 20 minutes ago so I am on a steep learning curve. You mentioned the word “history” and, of course, I looked to some of the history of this. I noticed, and indeed I remember this from my time in the House of Commons, that in the past we used specially appointed Select Committees of the House to look into issues, including riots and things of that nature. We do not seem to do that any more and yet it would meet some, in fact probably all, of the items listed by Lord Butler. I do not know whether your history took you back beyond the Second World War period, but if you look at it, there was very considerable use of Select Committees of Parliament.

Peter Riddell: I know we have known each other a long time, Lord Soley, but I am not quite that ancient. It is a very interesting issue, which is that on the whole my feeling has been the Select Committees as they developed after 1979, and indeed the Select Committees in this House, have not been good at investigating as opposed to examining policy issues. I think there is a big distinction between the two. They have not been good at that, partly because of the time element. Of course, in the Commons the partisan element has made it terribly difficult to do. If you look back, for example, historically at the Marconi inquiry, no one would say that was a great example of a dispassionate inquiry and Lloyd George escaped by the skin of his teeth from it. If you go back, one of the most famous inquiries brought down the Government in the Crimean War—the Motion on that.

Lord Trefgarne: They all resigned.

Peter Riddell: Indeed, absolutely. However, there is an interesting question now after the Tyrie commission, which was a joint one of both Houses, very eminent Members of both Houses, into banking standards. I was looking at the terms of reference for that. Andrew Tyrie, who is a creative man, expanded what that meant. Indeed, one of your colleagues was in charge of looking at what went wrong with one bank, HBOS, and produced a pretty tough report on it. They used counsel and they operated in pretty well a non-partisan way, but I know there was quite a debate in both Houses about whether that model can be used for investigation as opposed to a more detached policy thing.

I would have said for a very long time parliamentary committees were not very good at it for all the reasons of time, partisanship and so on, and also, to be honest, in some cases questioning skills, with some exceptions like, say, the late Lord Gilbert who was brilliant at it. I think with the Parliamentary Commission there may be a new model that you have to consider for some things.

Q56 Lord Soley: Can I just briefly put it to you? The one I had to look at was many years ago. It was after the 1980 riots the Scarman inquiry was set up. Along with Scarman, I was one of the people who visited the riot areas. The Scarman inquiry took many months, years, and it took many years to put the recommendations into effect. After the Cold Bath Fields riots of 1830, the House of Commons set up a Select Committee to look into it within a month and it had reported and recommended within the year, and those recommendations

included stopping police being able to do agent provocateur acts and various other very serious things. It all went through in about a year and a half so, in fact, there are some very good examples. There are others, too, on policing particularly, so when I looked at this quote by Lord Butler I thought in a way there is a parliamentary role there. I just wonder if we are not automatically turning to public inquiries rather than thinking about whether Parliament could use its time differently and arguably better. After all, we are not short of Members of Parliament in both Houses, are we?

Peter Riddell: No, you are not, but it is time. Particularly for Members of the Commons, as you well remember, the calls on their time are enormous. You have a good turnout this morning if I put it this way. You look at the equivalent Commons committee. The turnouts are not so good by any means and I frequently appear before them. It may just be me, but anyway, the turnouts are very hard to get, and also the skills to do a proper forensic inquiry. I think you have to have counsel. There are some exceptional lawyers, particularly in this House where you have lots of high-grade lawyers, but it is very difficult to think of that model being replicated without some variation in it. Because the evidence really from the 1970s and 1980s, the period when you were in the House, is the Commons was not terribly good at that type of thing.

Q57 Lord King of Bridgwater: Can I just add one point? There are two recent inquiries that have been done not by an ordinary Select Committee but by the ISC. One I was involved in in my time, we did the Mitrokhin inquiry, which could easily have been a public inquiry of one sort or another. Jack Straw rang me up, who was then Home Secretary, and said would we do it in the ISC. Obviously, there was a lot of classified material in that. Of course, most recently, two weeks ago, we had the ISC asked now to investigate Prism and the possible involvement of GCHQ in that, which is another area that could easily have been a public inquiry under different circumstances. If there were really serious allegations that GCHQ was way off the rails, one might have seen an alternative form of inquiry. Would you like to comment on that?

Peter Riddell: Of course, the ISC now has new powers under the legislation passed earlier this calendar year and we will have to see how that works. They have postponed seeing the heads of the agencies in public. Interestingly enough, we had a commitment from the heads of SIS and the Security Service to appear in front of the Detainee inquiry in public to discuss policy. They could not have discussed some of the other stuff, which would have had to have been done in private, but we had a commitment from them to do that. I think the ISC is still a kind of hybrid but progress can be made in that direction.

Lord King of Bridgwater: Yes, absolutely.

Dr Mackie: Just to mention another recent inquiry or potential inquiry that went down a different track—and it is quite interesting to see why inquiries go down one track or another—was the LIBOR rate-fixing choice. Originally there was quite a campaign to make that a public inquiry but it was then diverted into more of a parliamentary process.

I seem to remember that, I think, Justice in its discussions around the consultation over the Inquiries Act 2005, said “the public inquiry process is really a hybrid of the role of Parliament and the role of the courts but no one has woken up to that fact”. There may be scope there for saying we should look at the inquiry process more thoroughly, as you are doing and as CEDR is working on, to say what role parliamentary committees can play in particular inquiries? It is not necessarily running the inquiry but it may be they have a role in terms of an interaction over the policy developments that are being considered in the inquiry.

I think the Leveson inquiry is another good example of how difficult it is to have an inquiry in a very political context. There were very specific recommendations there, but once it comes back into parliamentary context it becomes very difficult for anything specific to happen when there are very serious rivalries about political agendas.

Q58 Baroness Buscombe: Which, my Lord Chairman, brings me rather neatly to my question. We are slightly straying into whether it should be statutory or non-statutory, but I am still a little bit troubled by the first question put to you by Lord Trimble in relation to independence. Is there not an issue in relation to setting up an inquiry under the Inquiries Act whereby it is a neat way of avoiding the truth, the politics behind the reason why an inquiry has been set up—Leveson being an absolutely prime example of that—whereby when it is set up according to the statute with judge, formal evidence and so on, it is a very good way of avoiding the real reason, the political reason, why the inquiry was set up in the first place?

Peter Riddell: I think the problem with Leveson was it was set up very quickly, very rapidly. I can never remember whether it is part 1 or part 2—anyway, the bit about the phone-hacking allegations, immediately, of course, had to go into limbo because of the police and all that. It is very much in parallel to the problem we had in the Detainee inquiry. As long as the police are investigating something, you cannot tackle that and people cannot give you evidence for perfectly good reasons of justice. I think that is the problem on that.

Then they got the terms of reference, which were far too broad. I gave evidence on politicians and the media, which I am sure—or I am not sure—will bore stiff future PhD students. It was an absolute waste of time. It did not contribute anything. I was startled when I was asked to give oral evidence as well as written evidence. It took up lots of time and they subsequently did a report that was neither here nor there. The key issue is a regulatory one, as we all knew, and you take all kinds of views on that.

One of the problems there was that it got off on the wrong basis because it could not tackle what it was originally asked to do. I think it is a fair prediction that it never will. Whenever the criminal case is completed—and all that stuff in two or three years' time, or the appeal or God knows when—the idea that it will then be reconstituted I think is a fantasy. That is one of the problems, getting inquiries off on the wrong basis.

Dr Mackie: I think there are two aspects. One is the confidence of the public in the inquiry process. I should have mentioned CEDR conducted a public opinion survey last year about the public's perception of the inquiry process. Around 77% felt they had very little understanding of the process and only 27% had confidence in the inquiry process. Over 50% thought politicians had too much influence. I think there is a sense among some members of the public certainly that public inquiries are often set up as a way of kicking issues into the long grass and providing relief for politicians from the immediate spotlight of the media or the public.

Baroness Buscombe: Possibly with good reason.

Dr Mackie: Possibly for good reasons. On the other hand, the inquiry does ultimately, or most inquiries do ultimately, report back, so it is postponing an issue that will have to be ultimately addressed.

Q59 Lord Richard: But it is not allaying a matter of deep public concern?

Dr Mackie: It would be once there is a report on it, but certainly not immediately allaying it. It is giving a quick catharsis in a sense that somebody seems to be doing something about it.

That is an important, as it were, ritualistic signal that we have decided to do something about this issue and we have decided to appoint someone independent to try to address it.

Peter Riddell: But a great problem is the false expectations. We had this. We were set up with a very limited brief to look at the awareness of the British Government and the intelligence agencies of the alleged mistreatment of British residents who were detainees and rendition. We were not a torture inquiry but a lot of the NGOs in this area, who basically operate as a club, and the detainees and their lawyers, who were also involved in civil action that was mediated quite quickly, actually, had a totally different view of what the inquiry was about. We could not have been a torture inquiry. The Government always said we were not and, therefore, we were not to do with the European convention. That is why it was not a statutory inquiry because by definition the evidence on torture would have had to have come from citizens of foreign countries. We were not dealing with defence matters so it was nothing like Baha Mousa or anything like that. The idea that citizens of foreign countries could be interrogated about whether or not they had been tortured or anything, because of extraterritoriality, could never have happened. There was a clash of expectation, which was absolutely crucial, for example, and that led eventually, after lots of meetings and toing and froing, effectively to a boycott both by the detainees, and particularly their lawyers, and by the NGOs. If we had ever got going it would not have been impossible for us to carry on because we were focused very much on the agencies and their actions and behaviour, but it was a real problem with public confidence. It was a real frustration from our point there was a clash of expectation, which is central to these arguments.

Dr Mackie: I would add to that this whole issue of terms of reference. The current system seems to generate terms of reference from the Minister. There will be some brief consultation with the chairman appointed. Often if it is an urgent inquiry appointment there is very little real discussion about that. We have suggested there might be, for example, a one-month period of consultation, particularly with key potential stakeholders in the inquiry subject matter, to consider how to draft terms of reference that match the needs of the parties and create legitimate expectations of what the inquiry process could deliver rather than have a problem of expectations at the end of the process.

Q60 The Chairman: I am conscious that we have spent over a quarter of our time on our first question, so I think we had better crack on a bit. Can I put a further question? Lord Bichard, in evidence to the Public Administration Select Committee, explained why he had reviewed progress on his recommendations six months after publication of his report. Do you think that supervision of implementation of inquiries' recommendations can be left to Parliament or should there be a procedure for an inquiry to be reconstituted at a future date in order to review progress? I do see that CEDR has had something to say about this.

Dr Mackie: Yes, we have recommended that there should be some kind of monitoring beyond the inquiry, perhaps with setting a default period of up to 12 months where there will need to be some kind of report from the responsible department saying what the intentions are with respect to implementation of the recommendations. We tried to look at inquiries in terms of the metrics of how many recommendations in past inquiries have actually been implemented but we found it an incredibly difficult process largely because many inquiries produce dozens of quite detailed recommendations, so it is quite hard to track. For example, the Francis Mid Staffs inquiry has 290 recommendations of changes in the NHS and other bodies that it suggests, so it is actually quite hard to track these recommendations. I think it would be very useful and, in fact, Robert Francis requested that as part of his recommendations that there should be a report back saying what the Department of Health and others intend to do with the recommendations. If one is going to

be stronger and more robust about the repair phase of the purpose of the inquiry—does it actually deliver results? Does it change policy in practice?—then I think there does need to be some kind of structured way of dealing with inquiry recommendations.

The Chairman: But are you saying that that should be up to the sponsoring department? It is not a matter of bringing back the people that produced the inquiry report; you are saying it is the sponsoring department?

Dr Mackie: I think there probably should be a report back to that inquiry group, so they should formally reconvene to hear what is being delivered and what is being promised. That will create also more public focus for and public engagement in what has happened, to remember whatever happened to Leveson, “whatever happened to that?” Twelve months later there would be a particular focused forum saying this is what has happened to it and it is where either the Government or other key people who have been involved in the inquiry’s concerns—it might be companies, it might be the NHS—have an opportunity to report back formally as to what they are doing with the inquiry recommendations.

Peter Riddell: I have been thinking about this reading your earlier evidence on that point. I certainly think there ought to be a firm guideline that the government response should be given within a certain time, as they are supposed to be, just like committee reports, although it is often more in the breach than the observance. I talked to Michael Bichard about what he did with Soham, and of course there all the criminal stuff was finished. It was an important area but not an enormously wide-ranging area of his recommendations on notification and so on, and so it was easier to do. I think it is very difficult to do formally because an inquiry is brought together, people then go on and get on with their lives. They do not necessarily have any locus. It would certainly have been true of the three of us on the Detainee inquiry if we had ever got to that stage.

I think the interesting link is with parliamentary inquiries. This was something Lord King mentioned. We did actually have a private discussion with the Intelligence and Security Committee, mainly just comparing notes and practical things about where we were, or rather where we were not, in the inquiry. My own view, if we had reported, is that the report obviously would have gone to the Prime Minister but when it was published it would be the ISC’s responsibility, because it was totally in the ISC’s area, to follow it up. The established parliamentary mechanisms are the primary ones. Obviously, the three of us on the inquiry would have kept a close interest in it and we would have various public ways if we felt that it was not being followed up properly, but it is an individual rather than a formal thing in most cases.

Baroness Hamwee: I am sure you are going to say that the chairman has a big role in this, but do you think that sometimes reports have been diluted in their effectiveness by having too many recommendations and that there might be guidelines about being more focused, particularly with a view to general public interest rather than professional interest?

Dr Mackie: Certainly, in terms of the way we are looking at the process and the variety of options one has about design, how recommendations are set out is obviously a critical issue. Even just looking at the Francis report, and I have had this discussion with Robert Francis, it might help to prioritise and say, “Here are the three things we think really must be addressed and quickly. Here are other issues that could be longer term questions for this particular group”. I completely agree; I think it would be helpful to look at recommendations and again how they are best framed in terms of prioritisations and timescale. That could easily be part of guidelines for inquiries.

Peter Riddell: Absolutely, because it becomes much easier to evade recommendations if you have too many, so I agree entirely.

Q61 Lord Soley: One of the issues in this context is the complexity of the number of inquiries, types of inquiries and so on, which we have already addressed. Is there a case for a body to be set up that could not only decide what type of inquiry but maybe have some oversight of them to see if they are operating appropriately and also, particularly those I have indicated, to decide what type of inquiries are needed in the first place?

Dr Mackie: Certainly, that is one of our recommendations that we put forward, originally quite tentatively because we are very aware of public constraints and public budget considerations. But there seems to be a strong case and it was already mooted before the Inquiries Act for what we have called an independent inquiries office, which can look at the practicalities of managing inquiries. Because although they are very different in terms of the subject matter, they will all have to deal with documents management, tendering for which solicitor firms will be solicitors to the inquiry, how to run websites about the inquiry process, any lessons from previous inquiries, how best to manage budgets. There are certain fundamental questions that recur again and again and what struck me very forcibly talking to a number of inquiry chairs is it almost feels to them like they are reinventing the wheel from scratch, that they have to call around their old mates who have sat on previous inquiries or, the same process that is happening with the Civil Service, calling around different department contacts to try to work out, “How did you do the inquiry?”, whereas there should be more scope for certainly a core office there.

Now, there could be wider roles for such an office. We have suggested, for example, that they could pass on lessons from previous inquiries. For example, there are a number of inquiries dealing with the military, with sensitive intelligence matters, so there is a lot of repetition about these issues in terms of confidentiality, about what is appropriate for public exposure, what is not. Again, there could be stronger guidance if there was a focused unit that took those issues, looked at previous experience and distilled the wisdom from past experience. Then the further aspect for an independent inquiries unit or office could be public engagement, of helping educate the public, who say they do not really understand the public inquiry process, as to what the inquiry process is about, the purpose of inquiries, talks to schools, build it into politics courses in universities. There could be much more active public engagement. If there was a group, as it were, responsible for the form of the public inquiry process and managing it but not dealing with a particular case, they could help that considerably.

Peter Riddell: My experience on that is that the reinventing the wheel point is a very strong one and that it does delay setting something up. In our case, we had a contact point, which was the Cabinet Office, because it involved the intelligence agencies and, therefore—the people in the Cabinet Office and what had just recently become the National Security Secretariat—one of their directors was the point we linked to, and also the Treasury Solicitor we had a link with. There is also a very interesting issue, which Karl has not mentioned but it is a very important one, in terms of staffing. Everyone had to have very high security vetting, they had to be DV-ed, so that limited the pool of people. Someone had to advise on that, it was done in connection with the Treasury Solicitor for the lawyers and we interviewed a number of people to be our counsel before picking one. Similarly with secretaries, we had a wide variety. But the secretary we picked had done two previous inquiries. He had done foot and mouth twice, so he had experience of that.

Some of the lawyers had been on Baha Mousa, which was ending when we were beginning, so that was a great advantage. As I say the Cabinet Office did it for us because they were co-ordinating intelligence, although interestingly enough, later on our sponsoring Minister became the Justice Secretary because there had to be various things said in the House and it was very difficult for the Home Secretary, the Foreign Secretary or the PM to do it because—not personally but their departments—they had become parties to what was going on. Justice had no involvement in any of the allegations, so all the PQs were answered by Ken Clarke at that stage.

I think there is a case for doing that. You would save time, it would save cost; however, the only caveat over what Karl said is independence. Once you get going you develop your own esprit de corps and while there have to be filters in setting it up, then you get on with it. In a practical sense it is useful, because we are continually negotiating under the pressure call that we had, which was the terms of the evidence, that was done by the Cabinet Office. It could have been done by Justice. Our legal problems were obviously done with the Treasury solicitor and various other legal people. You have to have a co-ordinated unit but I would back what Karl said on that.

Dr Mackie: I should add—Peter has just reminded me—I think if you ask the Cabinet Office they would say they had a virtual unit in the sense of they act as a central co-ordinator for departments in terms of past know-how and who has had experience in inquiries and so on. But whether that is sufficient I think is the question.

Lord Soley: The implications of what you both said is that it would have to have a considerable say on the inquiry in the first place, whether it should be a public inquiry or whether it should not be a public inquiry and if it was a public inquiry what type it should be. That is quite a power to give to an organisation like that. Would that be what you would think, is that right?

Peter Riddell: They are advising Ministers. Fundamentally, the key decisions in relation, I know, to Detainee were taken by the Prime Minister, the DPM, the Foreign Secretary and the Home Secretary because they were the affected people. Because it was not set up very hurriedly it came through that process. People like the Cabinet Secretary and the legal advisers would provide and did provide, I know, a lot of advice on the form of the inquiry. In the case of the Detainee inquiry it was balanced with other things, what has become the legislation on courts and the mediation in the civil cases that the Guantanamo detainees brought against the Government. It was all linked in together, so quite rightly there was a co-ordination on that.

The Chairman: I would like to take Lord Trimble out of turn because I know he has to go early.

Q62 Lord Trimble: The question I have is relating to whether inquiries are set up or not, where people are asking for inquiries and then a decision has to be taken as to whether to create one or not. But I would like to ask a question specifically with reference to last week's announcement on the Litvinenko case where the allegation is that Litvinenko was murdered. A coroner's inquest was established. As I understand it, the coroner said that he cannot conclude his inquest because he does not have the relevant information and that could only be obtained through a public inquiry. He, as I understand it, formally requested the Government to establish a public inquiry.

A public inquiry is not being held. I am not aware—and this may be just negligence on my part—of the Government giving any reason for this decision not to do it but it is supposed

that this is too sensitive from a point of view of relations with a foreign power. But sensitivities may be just simply that a foreign Government organised the murder of someone on our soil. I would have thought that is a matter of huge public interest and that it is quite scandalous that this alleged murder is not being investigated properly because the Government might find the outcome uncomfortable.

Peter Riddell: I cannot comment on the details of that case. I understand the points you are making, Lord Trimble. But there are plenty of parliamentary means for raising those points. No doubt the nature of the intelligence involved is a key factor but that is precisely a question that either the ISC can pursue through its route or someone could get up in half an hour's time and ask the Prime Minister that question. There are plenty of routes to raise the issue on that, leaving aside your particular outrage on that point, which I can fully understand.

Dr Mackie: I think Peter did that very well in terms of how he replied to your question, Lord Trimble. But certainly I think the public concern there is, how much are the public entitled to know about issues of sensitivity in relation to other Governments' actions on this soil? There is an issue there that could be the focus for a public inquiry but, equally, there are other methods such as parliamentary questions and lobbying of MPs and so on where there could be further action taken in that particular case.

But it is very interesting that someone who apparently has responsibility for review and examination of the case feels that the information is being blocked in a way that is not helpful to a decision. Certainly, there should be some response to that that is an intelligent and informed and transparent response.

Q63 Lord Richard: I just want to come back to the on/off switch, and it is the same point, because the more I listen to both of you, the more cynical setting up inquiries or not setting up inquiries clearly is. In all the evidence you have given us is that decisions as to whether to have an inquiry or not to have one are capricious or they are self-serving. They are basically a Government defence mechanism. The idea that somehow or other an inquiry is set up to allay a matter of great public concern, seems to be receding way, way into the background. In my naïve way I always thought public inquiries were there to look at an issue and produce a report that at least veered towards the truth. But the more we go into it the more dreadful, frankly, it looks.

Peter Riddell: I would hate to accuse you of being cynical, Lord Richard, after your long experience. Two points there, whatever the motive may be and whatever the pressure that leads to an inquiry, an inquiry should still do a good job and that is my difference from you. Whatever the reason it is being set up for, you can still do a good job. I remember when the Detainee inquiry was being set up a very senior civil servant said to me, "Oh, well, the trouble with you lot is you will get it into your own mind what you want to do" and I said, "Precisely". This was said jokingly between us. You do develop your own momentum and esprit de corps.

It is very interesting that in terms of civil servants they all had to be DV-ed, none of them had worked for the intelligence agencies, and could not have done to work on the inquiry, but that did not mean that they were subservient, far from it. They wanted the inquiry to work and they were as frustrated as the rest of us when it did not work. I think one can be a little too cynical on that.

One point I would make on that, one thing I would restore, which was in the 1921 Act and was not in the 2005 Act, is parliamentary approval and also for winding up, that it would

have to be taken to Parliament. In order to set up a 2005 Act inquiry there should be a Motion in the House and, similarly, if you want to terminate it there should be a Motion in the House.

Q64 Lord King of Bridgwater: Could I just add one point on that? Do you not agree that a lot of these things get set up because a Minister cannot deal with it, because a Minister or a Prime Minister's assurance will not meet the situation? In those circumstances, although I understand Lord Richard's comment, then a Minister is handing over his fate, in some cases, to a committee that he may not have any control whatever.

It may be that in the terms of the public interest or public concern there is no alternative but for it to be dealt with in that way. As you say, it can take on a life of its own, you cannot be quite sure—as we know with inquiries that have been—how long they will last, which directions they take, what may come out in the proceedings that nobody realised when the committee was set up. It is not an easy option for Ministers to say, "That is our jolly old inquiry and we will walk away clear, free of any problems". Do you agree with that?

Peter Riddell: Yes.

Lord King of Bridgwater: Thank you.

Dr Mackie: I think Lord King is right. There will be a political instinct as to which issues and what timing makes a public inquiry or an inquiry much more appropriate and relevant. So that instinct will be driven by the individual Minister but also by the amount of public pressure that is out there.

If I could just mention in terms of an alternative to what Peter describes as a cynical viewpoint, the Pollyanna viewpoint, if you like, about public inquiries is they are a jewel in the public-accountability toolbox because what other methods are there for creating a very focused review of a very specific area of public concern that is more or less independent and free of direct political influence, and that can create a public statement about what should be done about a particular area of concern?

Lord Richard: Why did Hillsborough have to be private?

Dr Mackie: Hillsborough went through seven—

Lord Richard: I will just expand the question because that is a bit bold.

Dr Mackie: Okay.

Lord Richard: It is a matter in which there was great public interest. There was clearly great public concern. It needed allaying in the way we have been talking about the use of that verb and yet the Government did nothing. They may have provided them with some documents, but the government decision was not to hold a public inquiry in circumstances in which, like most people would say, a public inquiry was needed. Why did they have to go private in those circumstances?

Dr Mackie: They did conduct an earlier review by Lord Justice Taylor of the original findings. But what I think went wrong with Hillsborough was confirmation of the way public bodies had behaved, that no one was sufficiently bold enough to break out of the previous mindset as to supporting, as they did, the police report of the whole situation compared to what the families were stating was the truth. It took many years for that pressure to build up and lead to Ministers to start supporting another kind of process, although it was a private inquiry before there was sufficient public impact on it. But it is very interesting, once that took place it did have a major impact in relation to releasing the feeling that there was truth

and justice finally established. So that contradicts the point about public inquiries or inquiries not being so helpful.

Q65 Baroness Hamwee: At our first evidence session I asked officials from the MoJ about how the decisions were taken, because being a cynic I had a picture in my mind of a Minister striding towards Parliament from his department to answer a question, saying to the people around him, “Well, we will have to have a public inquiry” and the Pollyannas and the cynics would probably be saying, “Good idea, Minister”. But I had no feeling for how much understanding there is in departments about what that really meant—indeed, whether there was any understanding about the distinction between an inquiry under the Act and another inquiry. I still do not have a lot of understanding of how those decisions are taken. I wonder—particularly Dr Mackie and the work you have done—whether you have found out and can share with us whether officials in departments understand the processes. Do they go straight to the Cabinet Office and say, “Help, give us advice, this is likely to come up”—that sort of issue?

Dr Mackie: I think you will find there are several departments that tend to have regular or who have had regular inquiries, and there is usually someone there who has had some experience of inquiries who can act as a focal point for giving thoughts or advice. But very often, yes, there will be a call to the Cabinet Office, from the kinds of information I have received, to check out with them whether there is some approval of that kind of process.

But the impression one gets is it is still a very ad hoc decision-making process, as Lord King and Lord Richard were suggesting—that there is a decision by a Minister or a Secretary of State at a particular point that this is outside being safely handled by politicians and needs more of a public forum to pass it over to and to take safe care of it for a number of months or years, and then we can revisit it. There is a political judgment process going on but it can be quite rapid in some circumstances.

Peter Riddell: Just briefly, just to supplement that, in most cases other things have been going on—there have been civil cases, there will be criminal cases around it, so it is being debated. Remember also that Government lawyers will be involved. We found, when we met all the relevant parties in our inquiry, right facing us would be the lawyer for that department and they thought about it an awful lot. I do not think it was ignorance at all, mainly because there was a background.

Lord Trimble: If you will forgive me issuing a commercial but coming back to the comment about Litvinenko and raising it in Parliament. I just want to remind colleagues that the debate I have on Tuesday evening next week provides a perfect vehicle for doing just that and I will.

Peter Riddell: I look forward to reading it in *Hansard*.

Lord Trefgarne: I have sat through some of the ministerial discussions on all of this and the predisposition is always against a public inquiry, I can tell you that for nothing. But the advice to Ministers was almost always the case that it had come from the Permanent Secretary himself. It will not be junior officials in the department and surely he would have consulted the Cabinet Secretary and, no doubt, the Permanent Secretaries of other departments too. The department is not working in isolation on this and it will be a Government view that comes to Ministers, which they may or may not accept.

Peter Riddell: Yes, certainly from the experience I had there were a number of Government departments and the two intelligence agencies, because GCHQ was not involved, involved in the issues. It was co-ordinated within the Cabinet Office at a senior

level but also the lawyers were also involved by definition who touched on, as I say, the civil cases and one or two other things. But, no, the decisions came right at the top.

Q66 Baroness Stern: Can I begin by declaring an interest that my husband was a panel member of the Billy Wright Inquiry? My questions are about public confidence in the 2005 Act and in inquiries generally. I did see the poll that CEDR did, suggesting only 27% of the public had confidence in public inquiries. Since I am more on the Pollyanna end of the spectrum, I wonder if I could ask both of you if you are satisfied that that poll says it all or is anything more nuanced to say about the public view of public inquiries? The second part of my question is: what about those other people that we are calling core participants, those who are affected or their relatives, if it is about people who have been killed? Does the inquiry process, in your view, secure their confidence in the end, once they have been through it?

Dr Mackie: I think in terms of the more nuanced, yes, I think there are nuances in the poll results. It was true only 27% said they had confidence in the public inquiry process. But of the same population, 77% said they had limited understanding of how the inquiry process works, so the lack of confidence may reflect the fact that the public just do not have enough information about how inquiries work—they do not feel engaged with the process. 68%, when asked “should the public be more involved in inquiry panels?”, said they thought there should be more public involvement in inquiry panels.

Over two-thirds of our sample said they thought the public should be active in public inquiries much more than they are, which suggests, although they have limited confidence, they might gain confidence if they felt the public inquiry process was less influenced by politicians and more of a serious process that engaged the public. The question is, how do you get there? It is partly about public education and information, it is partly about legal and judicial education and managing inquiries more effectively.

That relates, I think, to your second question about core participants. People who have been particularly badly affected by events that we can look at—and very often they are victims of some kind, either directly or their families—does the current system give enough acknowledgement, give enough reassurance and empathy, give enough of an experience that helps them move on from where they were? I think the answer from our research and our recommendations is, no, it does not because it is very much modelled on the investigation side on formal legal proceedings. You have judges very often sitting as chairs of the inquiry who follow strict witness examination, sequential witness examination and are less used to working, for example, with victim offender reconciliation processes. We are arguing the scope within the inquiry umbrella for a several track processes that take place. One of the tracks would be when we have a group of victims, of people who perceive themselves as victims—it might be the Hillsborough families; it might be people who felt the subject of the press, telephone hacking—they could convene as a group as part of the inquiry and maybe have direct conversations with people responsible for those incidents. In the Hillsborough case, that might be police/ground staff, or in the phone-hacking case, media barons, and they could have more direct conversations obviously brokered and mediated with suitable facilitative skills.

People would often feel they had a far better chance to have some catharsis of their real emotional concerns and they would have a better sense of emotional justice as part of the process of investigation, whereas the current inquiry process is very much modelled on the courtroom forensic analysis and that only deals with part of the purposes of an inquiry.

On your second point, I think, yes, there is scope for considerable improvement in the way inquiries would operate that would engage the public much more and also engage key constituencies for particular inquiries.

Peter Riddell: On that, the web provides a great opportunity to do that in a much more public-friendly way. We developed a website; we did not get very far but we dealt with those issues absolutely on the web. But it was certainly true that the main people interested—we could not claim the public were interested in what we were doing; if we had managed to get going and have public hearings, they might have been—were very much three groups. First were the detainees themselves and their lawyers who had been involved in lots of litigation, whom we met and indeed met one of the detainees a number of times. But we met them and that was extremely useful for our understanding and we tried to offer reassurance; though many of them changed their minds about participation. But there is such a climate of suspicion on their lawyers' part and, to some extent, on their part.

Then there are the NGOs. I think one of the problems with any inquiry is who the NGO is speaking for. I felt that the direct interaction with the detainees and their interest was more useful sometimes than the NGOs. In some cases they had a civic interest in it and very good credentials. For others it was part of their repertoire and they were acting very much as a club together, which could get a bit tiresome after a bit, to put it bluntly. I think there were problems there.

There were two or three journalists—two really—interlinked with NGOs and this was, to be honest, an inhibition in some of the interaction we had with them. A lot of lawyers were involved in human rights issues and we had a seminar, for example. Yes, absolutely try to engage but be realistic: you are only talking about a very small group initially. However much you make it accessible on the web, it is a pretty small group.

Q67 Baroness Stern: Could I just pursue that for a minute? Have you done enough analysis and research to be able to answer this question: are there some inquiries where the core participants, the victims or the victims' families, said they were satisfied—they felt better, they felt, what did you say, truth and justice had been established?—and they were grateful, or do we not have that information?

Dr Mackie: We probably do not have enough information to give a consistent answer on that. But certainly there are areas that are not quite the full public inquiry, for example, in the review of the 7/7 bombings, there was very much feedback from families that they felt very pleased with the way the process was managed and conducted and felt they had had a good chance to have their say. You can contrast that certainly—obviously Hillsborough is the prime example—with families feeling excluded from the process.

In the last independent panel review of Hillsborough, in fact, it was built into the terms of reference that the families would be consulted throughout on the process, and that does not necessarily happen in inquiries. If one looks at the feedback from the Leveson inquiry there is mixed feedback. There is initial recognition and appreciation of the fact that they are having a chance to have their say in public, but then other nuances creep in about the role of celebrities and other more cynical aspects of that process and the influence of the media that led to some dissatisfaction amongst witnesses.

I think it is, in other words, a mixed picture currently, and part of our recommendation is to try to create processes where there can be a stronger sense of appreciation by people participating in inquiries that, “Yes, we have had our say in an appropriate way” rather than being channelled down certain formal routes.

Baroness Stern: You suggested in your draft report—I think it is a draft report—a citizens’ panel, “To act as a consultative focus group to the Minister and Chairman and, in particular, to act as an occasional sounding board for the chairman as to the public perception of the value of the process in their role as citizens and taxpayers and opportunities for alternative processes”. Would you perhaps say a tiny bit more about how you envisage that working and which citizens it would be and what status it would have? Perhaps Mr Riddell would say whether he thinks it is a good idea or not.

Dr Mackie: You have picked on a very interesting area. What we were trying to do with that draft recommendation was to test the idea of how we can engage the public, given the public had said to us in this survey—over two-thirds of the public—“We would like to see a greater public presence on the panels of inquiries”. We were trying to find a way of responding to that. The jury/citizens’ panel idea was a way of testing the water, particularly with the experts we brought into our symposium.

The feedback we had on that was we recognised there are great practical difficulties. How do you choose which citizens and so on? But I think we still want to look at it in more depth because surely there could be a role for public focus groups around the country? The chairman of the inquiry could attend local radio stations and talk to people over the airwaves on certain key public matters. There might be ways of engaging the public more, and what we are trying to do is be creative about thinking that through to make this much more of a public process. Ironically, it is called a public inquiry but very little of it is public, other than the fact it is held in public, but otherwise it is a chairman appointed by the Minister who reports back to the Minister. There are very little public filters in there, other than the website Peter referred to.

It is true inquiries are getting better at having good websites, at having seminars with expert groups. What I think we were trying to get at with the citizens’ panel idea was, is there some way of just letting the public feel they are much more a part of this process?

Peter Riddell: I think it depends on the nature of the inquiry. If you are talking about something like Hillsborough or some of the hospital stuff, I can see it is of greater value. In the case of what we were looking at I cannot see any value in it at all. The problem we had was the danger of capture by various interested groups who had been quite difficult, and the whole point of the inquiry was to be a bit detached from that. I think it would apply in some instances but not others.

Baroness Stern: Thank you very much.

Q68 Baroness Hamwee: I know you want to get on, Lord Chairman, and if you feel that this should be dealt with outside this session then fine, but Dr Mackie mentioned the 7/7 bombings. I have not declared this as an interest because I did not think it was an inquiry, but I was a member of a scrutiny committee at the London Assembly that looked at a narrow aspect of the 7/7 events. One of the reasons that we undertook the work was because of the call for some sort of investigation. I was interested to hear you say that those families felt that they had generally been dealt with fairly well. I do not know, Lord Chairman, whether you think this would be better dealt with outside this morning but I would like to understand more of what they felt was good, when my own experience was rather the contrary.

Dr Mackie: Okay, maybe if I—

The Chairman: Is this something you can put in writing, do you think?

Dr Mackie: I can answer fairly quickly. It was an impression gained from what they have said in public, certainly some families, about the inquiry process and it was more about the way the chairman of that inquest handled the personal circumstances. But given the complexities of the issues that came up in the whole review I think it is fair to say there would always be differences of view about that experience because of the sensitivities.

Baroness Hamwee: Was it the inquest that handled it?

Dr Mackie: Yes.

Baroness Hamwee: Yes, as distinct from any other sort of inquiry.

Dr Mackie: Yes, yes.

Baroness Hamwee: That is very helpful, thank you.

Q69 Baroness Buscombe: We have touched a little bit on this area but let us pursue it a little further. Is it right that when Parliament has enacted a statute giving inquiries the power to summon a person and papers and take evidence on oath, Ministers should continue to set up non-statutory inquiries that do not have these powers, like the Iraq inquiry, the first Mid Staffs inquiry and the Detainee inquiry? Of course on this point we are already looking at the question of the public understanding of whether or not any inquiry is statutory or non-statutory and taking that one step further. Does the public realise what that entails anyway?

Peter Riddell: I think it is fair to say that the Government would not have set up a statutory inquiry, because of the secret nature of a large part of the evidence. Going back to the words “public inquiry” an inquiry, some parts of which would have been public, would be an accurate description of what we were doing. Quite a lot of what we were doing could not have been because with agents and on operational things it would have been in secret. Inevitably you are going to have Privy Council inquiries dealing with matters covering intelligence, like Chilcot.

An interesting point, and it was raised with us by a number of people and we had a seminar, was about the ability to get evidence. Our experience was we had no problem whatsoever in obtaining evidence. The Prime Minister had an instruction that all members of the intelligence agencies and relevant officials should fully co-operate with us. Permanent Secretaries, and I think the heads of agencies, as part of the protocol had to sign an undertaking that they had given us full evidence. Certainly from our experience nothing has been held back from us. Sometimes it requires a little shake of the tree but it got out.

Our problem is a different one, and that goes back to public confidence. This is exactly the problem the Chilcot inquiry faces now: how much of the evidence that is seen could be made public? That is one of the reasons for delay in Chilcot, as Sir John Chilcot has admitted—the discussions with the Cabinet Office as the co-ordinating body on the disclosure of evidence. That is the problem and that is why the inquiry, from what we were looking at, would have to be non-statutory. One of the arguments we used to people was, “Look, this is the only inquiry you are going to get”, but a statutory inquiry that is required under the Act is virtually impossible when you are dealing with highly secret intelligence information.

Q70 Baroness Buscombe: Could this be managed rather better and indeed in that sense manage public expectation and media expectation in the purpose and possible outcome, if up-front it was called by a different name and it was explained up-front that we should all be aware that there is a limit in terms of what this inquiry can achieve? Too often when we set

up public inquiries the great pronouncements are that we will get to the truth, we will find out what happened, and then we will all be happy.

Peter Riddell: Yes, is basically the answer to that. If you looked at the original statement by the Prime Minister, which was an oral statement in July 2010, he laid all that out but people did not believe it and they raised their expectations. Here at last was an inquiry into this scandal of a Guantanamo rendition and people transferred their hopes on to it, even though it was absolutely clear what the Prime Minister had said and we always made it clear, “Look, this is what we can and cannot do”. We then negotiated, over nearly a year, the protocol of evidence and trying to broaden the envelope, but it was quite clear where the envelope was.

Dr Mackie: It reminds me of a comment that we had in our taskforce from a former member of the Treasury Solicitor’s Department that the high points of an inquiry politically are always when you make the announcement and from then on it is downhill for the politicians and others. It is important at the outset and that again is part of our recommendations that expectations are managed, so I think the point that you are making is a sound one. It would be helpful to have the purpose of the inquiry set out in some statement and what design consequences flow from that, which could be related to how much should be in the public arena and there could be a separate political debate alongside the setting up of the inquiry. By managing expectations from the outset and saying what the framework is it will certainly mean there is less mismatch down the line and less controversy later.

The Chairman: Lord Richard, I think that there have been some responses on a couple of your questions, so you may want to push on.

Q71 Lord Richard: Can I just ask one question on the powers of Ministers? We were talking in the last question as to why the Act is not being used more. Do you think the way in which ministerial power is set out under the Act is a deterrent to Ministers using it? In other words, the powers that they are given to set up, not to set it up, setting terms of reference, appoint the chairman, appoint the members, suspend the inquiry, terminate the inquiry, restrict the publication of documents. All those ministerial powers are put in the Act. Do you think that deters Ministers sometimes from operating the Act?

Peter Riddell: Yes. In a sense it goes back to Lord Trefgarne’s point. The advice is always do not unless you have to, and also it develops a life of its own. So once you have done it, it is like with a teenage child—it is out in the world.

Dr Mackie: I think the reality is that the sort of provisions you are mentioning—some of them could be quite embarrassing politically for a Minister to take those steps halfway through an inquiry to terminate.

Peter Riddell: For example, in the case of the Detainee inquiry, if we had objected to being closed down it would have produced a hell of a row at the time. In fact we all recognised it was inevitable because of the reasons I outlined before—because of the continuing police inquiries. We just could not do it, and it was done by consent. There was no sense of pressure, but an inquiry panel could create quite a row if it was terminated against its consent and it still thought it had a useful life. It may be a two-day wonder, but still quite a row.

Lord Richard: If it is an inquiry outside the Act, not under the 2005 Act, Ministers do not have the power to say to the inquiry, “Stop.” The inquiry may agree that it is a good idea that they do, but there is no compulsion there to be exercised by a Minister. Not a legal compulsion.

Peter Riddell: No, not a legal one.

Lord Richard: In respect of the Act there is.

Lord King of Bridgwater: I do not understand this. I may have misunderstood Lord Richard's question, but whether the formulation of the Act makes it less easy for Ministers to set up the inquiry it would seem to me that the basis of the Act makes it easier for Ministers to have more control over what will happen: is that right?

Dr Mackie: The Act gave the Ministers much more formal powers than was obvious previously.

Lord King of Bridgwater: It did not put them off. They are more likely to be put off under the previous arrangement where you would not have that flexibility: is that right?

Dr Mackie: I think the problem is that to exercise those powers would result in some kind of public commentary about why you are exercising those powers in these circumstances, which could be politically embarrassing. Certainly the framework is there to give a lot more structure to the process, but it is difficult to see when the powers would be exercised, for example, in terminating an inquiry once it is underway.

Lord Richard: Can I turn to the other point we wanted to raise, which is judges? Do you think that Ministers should have to have the consent of the Lord Chief Justice to appoint a judge, a senior judge, to chair an inquiry? Is it enough to consult? There is this argument that has been going on since 2005.

Peter Riddell: It is an interesting point. There is a further distinction, Lord Richard, which is between currently serving judges and retired judges. In the recent inquiry I was involved in, Sir Peter Gibson was a retired Appeal Court judge. The Baha Mousa case similarly engaged a retired Appeal Court judge. There are quite a lot of retired judges pulled in. The problems occur when there is a currently serving judge. I think to consult is the right thing. Equally, a serving judge is hardly going to say, "I am going to do it" when the LCJ is going to say no.

Lord Richard: True.

Q72 The Chairman: All but one of the inquiries set up under the 2005 Act have had a chairman alone. Do you think other members should be routinely appointed to the panel and what criteria should govern whether a chairman should have the benefit of wing members? Is it better to have a trio rather than somebody sitting alone?

Dr Mackie: Certainly there are arguments of efficiency for having one person, but part of our recommendations are that inquiries have a number of purposes, and therefore it would be helpful to have more capabilities on an inquiry team than you get through one judge. Judges bring great skills—obviously forensic analysis, convening of witnesses, analysis of evidence and translating that into principle—but one would have to question do they bring capabilities when it comes to developing and formulating policy? Do they understand how best to create organisational change in the NHS, for example, and where will they get that from? Very often, having panel members who have those capabilities might make the inquiry a more effective and richer process than just having a single chairman or a judge.

We are arguing in favour of having more team members. Whether they are members of the panel or they are assessors, or whether they are conducting parallel track processes under the umbrella of the inquiry is a matter of design for each inquiry, but certainly there should be access to the resources out there.

Again, coming back to Hillsborough—it was very interesting that that was not a public inquiry—chaired by the Bishop of Liverpool, but again for their purposes they recognised they needed to bring in medical expertise; they had an archivist, because it was very much about the documents that were part of the history of the case, they had a media specialist, and they had a lawyer, so they recognised they needed a mix of talents to get the best outcome from their inquiry. I think that is true for many inquiries.

Peter Riddell: Could I just add two points to that? I was involved in a non-statutory one where there were three of us, and it operated very well because the chairman operated by consensus. Everything we did went through the three of us; indeed, drafts of letters we were sending to the Government or other bodies were all circulated by email. We met frequently, and the chairman, Peter Gibson, said from the beginning, “I want to operate by consensus.” We are three very different personalities with totally different experiences, and I think that worked rather well. I think the secretariat felt it was helpful to have three different people on what was some very sensitive stuff. I am in favour from my own limited experience of a panel.

In relation to the 2005 Act it would be quite interesting if you heard from some of the assessors on Leveson who I do not think necessarily felt the experience was totally satisfactory. There was a change between when they were recruited and the way Sir Brian operated the inquiry, and I think they had a more advisory role than they perhaps had anticipated when they were appointed. There are plenty of the assessors around and I think you would find a quite interesting perspective from them on that. It was very much “the Leveson inquiry” and the others were there to be drawn on—their expertise—so I think there is a difficult balance and it has been an interesting experience, but you would have to hear directly. I do not want to give hearsay evidence. A number of my friends were assessors and I think they found it a mixed experience. It has certainly been my personal experience, being part of a panel, that having three worked really well.

The Chairman: That is helpful. Thank you.

Q73 Lord Trefgarne: I wonder if I could ask you about your views on the roles of lawyers representing those who are appearing before inquiries, but also in particular—and this is a matter of interest to me—the role of counsel for the inquiry. I had some slightly mystifying answers as to who instructs counsel for the inquiry, and to whom they report. Perhaps you could help me.

Peter Riddell: Yes. We decided early on, in one of our first meetings, to have counsel. This is partly, to be frank, because of the experience under Chilcot where it was felt that some of the questioning had not been as structured as it might have been, and also because if you are on the panel you are listening. The difficulty is if you are on the panel you are thinking, “Here is my next question” and you are not listening to the evidence. As a non-lawyer we had a very interesting debate on this subject, and I was persuaded, and so were the other members—we collectively reached a decision—that it would be a good idea to have counsel to handle the questioning. The counsel worked through us.

Because of the sensitive nature of the intelligence we had to have someone who was already DV-ed. There were quite a lot of senior silks who, for various reasons, have developed vetting. We asked for suggestions through the Treasury Solicitor of possible lawyers and we interviewed a number. It was our decision who the counsel was—of course it was partly dependent on availability—and then we got a junior who had worked on Baha Mousa who therefore knew about it. Our QC, Philippa Whipple, was our counsel and very much worked to us and no one else at all, and very strongly so. The advantage of it, we felt, was

that it gave us the freedom to look at the overall picture while she and the junior would be doing—although it never happened of course—the specific questioning.

Lord Trefgarne: Did your oversight of the work of your counsel extend to the point where you would say before the session began, “Ask these questions”?

Peter Riddell: It would have done, but of course we never got going. That was the problem.

Lord Trefgarne: Might it have done, or would you have been willing to say, “Stop asking that question. We do not want that. Move on”?

Peter Riddell: It would have been I think more subtle than that, Lord Trefgarne—I hope, anyway. But we did have an agreement that Philippa and Nick Moss, who was the junior, would not exclusively ask questions—that those on the panel, rather as occurs in a court anyway, could intervene and ask questions. The primary question-making would be by them. If we felt, and this is totally hypothetical, that counsel were going off beam or too long on a topic we would have intervened, but would probably have done it much more subtly than that. The plan was, and we discussed all this—and, as I say, it never happened—that we would have pre-sessions to discuss what we wanted raised, but they worked to us.

Dr Mackie: That is my understanding, from other inquiries, that the counsel and the panel or chairman very much stay in touch in terms of what is necessary to move questioning on. That is the role of lawyers generally you asked about. I think there is a balancing act there.

Lord Trefgarne: As you know, I was a witness before the Scott inquiry and have slightly different views to that.

Peter Riddell: The other point to also take up, Lord Trefgarne, was that in our case, because we were not going to be adversarial, questions could be raised with us as the inquiry that would then be put by counsel to witnesses, because we were not going to have people appearing. The witnesses would be able to have legal advice but there would not be cross-examination.

Q74 Lord Soley: I find this quite a difficult area because I understand what you were saying about the expertise of the lawyers, but it is also true—and you see this in court, frankly—that if you introduce lawyers for the complainant as well as for the panel you put something between the people who are complaining and the body that has to report. I do wonder whether some of the feeling that might come out of people who have a complaint that they are not being heard might be because they are not speaking as much, because they are being represented. The same does happen, I have to say, in certain courts of law.

Peter Riddell: We picked a counsel we thought would be sympathetic—a very interesting decision. When we picked a counsel we sourced various people and we deliberately picked someone who would not be too adversarial in style and manner. That was a deliberate decision. While we wanted the discipline of questioning we did not want someone who would, particularly dealing with detainees and so on, create what you describe, and I think it is a very interesting issue.

Lord Soley: What about the complainant, though, the lawyers for the complainant? You picked your one because you had thought it through and wanted someone who would do that, but what about the complainant?

Peter Riddell: There would not be cross-examination. It was very much that they could provide advice—if I was giving evidence to the inquiry I would have a lawyer next to me speaking on that—but not cross-examination.

Dr Mackie: I would say in terms of mediation experience one of the reasons for mediation working is that in a sense one puts lawyers into a different role, a different process, and brings the clients further into the forefront. Whereas the danger of having lawyers representing is they are speaking for the client and that can sometimes be a barrier to a more human process. So it is again about design of how to make it more constructive, with more client engagement as part of the hearing, and that comes down to how well it is conducted by the chairman too.

Lord Trefgarne: There is a risk, is there not, that the inquiry ends up being conducted by counsel and not by the chairman?

Peter Riddell: There is, but we were well aware of these issues and discussed them at length. Indeed the counsel, who was based in the offices that we had, was around a lot of the time and was seen very much as part of the team, along with the civil servants. There were cultural differences between the lawyers and the civil servants who were in our secretariat, which was very interesting indeed. The three lawyers and the solicitors to the inquiry as well were very much part of the team and not seen as separate.

Lord Richard: I have a comment on the point raised by Lord Trefgarne. The idea, if I may say so, that you have a QC as counsel for the inquiry who is so capable of dominating a judge—a senior judge to the Court of Appeal who is chairing it—that is the counsel that runs the inquiry rather than the judge I am bound to say is somewhat fanciful. It is probably the same relation as you would have in the ordinary court, where you have a very senior judge sitting up there, and you are a counsel down here. The chances of you dominating the court to the extent that you take over the judicial function is nil.

Q75 Baroness Buscombe: From the witness's point of view: is it not the point that you can only reveal the truth if you are asked the right questions? Is it not more likely that the right questions may come forward through the giving of evidence if it is a more informal process, or where there is at least more than one person involved in the questioning? That is where I might say I am very much in favour personally of dispute resolution, a more informal process whereby you can eke out the truth by asking the right questions.

Dr Mackie: I think you are absolutely right. You get different kinds of truth emerging when, for example, you have a family group talking about their experiences compared to taking the family in sequence and in a witness box environment. Robert Francis has commented on that from his experience from Mid Staffs. So I do think that one needs to sometimes create a safe space where people just tell their own story with some prompting by an appropriately skilful investigator. It is a very different experience from a lawyer taking you through a series of set questions or prepared questions, and so a different kind of evidence emerges.

Certainly if one brings together, for example, patients and health administrators and managers in a room, and you just allow them to have a conversation about what happened you can get a very different picture emerging than if you take them one-by-one and examine them formally in traditional litigation terms. I think there is room for both, but at the moment the former gets neglected. The idea of giving people space just to tell their story gets neglected in favour of a much more formal approach.

Peter Riddell: In our case it would have been very difficult to go through what Karl described between officers of the intelligence agencies and the detainees, for various practical reasons to do with the fact that below the top level of each of the agencies they are unavowed and secret. There are different styles of lawyer. Where I agree with you, Baroness Buscombe, is that one of the things that we agreed and our QC Philippa Whipple

absolutely agreed, was that it would be a much more eliciting of the story rather than a courtroom style. Also, in many respects in relation to some of the detainees, some of the evidence was beyond us and was always going to be, which was about the nature of torture. It was getting their story and the real sadness of the inquiry is we were not going to get to that position.

Q76 Baroness Buscombe: Now we come on to the question of cost and length. If I may quote you both: Dr Mackie, you said that inquiries tend to take on a life of their own, and, Mr Riddell, you said that inquiries do a good job. My question is: are they worth it? I tend to look at this in the context of these inquiries costing many people's lifetime contribution to the tax system. Some of us attended the Al-Sweady inquiry a couple of weeks ago, a morning session. They have only recently started taking oral evidence and already it has cost over £16 million. Bloody Sunday was £191 million—the Saville inquiry recently was the reason why the Prime Minister said there will be no more open-ended and costly inquiries. The aim of the Act was to make inquiries less costly. Do you think that has been achieved?

Peter Riddell: We will have to see, is the answer.

Baroness Buscombe: There were several questions there.

Peter Riddell: I do not know, I think it is a very pertinent question. All I can say is that we did not even have to have it whispered in our ear. We were all the time aware of the Saville inquiry, its cost and time. The three members of the inquiry were well aware of that, and in terms of cost we put our costs on the website on a quarterly basis. The secretary of the inquiry, because he has run two other inquiries, was well aware of that, so we were very well aware of cost and length of time and there is a proportionality aspect to that. My eyebrows were raised at Professor Tomkins's view that justice is expensive. I think there is proportionality and I do not agree with him on that. We were very conscious of that, which is one reason why we got to the stage of the infinite delay before launch. One of the factors that you have to bear that in mind too is: what is the proportionate way of doing it?

This is where the involvement of lawyers is difficult. There is a different attitude to costs from lawyers and civil servants and it was quite interesting to observe that. The point on length of the inquiry: we were given a formal instruction by the Prime Minister that from our launch—the date that never happened—we had 12 months. It then became clear that that would be very difficult to achieve if we were going through the process with counsel. We went back to Government and said, "This is going to be difficult" and the word came back, "12 months". That never happened, but certainly, even if we had slipped a bit, we were well aware that there was a time limit there and that was what we had been requested to do, difficult as it would have been to achieve it.

Dr Mackie: Yes. It is hard to say that the Inquiries Act in itself has led to a reduction in costs. Inquiries still seem to be taking £2 million, £3 million, £5 million expenditure in order to be completed, so there has not been a repetition of the Saville inquiry in that sense but it is certainly not clear that there is any management of costs other than through departmental monitoring as the inquiry proceeds. So I think it is more about the fact that there is a greater public awareness of the cost of the inquiries and therefore greater pressure on each inquiry, the chairman and the lawyers, to see whether they can manage their costs, but no evidence of it.

Part of our interest is to see whether the methods that we are proposing might mean more cost-effective inquiries. For example, could the Independent Inquiries Office by reviewing inquiries and coming up with different kinds of design and different kinds of guidelines help

manage costs better in the future? Those are the kinds of questions that need to be addressed more closely.

Q77 Baroness Buscombe: Having talked earlier about public confidence, that if the public were to be given the space to focus on the value of these inquiries in terms of outcomes for some individuals to feel better—which probably makes me sound cynical but I am just being devil’s advocate here, as we all are in a sense—about something that has happened, does spending millions of pounds particularly in these austere times make sense?

Dr Mackie: You are back to what the purpose is and how to match the budget to the purpose in terms of achieving that purpose. If there is some value, for example, in dealing with disaffected relatives of patients in a hospital, “Does it need a full public inquiry?” is a good design question. Can it be done in a different way? But should it be done? Yes. But then there are subsidiary questions—“How should it be done?”, and that would come back to “Do you have local organisations that can manage that kind of inquiry in a way that does recognise people’s concerns and complaints?” The fact is that all the complex administrative machinery of the NHS has not succeeded yet in apparently answering that level of dissatisfaction, so we do need to address that, and that was a point in part behind the Francis inquiry. It still has not got there, so there is further work to be done, I think.

Peter Riddell: Virtually all inquiries do have a purpose. I did not think we were going to make people feel better. I think what we could have done was to establish the balance of what had happened, and we had a very potentially useful informative function about what had been the relationship between the Government and the detainees in rendition and we would have recommended guidelines and proposals for the future. This was a worthwhile task. Everyone involved within Government recognised what a useful task we had done, but it was a proportionate one. I agree entirely with proportionality but that certainly, post-Saville, not only in the mind of the Prime Minister but certainly in our minds on the inquiry and the staff we are well aware of that.

Baroness Buscombe: I think you both, in a sense, have answered the previous questions in relation to “If you have less time, would that help?”. The sense I have had from both of you—am I right?—is that time is not a good judge. Setting a time limit is not the right criteria; it is more about probably having constant oversight and accountability and transparency in the process. Perhaps an independent body—

Dr Mackie: I would say in addition to those other elements you mentioned, accountability and time are still useful and in fact, for example, we know from talking to people in the planning field about planning inquiries that deadlines have worked and milestone dates have worked in reviews of major infrastructure projects, once you have a set deadline. They have worked less well in inquiries but that may be because inquiries are much more ad hoc—different chairman, different secretariat—than in the planning arena.

Peter Riddell: Yes, and just to add to that, that is something where it would be useful once an inquiry was set up to then have a discussion with Government about realistic time. Our timetable was set from the start. It would have been quite useful at a later stage to have had a proper statement from the Government, “This is a realistic one that we can stick to, rather than the one you set from the start”.

Baroness Buscombe: I have been thinking about that. Could there be a process whereby not just six months or a year after recommendations have been made but perhaps during the process there could be an in-built moment where those involved in the inquiry could step back and just question where they are, where they are going—have they gone on the

right path? In Leveson, as you referred to earlier, this was a classic example of “Are the terms too broad? Shall we see if we can narrow those now, or is this proving too difficult in terms of eliciting the truth because of other external factors?”

Peter Riddell: Of course Lord Justice Leveson more or less did meet his deadline but I think there were some collateral costs, as you are implying. My experience was we were continually thinking about those issues.

Q78 Baroness Hamwee: Can I turn to the use of evidence, and whether evidence given to an inquiry should be admissible in civil or indeed criminal proceedings, and whether there is a case for inquiries to be allowed to determine liability? Or would witnesses be so inhibited by all of this that it would all be counterproductive?

Dr Mackie: I think there is a sense that if the inquiry moved over to liability, which you cannot do under the Inquiries Act, there would be more nervousness about giving evidence to the inquiry, certainly among those who might be found liable.

On the other hand, coming back to proportionality, it does seem a terrible waste to run through a whole inquiry process and to then contemplate starting from the outset again with litigation or civil liability proceedings. There presumably could be some halfway house there and I think Lord Woolf has talked about using inquiry findings of inquiry evidence as prima facie evidence for the purposes of civil or criminal trials. You can still challenge it once you are in that context, but at least there would be a starting point there.

Baroness Hamwee: So you would not then go on to say that it would be necessary for those who might be the subject of later proceedings to be represented during the inquiry?

Dr Mackie: Under the current procedures they can argue for representation if they do feel that there would be any blame attached to them.

Baroness Hamwee: I am just wondering whether you think that there would be a knock-on effect in that.

Dr Mackie: I think there would, but I am not sure if it is any greater than the current situation of getting public opprobrium. Certainly there was a mismatch of expectations, again, for example in the Mid Staffs inquiry, in that families were looking for heads to roll, but heads do not necessarily roll, and certainly not immediately on the basis of inquiry findings.

Peter Riddell: In our case the Attorney gave assurances that the Crown servants giving evidence would not be subject to criminal liability. I think there is a broader point—that it is probably desirable to have inquiries after you have done criminal investigations. The advantage Lord Bichard had from the Soham inquiry was that the two perpetrators were locked up and he himself—I have talked to him about it when he came to the Institute for Government to do a seminar—was quite clear that freed things up. I think it is much better to get that process out of the way before you start because it makes it easier.

Of course, things may come to light during the course of the inquiry but in order to get frank evidence I think you do not incriminate yourself by giving evidence to the inquiry.

Dr Mackie: I think there might be greater scope for inquiries to recommend compensation.

Baroness Hamwee: That was going to be my next question.

Dr Mackie: I am glad I anticipated that, as a substitute for findings in future courts. I do feel some empathy with the Hillsborough families, for example, having gone through this long process, now 27 years. Having had an inquiry that appears to vindicate what they have said

all along, they are now, as it were, starting from scratch in having to go through the civil courts and take civil actions to recover some compensation.

Baroness Hamwee: More than compensation, you mentioned restorative justice earlier. Whether that would work in the Hillsborough case I am not sure.

Dr Mackie: There is also a very difficult evidential environment now because of the passage of time. That particular inquiry could not because it was not a public inquiry, but there could certainly have been a recommendation that a simpler form of redress system should be instituted to replace the formal proceedings.

Q79 Lord Soley: Quickly if I could: am I right in assuming that if you made the evidence admissible in civil or criminal cases, and if lawyers are involved in representing, they would inevitably err towards caution and advise people not to say certain things?

Dr Mackie: That is perfectly true, yes.

Lord Richard: Could I raise the question of admissibility again? If you are going to make these prima facie admissible in civil or criminal proceedings you cannot dispense with the lawyers in the inquiry, can you? You cannot have two types of evidence being prima facie admissible, one of which is a legal—

Peter Riddell: That is the problem with not starting until you have your criminal stuff out of the way.

Lord Richard: The civil stuff follows too.

Peter Riddell: Indeed absolutely.

Lord Soley: I think I agree with what you are saying. What I am struggling with a bit is still the role of lawyers here again, because if you were the lawyer for a person giving evidence, whether there had been a case beforehand or not, you might still say to your client, “I would not advise you to say that unless you are recognising where it takes you”.

Lord Trefgarne: That draws attention to the shortcomings of people representing themselves in these inquiries.

Peter Riddell: Indeed.

The Chairman: I think we are about there. Thank you very much indeed for coming along. That has been very helpful and I must say that Baroness Hamwee and I particularly felt we benefited from coming to your Institute for Government seminar, which was very useful. I do not know whether any transcript was ever taken of that.

Peter Riddell: I meant to check that this morning, but I will let your clerk know.

The Chairman: That could be useful.

Peter Riddell: I will check that, Lord Chairman. We will probably have an audio anyway, but if we have a transcript I will forward it via the clerk and even an audio might be of some help with that. I would hope at some later stage to have another seminar or something like that in parallel, if it can be of any help.

The Chairman: Thank you very much indeed for coming along. That concludes the public evidence session. Thank you.

Ministry of Defence – Written evidence

References:

- A. Approved Judgment of R (Ali Zaki Mousa and others) vs Secretary of State for Defence (No 2), 24 May 2013
- B. Secretary of State's Submissions in Response to Judgment of Divisional Court dated 24 May 2013
- C. Approved Judgment of R (Ali Zaki Mousa and others) vs Secretary of State for Defence (No 2), 2 October 2013

The House of Lords Select Committee on post-legislative scrutiny of the Inquiries Act 2005 has posed to the Ministry of Defence three questions for its consideration. These are set out below, with the Department's answers.

Has the Ministry of Defence made any submissions to the Courts in response to the judgment of 24 May 2013?

1. On 4 July 2013, the Secretary of State for Defence made a submission to the Divisional Court in response to the Judgment handed down on 24 May in Ali Zaki Mousa (2). The submission, a copy of which is attached to this Memorandum, set out the views of the Ministry of Defence as to how it might set up the inquisitorial inquiries akin to Coroner's inquests that were proposed by the Court. It is to some extent overtaken by the final approved judgment of the Divisional Court which was handed down on 2 October.

What does the Ministry of Defence propose to do in order to comply with the Judgment as handed down on 24 May 2013?

2. The submission by the Secretary of State envisages that these non-statutory inquiries will be chaired by a retired Judge, a Coroner or a QC with the appropriate skills and experience to conduct these investigations.

3. It is anticipated that the first person appointed to chair one of these Inquiries would establish the details of the procedure, consistently with the principles set out in the Court judgments, and that these would be based in principle on the process which applies for inquests. The judgment indicated that there should be no cross examination of witnesses, other than by the appointed individual conducting the inquiry. Legal representation of witnesses should be limited.

4. The Secretary of State acknowledged the Court's requirement for greater involvement of the bereaved families and the public and, to that end, he agreed that public hearings should be made accessible to the families, possibly through the use of video-links.

5. The submission acknowledged that the inquiries, as non-statutory bodies, would have no power to compel witnesses to give evidence. The Secretary of State suggested that this might not be a fatal flaw because the Department would always regard itself as obliged to co-operate to the fullest extent.

6. The Approved Judgment handed down by the High Court on 2 October indicated that the Court was content with the Secretary of State's proposal for the appointment of the

Chair or Chairs, and confirmed that it was the right of the Secretary of State to set the Terms of Reference for each inquiry in conjunction with the person he appoints to conduct it. The Court set out its views on the general approach that might be taken. The Court ruled that the ability of the Chair to compel witnesses to attend was the only effective and fair way of determining the circumstances of the death. If the inquiries are not to be set up under the 2005 Inquiries Act (which the Secretary of State does not favour), an alternative must be found which would provide the Chair (to whom the Court refers as “the Inspector”) with similar powers and the ability to impose appropriate sanctions.

7. The Secretary of State sought the assistance of the Lord Chancellor on the appointment of a panel of retired Judges who might be approached to act as Chair. Work is continuing to determine the best method of ensuring that witnesses may be compelled to attend, should that prove necessary.

What is the estimated length and costs of the procedures proposed by the Ministry of Defence?

8. It is estimated that each inquiry of this type will last approximately 3 months. Public hearings might be expected to last between 1 and 3 days.

9. Work is continuing to refine estimates of the likely cost of each inquiry. The Secretary of state welcomes the Divisional Court’s recognition of, and indeed emphasis on, the need to ensure that there is no excessive burden on the taxpayer.

Ministry of Defence – Oral evidence (QQ 272-282)

Evidence Session No. 12

Heard in Public

Questions 272 - 282

WEDNESDAY 27 NOVEMBER 2013

10.40 am

Witness: Jonathan Duke-Evans

Members present

Baroness Stern (in the Chair)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Lord Soley
Lord Trefgarne
Lord Woolf

Examination of Witness

Jonathan Duke-Evans, Head of Claims, Judicial Reviews and Public Inquiries, Ministry of Defence

Q272 The Chairman: Good morning, welcome to our Committee. You may have observed that I am not Lord Shutt. Lord Shutt sends his apologies. He is appearing before another select committee this morning and I am standing in. I am Baroness Stern.

I want to begin by explaining the arrangements here for the record. The session is open to the public and a webcast of the session goes out live and is subsequently accessible via the parliamentary website. A verbatim transcript of the evidence will be taken and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If after this session you want to clarify or amplify any points made during your evidence or have any additional points to make, you are very welcome to submit supplementary evidence to us.

Jonathan Duke-Evans: Thank you very much.

The Chairman: If you are happy with that we will move on to the questions. First of all could I declare an interest in that my husband was a member of the Billy Wright inquiry?

We are concerned to pursue with you the way the Ministry of Defence is proceeding with the inquiries into incidents that occurred in Iraq between 2003 and 2009 that might require an investigation under article 2 or article 3 of the European Convention on Human Rights. The divisional court has ordered that a large number of inquiries must be held into these incidents. As you know, we are looking at the operation of the Inquiries Act of 2005. The Secretary of State has decided that these inquiries into events in Iraq are not to be constituted under the Inquiries Act. So my question to you is: why? Why does the Secretary of State not wish the inquiries to be under the 2005 Act?

Jonathan Duke-Evans: Certainly. May I take issue with just one part of your question when you said that the divisional court had ordered that a large number of such inquiries should take place? I do not think it was expressed quite in those terms. I am sure that the final number will be contested between us and those who are likely to call for many more than we are likely to think necessary. The ultimate decision is likely to be made by the designated judge appointed by the divisional court. We are thinking in terms of possibly a dozen or so. Why not a public inquiry?

Q273 Lord Woolf: Can we just pause there? As a former judge I am very worried about this, quite frankly. I can see how matters of this nature are capable of being reviewed by the divisional court. Indeed, in regard to the Saville inquiry, I think I presided over the court that twice reviewed Lord Saville. I think I would have been very hesitant to order the Secretary of State to do anything in regard to inquiries because I am not quite sure on what basis the court could do that. Has the court defined on what grounds it is going to do it? Are the reasons put forward accepted by the Secretary of State?

Jonathan Duke-Evans: I should perhaps declare that I am an administrator rather than a lawyer but I have been working with these cases quite extensively so I will do my very best.

My understanding, the way in which I would express it, is that the court has stated a clear view that there is a duty upon the Secretary of State to make sure that there are proper inquiries into a certain class of case, particularly fatalities in Iraq.

Lord Woolf: This is on the basis of article 3, is it?

Jonathan Duke-Evans: Principally article 2. Article 2, of course as you will be aware, relates to deaths. Article 3 relates to allegations of abuse, even torture, but falling short of death. There is an open question as yet about whether it is necessary to go through any of these procedures in relation to article 3 cases, of which there are some very severe ones.

Lord Woolf: That is very kind of you, but the normal process for article 2 cases is an inquest. Is that part of the matters in issue?

Jonathan Duke-Evans: No. It cannot be an inquest because the powers to hold an inquest and the powers a coroner has at his or her disposal are only triggered when a body is in a coroner's area, which may only be in the United Kingdom. What the court has found is that a process akin to an inquest is the most appropriate type of process for dealing with these cases—which it calls the ones that give rise to anxious scrutiny—but it cannot be an inquest so we have to develop a procedure that is as like an inquest as it can be without relying on the powers of the Coroners Act.

Lord Woolf: Who is presiding over the divisional court?

Jonathan Duke-Evans: In the divisional court it was the President of the Queen's Bench Division, now the Lord Chief Justice, and Mr Justice Silber.

Lord Woolf: Thank you very much.

Jonathan Duke-Evans: Your question again: why not a public inquiry?

The Chairman: Yes. Why not the Inquiries Act?

Jonathan Duke-Evans: First I should emphasise that in this the Secretary of State absolutely agrees with the divisional court. What was contended for by the other side was that a public inquiry should be held into many hundreds of cases where there were allegations of either wrongful death or abuse by British forces in Iraq, which the Secretary of State said all along that he believed was disproportionate on the current state of knowledge, having regard to the time that it would take and the expense to the taxpayer. He did say that he would keep the matter under review—that was a very important point—but he considered that was a disproportionate way of going about matters. In our view his approach to this was very largely upheld by the High Court.

However, the divisional court did say that although it accepted the reasons why there should not be a public inquiry, something that will at least ensure that there is some public process to establish what happened in these most serious cases, which it defined as cases where Iraqi nationals had died in British custody, was necessary and the Secretary of State accepts that view. He also accepts the view of the divisional court that basing it on the coroner's inquest is the best way of doing it.

The Chairman: That is your answer to the question “Why not under the Act?” Thank you.

Jonathan Duke-Evans: I hope it suffices. I will be very happy to develop it.

The Chairman: No, no. Thank you very much. I think we have some supplementaries. Lord Morris.

Q274 Lord Morris of Aberavon: This is a policy decision that has been taken by the Secretary of State, is it not?

Jonathan Duke-Evans: Yes.

Lord Morris of Aberavon: Have you any idea why the Secretary of State has not come here himself to explain the policy decision? He may not have been asked but had he been asked, would there be any objection?

Jonathan Duke-Evans: I believe he was not asked.

Lord Morris of Aberavon: Would it not be more appropriate on a policy matter of this kind—because you say you are an administrator rather than a lawyer and you have come to explain the Secretary of State's, unusual perhaps, decision—than that you should be here?

Jonathan Duke-Evans: I must leave it to the Committee to decide whom it wishes to see. I can only do my best.

Lord Morris of Aberavon: Well, of course, I am sure you will do your best. But would it be more appropriate on a policy matter of this kind for the political Minister to be here? I have regard to evidence from the Ministry of Justice back in July when most of the matters that were raised were deferred for Ministers to come along.

Jonathan Duke-Evans: I can only repeat that it must be a matter for the Committee whom it invites to see. I can at least say that I think I am reasonably familiar with the Secretary of State's thinking on this matter.

Lord Morris of Aberavon: Would the Secretary of State have any objection to coming along?

Jonathan Duke-Evans: I do not know.

Q275 Lord King of Bridgwater: I think that was a very fair answer to the question Lord Morris asked. It is rather like the vicar standing up in the pulpit and complaining to the congregation that there are not more people in church. It is a question for us as to whether we did or did not invite the Secretary of State. Can I ask you something quite different: a little bit of background? How long has your post been in existence?

Jonathan Duke-Evans: As with all these things it has a history that goes back to the establishment of the Saville inquiry into the killings on Bloody Sunday. When it became clear that the Saville inquiry would not be the only one the Ministry of Defence would be heavily involved in, and indeed subsequently it set up some public inquiries of its own, it was thought that there needed to be a quasi-permanent post dealing with public inquiries, which was the core of my job and which was set up in 2008. Subsequently I have taken on other responsibilities relating to judicial reviews against the MoD and to common law claims for compensation where there are various synergies that make the job coherent.

Lord King of Bridgwater: Thank you very much. The reason I asked the question is that for our next witness we have a very long CV, but we have nothing on you at all apart from the fact that you hold this post. Our previous witnesses in the last session we had were a very interesting team who had worked together over three major public inquiries as counsel, secretary and solicitor. The message that came across is that there needs to be continuity of experience in Government Departments. What we have been talking about is—whether it is going to be the Cabinet Office—where is there going to be a centre of excellence where different departments that suddenly find themselves faced with something they have never faced before can go? The position of the Ministry of Defence now—and this is extraordinary—since 2008, in spite of events in Northern Ireland and all that, is that you are now becoming a centre of experience. I do not know how big your team is, working on this, but it is quite clear from your early answers that you are having to turn yourself into a lawyer even if you are not one by background. Do you have legal support in your team?

Jonathan Duke-Evans: I have. I work very closely with the MoD's central legal services and I like to think that I speak the language and can understand it.

In many cases legal advice can be interpreted and leaves choices open to the Department and I am responsible for giving policy advice that is agreed by our lawyers to our Ministers. We do try to ensure that there is continuity. I have been doing this job since 2008 and have built up experience not only of public inquiries but also of alternatives to public inquiries, whether it is with managing the MoD's input into the Chilcot inquiry or into setting up inquiries that are not statutory inquiries into other matters, such as Nimrod or the Mull of Kintyre. I have certainly tried to contribute to the Cabinet Office when it is thinking in terms of setting out guidelines for when it is necessary to hold a public inquiry and on what terms.

Lord King of Bridgwater: I refer to some other Government Departments where they may face such matters for the first time in their lives. You have a complete level of experience and scale, with the load of work in the Ministry of Defence, of a quite different nature. I get the impression—it may be a bit unfair, the questions that you are going to get now—is that it is setting up a slightly different standard of what you think inquiries are that are relevant to Ministry of Defence matters. Would you like to comment on that?

Jonathan Duke-Evans: There is almost a gamut, a spectrum, of inquiries, if you like, in terms of increasing formality of which the most formal, the longest, is the public inquiry under the 2005 Act, of which we have set up two.. We have had the Baha Mousa inquiry recently and we have the al-Sweady inquiry now in process. Equally we have had other, quicker, inquiries, still entirely independent but not with the full panoply of core participants. When that has been appropriate, it has enabled us to come up with answers rather more quickly than a public inquiry would be able to. Mr Haddon-Cave’s inquiry into the Nimrod disaster, for instance, was, I think, very widely welcomed as being a full analysis of what went wrong in that disaster. Similarly Lord Philip’s inquiry last year on the Mull of Kintyre disaster, and specifically whether it was right at the time to blame the pilots, was again very widely welcomed. Both of those were short of a full public inquiry.

Lord King of Bridgwater: Then you have Courts Martial, of course, as an alternative route that may occasionally be applied.

Jonathan Duke-Evans: That is entirely right because a Court Martial, when held in public, will go some way to satisfying the article 2 obligation that allegations of criminal offences should be properly investigated and should be heard in public.

Q276 Lord Soley: You used the word “disproportionate” when you expressed concern about the public inquiry. You also referred to alternatives to public inquiries, which you have looked at. I want to try to get to the base of the problem here. In Iraq at this time we were talking about the involvement of Iran through Moqtada al-Sadr and a lot of complaints about British troops. On one side you have the problem of an international political agenda with one state challenging us in another situation. You also have the problem obviously of some troops who may have fallen below the very high standards we set for the British armed forces.

My question to you is twofold. Firstly, is that really the core of the problem here? Secondly, is there another way of dealing with a complex problem like that without going for the full public inquiry? Is there an alternative?

Jonathan Duke-Evans: I think there is. I do not think that the core of the problem lies in the investigation. We have the Royal Military Police, who are in principle responsible for investigating offences committed by British soldiers on operations overseas and similarly with the air force and navy police. We also have a special ad hoc branch of the service police called the Iraq Historic Allegations Team, which has about 90 investigators and indeed—

Lord Trefgarne: How many?

Jonathan Duke-Evans: 90 investigators. It is comparable to the serious crime investigation capability of all but the largest domestic forces. It is a huge operation. It became necessary as a result of earlier court cases in which it was found that the appearance of impartiality had not been maintained in some of the Royal Military Police investigations—and please cut me off if I am giving you more detail than you want. In many of these cases the abuses complained of took place in British camps for detainees, which are guarded by the military police. You can see how in that circumstance you can have the appearance of conflict of interest. For that reason we had to set up the special Iraq Historic Allegations Team. Had they not been set up, the work would have been done anyway by the RMP, the Royal Military Police, but the IHAT is clearly, and seen to be, independent and that has been vindicated. Their independence and competence was challenged, we think quite wrongly, in the course of the same legal proceedings that led to the divisional court’s judgment that the

coronial process is required. So we were very pleased that IHAT's integrity and competence was vindicated. I am sorry: a long-winded answer to your question.

I do not think investigation is the problem. The problem that leads to how we implement the court's judgment on setting up these public processes relates to the situation where if having investigated these allegations thoroughly it is found that there is no case that is capable of being brought to court; how are the families of those who died to be told what actually happened? That was the concern of the divisional court and that is part of what we are trying to achieve by means of these inquest-type procedures.

Lord Soley: Is that covering the allegations of mistreatment as opposed to deaths?

Jonathan Duke-Evans: IHAT, the investigative team I mentioned to you, is also covering allegations of mistreatment although the divisional court was very clear that the allegations of unlawful killing must take priority. It was also clear, though, that the article 3 allegations cannot be entirely forgotten.

Baroness Buscombe: I am interested to know who these people are, these investigators. What is their skill set? What is their expertise? Are they already employed under another umbrella somewhere else within the Ministry of Defence or elsewhere?

Jonathan Duke-Evans: Are you talking about our police-type investigators rather than the people who will be carrying out these quasi inquests?

Baroness Buscombe: The 90 people you referred to.

Jonathan Duke-Evans: They are hired on a contract and their backgrounds are uniformly as former investigators for the civilian police. The head was a former senior investigator with the Metropolitan Police and the Thames Valley Police. That is their professional skill. In other words, they are investigators.

Q277 Lord Woolf: In the light of the evidence you have given, very clearly and very helpfully if I may say so, I am going to go back. We have heard that the reason for holding public inquiries in the ordinary circumstances is as a method of allaying public concern. Obviously there are grounds of public concern if British troops are alleged to have behaved inappropriately, especially if that is said to be systematic. What seems to me novel in the present situation is the numbers of people involved who have complaints. A process that really is to deal with individual possible contraventions in relation to articles 2 and 3 is having the effect of using a public inquiry, so called, repeatedly. That is a very different situation. If you have something like Hillsborough, there were a lot of people affected, but Hillsborough—as I understand it, and I may be wrong—was not designed to satisfy articles 2 and 3, possibly because of the reasons you have already given, that there are other ways of doing that. In particular if somebody dies, there is the inquest.

Jonathan Duke-Evans: There will now be a new inquest, of course.

Lord Woolf: Yes. So I wonder whether you feel that the experience of your Department, and the issues the Secretary of State is dealing with, is outside what normally would be considered by a Minister in deciding to hold a public inquiry, of which we could give many examples.

Jonathan Duke-Evans: Yes, I think you have encapsulated the reasons why the Secretary of State resisted all along the idea of a public inquiry that would deal potentially with many hundreds of cases, which was referred to by our counsel as Leviathan during the hearings. Given the costs and length of public inquiries that are restricted to one or two well-defined issues, I think you can see—and I think the divisional court fully accepted our contention—

that it would have been absolutely impracticable on grounds both of cost and of length. So we were very pleased that they decided that an alternative solution was required.

Lord Woolf: One of the reasons that could make an investigation necessary—I am not saying a public inquiry—is the possible claim for compensation. How does that fit into what you are describing here? In the cases that you are going to have dealt with by the public inquiry, am I right in thinking that any conclusions or results might or might not be admissible in a civil claim? They are by no means conclusive as a civil claim.

Jonathan Duke-Evans: Indeed I have been concerned about that but we have taken the view that it is not necessary to complete a police investigation in order to settle a civil claim against the Department based on the same facts. The reason for that was in part because the IHAT, our investigative body, is giving priority to the allegations of wrongful killing whereas the cases to which you refer typically—I do not wish to minimise them—relate to rather less serious types of wrongdoing. In many cases there will be very little proof. It will be just one person's word against another. We have decided pragmatically that in many cases it is in taxpayer interests simply to settle if we can settle for a reasonable amount. Part of the reason for that is that we found as the result of a Strasbourg decision towards the end of the military engagement in Iraq that we were held by Strasbourg to have been acting illegally in detaining people in Iraq and therefore anyone who could show that they had been detained was entitled to compensation. There is no way of defending that proposition. So it has been possible to settle many claims on that basis.

Lord Woolf: I should perhaps make clear, Lord Chairman, that I, at one time, was engaged in respect of one mediation process with a view to settling those claims. I should make that disclosure.

Q278 Lord Morris of Aberavon: First of all may I say that like Lord King I am also pleased, as an old Defence Junior Minister, there is a body of expertise in the Ministry of Defence perhaps showing the lead to some other Government Departments?

The Secretary of State says he does not favour inquiries under the 2005 Act but does not give reasons for this. Can you assist us and give us any additional information?

Jonathan Duke-Evans: That he does not favour inquiries? Yes. It is largely that he believes that given the great length and the great costs of public inquiries he feels there needs to be a pretty high threshold of public concern and a very strong case that no other measure will be adequate. He simply does not feel that a public inquiry is the best way of dealing with these multiple accusations, many of which have very little concern with each other. He is absolutely clear that this would be an inappropriate way of proceeding. I would further speculate as to whether if a public inquiry had been ordered, would we have found a legal figure of sufficient seniority who would have been willing to take it on? I slightly doubt it.

Lord Morris of Aberavon: If the inquiry is not set up under the 2005 Act, the court has said a way must be found of providing the inspector with similar powers and appropriate sanction. You used the words earlier that what you favour is some kind of public process: a novel way of doing it. How can you meet the court's inclination, or at least the strong suggestion, that there should be similar powers and appropriate sanctions?

Jonathan Duke-Evans: Very much so and we had initially said in correspondence, as the Committee as picked up, that we thought this could just about be made to work without formal powers of compulsion but the divisional court in its supplementary or final judgment has said emphatically that it does not take that view.

We are still looking at how this can be made to work but we think the answer may well be that the High Court has powers under rule 34.4 of Civil Procedure Rules to exercise powers to summon witnesses or require the production of documents if requested to do so by an inferior court or a tribunal. These are not inferior courts but we think they may well be tribunals and we think that may well prove to be the answer bearing in mind, of course, that if recalcitrant witnesses are aware that a legal power exists then it is often not necessary to invoke that legal power. We think that may be the answer unless anyone can come up with a reason that says a new creature of this kind cannot be regarded as a tribunal but we think it probably can be.

Lord Morris of Aberavon: You have to establish first that it is the kind of tribunal in which a court would use its powers.

Jonathan Duke-Evans: I think that the judge designated by the divisional court to oversee this process will probably be the person who takes the final view on that. I think it is very likely that we shall make representations to him that the use of this rule is the answer to the dilemma the divisional court posed as to how a non-statutory body can nonetheless have the power to summon witnesses.

Q279 Lord Richard: I just want to follow this point up if I may. Either I have been labouring under a gross misapprehension or we need to go into it in a little more detail. Tell me, these tribunals that the divisional court now wishes to see established, are they are inquiries within the terms of the Act?

Jonathan Duke-Evans: No.

Lord Richard: Are they are not?

Jonathan Duke-Evans: No, they are not.

Lord Richard: Where is the distinction?

Jonathan Duke-Evans: They would be non-statutory.

Lord Richard: I understand that point but they are an inquiry.

Jonathan Duke-Evans: I would not use that term. They are a completely new creature.

Lord Richard: You may not use that term but they are capable of constituting an inquiry under the Inquiries Act.

Jonathan Duke-Evans: Certainly not under the Inquiries Act.

Lord Richard: That is the decision?

Jonathan Duke-Evans: Yes.

Lord Richard: Right. What I am saying is that the body that is being set up, the tribunal that is envisaged under the divisional court judgment, comes within the definition of a possible inquiry under the terms of the Inquiries Act. So the issue that we are asking about, or at least I was going to ask about—not in relation to general inquiries into all the allegations arising from Iraq, but in relation to each specific allegation, in relation to each tribunal—is why in those circumstances does the Secretary of State not wish to use the Act?

Jonathan Duke-Evans:

In theory it would indeed be possible to set up a public inquiry into each of these cases provided you were satisfied—it says in the 2005 Act that the matters in question must be the cause of public concern or be capable of causing public concern—

Lord Richard: It clearly is.

Jonathan Duke-Evans: Nonetheless if you decided so to proceed you would then need to go through the set of rules and requirements that are established by the Inquiries Act, which the Secretary of State believes would be disproportionate and the divisional court agreed with him.

Lord Richard: Why does he believe that?

Jonathan Duke-Evans: On grounds of cost and length of time to be taken.

Lord Richard: The assumption is that if you have an inquiry under the Act it will take longer than an inquiry not under the Act. Is that your assumption?

Jonathan Duke-Evans: That is not only my assumption but I think it is probably capable of demonstration.

Lord Richard: Is it? That is interesting. We have had different views on that but we will not argue about that.

I am intrigued as to why it is that in a situation that you are setting up these tribunals that are capable of being inquiries under the Act, and indeed in respect of which you are going to have to import a new power similar to that which is contained in the Act, the Secretary of State rules out the possibility of using the Act.

Jonathan Duke-Evans: In line with the guidance offered by the divisional court, I would repeat; the divisional court says that it feels that the correct procedure here is one that is modelled on an inquest and not on a public inquiry. The Secretary of State agrees with that view. The Secretary of State believes that that is the best way to do this expeditiously and not at a huge cost to the taxpayer: a not inconsiderable cost but not an exorbitant cost either. So he is very happy to follow the guidance of the divisional court on that matter.

The Chairman: Lord Trefgarne, your question has been a little bit raked over. Is there anything left? I thought there would be. Thank you.

Lord Trefgarne: The key question is how you summon recalcitrant witnesses to appear before non-statutory inquiries. Most of the potential witnesses are serving soldiers.

Jonathan Duke-Evans: I think you probably could not now say that given the speed of turnover of serving soldiers. They do tend to retire earlier than the rest of us or go on to other professions. Although most of the witnesses will be people who were serving in the forces in Iraq, there may well be some witnesses who are Iraqi civilians who witnessed what happened. Most of them will be members or former members of the armed forces but my guess is that at least 50% will be former members.

Lord Trefgarne: Those who are serving can be told to appear.

Jonathan Duke-Evans: They can be told to appear, yes.

Lord Trefgarne: So for that category at least a special power is not required.

Jonathan Duke-Evans: That is correct.

Lord Trefgarne: That is all.

Q280 Baroness Hamwee: Can we turn to the issue of counsel to the inquiry? We have heard from a number of witnesses that it helps the inquisitorial process, as distinct from adversarial, to have the chairman assisted by counsel and also to give the appearance of

impartiality but we know that the court has said no separate counsel. Can we know the Secretary of State's view?

Jonathan Duke-Evans: The Secretary of State agrees strongly with the court on this. If we take as our guiding star on this what an inquest would do, it is not the norm for a coroner to ask questions through counsel except in the highest-profile inquests. The coroner would normally ask questions him or herself. That we think is entirely appropriate in these cases as well.

Baroness Hamwee: I have to say I thought you were going to say cost. What other factors are there: not just, "that is how it is done for inquests"?

Jonathan Duke-Evans: On the adverse side of the balance it always comes back to cost to the taxpayer and length of time.

Baroness Hamwee: Cost as against effectiveness for what you want to achieve: there is a balance.

Jonathan Duke-Evans: That is right but we believe that in this case very little by way of effectiveness is sacrificed. The people that we are hoping to appoint as the inspectors, if that is what they turn out to be called, are people of very great seniority in the legal profession and will I think be pretty piercing questioners, if I may use that term.

Baroness Hamwee: But will have a great burden on them.

Jonathan Duke-Evans: That is why we are looking for people of great seniority who are able to shoulder it.

Baroness Hamwee: Thank you.

Lord Richard: It is a burden because you are saying they have to do it in, what, three months, and public hearings should only last between one and three days.

Jonathan Duke-Evans: Thank you for the opportunity to emphasise that these are merely finger-in-the-air figures.

Lord Richard: Can you tell me what they are based on? I think when we read that, certainly as far as I was concerned, my eyebrows shot up, because the idea of in effect telling a very senior judge he has to do it in three months—

Jonathan Duke-Evans: I may turn out to be entirely wrong. We have never done this before. But you can look at the length of time from the inception of a coroner's inquest for instance, the preparation time and then the amount of time that it is heard. I am sure some of them will be longer but it seems to me to be entirely plausible that in cases where there are very few witnesses then the amount of time devoted to public hearings may not need to be terribly long.

Lord Richard: You may have to get evidence from Iraq.

Jonathan Duke-Evans: Possibly.

Lord Richard: You will have to have all the interpretation of the oral evidence, translation of any documents. Almost certainly.

Jonathan Duke-Evans: To the extent that that is necessary—there will need to be discussions about the extent to which it is necessary—that would be part of the preparation time rather than the possible three days' hearing time.

Lord Richard: Can we take it that three months is an indicative target based upon preliminary indications?

Jonathan Duke-Evans: That is how I would like to leave it if I may. Yes.

Q281 Lord Woolf: Can you help to give this Committee an idea of the scope of the individual hearings that are going to be held pursuant to this process? In other words I am asking you how many deaths or serious injuries will be looked at in respect of one hearing? Is it envisaged that unless there is some very close connection between one incident and another they would be divided up into separate inquiries? Or is it envisaged that there is going to be an umbrella inquiry and a whole lot of satellite inquiries? I am trying to get a picture.

Jonathan Duke-Evans: Not an umbrella inquiry. The linking feature will be the judge whom the divisional court has designated to be the arbiter in any procedural issues that come up.

We did say that because the court was very anxious that we should begin quickly with two cases where there is no procedural obstacle the court did say—and we have no reason not to follow it—that those two cases might well be dealt with together in the first of these quasi inquests even though there is no real link between them. They do not arise out of the same incident.

Lord Woolf: That is by way of exception: or is it going to be the pattern that perhaps where, so far as practical, a couple of incidents, even unconnected, will be the subject of one? I just do not have a feeling for it. How many possible individual “inquiries”—in quotes, because I know of your qualification—is it thought that there will be?

Jonathan Duke-Evans: I think this will be contested. We accept that there are II cases that fall squarely within the court’s definition of a death in custody. It is a wide definition. There were not II people who died while detained by British forces but there were a number of people within that number of II who were, for instance, stopped at roadblocks and then a situation developed as a result of which they were killed. In that very wide sense they were in British custody because they had been stopped. One might distinguish that situation from for instance a firefight, which is clearly not what we would regard as a death-in-custody case.

On that basis we think there are II cases that fall squarely within the definition. There will be a few more that are contested. One possibly difficult category will be people who were brought into British military hospitals as a result of earlier shootings, which are unexplained, and then died in British custody although that custody was only for the purpose of treating their wounds. Does the obligation arise in those cases? That is a question that we do not have a final view on as yet.

Lord Woolf: Perhaps I can just ask you one more question. Are all the decisions of the divisional court reported?

Jonathan Duke-Evans: I think it has still to make a final order⁶⁸, which will basically be distilled from the terms of its judgment. There is no further judgment required but it has still to make an order, which will include the underlying principles of these quasi inquests.

Lord Woolf: The judgments so far have been transcribed and been made public?

Jonathan Duke-Evans: Yes.

⁶⁸ The judgement of the court was embodied in an Order dated 31 October 2013..

Lord Trefgarne: The inquiries will be modelled on coroners' inquests. There will be no counsel to the inquiries, as we have discussed. Will witnesses be entitled to be represented by counsel?

Jonathan Duke-Evans: Generally not. If the presiding inspector takes the view that there are exceptional circumstances, we would not rule it out, but the divisional court was clear that it did not envisage that there would be any need in general for that to happen and the Secretary of State agrees with that.

Lord Trefgarne: That might colour witnesses' willingness to attend.

Jonathan Duke-Evans: We have ways of dealing with witnesses' willingness to attend, as we have discussed.

Lord Trefgarne: You are treading on thin ice, if I may say so, because that happened to me in the Scott inquiry and I did attend but only when I was allowed to be represented by counsel.

Jonathan Duke-Evans: We think it is a professional obligation that would certainly be enforced against serving soldiers. It is also relevant—the court was very clear—that these procedures should only be held once any associated criminal proceedings had either been determined or it had been decided they would not go ahead at all. So it will not be plausible for people to say they cannot appear before these because they might incriminate themselves. There will be no other proceedings for them to incriminate themselves before.

Q282 Baroness Buscombe: Could I then just follow on from that? Is there any sort of support system envisaged for either current or retired military personnel given that this must have a huge demotivational effect?

Jonathan Duke-Evans: Yes, there is and we do this for all former servicemen who face criminal proceedings as a result of their service but it would not extend to advocacy before these quasi inquests.

Lord Trefgarne: I am slightly troubled by this matter of witnesses not being represented. If they are not allowed to be represented by counsel as they appear before the inquiry, are they allowed to take legal advice before they appear and will that be paid for by public funds?

Jonathan Duke-Evans: In the case of former soldiers, yes.

Lord Trefgarne: Not serving soldiers?

Jonathan Duke-Evans: Sorry. Yes, former and serving soldiers I should have said. Yes. Anyone whose reputation or legal standing is at risk as a result of proceedings, we would seek to ensure that they had legal support.

Lord Trefgarne: Thank you.

The Chairman: Thank you very much. We are very grateful to you. It has been an eye-opener to hear about this new form of inquest that has been devised between you and the divisional court. We look forward very much to perhaps seeing some proceedings. Do you have a view when the first one will be?

Jonathan Duke-Evans: We hope that the first ones will not be too-long delayed in the New Year and that is certainly the expectation of the court. Much will depend on when we can find someone appropriate who will agree to chair them and then that person will need to be satisfied as to the rules of procedure. They will not be simply imposed the chairman. That would not be appropriate. We would hope we will be moving within a few months.

Lord Trefgarne: Could one judge chair all the hearings?

Jonathan Duke-Evans: That would be ideal perhaps but I do not think anyone would want to take that on. When I say a judge I mean it is more likely to be a former judge rather than a serving judge, or possibly a senior QC. I think we will probably see a panel of people who are willing to do these.

The Chairman: Thank you very much. We are all very grateful.

Jonathan Duke-Evans: Thank you very much.

The Chairman: It has been extremely interesting and informative. Thank you.

Ministry of Justice – Oral evidence (QQ 1 – 21)

Evidence Session No. 1

Heard in Public

Questions 1 - 21

TUESDAY 25 JUNE 2013

Members present

Lord Shutt of Greetland (Chairman)
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Witnesses

Judith Bernstein, Head of Coroners, Burials, Cremation and Inquiries Policy Team, Ministry of Justice, and **Richard Mason**, Deputy Director for Civil Justice, Administrative Justice, Coroners and Inquiries, Ministry of Justice

Q283 The Chairman: Welcome all to the first public evidence session on this, the Select Committee on the Inquiries Act 2005. We are delighted to welcome Judith Bernstein and Richard Mason, who are here from the Ministry of Justice. I just want to tell everyone that the session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. Additionally, this session is being televised at the request of BBC Parliament. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after this evidence session, you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us. I do not believe that I have any interests to declare relevant to this inquiry, so I think it would be helpful if our two witnesses would just introduce themselves for the record and, if you have any opening remarks, this is the time to make them, so welcome.

Richard Mason: Thank you very much indeed, Chair. Good morning, everyone. My name is Richard Mason. I am a senior civil servant at the Ministry of Justice, a career civil servant. My current responsibilities are for administrative justice, civil justice, and coroners, burials, cremations and inquiries.

Judith Bernstein: Good morning. I am Judith Bernstein. I am also a career civil servant. I work to Richard and I lead a team on coroners, cremations, burials and inquiries.

The Chairman: Could I just ask if you could speak a little louder. You are a long way from us and we do want to hear you.

Judith Bernstein: Yes, of course.

Richard Mason: We thought we would be closer to you.

The Chairman: Is there anything you want to say in opening?

Richard Mason: I do not think so. I think we are ready to go, thank you.

Q284 The Chairman: If I can make a start, can you explain a little of the background that led to the decision to place inquiries on a new statutory footing and, in particular, the timing of the decision? Would it not have been sensible to wait for the views of witnesses and the recommendations of the Public Administration Select Committee before the policy was formulated?

Richard Mason: Thanks for that question and also thanks for prior notice of the questions that you might be asking us. I think it is fair to say that Ministers at the time would have considered the options very carefully and decided, after some care, to go ahead. I do not think it is a question that we can readily help you with as to why it was done as it was back then. That is probably a question you may want to put to Ministers rather than to us, as to why things were sequenced as they were.

The Chairman: You may not want to answer this one, but is this issue something that people had been busying themselves about in the department, for months and years and so on, and an opportunity arose and they said, “Minister, this really is something that now ought to be tackled”, or is it a case of a Minister coming in and saying, “We really must do something about this, for goodness’ sake let us get on with it”?

Richard Mason: We were not around at the time, sorry, which may not sound like a terribly helpful answer. We were not around at the time, and I do not know the sequence of that but, in any event, I think there is a difficulty with us, as serving civil servants under the current administration, answering as to why Labour Ministers made the choices that they did back in 2004-05.

Lord Trefgarne: Is it not the case that the papers of that time, of the Labour administration, are in fact not available to subsequent administrations in any event, so even if you knew the answer to our question you could not tell us?

Richard Mason: Indeed. There are strict rules and conventions around what serving civil servants can comment on.

Lord Trefgarne: Correct.

Richard Mason: Exactly, thank you.

Lord Trimble: Can you not tell us what is on the record, because surely the Ministers at the time said something on the record?

Richard Mason: Sorry, I do not know what Ministers said at the time, but the questions that were put to us appeared to be trying to get behind the internal thinking within what was then the DCA. That seemed to us, having read the very helpful questions prior and hearing,

Chair, the way you have put it to us just now, to be trying to get behind the internal workings of the department. I do not think it is quite appropriate for us to go there, as serving officials.

The Chairman: We may get the opportunity to have the former Ministers here.

Q285 Lord Morris of Aberavon: I fully understand there are limitations for one administration discovering what happened in a previous one, but there must be some departmental diary of some kind because the timescales seem to be exceedingly short of two months when this matter was launched. There must be some record in the department.

Richard Mason: I suspect there is.

Lord Morris of Aberavon: Can we have it?

Richard Mason: I would have to take that away. I think the fair thing to say—the right answer to that—would be that your Committee put out a call for evidence on 13 June, Ministers will be taking advice shortly on the questions you put in that call for evidence, and the Ministers will wish to address that set of questions and any other questions that you put to us today. That is certainly something that we can make sure we address with Ministers for you when they engage with us.

The Chairman: I do not have the precise date of when the Public Administration Select Committee was set up, but it must have been earlier than 6 May 2004. On that date they got what seemed to be the pre-consultation documents from the Ministry. They were then considering their evidence and then the Bill was published in December 2004, but they did not report until February 2005. Perhaps we will leave it at that; nevertheless, it would be useful if you could dig out how all these things happened. I think that would be helpful.

Richard Mason: We will very happily take the question away and see what we can come back to you on.

Lord King of Bridgwater: Presumably the Public Administration Select Committee had something to say about this and there must be something on the record about that. There must surely have been questions in Parliament that Ministers would have answered at the time, because I can see the Public Administration Select Committee's nose might have been a little out of joint if they had taken the trouble to do a report and were apparently ignored by Ministers. Could you include in your further evidence, which is rather fuller evidence, a survey of anything the Public Administration Select Committee said with Ministers about this?

Richard Mason: We will very willingly take that away, add that into the pot and then put it to Ministers and see what Ministers consider is appropriate for them to put to the Committee.

Lord King of Bridgwater: No, I am talking about what is on the record in Parliament.

Richard Mason: Sorry. What is on the record; yes, of course.

Lord King of Bridgwater: The Public Administration Select Committee, obviously a Select Committee of the House of Commons, may well have had things to say. Will you include that in your search when you give us your replies?

Richard Mason: Absolutely, yes. Very willingly. Thank you.

Baroness Hamwee: I was going to ask about that. My second point, which may be for our clerk rather than for our witnesses, was to ask about consistency between the written evidence given to the Select Committee and what then came out in the Bill. That is a question of analysis, not perhaps one for our witnesses.

Lord Richard: I was just wondering, can you also let us have the date upon which work on the Bill started? We know when the department said they would be interested in views on a number of issues, which was in May 2004, and the Bill was introduced in December 2004. Work must have started on the Bill before May, so could we have the date upon which work started on it?

Richard Mason: We will certainly take the question away for the Committee, of course.

Q286 The Chairman: I think I ought to press on and come to the second question that we have. In October 2010 the department issued its post-legislative assessment of the Act. Are there any changes of view since that assessment and, if there are, would you give them in a written submission but you may have something to say now?

Richard Mason: I think you have straight away largely answered your own question, Chair.

The Chairman: Sorry about that.

Richard Mason: No, it is fine. It helps your witnesses. I have read, of course, the 2010 document, which you will all have seen, I am sure, and read very carefully. There are no changes to give you at this stage. Certainly Ministers will want to revisit that document in considering their formal submission to this Committee. I think one thing I would note is that, in looking again at that document, they will want, of course, to look at what has happened in the three years since.

As I recall the figures, when the department put that post-legislative scrutiny document out, I think we had only had four 2005 Act inquiries that had reported. Since then, six more have reported. It seems to me that potentially there is a lot of learning there. There are also discussions to be had, obviously—and you are interested in this—in those cases that came up where Ministers chose to have an inquiry and those where Ministers chose not to have a formal 2005 inquiry. Those are things that we can put into the mix for you.

The Chairman: Can I move to a question that you have not had notice of? Lord Trefgarne.

Q287 Lord Trefgarne: I wonder if you can give me any guidance as to how counsels for the inquiry are selected and who appoints them?

Richard Mason: Can you help there?

Judith Bernstein: As far as I am aware, the counsel to the inquiry generally can be appointed by the chairman of that—

Lord Trefgarne: His personal selection, maybe?

Judith Bernstein: I think it is a personal selection, but I would have to—

Lord Trefgarne: Are there any minimum qualifications required?

Judith Bernstein: Not to my knowledge.

The Chairman: What about bright ideas for the chairman? Who gives those?

Richard Mason: You mean in terms of appointees?

The Chairman: In terms of the people.

Richard Mason: Can we help, Judith?

Judith Bernstein: Can you explain that?

The Chairman: When you say “the chairman can pick them”, they just do not go out into the street. Where do they get the ideas as to who might be the appropriate people from? Are they supposed to know that themselves?

Baroness Gould of Potternewton: Could I follow that through, Lord Chairman, and ask: is there any sort of criteria that is expected to be used by the Chair when deciding who should do that, whether it is qualifications or whatever it is? Surely there must be some guidance that is given as to who should be chair or the type of person that should be chair?

Richard Mason: Let us take that away. I am sure we can say something useful—

The Chairman: You have been bounced on this but, nevertheless—

Richard Mason: No, that is not a problem.

The Chairman: —it is an important point that a Member is concerned about and we all are, so it would be useful if you could look into that further. That would be helpful.

Richard Mason: I think it is fair to say the chair of the inquiry will want to have the best possible legal advice—the best possible counsel. I might just declare a bit of an interest. My one personal experience of inquiries close up was that some years ago I was a member of the team that worked with the late Sir John May in his inquiry into the Guildford Four and the Maguire Seven. We then had an absolutely cracking first-rate team of counsel and I am sure that the late Sir John May would have settled for nothing less than a first-rate team of counsel.

Baroness Hamwee: Could I just ask a supplementary and Mr Mason has touched on it; a decision as to how many counsel should be appointed, whether it is a team of one or a cast of thousands. It falls within the same category?

Richard Mason: Yes, it does. Let us take that away. I suspect it is horses for courses, depending on what kind of inquiry you are looking at, and indeed the—

Baroness Hamwee: That may be different in the eyes of different beholders, of course.

Richard Mason: Yes, indeed.

Lord Woolf: I suggest the practice may, of course, differ depending on who is the chairman of the inquiry. If it is a judge, the judge will have pretty good ideas probably, from his experience sitting as a judge, of who he would like. If he does not, I would suggest the practice is to ring one of his colleagues who has previously sat on an inquiry or, indeed, a counsel who has recently handled an inquiry for recommendations.

Richard Mason: You have your own experience of this, do you not? Let us add that to the pot and we will see how we can help the Committee.

Lord Morris of Aberavon: Could you take back my account of what happened in the Stephen Lawrence inquiry to see if that is the norm or whether there are divergences? I was Attorney and I was asked to recommend counsel to the proposed chairman. As it happened, that counsel ceased to be available because he was elevated to something even more important and then somebody else—again, if I recall, on the recommendation of the

Attorney—was considered by the chairman, but it was the chairman’s decision as to who he wanted. It was rather important that the chairman did get on with and have confidence in his counsel.

Richard Mason: Of course, yes.

Lord Morris of Aberavon: Will you take that back and comment on it?

Richard Mason: Very happily, yes. Thank you.

Q288 Lord Richard: I want to ask about ministerial powers. I think it is right to say that the Act, when it was introduced, gave Ministers a significant range of new powers in relation to inquiries, which they did not have before. Without going into all the details of what those powers were, do you think that it is right and acceptable that Ministers should have the power to set up or not to set up an inquiry, to set its terms of reference, to appoint the chairman and the members, to suspend or terminate the inquiry and, indeed, to restrict the publication of documents? Should other persons have any of these powers in addition to or instead of Ministers?

Richard Mason: I think, Chair, serving officials would struggle a little to offer an answer whether it is right that people should have these powers under the Act. Parliament, after due scrutiny, passed the legislation; so the powers are as they are. You pose a very important set of questions and this is something that Ministers will want to look at, but I think I and my colleague would struggle with a direct question: “Are these the right powers?”

Lord King of Bridgwater: You can answer this, can you not: why was it thought necessary to put those powers into the Act?

Richard Mason: I do not know. That may well be on the public record. I would expect that, as the last administration were taking the Bill through Parliament, Ministers would have explained the powers and why they were in the Bill as it went through. That will be on the public record and we can find that for you, as we have already undertaken to look at other bits of the public record. But as for anything that might stand behind internal departmental thinking, I think that would be something that we would have difficulty with. Certainly I do not think we can offer a judgment on whether the powers are the right ones. I think that is very much ministerial territory, I am afraid.

Q289 Lord Morris of Aberavon: Is there a departmental view as to why an inquiry is set up under the Act or perhaps in a more informal way, again possibly headed by a very senior judge or ex-judge and lasting rather a long time? How is a decision taken whether it should be under the Act or perhaps—what I would term, lacking a better description—in a more informal way?

Richard Mason: In looking at any case where an inquiry under the 2005 Act may be a possibility, Ministers would want to weigh up very carefully indeed all of the circumstances of the case and then come to a view but, again, I think we need to take that away and have a discussion with Ministers. The 2010 post-legislative scrutiny document was published when Kenneth Clarke was our Secretary of State at the Ministry of Justice. The current ministerial team came in in September last year. They have not had a proper opportunity to engage in a very detailed way with this subject matter. They are going to do that when they think about the evidence they want to put to your Committee. I think that is the time and the place for them to address that question.

The Chairman: On that very point, supposing that there is an inquiry demanded and acceded to concerning education and the Minister in charge of education said, “Well, yes, there really needs to be an inquiry about this”, does your department say, “Well, Minister, there is this Act, the Inquiries Act 2005. Do bear in mind that this is the way you do public inquiries these days. On the other hand, there are other ways of doing it”, but you get involved in that because it is another department that is asking for it.

Richard Mason: I understand we do as the guardians of the Act, as it were.

Judith Bernstein: Yes.

Richard Mason: Do you want to help us with that?

Judith Bernstein: Yes, we do and occasionally we do have inquiries from other Government departments considering what they might do with a particular set of circumstances. The 2005 Act provides a framework for inquiries, but Ministers are not obliged to establish inquiries under it and there are other ways that they might choose to investigate or inquire. What we do is we explain the Act and what might be perceived as advantages in being able to compel witnesses and documents and to take evidence on oath, but it is up to Ministers to decide, weighing the advantages in other matters, what they want to do.

The Chairman: Do you see yourselves as advocates for the Act route?

Richard Mason: I think the department would see itself, if it is consulted, as an impartial adviser on the Act and what it allows and what it does not.

Q290 Lord Trefgarne: You reminded us just now that papers of the previous administrations are confidential. Advice to Ministers is also confidential, is it not?

Richard Mason: Absolutely right, yes. Under normal circumstances, certainly, yes.

Lord Trefgarne: I think both of those categories are exempt from the Freedom of Information Act, if I remember rightly.

Richard Mason: I am not an FOI Act expert, but I understand that there are circumstances in which advice to Ministers may be released under FOI. Generally, yes, the convention holds good that advice to Ministers is confidential.

Lord Trefgarne: Those of us who have been junior Ministers in the past are often being asked would we agree to this or that paper being released. I generally say “No”.

Richard Mason: Yes.

Lord Trefgarne: Especially if it is critical of me.

Baroness Hamwee: I do not know whether you can answer this question and I perhaps can in a number of different ways, but I am unclear in my own mind as to how much other departments are alert to the distinctions between an inquiry under the Act and other inquiries and, therefore, when a Minister is rushing over to the Commons in response to some disaster, thinking to himself and talking to those immediately around him, “Well, I am going to have to say that I will set up an inquiry”, whether there is any knowledge in that Minister’s mind or in the minds of those who are immediately advising him about the distinction between an inquiry and an inquiry under the 2005 Act. I suppose what I am asking about is information flowing between departments about this.

Judith Bernstein: The Cabinet Office has an overarching responsibility for public inquiries and they will be assuredly involved when there is talk of having a public inquiry.

Baroness Hamwee: Thank you.

Q291 Lord Trimble: This slightly overlaps with the previous question, but there are frequently requests for inquiries to be set up. Recent requests have not been acceded to, and I am just wondering what the criteria are that you would use when there is a public request for the establishment of an inquiry.

Richard Mason: I think we might want to put that to Ministers. I am not sure that we have a published position on criteria. The Act gives Ministers power—we are all clear, are we not?—to set up an inquiry, but, as I think my colleague said in her answer to the last question, Ministers are not bound to set up an inquiry under that particular piece of legislation. There are other routes. I think we need a discussion with Ministers and then invite them to put into their submission to the Committee how they might respond to that question about criteria.

Lord Trimble: I am just thinking of what happened in the House of Commons yesterday when the Home Secretary made a statement. It is about the question of whether there has been some undercover police activity relating to the Lawrence family. In the course of that statement the Home Secretary mentioned that there was a “review”, I think is the term that was used, being overseen by Chief Constable Creedon of Derbyshire Police and a second review being conducted by Mark Ellison QC. During the discussion in the House yesterday, Yvette Cooper—who I think is the Opposition Home Affairs spokesperson but I am not clear about that—said that there was a need for an independent investigation. Mr Keith Vaz, Chairman of the Home Affairs Select Committee, said he thought the time had come to look seriously at a public inquiry into the use of undercover agents. When you see comments like that being made, what do you do?

Richard Mason: I understand the point. Let us take that away and have that conversation with our Ministers.

Baroness Gould of Potternewton: If I could just follow that? Somebody has made a request that there be an independent inquiry. Is advice then given to that person or given to the Minister saying, “Yes, this is a good idea”, or not, because very often the Minister has to respond very quickly to a request like that. Who is it who gives the advice in between that request and the Minister having to make a statement so there can be an instant response, as there will be expected to be, I should think, on this issue?

Judith Bernstein: Talking generally—

The Chairman: Could you lift it a bit? There are still people saying they cannot hear you.

Judith Bernstein: I am so sorry. Is that better?

The Chairman: Thanks.

Judith Bernstein: Talking generally, it will be a matter that officials in the particular department will give to their Ministers, weighing up the advantages of particular courses of action—of having an inquiry under the 2005 Act or having some other form of investigation. There will be a range of options.

Lord King of Bridgwater: Is not the reality that it depends on the department? It depends on the legal adviser in that department as to how confident he is that he knows the law, or whether he feels it necessary to consult the Government’s law officers, or whether he rushes off privately to you in the Ministry of Justice and says, “How is all this meant to

work?” It depends. The interesting thing about all these inquiries is that there is a whole range of different Government departments that will have had more or less experience of ever having a public inquiry. Once a department have had maybe one or two public inquiries and feel they know all about it, they probably do not consult anybody. But that is the reality, is it not, of how Government would work in these situations, or do they consult the Cabinet Office as well?

Richard Mason: We can take that away. Obviously, Lord King, you have great experience yourself in Government. The Cabinet Office is involved. We are the sort of guardians of the Act, so whichever department can come across to us and ask us to go into detail. As you say, departments have their own legal team.

Lord King of Bridgwater: But with great respect, your colleague I think has been dealing with these problems and has been involved in them for some considerable time. Could I not ask her directly: that is surely how it works across Government?

Judith Bernstein: I think it does depend, as you indicate, from department to department, but I think that there will invariably be some Cabinet Office involvement, which we may not necessarily know about.

The Chairman: Lord Trimble is still batting, I am afraid.

Q292 Lord Trimble: Would it make a difference as to who calls for the inquiry? The examples I used earlier were Members of the House of Commons in an exchange. You might dismiss that as just parliamentary badinage and not worthy of your consideration, but what if, say, a coroner after an inquest called for an inquiry to be held under the legislation? Is that something you would take into account? Would that have any impact on you?

Judith Bernstein: I am trying to think of an example where an inquest has taken place where there would then be a request for an inquiry. There have been inquests that have been adjourned pending a public inquiry being established.

Lord Trimble: We have received a note saying that the coroner conducting the inquest into the death of Alexander Litvinenko requested that an inquiry be established.

Judith Bernstein: Yes. I understand that is because he has said openly that he does not think that he can continue to conduct the inquest for various reasons and a public inquiry would enable those issues to be investigated and inquired in a different forum.

Lord Trimble: What was the response to his request?

Judith Bernstein: That is being considered within Government.

Lord Trimble: You describe yourselves repeatedly as being guardians of the Act. I wonder what guardianship is.

Richard Mason: Sorry, I used the term loosely. Perhaps I should have thought about that before we came. I mean simply that—

Lord Trimble: You are not champions of the Act?

Richard Mason: That is a good question. I think what we are saying is that for every piece of legislation there are policy officials whose responsibility it is to know that piece of legislation very well to be able to provide advice on it when needed.

Lord Trimble: Would you not say that legislation is an embodiment of policy?

Richard Mason: Yes.

Lord Trimble: If Parliament has legislated, then there is a supposition that Parliament intends that the policy embedded in the legislation be carried out.

Richard Mason: Yes.

Lord Trimble: While there is discretion whether or not to have, surely the fact that there is legislation for a form of inquiry carries with it an implication that this will be used on a regular basis?

Richard Mason: It depends on what the Act says, does it not? The Act says that Ministers have these powers to do X, Y and Z, which they may exercise when they think appropriate.

Lord Trimble: Yes, but does not the embodiment of it in legislation carry with it an implication that Ministers will do this—that it is not an absolutely free discretion whether to have it or not; that one should approach issues with a view to say, “This is something we should use”?

Richard Mason: The Act gives Ministers powers that they may use under certain circumstances should they choose to use those powers. Sometimes they choose to use those powers. Sometimes they judge that the circumstances are such that they do not want to use the 2005 powers and they want to do something else. Ministers have discretion under the Act as to how they use it.

Q293 Lord Morris of Aberavon: May I try to narrow one issue? When there is a clamour for an inquiry, is there any departmental advice or view whether there should be a statutory inquiry or an informal one? My impression is that the Government has leaned against the use of the Inquiries Act and they try to do it informally because they think it is less expensive. Is it a departmental view or is it just left to the Minister seeking whatever advice, other than from your department, that he wishes to take?

Richard Mason: I think we need to go back to our own Ministers on how they would like to respond to that. It is worth just maybe mentioning now, and several of you will have spotted it or will recall, that the Prime Minister made some remarks to the House of Commons when he was addressing the House at the end of the Bloody Sunday inquiry. This is not a quote, so please do not think I am quoting, but he used words to the effect that in future there would not be very long, very expensive, open-ended inquiries. That must tell us something about Ministers’ view about a sense that there should be, ideally, some grip on length and some grip on budget. That is what the Prime Minister said on record in the Commons. Clearly, cost is going to be an issue that Ministers will want to think about, but it is merely going to be one of the things that Ministers will want to consider in the overall mix of things.

Lord King of Bridgwater: Just following up Lord Morris’s point, this is what I am trying to get at. Is there any overarching requirement that says, “No Minister may set up an inquiry without it being cleared centrally”? It is exactly the point Lord Trimble made. Surely the situation here is we get a proliferation of different sorts of inquiry and it is not clear what the policy is. I would have thought the Ministry of Justice is the place, with the Cabinet Office, as it is your Act, that would be trying to control the situation and get some consistency in the Government approach. Is there any consistency?

Richard Mason: I think it is very hard to—

Lord King of Bridgwater: Perhaps not consistency. Is there any attempt to keep control centrally on what different Ministers are seeking to do?

Richard Mason: I think the advice the Cabinet Office would give on what the 2005 Act allows would be consistent from one day to the next. What we would say about the Act in terms of what is in it and what it allows would be consistent. I will not use the term “guardian of the Act” again. We are just the policy owners and I take Lord Trimble’s point entirely, but I think beyond that it is very much horses for courses.

I think one of the difficulties here is we have only had so far, have we not, 14 inquiries set up under the 2005 Act? I think that is right and they vary very widely. Although they were all set up under the 2005 Act, to a degree you are comparing apples and oranges, and you are trying to potentially look for similarities when you are looking at a range of things that are very different. Applying very tight criteria may be quite difficult.

Lord Trimble: Coming back to your quotation of what the Prime Minister said with regard to the Saville inquiry, the Saville inquiry was set up under the 1921 Act and part of the reason, as I understand it, for the enactment of the 2005 Act was to ensure that the Secretary of State would have more control over matters such as cost and so on, which he had no control over under the 1921 Act. That is the context of what the Prime Minister was saying.

Richard Mason: Absolutely, yes.

Lord Trimble: You could have told us that.

Richard Mason: Sorry, I was not suggesting that it was a discussion of the 2005 Act. No, indeed; merely a point about the cost. Cost is, of course, an issue. Yes.

Q294 Lord Richard: When you get a request for an inquiry, do you operate on a presumption that it should be under the 2005 Act? If you do not, what criteria do you apply so that it comes outside the 2005 Act or do you merely say to Ministers, “You have this option or you have that option; it is a matter for you to decide”? You must have views. The department must have a view as to whether they think the 2005 Act is something that ought to be followed—that prime facie that is the thing that you should do?

Richard Mason: Do you want to have a go at that?

Judith Bernstein: Yes. I think it is right that there is a presumption as there is a statutory framework under the 2005 Act that, when new inquiries are being considered, that will be the framework that Ministers will be considering. As we have said before, they are not required to do that if there are other reasons why they may prefer to do otherwise, which has clearly happened in some notable cases.

The Chairman: Do you wish that there was a rulebook for other sorts of inquiries or are you quite relaxed that there are relaxed rules?

Richard Mason: I think we would find it difficult to say that we would wish that there were a rulebook or that we are relaxed. Ministers have fairly wide discretion as to whether or not to set up an inquiry under the 2005 Act or not. One of the things that comes with the 2005 Act is the fact that there are public hearings, people are giving evidence on oath, they may be compelled and so on. Ministers would want to weigh up very carefully the advantages of that approach in the circumstances of the case that they were looking for. They may decide that the attributes, if I can use that term, that come with a 2005 Act inquiry are not in fact the

attributes that they want to apply to a particular case. Compelling witnesses, putting them on oath and so on—they may judge that under the circumstances of that particular case that may not be, in their judgment, the best way to get the best evidence out of potential witnesses. That is the sort of thing that they would want to weigh up.

Q295 Lord Woolf: I think I am meant to disclose interests. I suppose I should disclose I have conducted inquiries, but my experience was before the Act came into force. That is what I wanted to ask you because, to give examples of very significant inquiries that have taken place since the Act but did not use its powers, we have the Iraq inquiry, the first Mid-Staffs inquiry, the Detainee inquiry. Can you help as to the considerations that would explain why significant inquiries of that nature investigating difficult issues were not under the Act?

Richard Mason: Do you want to have a go?

Judith Bernstein: It will have been a matter for the Ministers concerned at the time why they decided in the Iraq and Detainee inquiries. I can say a little about the first Mid-Staffs inquiry, which I understand was a private inquiry. It was not a public inquiry at all. I understand that was because, as my colleague has indicated, it was felt that they would get the best evidence in an entirely closed forum but I am afraid I cannot answer; I do not know why it is that in the other two inquiries the 2005 Act framework was not used.

Lord Woolf: As just an onlooker, to some extent, of what is happening in the public scene at the moment, one gets the impression that the calls for inquiries are becoming more and more frequent. Would you share that impression?

Judith Bernstein: Over the years my experience has been that there have always been calls for inquiries of one kind or another, and I am afraid I do not have evidence whether they are more frequent today than they have been in the past. I just have not researched that in any detail.

Lord Woolf: That is something that the department could do to help us?

Judith Bernstein: Yes, we could.

Richard Mason: Very happily and the previous point you made as well, we can take that away.

Lord Woolf: Yes. Have you found that the public are conscious of the difference between one inquiry and another and so do not particularly want to have an inquiry that either is or is not under the Act?

Judith Bernstein: I am not sure that the general public would understand the distinction between an inquiry conducted under the 2005 Act or otherwise. It may be that they would understand a public inquiry as opposed to an inquiry held behind closed doors, in private, but I do not know that the generality of the public would understand a statutory inquiry.

Lord Woolf: In your experience, would you say that if the public are asking for an inquiry they tend to like to think of a High Court judge or above conducting the inquiry?

Judith Bernstein: We certainly read about a call for—the usual expression is—a full public judicial inquiry, without people fully understanding every aspect of that request or that call.

Richard Mason: One can understand why people say that. One can understand the attraction or the reason why people call for something being judicial. There is the obvious independence from the Executive through that and I think you have touched on this in other

questions that you notified us of. Some inquiries are set up under a judge; many are, but others are not. Sorry, Chair, but at the risk of jumping ahead in your questions, I was reading the other day—and you have already referred to this in questions—the 2004-05 Public Administration Committee report and I thought that was very interesting. Reading that document from 2004-05, it said some very interesting and helpful things about the relative merits of having, say, a very senior judge as against, say, a former Permanent Secretary and the different qualities that people from those different worlds bring to being the chair of an inquiry.

Q296 The Chairman: Is there a sense that your department is wary of running out of judges?

Richard Mason: Sorry. Can you expand on the question a bit, please?

The Chairman: Are you worried that the courts will be bereft of judges because they are spending their time in public inquiries?

Richard Mason: I know what you mean but, generally speaking, retired judges are appointed, are they not, as chairs rather than serving judges?

Judith Bernstein: The Lord Chief Justice's views—in fact, his nominations—are always sought for judges to conduct inquiries because he and his colleagues will know who would be most appropriate to conduct them, once a Minister has decided that they would like a judge to conduct an inquiry. I am sure that there are issues of judicial deployment and certainly having a serving judge conduct an inquiry does take them out of their mainstream sitting duties for a considerable length of time.

Lord Woolf: Is the fact that the Minister will not have to pay for the judge, if he is a serving judge, a relevant consideration?

Judith Bernstein: I think that there will be what is called a back-filling so that, although the judge is taken out, departments may well have to pay for—

Lord Woolf: To your department?

Judith Bernstein: I am not sure who it would be. The department sponsoring the inquiry would meet the cost of having a deputy sit in place. The judicial schedules are set out well in advance.

Lord Woolf: They certainly are.

Judith Bernstein: It may be that if a judge is needed quite quickly somebody else will have to deal with their work.

Lord Woolf: Yes. Is the question of expense a relevant consideration in considering whether to apply the Act? I think I am right in saying that under the Act you have to give legal representation to witnesses.

Judith Bernstein: I think you “may” have powers.

Lord Woolf: Is it “may” or—

Judith Bernstein: I think it is a power to do so.

Lord Woolf: It is the practice to do so, is it not, when it is under the Act and there may have to be legal aid for that purpose?

Judith Bernstein: There is no legal aid, as such, for public inquiries.

Lord Woolf: As such, no.

Judith Bernstein: They are outside the scope.

Lord Woolf: I was not using it in a technical sense.

Judith Bernstein: Sorry.

Lord Woolf: No, I should have made that clear. It does have financial implications, does it not?

Judith Bernstein: Yes, the potential cost of providing funding for core participants in a 2005 Act inquiry will be one of many considerations—but it will be one of many.

Lord Woolf: Perhaps I could summarise. Do you feel any need for there to be greater prescription as to who does what in making decisions of this nature so as to guide; otherwise, it is a free-for-all every time an inquiry is appointed?

Richard Mason: Are you asking: would we think it would be useful if there were greater prescription, greater clarity and consistency?

Lord Woolf: Yes.

Richard Mason: I think this is something we need to take away and discuss with Ministers and see what their view is and put it in our submission to your Committee.

Lord Morris of Aberavon: On the expenses issue you might care to look at section 40 of the Inquiries Act whereby the chairman may award reasonable costs and also award amounts in respect of legal representation.

Could I come back to one issue? The cry for a judge-led inquiry does cause, of course, problems for the allocation of judges. I suspect that that is quite important for the Lord Chief Justice, but will you confirm as a matter of fact that both the Mark Ellison QC inquiry, which we have heard so much about recently, and the Chief Constable of the north of England are not inquiries under the Act?

Judith Bernstein: Are these ones that have just been announced? No, they have not been established under the 2005 Act.

Q297 Baroness Stern: I will start by declaring my interests relevant to this inquiry, which are listed in the record, as I understand it. Is that adequate? Thank you. I want to carry on from Lord Woolf and also talking about lawyers. I have a feeling you will find this question a little difficult but I will ask it. Do lawyers acting for an inquiry or representing those complaining or complained about make an appropriate contribution? I suppose what we are asking is: has experience so far left you satisfied with the way this works or do you have it in mind that there may be ways of improving the way lawyers are involved?

Richard Mason: I have already spoken of my own experience some years ago under Sir John May where it was terrific. As to wider policy position on that, yes, as you anticipate, I think we need to discuss that with Ministers and see what they think on the matter.

Judith Bernstein: May I just add that this was not the quality of the legal representation? The contribution made by the teams to inquiries was not something that was specifically brought to our attention when we carried out the earlier post-legislative scrutiny, but it is certainly something I think we would want to look at now.

Richard Mason: It would be helpful for us in taking these many questions away if you would like to, Lady Stern, say a little bit more about your concern that lies behind the question.

Baroness Stern: I think it is probably our concern.

Richard Mason: Sorry, your concern collectively.

Baroness Stern: Yes. I will have to choose my words with care, I think. Our concern is probably about the number of lawyers that end up being needed, the increasingly adversarial nature of the proceedings, which may be desirable or inevitable but maybe not—we really do not know; maybe you know and you can tell us—and whether this involvement of lawyers is felt to be the right way for an inquiry to be carried out by those who have a real interest in it, the people who have felt there needed to be an inquiry, and also those who are likely to find that they are criticised as a result of it. Has this involvement of lawyers been felt to be helpful by all of those groups, I think, is probably what we are getting at?

Richard Mason: I think we just need to take that away but it is helpful, thank you, to have that elaboration.

Baroness Stern: You did tell us very helpfully that legal aid, as such, was not relevant.

Judith Bernstein: Yes.

Baroness Stern: But do you foresee that more people will need to represent themselves and whether that is going to be a complication? Is it going to be a good thing or is it likely to make people feel they are not getting justice if they do not have their lawyer?

Judith Bernstein: I think, as I said before and somebody else did say, that it is section 40 of the Inquiries Act that gives the inquiry chair the power to award public representation and it has nothing to do with legal aid.

Baroness Stern: That is right.

Judith Bernstein: All I will say is that inquiry chairmen do often use the legal aid rates as a starting point for the rates that they themselves will fix. There may be implications for the fees that are paid to lawyers in future, but the question of whether or not there will be representation is a matter for inquiry chairmen.

Q298 Baroness Stern: Indeed, thank you. Could I go on to ask you about cost and length? I assume you agree that an aim of the Act was to make inquiries shorter and cheaper. If you agree with that, has this been achieved and, if not, what would you now suggest if you think they should be shorter and cheaper?

Judith Bernstein: We have already provided the Committee with information about the length and cost of all the 2005 Act inquiries. You will have noted that the length and costs do vary very considerably and cost of inquiries is clearly an important consideration, especially after the Prime Minister's statement, but the issue is that inquiries are so relatively few and they do vary greatly in their scope. It is quite difficult to assess what is less costly or more costly and what that might mean, but the issue of what might be done to make

inquiries shorter and cost less will be dealt with in the department's submission. We do have some ideas but we have not yet discussed them with Ministers.

Lord Richard: I just wanted to come in again on costs. If you go back to Salmon when there was a fairly clear statement as one of the principles that a witness “should be given an adequate opportunity of preparing his case and of being assisted by his legal advisers” and “His legal expenses should normally be met out of public funds”, is there any vestige of that remaining anywhere?

Judith Bernstein: Could you just repeat that?

Lord Richard: Yes, certainly. Of the Salmon principles—the six cardinal principles—the third was, for anybody who is called as a witness, “He should be given an adequate opportunity of preparing his case and of being assisted by his legal advisers.” Secondly, “His legal expenses should normally be met out of public funds.” Is there any vestige of that remaining or is it totally gone?

Judith Bernstein: We are not entirely sure of the answer for that. I can only talk about core participants rather than witnesses' costs.

The Chairman: If you have any information on that perhaps you would put that on the record for us. That would be helpful.

Judith Bernstein: Absolutely.

Richard Mason: We will take that away for you, yes.

Lord Morris of Aberavon: Perhaps if the witnesses look at section 40(4), “The power ... under this section is subject to such conditions or qualifications as may be determined by the Minister.” How does that operate?

Judith Bernstein: I think we would have to go back to look and see how that operates in practice. It may just mean that the chairman will run past the Minister the amounts that—what levels—he is proposing to award legal representation at so that the sponsor department is aware of what the likely cost might be.

Q299 Baroness Gould of Potternewton: In some ways my question follows a little bit, but it was not basically around the cost. I wanted to go back to the question of the chair being able to award legal representation. I am a complete newcomer to all this, so they might be fairly innocent questions, but I have yet to know at what point would a chair determine that somebody should be awarded legal representation? Obviously there is a case to prepare, so would it be very early in the proceedings as to how that was done? On what grounds would the chair say, “No, I am not going to award legal representation”, and that person is left on their own to represent themselves?

The Chairman: Do you want to add to that?

Lord Woolf: I was just going to add to that. Is it still the normal practice in an inquiry, after it has been announced and the chairman appointed, for the chairman to have a preliminary hearing where there would be applications made to him as to how the inquiry is going to be conducted, so that people know what their position should be?

Judith Bernstein: I am afraid I do not know exactly what happens.

Lord Woolf: Could you help the Committee on that in the numerous matters on which you are going to come back to us?

Judith Bernstein: Yes, we will.

Lord Woolf: Certainly the practice still varies quite considerably. Some chairmen would not want legal representation apart from that of the counsel to the inquiry, and part of the role of the counsel to the inquiry is that he can himself act as a sort of inquirer into which witnesses could give useful evidence, and take over the major responsibility for seeing the evidence is put before the inquiry.

Judith Bernstein: As I said, we will have to go back on that, but I think it is right that inquiry chairmen will ask for submissions from those who might want to be provided with representation.

Richard Mason: I doubt it is the case, though we will check this. Thinking again back to my own admittedly long-ago experience, I doubt that it is the case that somebody who has not been given legal representation at the start cannot then have it later, because clearly, if you are running a big complex inquiry, you may well find halfway through it that somebody who did not seem at any risk of criticism at the start, having heard several witnesses, you then realise this person is in fact at risk of criticism. So you may then want to reopen the question of legal representation with that individual.

Lord Woolf: If the chairman has discretion, he can obviously do that, but at least people should surely know before they get involved what the thinking is initially.

Richard Mason: Of course. Yes, absolutely.

The Chairman: I think we had better move on a bit. I wonder if I can invite Baroness Hamwee to come in with questions 10 and 11.

Q300 Baroness Hamwee: Can I follow up firstly with a question about length of inquiries? As I read section 14 of the Act, a Minister can bring an inquiry to an end, but that looks like quite a sledgehammer. There are often comments about inquiries needing to report quickly, by a particular date and so on. Are there deadlines set, estimated times of arrival and so on, and can you make any comment around whether there should be more deadlines and a more formal structure in terms of length?

Judith Bernstein: As far as inquiries overrunning and whether there should be a power to curtail their proceedings, I think this will depend on the circumstances of why the inquiry has gone over its estimated timetable. I think that inquiries do nowadays have a sense of timetable, but there may be good reasons for an inquiry overrunning that are entirely outside its control. For example, there may be judicial reviews of something during the course of the inquiry.

Baroness Hamwee: Do you think that there should be any change to or expansion of section 14, which provides that the Minister, after consultation with the chairman, can give a notice to bring the inquiry to an end? He has to give his reasons for it. Obviously, once the report has been delivered by the inquiry, the chairman can give a notice, but I am looking at the forcing of the pace, if you like.

Richard Mason: I understand the question. As to whether there should be a change there, I think that is something we need to discuss with Ministers to see what they think the merits might be of changing the current arrangement.

Baroness Hamwee: Can I go on to a slightly wider question then? I do not know whether, within your department or the Cabinet Office, there has been any research into this, but can you tell us whether you think that the Act has succeeded in securing confidence in the process, both from the core participants and from the wider public?

Richard Mason: That is very hard to say. I think I am right in saying we do not have any research into that, certainly not that the department has done; so it is very hard to give a firm or terribly satisfactory answer on that.

Baroness Hamwee: Do you have any sense of the situation? You must be on the receiving end of comments from all sorts of directions.

Richard Mason: I suppose one could go back to the 2010 document, which admittedly was prepared by the department, but with some care. That concluded that the Act was running reasonably well. Again, you and colleagues will have read it, but it particularly found that the Rules were felt to be overly restrictive, but broadly the 2010 view—based admittedly on only four inquiries under the 2005 Act, as I said earlier, having reported by then—was that the Act was working well at that point.

Baroness Hamwee: Ms Bernstein, you used the phrase, I think, “particular advantages” earlier on.

Judith Bernstein: Yes.

Baroness Hamwee: I am not trying to trip you up or anything. I am interested in knowing what you think are the particular advantages of an inquiry under the Act.

Judith Bernstein: As far as the chairman is concerned, it is the opportunity, as I think I have said already, to summons and compel witnesses to attend, and for documents to be produced, and for evidence to be given on oath. Other forms of inquiry that are not established under the 2005 Act do not have those features and will be relying on the goodwill and compliance of those who they would like to hear evidence from.

Q301 Baroness Gould of Potternewton: Can I move on to look at something relating to post-inquiry? Where an inquiry reveals or confirms any wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings? What would be the criteria for that and would you, as a department, be giving any advice not least on the safeguards that should be followed through?

Judith Bernstein: There is the safeguard currently under section 2 of the 2005 Act that provides that the inquiry cannot rule or determine any person’s civil or criminal liability, although that does not prevent it from determining facts or making recommendations, even if liability might be inferred from those facts or recommendations. As to what additional safeguards there might be or whether Ministers might want to revisit that, it is not something that we have considered in any detail at present and we would need to take our Ministers’ views on it.

Richard Mason: I think Ministers particularly want to look at the inquiries in their different forms that we have seen over the last three or so years, since the last MoJ document.

Baroness Gould of Potternewton: But would you be giving advice to the Ministers as to what decisions they should take?

Richard Mason: That would be the normal way of doing it. We would look at the questions that the Committee is posing and advise Ministers on options. They would then decide

which they wanted to pursue and which they did not or indeed come up with wholly different options of their own.

Lord Woolf: On getting the views of Ministers, could I ask you to consider the question that there perhaps should be some informal procedure whereby evidence given at an inquiry can be prima facie evidence, at any rate, in subsequent criminal or civil proceedings?

Richard Mason: We can certainly take that away and consider it. Thank you.

Lord Morris of Aberavon: Lord Bichard, after his inquiry, conducted a review of the recommendations six months after the event, I suspect of his own volition. He did say it concentrated the minds wonderfully, but would you regard it as a matter that might well be considered favourably that there should be a norm of six months after an inquiry for the chairman to be asked to review progress on his recommendations?

Richard Mason: As to there being a norm, I think Ministers will want to take a view on that. I suspect it would be very much about the nature of inquiry: what was that particular 2005 inquiry looking at and is it one that you would want to particularly follow up or was it not? Again, how many recommendations came out of it? Were there many? Were there a few? How difficult were they to track? I think that is again something that Ministers will want to look at. Clearly there may well be advantages in doing so. I think certainly Lord Bichard thought there was.

Q302 Baroness Gould of Potternewton: In the department's post-legislative memorandum, they criticised the Inquiry Rules 2006 as being too prescriptive and inhibiting the chair's flexibility. Has there been any evidence from the chairs that they agreed with that view? Is it still the view and are there any suggestions that amendments might be made to the Rules?

Richard Mason: I think there was a lot coming from the chairs on that. Do you want to follow that up?

Judith Bernstein: Yes. The restrictive nature of the 2006 Inquiry Rules was a theme that ran through the earlier scrutiny that the Ministry of Justice conducted. There were discussions with inquiry chairs and their legal and administrative teams across all the inquiries, those that had reported and those that had not, but we have not yet undertaken an update of that post-legislative scrutiny. So we are not sure yet whether that remains the position.

Baroness Gould of Potternewton: Is it the intention to do so?

Richard Mason: Again, I think this is another matter that we are going to have to look at for you in our evidence to the Committee, and Ministers will have to decide. Those recommendations or those findings go back obviously to 2010. The department has not pursued them since then. We have a new set of Ministers now in post since September. They will want to make their own minds up about whether to change the Rules or whether to leave them as they are.

Baroness Gould of Potternewton: It is a little while back. Has there been discussion with the Ministers in those two and a half or three years?

Richard Mason: I do not know what discussions went on with the previous set of Ministers under the Coalition, Kenneth Clarke and his team, but certainly there has not been a discussion of this point with Chris Grayling and his ministerial team since they arrived, no.

Baroness Gould of Potternewton: I think it falls on me to ask the last question, which is the question about whether the inquiry records should be kept confidential after the inquiry is concluded. In a sense, the final point about the Freedom of Information Act goes back a little to Lord Trefgarne's opening comments about how else might there be an interface between the Inquiries Act 2005 and the Freedom of Information Act. Does there need to be some change or is it working?

Richard Mason: Again, this is something we are going to have to discuss with Ministers. It is an interesting point, what the interplay should be between the two, but it is something we need to take away.

Lord King of Bridgwater: You said something some while back that fascinated me. You said you are a senior official in the Ministry of Justice, but you are not an expert on the Freedom of Information Act. Is not the reality of the world now that any senior member in any Government department does need to be pretty familiar with the Freedom of Information Act in determining what will or will not be in the public domain?

Richard Mason: I think I am familiar enough with the FOI Act.

Lord King of Bridgwater: That is what I would think.

Richard Mason: Yes, but I would not go so far as to call myself an expert in the FOI Act.

Q303 The Chairman: Are there any other further questions to our two guests?

It seems to me that you have given yourselves some homework and we have added to it to some tune, but the important thing is this. Can you confirm to us, because you have referred so much to going back to Ministers, whether that which you write to us will be franked by the appropriate Ministers before it comes to us, so that what you have to say—and you will no doubt be writing a page or two—will be franked by the Ministers?

Richard Mason: The evidence that we will put to the Committee will be evidence from our Ministers or the evidence that Ministers are content with. It will be their view.

Lord King of Bridgwater: Could I just ask a question—because what has come out of this seems to me extremely important—as to when we are likely to get that, because it is going to be very important in our consideration?

Richard Mason: Yes.

Lord King of Bridgwater: You did say that you had not started yet on the process and that was extremely worrying to me. I do not know if we have a plan yet in our schedule as to when Ministers are likely to appear before the Committee and obviously we would need any papers well in advance of that to consider them before the Ministers gave evidence.

The Chairman: We are hoping to get evidence by the end of July, but we will not be seeing people until October.

Richard Mason: It is very helpful, Lord King, that you have asked that. I think the timetable is important. I am conscious that your call for evidence came out on 13 June. That was when you notified the department of your questions and that is fairly recent. There is a lot of work implied just in that call for evidence. There is a lot more work in the further points you put to us today. I cannot speak for Ministers when they have not been asked, but I think that hitting a deadline of 31 July might be difficult. Whether we are able to do it in a few bites maybe or whether we submit all in one go, I do not know. I think the sensible thing is

we take this away, think about what is doable and then come back to your clerk, but I doubt that we will be able to go through all of this material and take it through Ministers, not least because we are so close to the recess now, and get it all back to you by 31 July. That might be something of a tall order.

The Chairman: It would be helpful if we get some of it. Clearly we will not be seeing people until we have returned in October, but we will need to prepare. Of course the Ministers will not necessarily have two months' holiday. They might have just a little bit less, so we are hoping that some of this can be dealt with.

Richard Mason: But I can assure you we are cracking on with the work.

The Chairman: Good.

Richard Mason: Whenever we get it to you, we are cracking on with the work.

The Chairman: Okay. Can I thank you on behalf of the Committee for coming in and giving evidence to us? Thank you very much indeed.

Richard Mason: Thank you.

Ministry of Justice – Oral evidence (QQ 317 – 345)

Evidence Session No. 15

Heard in Public

Questions 317 - 345

WEDNESDAY 11 DECEMBER 2013

10.40 am

Witnesses: Shailesh Vara MP, Richard Mason and Judith Bernstein

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Hamwee
Lord Morris of Aberavon
Lord Richard
Lord Soley
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Examination of Witnesses

Shailesh Vara MP, Parliamentary Under-Secretary of State, Ministry of Justice, **Richard Mason**, Deputy Director, Ministry of Justice, and **Judith Bernstein**, Head of the Coroners, Burials, Cremation and Inquiries Policy Team, Ministry of Justice

Q317 The Chairman: Good morning. Welcome to the Committee. This is the 15th occasion on which we have met, and it may well be the last occasion on which we take evidence. You are warmly welcomed. We met your colleagues earlier, on our first meeting, and we welcome them back, too. This session is open to the public. A webcast of the session goes out live and will be subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and put on the parliamentary website. A few days after the session, you will be sent a copy of the transcript to check for accuracy. It would be helpful if you could advise us of any corrections as quickly as possible. If, after the evidence session, you wish to clarify or amplify any points you made in evidence, or if you have any additional points to make, you are welcome to submit supplementary evidence to us, but we will need it no later than Tuesday 17 December. As I say, we are getting to the

end of our inquiry and we need to crack on, because we have been told to produce a report by a certain date. We are meeting on 18 December, so if there is any fresh evidence, we would like to be able to take it into account at that meeting.

Perhaps I can make a start on our questions. I think that you have been given some draft questions. The first one is this. This Government have set up only two inquiries under the 2005 Act in three and a half years. The Mid Staffordshire inquiry was set up in response to an undertaking given in opposition. Only the Leveson inquiry in July 2011 was a response to current public concerns. What criteria do the Government apply in deciding whether public concern is sufficient to justify setting up an inquiry?

Shailesh Vara MP: Thank you, Lord Chairman. I will start by wishing a very good morning to you and your Committee. I will also say, by way of background, that I joined the Ministry of Justice just over two months ago. This subject was within my remit, and I have done my best to read into it. I have to say that I have done so with considerable interest, and I am very pleased to be here this morning to assist your Committee.

To turn to your question, you will be aware that the Committee has been supplied in advance with a copy of the Cabinet Office guidance on inquiries. That sets out that, when considering whether to have an inquiry, there should be “robust reasoning” as to whether it should be held. Clearly, inquiries cost a lot of money, take up a lot of time and demand a huge amount of resources. So the criteria that are taken into account include whether any other investigatory methods can be considered, whether there is clear public purpose, whether there is clear public concern and a clear public interest, and, above all, whether the public interest and benefit outweigh the cost.

Lord Trimble: Minister, I do not know whether you have been briefed on this. I asked this question on 25 June. At the time I gave the example of something that was in the news at the time: namely, that the Home Secretary the previous day had talked about having a review on the question of whether there had been undercover police activity relating to the Lawrence family. Mr Keith Vaz MP had commented on it, saying that he thought that the time had come to look seriously at a public inquiry into the use of undercover agents. I asked then what had happened as a result of these comments. Of course, I got no reply, and I wonder whether you are in a position to give me a reply now.

Shailesh Vara MP: Specifically on the point about the Lawrence inquiry?

Lord Trimble: The review into undercover police activity relating to the Lawrence family, yes.

Shailesh Vara MP: You will forgive me, Lord Trimble, but I am not a member of the Home Affairs Committee. I appreciate that that is not an excuse.

Lord Trimble: This was a statement by the Home Secretary. There was also a reference by Keith Vaz, but it was the Home Secretary who said that there was going to be a review of this question, without specifying what it would amount to. Can you tell me what happened to the Home Secretary’s review?

Shailesh Vara MP: I do not know, Lord Trimble, but I will say that I am happy this time to go away and ensure that you get a written response. I have noted the deadline and apologise for the fact that you have not had a response so far.

Lord Trimble: I would also like to have some idea of what will constitute such a review. Announcing that a review will be held internally is, I think, announcing that there will be an

inquiry of which no element will be in the public domain. If there is a serious issue, and it looks as though this is, that would seem to be highly undesirable.

Shailesh Vara MP: I will look into it and come back to you.

Q318 Baroness Hamwee: When we met your officials, Lord King asked whether there was “any attempt to keep control centrally on what different Ministers”—he meant, across different departments—“are seeking to do”. Mr Mason will recall that we had some discussion about whether the MoJ was a champion or a guardian—whatever the right word was—of the Act. Can you help us on how departments liaise, and how there is control and a consistency of approach across government?

Shailesh Vara MP: I will certainly try. The way it goes is that the Ministry of Justice is responsible for the application of the Inquiries Act 2005. There is close working with the Cabinet Office, which has general oversight. The criteria of the *Ministerial Code* require that, before any inquiry is set up, the permission of the Prime Minister must be sought. Where cross-departmental inquiries are necessary, it is the job of the Cabinet Office to ensure that there is proper liaison between the departments. It acts as a conduit to the Prime Minister and has general oversight. Indeed, it is the Cabinet Office that has produced the guidance on inquiries that at the moment is sent out to the chairmen of inquiries.

The MoJ helps and supports—

Lord Woolf: Sorry, Minister, who is it sent out to?

Shailesh Vara MP: The guidance, although it is a draft, is widely used at the moment. I have a copy here. My understanding is that a copy was sent previously to this Committee. I believe that Baroness Hamwee has it. It is in draft and it has not become formal for the simple reason that they wish to update it to take account of recent inquiries and whether there is anything to be learnt from them. That is the guidance, and it is presently sent out to the chairmen of inquiries when they are set up.

Lord Woolf: Do you know when that practice began?

Shailesh Vara MP: No, I do not know. I cannot see a date on here. Perhaps my officials know.

Judith Bernstein: This document has been in draft for some time. For the past few years, while it has been developed, inquiry teams and chairmen have been provided with it.

Shailesh Vara MP: It is a comprehensive document that provides very useful guidance. I have read through it.

Lord Woolf: I am not questioning that. I just wanted to get a picture of when it started to be sent out and whether it had been reviewed. I understand that it is now being considered for review.

Shailesh Vara MP: I would have thought that in order for it to be compiled, it would have had input from a number of departments wherever there was relevance, certainly from the Ministry of Justice and the Cabinet Office and, I suspect, from other departments where it was felt that they could have some input. But it is comprehensive in terms of its guidance. I cannot imagine that something like this would have been introduced just by an official sitting in a corner and drafting something.

Judith Bernstein: Perhaps I may jump in here. There was a substantial amount of amending, I think, in summer 2012, across government departments. It also involved those who had taken part as inquiry teams and inquiry lawyers.

Lord Woolf: Are the chairmen to whom it is sent asked to make any comment on it at the end of the inquiry?

Shailesh Vara MP: At the end of an inquiry, the secretary, working of course with the chairman, is asked to write a lessons learned note. It is hoped that they will send one to the Cabinet Office. From that, we can then try to learn lessons. I would like to think that any comments from the chairman would be incorporated into the lessons learned exercise.

The Chairman: I think Baroness Hamwee is still at the crease.

Baroness Hamwee: This comes after there has been a decision to set up an inquiry. You were explaining, Minister, about the decision to set one up. Would it be simplistic if I were to describe it very broadly as the Cabinet Office taking a political view, and when there seems to be a movement towards a decision to set up an inquiry the MoJ comes in with perhaps more technical advice and background knowledge?

Shailesh Vara MP: As I see it, there would be a sponsoring department. For example, if there were a tragedy in transport, it would be for the Department for Transport to take the initiative that there ought to be an inquiry related to that department. It will then liaise with the Cabinet Office and with all other departments, as necessary.

Q319 Lord Soley: Has there been much discussion, either in your department or with other government departments, about why the 2005 Act is not used more frequently? Most people seem to accept that it is a good Act, and yet, as we have seen, it is used fairly rarely. Has it been discussed why that has happened? I recognise, Minister, that you might want to take the views of your assistants on this.

Shailesh Vara MP: They may well wish to come in, but my preliminary thoughts, Lord Soley, are that there are still other measures by which investigations can be conducted. Certainly the Inquiries Act 2005 is comprehensive. It consolidates and codifies a lot of provisions from previous legislation, but there remain other statutes by which inquiries can be set up—or non-statutory inquiries. Indeed, sometimes it might well be felt to be preferable to go beyond the Inquiries Act. For example, the Chilcot inquiry and Sir Peter Gibson's detainee inquiry were both set up on the basis that everyone on the committee was a privy counsellor. They had to deal with a huge amount of sensitive material and it was felt that both the chairman and the committee should have the flexibility to deal with the material as necessary. So the Act is there, but the flexibility remains to go outside it, as necessary.

Lord Soley: I understand the sensitivities of the inquiries involving military or diplomatic incidents, but does it not strike the department as odd that the 2005 Act, which was designed to bring things together, is rarely used?

Shailesh Vara MP: With respect, as the Chairman said in his opening remarks, it has been used twice since this Government came in. and it really is a judgment call for the people who take the decision.

Lord Soley: But the implication is that other ways of doing it may be better and that the 2005 Act was unnecessary.

Shailesh Vara MP: The other thing that I would say is that an official inquiry costs a lot of money. It takes up a lot of time and it uses up a lot of resources. The guidance is that if an investigation can be carried out without having an official inquiry, it should certainly be considered, because the costs do mount up.

Lord Soley: Sometimes a non-official inquiry leads to another inquiry.

Shailesh Vara MP: That may well be so, and where that is the case, a proper inquiry is set up, as in the Azelle Rodney case. That started off as an inquest and subsequently became an inquiry.

Judith Bernstein: And it is the case that since the 2005 legislation was enacted and under this Administration, the Hillsborough Independent Panel reported. I think people generally felt that that was a very worthwhile way of dealing with the issue. That then adds to the mix of options for Ministers. The Home Office recently set up something along similar lines in the case of Daniel Morgan. So there are other options now.

Shailesh Vara MP: Perhaps I may come in briefly on the Hillsborough panel. It was set up with the Bishop of Liverpool, and some 450,000 documents had to be looked at. I remember the debate in the Commons after the panel had made its recommendations. It allayed a lot

Q320 Lord Morris of Aberavon: Minister, is the real problem the split responsibility between the Ministry of Justice and the Cabinet Office?

Shailesh Vara MP: I missed two or three words.

Lord Morris of Aberavon: Is the real problem in dealing with some of these questions the split responsibility: that on one hand there is the Cabinet guidance document and on the other hand there is the Ministry of Justice providing the machinery for setting it up? Would it not be better for it to be under one roof?

Shailesh Vara MP: I take your point Lord Morris, but actually in reality the two departments work quite well together. It is important when more than one department is involved—in the inquiry into the Hillsborough tragedy, for example, the Department for Culture, Media and Sport is involved as well as the Department of Health—to have an overarching department, and that is the Cabinet Office. Then the MoJ comes in because of its legal input by way of application. There is no conflict and the departments work quite work together.

Lord Morris of Aberavon: A large number of different departments can be involved in different inquiries. Who specifically in the Cabinet Office would be responsible for giving guidance? There are six Permanent Secretaries there, at the last count.

Shailesh Vara MP: If I go back just a moment—I will answer your question on the Cabinet Office—it starts off with the sponsoring department taking the initiative. It is then passed to the Cabinet Office for advice and guidance. Which Permanent Secretary it is, I honestly do not know. I am happy to find out and come back to you, and I will let you know who has the ministerial responsibility to whom they ultimately report within the Cabinet Office.

Lord Morris of Aberavon: Leaving the identity to one side, would there be one specific point in the Cabinet Office who would be responsible?

Shailesh Vara MP: I would have thought that there are officials—

Judith Bernstein: We will need to go back on this. It is the propriety and ethics directorate at the Cabinet Office that is responsible, but I am afraid I do not know either which Permanent Secretary it is.

Lord Trefgarne: Minister, in one of your earlier answers to said that ultimately the Prime Minister approves the setting up of an inquiry. Is that the case both for statutory inquiries and non-statutory inquiries, and indeed did it include the review which the Home Secretary initiated and to which Lord Trimble referred earlier?

Shailesh Vara MP: I am not aware that it covers reviews. The guidance provided by the Cabinet Office and the *Ministerial Code* refers to inquiries. Therefore I would have thought that any inquiry would need permission from the Prime Minister. Certainly those under the 2005 Act do, but other inquiries do as well, given the costs and the other implications that are there. I am not aware that the word “review” was used in the *Ministerial Code*.

Q321 Lord Richard: I want to pursue the point that Lord Soley raised. We have the Act. The Act sets up a procedure for holding inquiries and sets up ways in which inquiries should be conducted. It gives powers to chairmen and all the rest of it. There is a statutory framework in the Act. I want to know why on earth it is not being used. You have an Act, and it was set up in order to deal with this problem. Under the last Administration, as I understand it, there were four non-statutory inquiries. Why cannot the Government say that they will use the Act?

Shailesh Vara MP: I come back to my earlier answer that the Government can sometimes take the view that a different measure is required for investigations. There are privy counsellors, for example.

Lord Richard: Of course they can take a different view. We want to know why they take a different view.

Shailesh Vara MP: They take the different view because they feel that they want to give the committee more flexibility than is allowed and prescribed by the Act.

Lord Richard: There is very little difference. The only difference surely is that the Act gives certain powers of compulsion to a chairman which a non-statutory inquiry does not. What other differences are there?

Shailesh Vara MP: Where you have a committee made up entirely of privy counsellors, they are all entitled to have access to matters that are of great national importance and other sensitive issues or whatever.

Lord Richard: You mean secrets, a secret committee.

Shailesh Vara MP: Secret, sensitive matters—I do not know. I am not privy and I do not have access to these materials, so I cannot comment, but my understanding is that they are issues of national importance and national security, or they might jeopardise our economic measures concerning Britain’s economy.

Lord Richard: Can you give me an example of such an inquiry?

Shailesh Vara MP: The Chilcot inquiry, and the inquiry on detainees by Sir Peter Gibson.

Lord Richard: Quite dangerous stuff.

Shailesh Vara MP: Which one? The Gibson one? It was set up and it had a purpose. It might have been stopped but certainly at the outset there was a reason for doing it. The other reason, I gather, is that an inquiry was recently set up by the Treasury under Part 5 of a 2012 Act and it was felt that that Act provides more flexibility to the chairmen than does the Inquiries Act.

Lord Richard: Do you not think that there should at least be a presumption that if the Government are setting up an inquiry, it should be an inquiry under the Act rather than one outside the Act? That is your starting point: that it ought to be under the Act unless there are strong reasons for it not to be under the Act. Would you have said that?

Shailesh Vara MP: I see no reason for not having that presumption, but at the moment there is obviously the right to go outside it. But certainly the Act is there and it is there to be used.

Lord Richard: The presumption would be that the Act would be used.

Judith Bernstein: I think that is right. I think that is the presumption, but then against that there may be arguments for using another Act.

The Chairman: Sorry, the presumption is that the Act will be used or will not be used?

Judith Bernstein: The presumption is that the Act will be used.

The Chairman: Will be used? Right.

Judith Bernstein: Yes, it will be a starting point but with other options in the mix.

The Chairman: Is that the Cabinet guidance: that it will be used?

Shailesh Vara MP: I do not know whether that is in the guidance, but I would have thought that given that there is the Act and that it has been used—it was used for Leveson recently—it is a first port of call.

Lord Trimble: Could you then come back to what I said about departments setting up private, or secret, inquiries?

Shailesh Vara MP: I certainly will, Lord Trimble, but may I also say that sometimes matters that are under review may well be intended to be departmental reviews, and hopefully you will agree that not every internal department review that is meant to guide an assist a bigger picture should be made public?

The Chairman: Lord Woolf, did you want to come in on this?

Lord Woolf: I was surprised, because we seem to have moved from what was said before. If I heard properly, I thought the Minister was saying that because the use of the Act involved additional expense, the presumption, at the present time at any rate, is that the Act is not used unless there is some reason to think that it should be because of the additional powers.

Shailesh Vara MP: The Act is there to be used, but the cost factor, the public benefit and interest have to be taken into account. If something else can be done, then obviously you use it. You are going to go for a cheaper and better option. But this is the central pillar to which people turn at the outset.

Q322 Baroness Buscombe: Thank you, Lord Chairman. I should begin by saying that I gave written and oral evidence to the Leveson inquiry. Is there not an underlying problem with this? Take the Chilcot inquiry, for example. There was huge public benefit to be gained—and huge public interest, in my view, although the public interest test can be quite subjective. Is there not a problem whereby it is decided up front, “We had better not use the Act because I think we will want to keep quite a lot secret”? I am putting it in simplistic terms because that is how the public might view it. Certainly right from the beginning of the Chilcot inquiry an awful lot of people felt that they had very little trust in it because it has been quite secret from the start.

Shailesh Vara MP: I hear and take on board what you say about the public perception, but it is a fact that there are a lot of sensitive pieces of material that it is perhaps not in the best interest of the public to know, notwithstanding the enormous concern that people have about the whole Iraq war and everything else around it. It is a question of putting the

national interest first. The people who decide to hold a public inquiry will put the national interest first, and in so doing if they feel that it is necessary to have a committee made up entirely of privy counsellors and that they have to go through a lot of documents in private session, that must be their call.

Lord Soley: I will pursue this, if I may. It is a very important area. This is a Select Committee on the Inquiries Act 2005. Your department and the Cabinet Office are rather critical of the processes involved in setting up inquiries, and I find it odd that there seems to be no discussion within one or both of those departments as to when you use the Act and the criteria that are used. You have listed some, including cost and so on, but frankly the cost argument could work both ways. I am simply saying to you that surely within government there needs to be someone asking, “Why do we use one type of inquiry at one time and the 2005 Act at others?”. There ought to be a list of clear criteria. Again, I appreciate your position—you have been in the job for only six weeks—but is it not necessary for the department to work that out, perhaps with the Cabinet Office? It seems very odd.

Shailesh Vara MP: This is a relatively new Act and there was post-legislative scrutiny in 2010. I am not averse to taking on board that perhaps further thought needs to be given as to when we turn to the Act or not. I would, however, Lord Soley, pick up on one word that you used at the outset of your comments when you said that we are “critical” of the Act. We are not critical but we are just saying that there may be occasions when other means of obtaining the truth and evidence that is required may be a better option or forum.

Lord Soley: Sorry, I did not mean “critical”. I was saying that there were no criteria.

Shailesh Vara MP: I understand.

Q323 The Chairman: I just come back to this. There is the possibility of there being public concern and a build-up of pressure for a public inquiry on an issue involving a department, whether it be the Department for Transport or the Department of Health. I get the idea that there may well be circumstances in which the Minister says, “I can’t do with an inquiry. It will reflect on me”. The department says, “We can’t do with an inquiry. It will reflect on us”. Do you or the Cabinet Office have a role in saying, “You had better have one”?

Shailesh Vara MP: Before an inquiry is set up no individual or department is solely responsible, although there is certainly a sponsoring department. In an example such as the one you gave about there being widespread public clamour for an inquiry, there will doubtless be questions in both Houses of Parliament. There will be a clamour from the media. The decision is taken by more than one person at a very senior level. The Prime Minister’s Office and the Cabinet Office will be involved, and other departments may well have input. I am not entirely convinced that simply one Minister or his department saying, “We don’t want this”, would work because if it gets to that level, too many other people are involved who may well say, “No, we need an inquiry”.

The Chairman: But you and the Cabinet Office—either you or both of you—have a role in leading that forward to an inquiry?

Shailesh Vara MP: Certainly somebody has to mention that there is a sponsoring department that would say, “We need to have an inquiry”. It then escalates from that to all the people who are involved.

Judith Bernstein: All I wanted to say is that when there is an issue that causes public concern it is more of an iterative process between the department responsible, the Minister,

officials, our department and the Cabinet Office, in which there will be conversations such as, “We think there ought to be a public inquiry, but these are the kind of processes that we want to enable. This is what we want to get out of it”. It is in considering all the criteria relating to what they want to get out of the process that a decision is ultimately made about the best vehicle for that.

Richard Mason: As the Minister says, I am sure that No. 10 would have a critical role to play in that discussion.

Lord Richard: I just want to be clear about this. A decision is taken to hold a public inquiry. I understand that. Who then decides whether or not it should be held under the Act?

Shailesh Vara MP: Forgive me for stating the obvious, but it is a collective decision by those who take the decision, and a number of people are involved. Ultimately, the consent of the Prime Minister is required in setting up an inquiry. As to the means by which that inquiry is set up, I do not know whether it is a Minister in the Cabinet Office or the Secretary of State in the Department for Transport, DCMS or wherever. Clearly there will be talks and a lot of people are involved in trying to find the right answer. This is not a stand-alone decision by one individual, no matter how big or grand they may be in the scheme of things.

Lord Richard: And everybody involved in those talks knows that the presumption is that you will use the Act unless there are strong reasons not to.

Shailesh Vara MP: May I just clarify that point? I appreciate the discussion on presumption. I am not convinced that there is a presumption. I know that the Act is there. I am correcting myself. To the extent that I may have led the Committee to believe that there is a presumption, I am saying that I do not know the answer. I am not aware of the word “presumption” being used in the guidance. Along with everyone else, I was aware of the Act being there, and it is clearly there for inquiries, but I do not know whether there is a natural presumption or whether the decision that needs to be taken is something for future guidance. I would just like to clarify that point; I do not know whether or not there is a presumption.

Lord Richard: The trouble is that this Committee, and everybody else who looks at this, slightly now feels that the Government have decided that they do not want to use the Act, that it somehow or other ties their hands, is too complicated, is too public or somehow or other is not helpful. Do you share that view or not?

Shailesh Vara MP: No, I do not.

Q324 Baroness Hamwee: I will not use the term “presumption”, but given that confidentiality, security and so on are a factor in some decisions, has there been any consideration in government of statutorily providing mechanisms to deal with some parts of an inquiry in camera, so that it is quite clear when it is decided that some bits of an inquiry should go into closed session when the broad thrust of an inquiry is held in public, with an obvious and publicly understood part going into closed session?

Shailesh Vara MP: I think the general presumption, if I may use that word, is that where possible people will try to be open and transparent.

Baroness Hamwee: I am not questioning that. I just wonder whether, given that it has been a factor, there has been consideration of, if you like, a third way: using the Act but amending it to make it suitable for occasions when not everything is in the public interest to be dealt with in public. It may not have been discussed.

Judith Bernstein: That has not come up in the course of either the 2010 post-legislative scrutiny or the work done over the summer talking to more recent inquiries.

Baroness Hamwee: It has not come up?

Judith Bernstein: No it has not.

Lord Morris of Aberavon: I do not want to be unfair, but I think we heard clear evidence a quarter of an hour ago that there seems to be a presumption that there should be a statutory inquiry. I may be wrong, but I suspect that there is nothing in the Cabinet Office guidance indicating such a presumption. I would like the answer: yes or no.

Shailesh Vara MP: Lord Morris, I specifically said that to the extent that I or my officials had led this Committee to believe that there was a presumption, there was not.

Lord Morris of Aberavon: You said it, but the witness said to the contrary.

Shailesh Vara MP: As far as I am aware—it is one word; I stand to be corrected—in this document of 57 pages, the word “presumption” is not there.

Lord Morris of Aberavon: We will leave it on the basis that there does not appear to be a presumption, but it seems to me that the issue for a departmental Minister is cost. That is the bottom line.

Shailesh Vara MP: Cost is important.

Lord Morris of Aberavon: Which avenue you go down depends on cost.

Shailesh Vara MP: Lord Morris, it is important that the truth is discovered. It is important that while that is considered, we also considered the greater public interest and public benefit. You will be aware that the Savile inquiry, very important as it was, cost nearly £200 million. There were reasons for that. For example, lawyers were instructed before even agreeing their rates, and if that inquiry were to happen now, different measures would certainly be involved, but I have to say that these inquiries do cost a lot of money. One of the costs is lawyers. Another is premises, if they are not government or judicial premises. So yes, cost is a factor, and if the truth can be obtained without having a formal inquiry, clearly it is prudent to do so, as we have had in the Hillsborough panel or the Daniel Morgan panel, which the Home Secretary announced earlier this year.

Q325 Baroness Stern: I declare an interest in that my husband was a member of the Billy Wright inquiry. I do not want to use the word “presumption”, but I am searching for another word. You might be able to suggest one. When it is being decided what mechanism is to be used, does the subject matter of the inquiry play a part? For example, where there have been deaths and where there therefore needs to be an Article 2 inquiry anyway, would that suggest a presumption—forgive me for using the word—that it should use the statutory powers of the 2005 Act?

Shailesh Vara MP: The circumstances and the facts are clearly taken into account. If I may use the phrase, it is horses for courses. All factors are considered. In some instances, it may be the view that a 2005 Act inquiry is not the best way to go forward. Yes, factors such as what is involved are taken into account. I go back to Chilcot. A lot of sensitive material was involved. The people chosen for that inquiry were some of the most eminent people in the country who could be trusted with state secrets. Yes, that is taken into account.

Baroness Stern: But the fact that there needs to be an inquiry under Article 2 that conforms to certain requirements is not one of the criteria that would affect the decision whether it should be under the Act?

Shailesh Vara MP: As long as the inquiry—whether inside or outside the 2005 Act—conforms with the law, it is for the decision-makers to decide which way they go: statutory or non-statutory, private or public, and if statutory whether under the 2005 Act or any other statute.

Lord Trefgarne: Minister, may I venture to suggest that we look at the real world? In the real world, when there is a terrible incident that causes wide public concern, it will, for example, be raised at Prime Minister's Questions. The Prime Minister will go back to No. 10 after Prime Minister's Questions and say, "God Almighty, I cannot put up with another week like that". Then officials will make a submission within a week or a couple of weeks saying, "We recommend that you have an inquiry. Public concern is so serious that it will have to be under the Act. You may be able to get away with one that is not under the Act, but it is a bit dodgy". That is the sort of submission that is made. I know, I have seen lots of them.

Shailesh Vara MP: That is where the role of the Minister and the Prime Minister come into play. They take a view as to whether they follow the advice given to them or not.

Lord Trefgarne: Indeed. They very rarely depart from it in such circumstances, although they may.

Judith Bernstein: If I may add this, I think that advice would say not just, "We have heard the clamour for an inquiry", but, "We have to think about other options as well".

Lord Trefgarne: Indeed, I accept that.

The Chairman: You will be delighted to know that we will move on.

Q326 Lord Trimble: In their written response, the Government said that it would not be practicable for them to monitor and record all calls for inquiries, which one understands, but some calls are obviously more significant than others. The question then arises: what happens if the Government decide not to order an inquiry? They sometimes give reasons. The question then arises why only in some cases Ministers give reasons. What criteria do they use to decide whether or not to give reasons? I have a supplementary question on this as well.

Shailesh Vara MP: To take two extremes, if, in the heat of political debate in the Commons a Member of Parliament were to say, "There ought to be an inquiry on this", but that clamour is not followed up by him, the media or anyone else, clearly that would not require reasons to be stated. But if there has been a major tragedy or incident and a lot of public attention, it may well be that there should be an explanation why there should not be an inquiry. In the Daniel Morgan case, the answer that a Home Minister under a previous Administration gave was that there had already been four inquiries and an inquest, and that it was felt at the time that having an inquiry would not add any more information. As it happens, the present Home Secretary earlier this year decided to have an independent panel on the same issue, but I give the example that there may have been previous investigations, or that reasons are given for not having an inquiry but another option is offered instead.

Again, under the previous Administration, the Home Secretary decided on the Hillsborough disaster to go for an independent panel as opposed to an inquiry. Reasons may be given to explain why something is not being done because it may have already had a different route.

Lord Trimble: You have used twice the phrase "independent panel". Is that the same as a non-statutory inquiry, or does an independent panel have any sort of status or consistency in its operation?

Judith Bernstein: No, I do not think there is any particular definition of an independent panel. It is what it says: it is a panel of independent members under a chair considering a particular issue. They will not have powers to summon witnesses.

Shailesh Vara MP: They will not be operating under the inquiry rules set out in the 2005 Act or the guidance—

Lord Trimble: You are saying that it is a non-statutory inquiry. Using the term “criteria” takes us back to the criteria in the opening clauses of the 2005 Act, which are the criteria on which the Government may appoint a statutory inquiry. Once you get to non-statutory inquiries, the problem is the absence of criteria, but that is another matter. There have been cases where the Government have given detailed reasons, an example being when Theresa Villiers, the Secretary of State for Northern Ireland, gave full reasons last September for not ordering an inquiry into the Omagh bombings, which a lot of people have been pressing for quite some time. At least she gave reasons. The Home Secretary also gave a detailed statement when the coroner conducted the inquest into the death of Mr Litvinenko. I suspect that I raised that on 25 June. Towards the end of the Home Secretary’s lengthy letter to the coroner, she said—I paraphrase—that there are international aspects to this case. One of the factors that she took into consideration is that she thought that people abroad, looking at an inquiry set up by a Minister where the person conducting the inquiry is appointed by a Minister and the same Minister has powers to regulate and control the evidence that may be given, might very well conclude that that is not an independent process. We must consider that people looking from abroad may include members of the European Court of Human Rights, and there is the question of whether inquiries are compliant with the articles of the Convention on Human Rights. Are not those comments from the Home Secretary effectively saying that although people within the United Kingdom may have confidence in the process, we cannot expect anybody outside to have such confidence, and it is not itself compliant with the human rights convention?

Shailesh Vara MP: I am not sure that I agree with the bit about compliance with the human rights convention. It may be, but I caveat it by saying that the Home Secretary was being specific to this case, because of its international outlook.

Q327 Lord Trimble: The Home Secretary cited three factors that are general to the 2005 Act and relate to every inquiry under the Act—namely, that the government Minister decides on the inquiry, appoints the chairman and has powers to regulate the evidence. That is general, not specific. If for those reasons the Home Secretary feels that people abroad would not have confidence in the independence of the inquiry, is that not a very serious criticism of the statutory inquiry procedure?

Shailesh Vara MP: No, it is not. It simply explains why one method of inquiry in this instance is better than another one. The inquest is open. An inquiry can be in closed session. Given the circumstances and the international nature of the facts, it was felt that this would best be handled by way of an inquest, given the international market. The issue itself remains serious. It involves a British citizen and a death on British soil. The Government are keen to get to the bottom of it as much as anyone else, but the inquest, which the Home Secretary eventually decided was the route to pursue, is an open forum. Certainly, that has something to do with the fact that this is an international issue.

Judith Bernstein: If I may just come in there, the inquest has to take place by a process of law. They are the facts of this particular case and I think that the foreign partners understood the inquest. One always hopes that one can continue with an inquest. At the end of the inquest, Ministers may take a view on whether anything further is needed, but I

think that the facts of the case were such that it was important to have confidence. The person died in 2006, so it is a long time during which people have been used to the idea of the inquest.

Shailesh Vara MP: And in an open forum as well.

Lord Trimble: You might not have seen the evidence that other people have given us in the course of our inquiries, where they have drawn attention to these factors in the 2005 Act and suggested that inquiries are not necessarily human rights-compliant and that a robust chairman is required in order to satisfy the requirements of the convention. This is a general issue. I am raising it in the context of what the Home Secretary said on Litvinenko, but her comments were of a general application and there is a general issue here, which I am inviting you to address.

Shailesh Vara MP: I addressed it and said that I do not take the same interpretation as you do, but I will await the conclusions of this Committee's report, and if anything needs to be looked into I am sure that it will be.

The Chairman: Lord Richard, do you have anything left on question 3?

Lord Richard: I would like to raise one small point, if I might, about the same presumption issue. Listening to the evidence that you have given us this morning, it seems to me that it is the Prime Minister who decides whether there should be an inquiry under the Act or not under the Act. It goes up to the Prime Minister and he decides whether there is going to be an inquiry. You say that the people who decide that decide whether it will be under the Act or not under the Act. It looks as though the ball is really in No. 10.

Shailesh Vara MP: The Prime Minister is consulted and he has the final say, but he will be guided and, of course, there will be advice. As I said at the outset, a lot of people will put arguments to him.

Lord Richard: Prime Ministers are guided when they want to be guided, are they not?

Lord Morris of Aberavon: Just a quick matter. I think that you said there would be discussions about this. Is there any guidance on whether an issue of this kind should be the subject of an inquiry in this form, where the guidance shows that it should normally go to a Cabinet committee for discussion?

Shailesh Vara MP: There is just general reference to the Cabinet Office. There is no mention of a Cabinet committee. It is left at that level.

Lord Morris of Aberavon: There is no real guidance for the Minister to decide and to inform whatever colleagues he thinks may be affected, is there?

Shailesh Vara MP: No, the guidance itself, when it comes to appointments, sets out genuine guidance. For example, it is critical who the chairman is.

Lord Morris of Aberavon: That is not the issue. It is whether there should be an inquiry and what its form should be.

Shailesh Vara MP: No, people will discuss and they will speak with other Ministers and other departments. I simply say that it is not a stand-alone decision made by one Minister. Others will be involved. There may be one person at the top who takes the final decision, but there is wide consultation and a sense of agreement as to what the final conclusion will be.

Q328 Lord Woolf: Minister, I appreciate your difficult situation here, but we have to ask you these questions because you are the only person we have been offered.

Shailesh Vara MP: That is one way of putting it.

Lord Woolf: Looking at this in the best way you can, do you agree that it is very desirable that there should be clarity on a matter of this sort? Otherwise the public just do not know where they are.

Shailesh Vara MP: Lord Woolf, I accept that there should be clarity and I would like to think that one of the purposes of the conclusions that this Committee will come up with is to provide clarity where there is no clarity. You and your colleagues therefore have an important role in the submissions that you will make.

Lord Woolf: But if the best guidance that you can find is a draft document, which as I understand it has not been published because it is still a draft, and it has been like that for years, we have not been very sensitive about the whole issue of when there should be inquiries.

Shailesh Vara MP: Lord Woolf, certainly, as I say, the document's title contains the word "draft", but it is in circulation. I fully take on board the point that it should not be called "draft". There are also the Inquiry Rules 2006, which accompany the Act. One of the criticisms made of those rules in the post-legislative scrutiny of 2010 was that they were perhaps too prescriptive. That may be an issue that you come to later on, but a criticism that was levelled was that the question of Salmon letters or the Maxwellisation process delays the inquiries and needs to be addressed, as the MoJ has acknowledged in the past. There are rules, and as I say there are criticisms, but the purpose of your meeting today and all your previous meetings is to try to make the Act and the whole process of inquiry better. My understanding is that while you are looking at the Inquiries Act, you are also looking at inquiries slightly more broadly, which is all the more reason why your conclusions will be looked at in detail.

Q329 Baroness Stern: Can we return to a matter that has already been raised, which is Part 5 of the Financial Services Act 2012? We understood that one impetus behind the 2005 Act was to replace the many different parts of legislation under which inquiries could be held with one Act, which would be the one Act used for inquiries. However, the Government re-enacted the power of the Treasury to hold inquiries under Part 5 of the Financial Services Act 2012—in other words, we decided that we did not need the power and then we decided that we did need it. Could you explain why that happened?

Shailesh Vara MP: My understanding of that is that Section 14, I believe, of the Financial Services and Markets Act 2000, of which Part 5 has now taken life, provides greater flexibility in the process of inquiry than would otherwise have been the case.

Baroness Stern: Could you give an example of what is more flexible and what was felt to be very beneficial to an inquiry?

Shailesh Vara MP: As I see it, the details of the inquiry are very complex regulatory financial matters. The authority that the Part 5 inquiry has is greater because it vests in the chairman the powers of a High Court judge, which is not the case with the Inquiries Act. I think that Section 46 of the Inquiries Act 2005 specifically says that if there are certain circumstances, the chairman or a Minister can apply to the High Court for the High Court to use its powers. The inquiry set up by Part 5 already gives to the new chairman powers that otherwise would need to be applied for under the 2005 Act.

Baroness Stern: Since that was done, has it been used?

Shailesh Vara MP: I do not know.

Baroness Stern: I thought I would just check whether you knew. Thank you very much.

Q330 Lord Trimble: I want to direct your attention to the Inquiry into Historical Institutional Abuse Act (Northern Ireland) 2013, which was legislation enacted for a specific inquiry. Glancing at the Act, its substantive provisions are very close to the 2005 Act, which applies to the whole of the United Kingdom. It would have been possible under the 2005 Act for the Secretary of State for Northern Ireland to set up an inquiry jointly with the First Minister and Deputy First Minister covering all these issues, so why was that not done?

Shailesh Vara MP: First, I should say that this is a very serious and sensitive issue of great importance to the people of Northern Ireland and that a thorough and sensitive inquiry needs to take place. The issue itself is a matter of devolved responsibility. The Northern Ireland Assembly did not ask the Secretary of State for Northern Ireland to set up an inquiry, either under a single Minister or jointly. They felt that they wanted to do it themselves. That being said, there has been communication between the Secretary of State for Northern Ireland and the Assembly. There has been help, assistance and co-operation to the fullest extent.

Lord Trimble: Did the Secretary of State for Northern Ireland not point out to the Assembly that statutory powers to do what the Assembly wanted to do existed and could be used, without the Assembly having to legislate and without all the time that such legislation would require? Was that not done?

Shailesh Vara MP: I do not know what the Secretary of State for Northern Ireland specifically said when he and his officials were in liaison with the Assembly. All I know is that they were not asked about this.

Lord Trimble: I am asking what they themselves thought of doing. They are not entirely passive, I take it.

Shailesh Vara MP: “They” as in the Secretary of State for Northern Ireland?

Lord Trimble: Yes.

Shailesh Vara MP: Right. They co-operated fully and I believe that they even assisted with some of the drafting of the new legislation. But it is a devolved issue. I do not know what was said, but this was a devolved measure. The Northern Ireland Assembly decided that they wanted to do something and the Secretary of State for Northern Ireland and his team co-operated fully with them and continue to do so.

Lord Trimble: The reason for my bemusement, Minister, is that you were saying that they helped them with the drafting of that. It rather looks to me as though in drafting it they were looking at the 2005 Act and copying the relevant provisions. I am surprised that they did that without saying, “Look, we can set this up immediately under the 2005 Act. You do not need special provision”.

Shailesh Vara MP: Lord Trimble, for that, with respect, you must ask the Northern Ireland Assembly.

Lord Trimble: I am talking about what the Secretary of State for Northern Ireland and her officials did, and you are answering for her.

Shailesh Vara MP: I am answering for her and I have said that I do not know the specific answer, but I can give you the general point as a government Minister.

Lord Trimble: Could you find the answer to the specific point?

Shailesh Vara MP: I am happy to do so, but I can comment on a general level on behalf of the Government. Her Majesty's Government have co-operated to the fullest extent with the Northern Ireland Assembly on matters when assistance has been requested, and we will continue to do so.

Q331 Lord Trefgarne: One of the main criticisms of the 2005 Act right from the start has been that Ministers alone have the power to set up or not set up an inquiry, to set the terms of reference, to appoint the chairman or the members, to suspend or even terminate the inquiry and to restrict the publication of documents. These reservations, which have been expressed to us, were strongly represented by the then opposition spokesmen and, when the Bill was going through Parliament in 2005, not least by Oliver Heald, who now holds a distinguished office. Can you say whether or not the view expressed by the then shadow Ministers is still held by Ministers?

Shailesh Vara MP: The Act has been properly enacted and is in force. We therefore live with the Act as is rather than with the arguments put forward in 2004, or whenever the debate took place. I would also refer to some of the comments that I made earlier: these are not stand-alone decisions. Yes, the Act says that the Minister will do this, can do that, and so on, but in all the decisions taken there is an abundance of advice. Many people who know better on these things are consulted and a wide variety of opinion is taken before arriving at all those decisions.

To give you the example of the appointment of a chairman, depending on the facts of a particular case, an expert chairman may be appropriate or a judge may be more relevant. If it were to be a judge, the Lord Chief Justice or other senior members of the judiciary would be consulted. If an expert was required, clearly inquiries would be made to find out who the experts are. So while all those decisions can be taken by the Minister, they are taken on the basis of good advice and consultation.

Lord Trefgarne: I just offer you a short quote from what Mr Heald said on 15 March 2005, referring to all the ministerial powers relating to inquiries. He said, "We need to get this balance right, especially when considering the aspects of the Bill that relate to the terms of reference and to disclosure and publication of evidence". Does Mr Heald still think that that we have the balance right, or do you think that we have the balance right?

Shailesh Vara MP: I think the balance is right. The terms of reference are formalised after consultation with the chairman. The Act reserves the right that if necessary during the course of an inquiry the terms of reference can be changed. I am not aware that that right has been exercised once an inquiry has been under way.

Lord Trefgarne: Ministers' powers of course go much wider than just changing the terms of reference. They can stop the inquiry in its tracks if they feel so inclined.

Shailesh Vara MP: They can, but I would like to think that the appointments made in the first instance and the terms of reference would have specified the time by which the inquiry should end and that that deadline would be adhered to and where possible and, if there is to be an extension, there are good, justifiable reasons for doing so.

Lord Trefgarne: Good, justifiable reasons for the Minister maintaining his power to stop an inquiry, say?

Shailesh Vara MP: The inquiry is set up by the Minister. There is a need to have parameters. There are implications because of the need for a decision or recommendations. There are cost implications, there are resource implications, and I think the Minister is justified in saying, “I would like this inquiry to conclude by X”, and questions certainly need to be asked if it is not. It is a right that exists but I am not aware whether it has ever been exercised.

Judith Bernstein: Not under the 2005 Act.

Shailesh Vara MP: Not under the 2005 Act. As far as I am aware, the right to terminate has not been exercised under the Act.

Lord Trefgarne: So you are satisfied with ministerial powers as they are presently set out in the Act?

Shailesh Vara MP: I am, yes.

Q332 Lord Woolf: Minister, you have not so far mentioned the position of a judge if he is appointed chairman of an inquiry. Do you think that a decision not to continue an inquiry, either under the Act or outside it, could reflect on the status of the judge? He will be taken out of his normal role as a judge to conduct an inquiry, spending substantial time not trying cases and doing other things that judges normally do but then a decision is taken to stop the inquiry.

Shailesh Vara MP: The power exists, Lord Woolf, but it is not one that would be exercised lightly. I suspect that there would need to be very formidable reasons to do so. As I say, that power has not been exercised and it is not one that would be exercised lightly. I recognise the independence of the judiciary—although in an inquiry a judge would be acting as the chairman of the inquiry—and all that goes with that.

Lord Soley: I think you have given us a part-answer already to the question of how chairmen of inquiries originate, whether they are expert, judicial or whatever, but can you give us a little more information? Am I right in assuming that the department concerned—perhaps the Department of Health—would put forward suggestions, and that perhaps your department, the Cabinet office and, no doubt, the Prime Minister would all have a say? What sort of criteria emerge, and where do the names come from? It is a slightly mystical smoke and mirrors activity.

Shailesh Vara MP: You raise a very good point, Lord Soley. They come from a variety of sources, with a view to try to ensure that the best person is selected. The role of chairman is critical, because the whole purpose of the inquiry is to elicit the information sought. There may be a need for recommendations and lessons learned to allay public concern and fears and ensure that matters run smoothly. It is a critical role. I do not think for one moment that, “This name sounds okay, let us go with it”, would be the policy. If it was a health matter, there would be consultation with known experts in the field. Advice would probably be sought from other people who have handled inquiries and dealt with the individual. In the case of judges, the advice and views of the Lord Chief Justice or other senior people would be sought. People who have been chairmen in the past might well be asked for their views, because they know what is required and what the demands are. They will be asked, “Do you have colleagues who you know and feel can handle what is involved?”. It is a broad search, and it needs to be to get the right person.

Lord Soley: If you consider an inquiry that is politically contentious and is therefore getting a lot of attention, clearly there will be great concern not only about the type of inquiry but about the chair of that inquiry. I wonder how much the Prime Minister’s office steps into

that to say, “This is too important, and we must have this or that chairman”. Perhaps one of your officials may have more knowledge about this. I am looking at Mr Mason.

Richard Mason: Certainly No. 10 would be consulted on this. As to the finer, detailed machinations, and that is not something that we could help you further on, but certainly No. 10 and the Prime Minister would be consulted.

Judith Bernstein: There is nothing I can usefully add to that.

Lord Soley: I am asking about the contentious ones where you have difficulty identifying someone without a lot of negotiation between departments, the Prime Minister's Office, the Cabinet Office, and so on. Is that right?

Shailesh Vara MP: The central point is that you have the right chairman for the inquiry, depending on the facts and circumstances. I say again that the decision is not taken lightly.

Lord Trefgarne: I wonder whether the department has a secret list of likely candidates for chairman of public inquiries, and if so how you get on the list or, worse, how you keep off it.

Shailesh Vara MP: I am not aware that a secret list exists. It is a situation where matters are decided as they arise.

Q333 Lord Morris of Aberavon: Could I add to that? The bottom line, having heard your evidence on this issue, is that it would not be desirable or productive to spell out anywhere criteria for choosing a chairman. Is that right?

Shailesh Vara MP: The guidance provides criteria, and I would like to think that in my earlier answers I covered some of those points. If someone is felt to be an expert in a particular type of inquiry, who will be able to ascertain the evidence better than someone who does not understand the technicalities of the subject, keep to time pressures, keep counsel in check, ensure that if witnesses are representing themselves they are taken care of and who, where there is a need for confidential, sensitive information, has the authority to deal with that and take the officials and inquiry team with them. There are provisions in the guidance that I referred to, and a whole variety of skills are required that narrow down the number of people who are suited, particularly if it will be high profile and they will be the face of the inquiry.

Lord Morris of Aberavon: I appreciate the guidance. Would you not suggest that there should be further guidance on precisely how to choose a chairman? It is basically up to the Minister: whom he happens to know or have heard of.

Shailesh Vara MP: No, I do not accept that, Lord Morris. It is the person who is best for the job. If you look at the list of inquiries, you will see that there have been a number of judges or people with legal experience who have been selected. They would not have been selected without the advice of the Lord Chief Justice or one of his senior people. Therefore clearly the facts speak against saying that they are people he knows, because, by convention, the judiciary is consulted.

Lord Morris of Aberavon: My question is wider than judges. In the generality, some are judges and some are not. I appreciate the conditions regarding consultation—I will come to that in a moment—but generally you would not suggest that there should be any further more detailed criteria but that it should be left to the Minister to choose.

Shailesh Vara MP: It is for the Minister to decide and have the final say, bearing in mind all the other criteria that I mentioned for the consultation, such as making sure that the person

has been recommended by people who are knowledgeable in the area and whose judgment you can trust because, for example, they have already conducted an inquiry.

Lord Morris of Aberavon: I can be very brief on the next question. There have been different views from time to time as to whether the Lord Chief Justice should be consulted or whether there should be the consent of the Lord Chief Justice. What is the view of the Government now? Should there be consent or mere consultation?

Shailesh Vara MP: The consultation process works very well, and I would venture to say that it is highly unlikely that a Minister would go against the advice of a Lord Chief Justice. It is an ongoing relationship and it is one that is based on trust. I have been in post for only a few weeks, but I have already met a number of the senior judiciary, including the present Lord Chief Justice. One thing that is abundantly clear to me is that it is a relationship based on trust, as is the relationship of the Lord Chancellor to the Lord Chief Justice and others.

Q334 Baroness Hamwee: You touched on the terms of reference. May I come back to them? We have heard suggestions that it might sometimes be helpful for terms of reference to be reviewed when an inquiry has been going for a little while—when it has got under way—and should not be finally settled right at the outset. Do you agree with that, and do you think it is enough just to give the power to amend the terms to the Minister after they have been set out initially?

Shailesh Vara MP: I am content that the rules that we have at the moment are good and serve their purpose. It is important at the outset to have clarity. The inquiry needs clarity and the public need clarity. So far as far as I am aware, none of the rules has been changed.

Baroness Hamwee: You mean none of the terms of reference.

Shailesh Vara MP: Yes, none of the terms of reference has been changed midway through an inquiry. If necessary, the power exists, but to start off with a loosely worded inquiry that then takes shape afterwards would not be a way forward. There needs to be clarity from the outset.

Baroness Hamwee: I was not necessarily suggesting loosely worded terms of reference. Let me pick up on your point about the public having clarity. A number of inquiries are set up after there has been a public clamour for them. We have heard on other occasions that it might be helpful for leaders of campaigns, who are very much involved in the call for an inquiry and likely to be involved in the inquiry itself, to be consulted. Would that be helpful in establishing terms of reference?

Shailesh Vara MP: I think that before the terms of reference are set, serious consideration would be given to all aspects that have called for the inquiry. However, I am minded to say that if a public campaign group has been so vocal and so prominent, it is highly unlikely that a Minister would be unaware of what they would wish to see in the terms of reference.

Baroness Hamwee: One of the people who made this point was the leader of a very effective campaign in the Mid Staffs inquiry, who said that one of the things they felt was missing was the chance at the beginning to all get together and look at lines of inquiry that needed to be looked at. I suppose I am asking you not just about the Minister making inquiries—I do not mean that to be a pun—as to what the concerns are, officials looking at that and advising, and then the Minister saying, “Oh, I understand, so this is what the terms of the inquiry will be”; rather, I mean a dialogue or consultation with the public or leaders of a campaign before setting the terms of reference in stone.

Shailesh Vara MP: Baroness Hamwee, it is important that we get it right. I see no reason why proper thought and consideration should not be given to what others have to say if it could benefit the final outcome of the inquiry.

Q335 Baroness Hamwee: I do not know whether anyone else wants to come in on that or whether I should keep going.

This is a half-related point about the scope of an inquiry. Again, it has been suggested to us that there might be an evaluation or a scoping exercise near, but after, the start to help get a handle on the length of time and cost. We are interested to know whether you think this would be helpful, whether it would be conducted by the chairman and the Minister together, or what.

Shailesh Vara MP: It is certainly helpful to have a scoping exercise at the outset. It is important to have parameters, broadly. It is also important to know roughly the timetable that may be involved, as well as the cost, the personnel, the facilities required, the offices, the place where the inquiry will be heard, information technology, dealing with the press—depending on the circumstances, witnesses and whether they will be acting on their own legal counsel, and whether you have government lawyers who will help out. These are all very important factors and probably best dealt with by the inquiry team and the sponsoring department. There is the front face, or the room where the inquiry is held, but a huge amount of back-up is also required. That is important so, yes, I agree that there should be a scoping exercise at the outset.

The Chairman: It is now 12.05 pm. I should like to have a short break until 12.15 pm, with the hope of concluding by around 1 pm. If we could adjourn until 12.15 pm, that would be helpful.

Committee adjourned until 12.15 pm.

Q336 Baroness Buscombe: There has been a common theme throughout our sessions so far relating to the machinery for setting up an inquiry. Many of our witnesses have complained about the time and resources lost because every new inquiry has to start from scratch with decisions on all the practical issues, as the expertise of the previous inquiry staff has been lost. There does not appear to be much of a memory bank within either the Cabinet Office or the Ministry of Justice. Indeed, the Francis report executive summary states, “It may come as a surprise for some to appreciate that there is no effective established template for the setting up or administration of a public inquiry, and therefore the team has had to start from scratch. I am sure I am not the first chair of an inquiry to wonder why it is necessary for the wheel to be reinvented in relation to the many administrative and logistical details without which an inquiry cannot function”. Do you agree that a unit in the Ministry of Justice should be responsible for retaining and sharing best practice with regard to the setting up and administration of new inquiries? If not in the Ministry of Justice, where? That relates very much to cost as well as the effectiveness of an inquiry.

Shailesh Vara MP: I agree with much of what you say, Baroness Buscombe. It is regrettable that very technical experience that is acquired has to be acquired again by different individuals as and when inquiries come up. You raise a very good point, and I do not disagree with it. I simply say—I do not say this by way of criticism but simply by way of reflection—

that inquiries do not come up very often and there is therefore the possibility that that body of experience will be waiting between inquiries, or you might have an inquiry that goes on and you do not still have the relevant people.

As I say, I simply reflect on those points, which need to be taken into consideration, but broadly speaking you raise a very good point. Thought needs to be given to keeping that information. On the question of where it should be, you are right to point out that this is a resources issue. In the present climate, each department is having to fight very hard to see where there can be savings. This is technical knowledge with people who on the whole are paid huge sums of money, relatively speaking in the scheme of things, and that all needs to be taken into account, but that is not something that I would rule out at all.

Baroness Buscombe: In 2004, the Government stated: “The Government recognise that there is a case for a dedicated Inquiries Unit and will consider the matter further”. I am assuming that they did not. An inquiries unit might be the icing on the cake, but it would be useful to have even one person with a memory. Robert Jay said that the first module of the Leveson inquiry was really difficult because there was so much to do and nobody there to tell them how to do it. You ended up, for example, with a number of different people reading the written evidence, which meant that in practice it was very difficult to ask the right questions of the witnesses to the inquiry and the whole process was rather disjointed. After that first module, they felt that they had gained some expertise, ready for the next round, which was of course post any criminal proceedings. Even having one person with the skill set and the experience to draw on and advise would save a lot of money in the process, because a lot of this is about time, as well

Shailesh Vara MP: It is, Baroness Buscombe. I do not disagree. As well as the example of the first module of Leveson, there are other very practical issues to be considered. There is the list of items that I gave earlier: dealing with personnel, making sure that witnesses are properly looked after, and all those things. Sometimes people have to learn and say, “Oh, someone is going to represent themselves. Thought needs to be given to that”, whereas, if it was given at the outset, it would save a lot. We live in an information technology world. That needs to be taken into account. We could save costs on contracts. It is important that someone advises that rather than going to independent people for tenders as to how to sort out the IT facilities, that can be provided by the government machinery, which could save costs. Certainly we have to ensure that independence is kept between the inquiry and the government machinery. That can be done through the Chinese wall, so to speak. There is also the question of the facilities used. There is no reason why, if the judiciary is agreeable and there is space available in the Royal Courts of Justice, a court room there and one or two back-offices cannot be used. All those things are important.

Baroness Buscombe: Absolutely, Minister. That was going to be my next question. If I dare say so, in the private sector it would be a complete no brainer to have a system where there is a proper process for budget procurement and facilities. We know that there are departments across Whitehall where there is space, if there is not space in the Royal Courts of Justice, where perhaps a dedicated unit could be set up. Notwithstanding the fact that a new inquiry is not set up every day of the week, we have heard from other witnesses about other kinds of inquiries or investigations. For example, there are ongoing investigations in the Ministry of Defence. Having that focal point to which people from different departments can turn for expertise would be good.

Q337 Lord Trimble: With regard to the institutional memory, which has been touched on, I imagine that the lessons learned memoranda should accompany inquiries. I think when

you mentioned the Cabinet Office guidance you mentioned lessons learned memoranda. Are they automatic for all inquiries or just statutory inquiries? Are there lessons learned memoranda on non-statutory inquiries? Does the Cabinet Office keep lessons learned memoranda? We asked for them and were told that there was only one in the bank, if I remember rightly. Why is there only one lessons learned memorandum document in the Cabinet Office?

Shailesh Vara MP: As I see it, they are not always provided in an inquiry, which is a fair criticism. Perhaps there ought to be more pressure to ensure that they are provided. My understanding is that although they are asked for at the outset, they do not always materialise at the end.

Lord Trimble: So you are saying that there is no follow-up if the chairman of the inquiry does not write a memorandum? Going to my first question, how many memoranda are there in the Cabinet Office?

Shailesh Vara MP: I do not know the precise number.

Lord Trimble: We have only one supplied to us.

Judith Bernstein: On the 2005 Act, there is the Baha Mousa lessons learned and a form of lessons learned from Azelle Rodney, but you are quite right: there have not been other lessons learned. It is in the draft Cabinet Office guidance and something that should be emphasised rather more, because it is a way of capturing the corporate mood.

Lord Trimble: So you are saying that only one proper lessons learned paper has been received and something that is a sort of lessons learned paper?

Judith Bernstein: It is what the secretary has said is lessons learned. When he finishes being secretary of the Mark Duggan inquest, which has raised similar issues, he will review to see whether there needs to be further work on that.

Lord Trimble: I could not get the hang of what you were saying there.

Judith Bernstein: I am saying that the secretary to the Azelle Rodney inquiry provided a paper to the committee. I checked with him; there is a lessons learned document from that inquiry. When he completes the work on the current Mark Duggan inquest, which raises similar issues for the secretariat, he will review to see whether there needs to be anything further. That is the lessons learned document.

Lord Trimble: How many inquiries have there been where no lessons learned document was submitted?

Judith Bernstein: If we are just talking about the 2005 Act, there have been 14 inquiries. They have not all completed. Of those that have completed, there have been two.

The Chairman: Do you think that the reason that we are not getting them is because they are only a draft?

Judith Bernstein: No.

Shailesh Vara MP: I think they simply are not materialising at the end of the inquiry. Lord Trimble, you raise a very good point. There are very few—indeed, one or two. We need to make clear that we would like those lessons learned notes more regularly.

Lord Trimble: A number of non-statutory inquiries are virtually indistinguishable from statutory inquiries, so will you seek lessons learned memoranda from the non-statutory ones?

Shailesh Vara MP: I am happy to take advice and learn lessons from wherever we can if it will help the end product. I see no problem in including non-statutory inquiries within the 2005 framework or under any other statute. If we got the memorandum at the end of the day, that would be helpful.

Judith Bernstein: The Cabinet Office guidance covers all kinds of guidance; it is not just on 2005 Act inquiries.

Lord Trimble: Who is actually doing that in the Cabinet Office, and why are they not chasing these things up? Why are they taking this laissez-faire approach?

Shailesh Vara MP: It is the propriety and ethics department within the Cabinet Office. It is something that needs to be followed up.

Lord Trimble: Are you going to follow it up? Who is going to follow it up?

Shailesh Vara MP: I will take note of what has been said today, but more importantly I await the bigger picture of what you have to say. In 2010 there was, with respect, one particular issue, which we may come to later, where letters were written to people when something critical might be said about them. Jonathan Djanogly, one of my predecessors, took that on board and it was looked at, but unfortunately priorities in the department did not allow for the matter to progress. I think that right now the best idea is to await what you have to say and consider it in the bigger picture. I gather that you have to report by the end of February, so it is a matter of weeks.

Q338 Lord Richard: I was going to raise the issue of the lessons learned documents as well, but perhaps I may ask one final question on this issue. When you were dealing with the fact that the Cabinet Office guidance was still in draft, one reason you gave was that it was updated from time to time because of the lessons learned coming in.

Shailesh Vara MP: I asked why it was in draft. I am told that they want to learn the lessons of the recent inquiries to see whether anything can be learnt. Clearly, Leveson was a major inquiry. It may well be that lessons can be learned, particularly given that it was a very public inquiry, now introduced into the realms of broadcasting. I would like to think that if we are to get guidance, given how long it has been in draft, perhaps it is no bad thing if it remains in draft a little longer just to make sure that it is totally up to date, because we do not know when next it might get reviewed.

Judith Bernstein: Perhaps I may just add that there are very few lessons learned documents, but when drafting its guidance the Cabinet Office has taken informal soundings and informal views of those who have conducted or been involved in inquiries.

Lord Richard: Are they in writing?

Judith Bernstein: They may be.

Lord Richard: Can we have a look at them if they are?

Judith Bernstein: If they are.

Richard Mason: We can ask in what form they are.

Lord Richard: On the understanding that if they are in writing, we get them.

Richard Mason: Let us talk to the Cabinet Office and see what they can provide.

Baroness Buscombe: Lord Chairman, this is just for the record. I just wanted to be sure that we are all clear that when we are talking about lessons learned, we are talking about the

machinery of running an inquiry. Lessons learned is a trendy term on which I have my views. It is not about the outcomes of particular inquiries, it is about the process itself. That is for the record.

The Chairman: You are quite right to make that point. Lord Woolf.

Q339 Lord Woolf: You are aware of course, Minister, of the fact that there have been powerful expressions of concern of the effect of inquiry rules. That may be for some time. Do you think that that is a symptom of the fact that there is no consistency in the organising and conduct of an inquiry—the procedural matters we have talked about this morning?

Shailesh Vara MP: I am not sure that there is a connection. I recognise that the rules need looking at; there are matters that need tidying up. In one of your questions, I think you referred to inquiry records, written statements, oral evidence and so on. Those issues have been identified. Indeed, in the submission made on 2 September, we listed them all and recognised that there are concerns when matters are reviewed.

Lord Woolf: Do you think that the possibly inappropriate nature of some of the rules is a reason why Ministers are reluctant to use the Act? If the rules engender expense that can cause Sir Robert Jay, for example, to respond that he was caused huge grief by the Leveson inquiry, it does not encourage you to get into a situation where you have to use them.

Shailesh Vara MP: As I said at the outset, when deciding what sort of inquiry to put in place they would look at all the circumstances, and the rules may well be one of them. In the example that we referred to earlier, where the Treasury used Part 5 of the 2012 legislation, it was felt that the rules were not adequate for the purposes of having an inquiry into complex regulatory rules of a financial nature.

Lord Woolf: Who would be responsible for amending the rules if they were to be amended?

Shailesh Vara MP: We would.

Richard Mason: Our department would be responsible. We own the legislation.

Lord Woolf: It has been some years now since criticism of the rules has been made. Can the Ministry of Justice spare anyone to prepare a rule or report on the rules?

Shailesh Vara MP: Lord Woolf, one particular issue was looked at by Jonathan Djanogly in 2010, when he held my post. However, it was felt that the department had other priorities. That is not to say that this is not important; of course it is, but in the scheme of things, for the moment, it has not been addressed.

Q340 Lord Morris of Aberavon: You mentioned costs repeatedly. These rules are expensive, as we have heard from the evidence and your own assessment. Is anybody in particular in your department now working on amending or abbreviating the rules?

Shailesh Vara MP: Not at the moment, no.

Lord Morris of Aberavon: Why not?

Richard Mason: As the Minister said in answer to a few of your other questions, we are very much looking forward to what this Committee will recommend. You have raised rules as an issue. The Minister has just explained that Mr Djanogly looked at this a few years ago. At that point, in 2010, the view was taken in the Ministry of Justice that it was not a high priority. However, obviously, the department will look with great interest at the

recommendations of this Committee. You may have trenchant things to say to us about the adequacy—or not—of the rules, and we will take that away and look at it.

Lord Morris of Aberavon: But the delay has been expensive, according to Sir Robert Jay.

Shailesh Vara MP: The cost is due to a number of factors. The rules are one but it could be the accommodation you use or that you contract out your IT facilities when you could have gone in house to the MoJ, which would have loaned you a couple of people to set up the IT system. There are a number of reasons for the costs and I maintain that that is the important thing. Rules are an issue to be taken into account. Certainly, some of the rules that need modifying impact on cost. For example, when people are written letters, such as the Salmon letters, they are alerted to the fact that they may have some critical comments made against them in the report and therefore they may like to come back and give their comments. Clearly, that delays the inquiry and there is a cost implication. However, there are others of a more practical nature, such as whether the core participants have an opening speech or a closing speech. There are arguments as to whether that fetters the right of the chairman to be in charge of the inquiry and decide whether there should be opening and closing speeches by those individuals.

Lord Morris of Aberavon: Your department criticised some of the rules in your assessment of October 2010. Sir Robert Jay told us that, additionally, Rule 15 caused huge grief, as Lord Woolf has mentioned, and a huge amount of work and public expense. I think that literally thousands of hours of work went into the generic letter. Nothing seems to have been done since October 2010.

Shailesh Vara MP: As I said, it was considered by Jonathan Djanogly in 2010 when he was appointed Minister. However, at the time, it was felt that there were other priorities in the department. I do not in any way diminish the importance of this and it needing attention.

The Chairman: Are we clear, then, that when we produce a report it will go up the scale in the department?

Shailesh Vara MP: It will certainly get a lot more attention and we will look at it very seriously. There are matters that need to be addressed. You have had the benefit of speaking to a lot of people—civil servants for the ministerial angle, but also those who have been at the front end in the ministry. Your conclusions will be read with considerable interest and, to the extent that it is possible, revisions will be made. However, it will have to be considered in the scheme of other priorities. Let me make it absolutely clear to you, Mr Chairman, that what you have to say will be taken on board, listened to and noted very carefully.

Lord Woolf: Hearing what you say and knowing the reality of life in a government department, is part of the problem not that unlike the Courts and Tribunals Service, where judges campaign for resources to conduct things better than they have in the past—they think this is important and really take it to heart—inquiries have nobody to defend or progress their interests? Somebody looks at the situation in 2010 and then it is pushed to one side and nothing happens. Does this not point to the need for some sort of unit to be established whose priority is looking after inquiries? The amount spent by the Government on inquiries continues to grow.

Shailesh Vara MP: Lord Woolf, the cost is considerable and it is a matter that needs to be looked at. You will appreciate that, important though it is, there are other important matters as well. Clearly, this is something that is on the radar. It needs to be looked at and addressed but I cannot say when for the moment.

Q341 Baroness Hamwee: We have been talking about the effectiveness of rules and procedures more widely. I cannot ask you whether you have considered the factor that I am about to introduce, given what you have just been saying. However, would it be a proper factor to include public confidence and the role of an inquiry as catharsis, which is a term we have heard? Would that be one of many lenses through which one should look at the procedures?

Shailesh Vara MP: Public confidence in inquiries is very important. Inquiries are often set up following major tragedies that have certainly had attention in the UK but possibly internationally as well. It is important that all aspects of the inquiry are properly handled so that the public have confidence in the evidence, the truth and the answers that were sought, to the extent that it was possible to obtain them. Also, recommendations must be forthcoming. What happens with those recommendations, whether they are implemented or not—

Baroness Hamwee: We want to talk to you about that.

Shailesh Vara MP: Certainly. The confidence of the public is very important.

Baroness Hamwee: And catharsis for those who have been directly involved.

Shailesh Vara MP: Absolutely. The Hillsborough disaster is an example in that respect. The relatives of the bereaved took some comfort from seeing the evidence and documentation—450,000 was, I believe, the number of pages. Some of it made for uncomfortable reading but it helped to give closure to a very sad part of their lives.

Q342 Baroness Buscombe: I am slightly changing my question. Following Lady Hamwee's question, I am interested in whether we should be questioning whether an inquiry is proportionate. I slightly stuck my neck out a few weeks ago by suggesting that we might have a problem in spending sometimes more than £100 million making a few people feel better.

Shailesh Vara MP: The word “proportionate” is very relevant. That is why I repeatedly come back to saying, “We have to take account of the cost”. An assessment has to be made: is the public benefit, interest and concern more than the cost of the inquiry? Clearly it is important that we ascertain the truth and that, where necessary, recommendations are made. However, is it possible to do that in a manner other than under the Inquiries Act 2005? In some instances that is possible. Then the conflict arises: you have the 2005 Act so why are you not using it? We must consider each of the circumstances in their own light and take a decision depending on the circumstances, whether matters are proportionate and what exactly we are trying to obtain. Also, can that be obtained in a manner that does not have all the set-up of a formal inquiry under the Act, which has a chairman and which may have a solicitor advising the panel, other panel members and counsel advising the inquiry? Then you would have the legal expenses of other people—core participants for whom legal advice will be necessary—paid for by the state. You have all the back-up, the venue and everything else. All that machinery is put in place to obtain certain details. Of course, you have to ask the question: that is the set-up provided by the 2005 Act, but can we achieve the same objective without using the 2005 Act? If you can, I venture to say that it makes eminent sense to do so.

Lord Richard: May I follow that point a little further? As I understand it, the extra cost that is imposed by the 2005 Act, as compared with an inquiry not under the 2005 Act—

Shailesh Vara MP: Would the non-2005 Act inquiry be statutory?

Lord Richard: Yes. As I see it, the only cost that is inevitable under the 2005 Act, compared with what the cost could be under the other procedure, is the cost of dealing with Rules 13 and 15. You have been very kind in saying that you are waiting for us to say that you should amend Rules 13 and 15. However, if we do say that you should amend Rules 13 and 15 so that that cost is removed from the 2005 Act, what is the difference in cost between an inquiry under the Act and an inquiry that is not under the Act? As I understand it, the answer is very little. If that is so, why should we not use the Act?

Shailesh Vara MP: There is the inquiry, but there is also the panel, as was mentioned earlier. Your body language gets the message to me. I am simply trying to say that it may well be. I will give an example. If there were an air accident, then maybe suddenly a clamour to say that we need an inquiry. It might well be that once the black box is obtained, all the answers and information you want it in there.

Lord Richard: But then there would be an inquiry?

Shailesh Vara MP: But you have had an investigation. The word “investigation” covers inquiries, inquests, independent panels or whatever. I come back to the earlier point: look at the facts and the circumstances and then try to find a vehicle.

Lord Richard: I want to know whether the Government think that if you extract the costs of dealing with Rules 13 and 15 from the statutory obligations imposed on inquiries under the 2005 Act, the costs of two types of inquiry—those under the Act and those not under the Act—would be virtually identical.

Shailesh Vara MP: I cannot comment on different circumstances, and I do not agree with you. Each case needs to be looked at in its own right and each circumstance must determine what investigation takes place.

Lord Richard: You can surely tell me what additional costs are imposed under the 2005 Act as opposed to the costs of pursuing an inquiry that is not under the 2005 Act.

Shailesh Vara MP: It might be that site visits are required. The location of the inquiry may be a determining factor. It might be necessary to have an inquiry closer to the location of an accident or incident. That might make it easier for witnesses to be there. It might be necessary for people on the panel to visit, as compared to having a location in central London. All that will vary depending on the circumstances. It is not simply that if you take two clauses out, everything else is the same.

Lord Richard: But inquiries under the Act do not have to be in central London.

Shailesh Vara MP: No, I am not saying they are. I am saying that all factors need to be taken into account. That was an example.

The Chairman: We have a record of what inquiries have cost, so we will have to take that into account in our deliberations.

Baroness Buscombe: Just one quick thought, Lord Chairman. Perhaps in our deliberations, we should be looking at amending the rules on inquests. If there was more flexibility, so that for example the body did not have to be in the area, you could have an inquest where, under the current legislation on inquests and coroners’ courts, we have to look elsewhere for an expedient process.

Shailesh Vara MP: Sorry, I am not with you.

Baroness Buscombe: In terms of our deliberations, perhaps we should be looking not only at the Inquiries Act itself but at other Acts. It might be more expedient to amend other

Acts instead or in addition to amending the Inquiries Act. There might be other routes to more expedient processes for investigations, which is more of a generic term.

Shailesh Vara MP: My understanding is that the terms of reference for this Select Committee include the Inquiries Act but are more general. You may well make the decision that that is a route that you want to look into further.

Baroness Buscombe: We are very encouraged—I am certainly am—that you will take what we say seriously.

The Chairman: It is time to move on to recommendations.

Q343 Baroness Buscombe: On recommendations, many witnesses have told us that once an inquiry has reported, it is not for the chairman to pursue whether or how his recommendations are being implemented. Certainly, Lord Justice Leveson was of that view. What more could the Government do to persuade the public that they are giving full consideration to the recommendations?

Shailesh Vara MP: Given the public call for an inquiry, it is important that at the end of an inquiry, the Government make it clear and publicise what is being done, what recommendations are being followed through and, if they are not, why not. Certainly with the Mid Staffordshire inquiry, the chairman suggested that the relevant Select Committee should follow it up to see whether what he had recommended had had an impact. That is a route that is open to Select Committees, but they are independent and determine their own remits.

One thing that the Government should do is look at other ways to ensure that the public is aware of what happens at the end. Given the internet age, one thing is perhaps to make sure that the public can go easily online to see the information. That area needs to be addressed. I am not saying that I have the answers, but it is important for public confidence that the public know what is happening. Leveson, to an extent, has been carried through. For example, Leveson asked for there to be greater transparency with Ministers' contact with senior media people. All those meetings are now reported and put online at regular intervals. He suggested that there should be measures concerning data protection. As a department, we are considering whether to have a consultation on that sometime in the new year. The royal charter process has been followed through. In that case, it was so highly publicised that many people know what has happened, but in other cases we need to be a bit more proactive.

Baroness Buscombe: Would one route to that be not just using the internet to explain to the public but more detailed and explanatory media briefings, so that the media understand the process and the outcome of the process? The media are so often the architects of the minds of the people.

Shailesh Vara MP: They are, Baroness Buscombe. The nature of modern inquiries is that you have to take account of liaison with the media at the outset, during and afterwards. Depending on the level of inquiry, you may need a full-time person keeping the media informed on a regular basis. Yes, we need to change with the times, and in some cases it may be a daily feed.

The Chairman: Do you believe that Commons Select Committees ought to be a primary route for consideration to take forward the results of an inquiry?

Shailesh Vara MP: Lord Chairman, that option is available. I am not saying that that is the route. This area needs to be looked at, but I am not saying that it is the only route. It would

be for the Select Committee to decide whether to do it. The job of Select Committees is to act as a check on the Executive and they have their independence, so I am reluctant to advise them on how to do their job.

The Chairman: That may be, but what is the Government's response to the fact that the report could just go on a shelf?

Shailesh Vara MP: I would hope that reasons would be given if recommendations were not to be followed at the end of the inquiry. It may be that the recommendations are not to be followed—that is the prerogative of the Government—but I would like to think that an explanation would be forthcoming.

Q344 Lord Soley: Select Committees are a useful route, but is there not a very useful route that is missing here? Given that there have been complaints over the years that inquiries make recommendations that vanish and are not acted on—not necessarily all of them in one report, but a number of them—should there not be a duty on the relevant Minister to make a statement to the House on what will be progressed and what will not be? In that way, you get a clear response, and the public would then know, through their Parliament, what the Government's response is. I can think of a number of inquiries where recommendations have not been followed up, or not for a very long time. That needs to continuing disquiet and questions such as, "Why did we have an inquiry any way.?"

Shailesh Vara MP: Lord Soley, you raise an important point that we have not addressed so far: the role of Parliament. When an inquiry is set up, the terms of reference and the names of the chairman and the panel have to be put before Parliament. It could be in a Written Statement or in an Oral Statement. At the conclusion of an inquiry, there is a response from the Minister, likewise written and oral. Parliament itself acts as a good check. There are Members of Parliament, including Peers, who are very learned in specific areas. They, too, can ensure that the subject is kept in the public eye and raise matters in either House.

Lord Soley: So you would not object to a duty on the relevant Minister to respond to the recommendations made by any given inquiry?

Shailesh Vara MP: It is easy to make a commitment, but a lot of things out there need to be dealt with and addressed. It will be abundantly clear, if an issue is as major as Mid Staffordshire or Hillsborough, that there must be a Statement and an opportunity for MPs to question the Minister, and likewise in the upper House. But where you have a small investigation that has the relevant answers, it may not be necessary, so I would hesitate to make it a compulsion.

Lord Soley: Bearing in mind that it is the taxpayer who has paid for all this and Parliament is there to represent them, why should the Minister not be required to make to make a Statement?

Shailesh Vara MP: Parliament is looked after by the taxpayer, and there is nothing to stop Members of Parliament standing up to question the Prime Minister or the relevant Minister during departmental questions.

Lord Soley: That is slightly different from a requirement on the Minister to make a Statement on the recommendations.

Shailesh Vara MP: I come back to the point that it would it would depend on the circumstances. I am confident that where it is necessary, those Statements are made.

The Chairman: We come to the final question. Can we cope with this quite quickly? It is on the Freedom of Information Act

Q345 Lord Woolf: Do you want to make any comments about the interface between freedom of information legislation and inquiries both under the 2005 Act and outside it?

Shailesh Vara MP: The Freedom of Information Act poses matters that need to be considered; I accept that, Lord Woolf. Court papers and the like and non-2005 inquiries are not subject to Fol, but the Freedom of Information Act does apply to records. There are certain exceptions under Clause 19, but on the whole our difficulty is that the records are sent to the keeper of the National Archives, and everything that is kept by the National Archives is subject to the Freedom of Information Act. I accept that there is an issue here. It is an oddity in the sense that the 2005 Act has these impositions on it whereas other court papers and other inquiries do not. It needs to be looked at.

Lord Woolf: Do the Government have any view as to the solution?

Shailesh Vara MP: Not at the moment, except to recognise that there is an issue that needs to be looked at further.

The Chairman: Thank you very much indeed for coming along and giving us your time. I just mention again that if there is anything else about undertakings that have been made, it would be very helpful if we could have them before 17 December, so that we can consider them on when we meet on 18 December and in our work that follows.

Government Response to the House of Lords Select Committee on the Inquiries Act 2005

Introduction

1. This is the first of two responses, prepared by the Ministry of Justice (MoJ) and Cabinet Office (CO) on behalf of Her Majesty's Government, to:
 - the Committee's Call for Evidence issued on 13 June;
 - questions provided to MoJ officials ahead of their appearance before the committee on 25 June 2013; and
 - further points arising during the session on 25 June.
2. The second response will be submitted to the Committee by 2 September.
3. CO has produced draft guidance for Departments on establishing inquiries, drawing on experience to date and providing assistance with the practical application of the 2005 Act. This guidance is currently being finalised and will be made available to the Committee and published in due course.

The function of public inquiries

4. HMG's view is that an inquiry may be set up for one, or more, reasons. These include: to establish the cause of a major disaster, accident or other event involving significant damage or loss of life; to make recommendations as to how to learn lessons from such an event; to investigate allegations of serious public concern which require thorough and impartial investigation, and for which ordinary civil or criminal processes may not be adequate or appropriate.

Decision to bring forward legislation and interplay with the Public Administration Select Committee (PASC)

5. The Department for Constitutional Affairs (DCA) had been considering the need for the modernisation and consolidation of existing legislation on inquiries for two years when it published the consultation paper '*Effective Inquiries*' in May 2004. As noted in the foreword, the then Government felt that the discussion merited '*wider comment through a public consultation, in addition to the views of PASC*'.⁶⁹
6. Following the consultation, an Inquiries Bill was prepared which aimed to consolidate much of the previous legislation and to codify past practice for inquiries, including the setting up of inquiries, appointments to them, their procedures and powers, the submission of evidence and the publication of reports.
7. The DCA had built a good working relationship with PASC and there was close co-operation during the DCA's consultation exercise and subsequent policy development work. The DCA shared in full the responses to its consultation with PASC. It was considered that PASC's inquiry would complement the process of scrutinising the Bill. Baroness Ashton of Upholland, then DCA Parliamentary Under Secretary of State, addressed this issue, and that of the timing of the Bill, during second reading on 9 December 2004:

I recognise the fact that the Public Administration Select Committee has not yet reported. On the day of the Queen's Speech I wrote to the chairman of that

⁶⁹ DCA, *Effective inquiries: a consultation paper...*, May 2004, Page 2

committee with an offer to meet and discuss this. I trust that it will be of some comfort to noble Lords to learn that the Public Administration Select Committee will have reported before the Bill is considered in another place. Therefore I am willing to assume that we shall look carefully at the committee's conclusions before the Bill returns to your Lordships' House. It may be worth pointing out that originally we thought that the committee would report much earlier. However, we were ready to roll and we wanted to bring the Bill forward. It is not meant to do anything other than complement the deliberations of the committee; hence we are following carefully the evidence that has been brought forward.⁷⁰

8. PASC also commented on the Bill in the foreword of its paper '*Government by Inquiry*', published on 27 January 2005:

The Committee welcomes many of the provisions in the new Inquiries Bill, especially its rationalisation of the many statutes which currently regulate such inquiries.⁷¹

Ministerial Powers in the Inquires Act 2005

9. During second reading in the House of Commons on 15 May 2005, Christopher Leslie MP, then Parliamentary Under-Secretary of State for Constitutional Affairs, explained the inclusion of a range of Ministerial powers within the Bill.

10. HMG's view on Ministerial powers was further set out in a DCA press release when the Inquiries Act 2005 came into force:

The Act does not, as has been suggested, radically shift emphasis towards control of inquiries by Ministers. Instead, it makes clear what the respective roles of the Minister and chairman are, thereby increasing transparency and accountability.

It also stipulates that proceedings will be in public unless restrictions on access are imposed by either the Minister or the chairman. Unlike previous legislation, it specifies the grounds on which access can be restricted.

The Act does not give Ministers any power to decide what evidence an inquiry should hear. It gives inquiries full powers to seek out information within their terms of reference.⁷²

11. To assist the Committee a time line with web links to the relevant documents is at **Annex I**.

Inquiries not established under the 2005 Act

12. The Committee requested details on why the first Mid-Staffordshire inquiry, the Iraq Inquiry and the Detainee Inquiry were established outside the terms of the 2005 Act.

13. Andy Burnham MP, then Secretary of State for Health, set out his reasons for using the NHS Act 2006, rather than the 2005 Act, in a letter dated 10 September 2009 to the Inquiry chair, Robert Francis QC, which was published in the Inquiry report⁷³. (**Annex 2**)

14. The Iraq Inquiry and the Detainee Inquiry are both being conducted by a committee of Privy Counsellors. This model reflects the previous precedent of the Franks Committee (which looked at the run up to the Falklands conflict) and the desire to ensure that the inquiries

⁷⁰ Hansard: (9 December 2004 : Column 1013)

⁷¹ PASC report: Gov't by Inquiry, 27 Jan 2005, Page 3

⁷² DCA, "Statutory inquiries are modernised with commencement of Act", News release 140/2005, 7 June 2005

⁷³ Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust, Volume 1, Page 424

Government Response to the House of Lords Select Committee on the Inquiries Act 2005

focussed on lessons learned, and reflect the original intention that these inquiries should be able to take evidence in private (in order to have access to the most highly classified information).

15. The Memorandum on Post-Legislative Assessment of the Inquiries Act 2005 submitted to the Justice Select Committee by MoJ noted:

It is... argued [by HMG] that non-statutory inquiries have the freedom to devise their own procedures and protocols and this approach may be more helpful than having detailed rules. The Chilcot Inquiry team, for example, has been able to develop effective procedures tailored to the Inquiry's needs.⁷⁴

Calls for inquiries and public confidence in their outcomes

16. It would not be practical for HMG to monitor and record all calls for inquiries. As awareness of inquiries has grown it is likely that calls for inquiries would increase. It is also possible that victims' calls for inquiries have been given a more prominent position in the media following the growth of rolling news and social media as a reporting tool.
17. The Centre for Effective Dispute Resolution (CEDR) have undertaken surveys into public perceptions of inquiries. CEDR's findings and recommendations on inquiries in general are set out in their note of December 2012: *'Public Inquiries – Proposals for a Design Rethink.'*

Setting up an inquiry

18. The Ministerial Code includes a requirement that Ministers must consult the Prime Minister about any proposal to set up a major public inquiry under the Inquiries Act 2005.
19. When considering whether to establish an inquiry it will also be appropriate to consult other Ministerial colleagues and, depending on the circumstances and issues involved, the devolved administrations and outside bodies such as special interest groups or individuals directly affected by the issue or issues in question (including a previous administration in some cases).
20. Departments wishing to establish an inquiry should seek advice from the CO Propriety and Ethics Team on the different forms of inquiry and options. Possible forms of inquiry include inquiries conducted under the Inquiries Act 2005, statutory public inquiries under other legislation, non-statutory ad hoc inquiries (public or private), inquiries conducted by a Committee of Privy Counsellors or Royal Commissions. MoJ has policy responsibility for the Inquiries Act 2005 and by extension, an interest in 2005 Act inquiries more widely. It also regularly advises Departments looking to set up a 2005 Act Inquiry.

Appointment of judges

21. The Lord Chief Justice should be consulted where there is a proposal to appoint a judge or senior lawyer to chair an inquiry. This is facilitated via Lord Chancellor and Secretary of State for Justice.
22. HMG considers this the appropriate level of consultation.

Appointment of Counsel

23. The decision to appoint counsel is for the inquiry chair. If it is decided to appoint counsel the Chair should discuss selection of candidates with the Solicitor to the Inquiry, who can then make

⁶ Memorandum to the Justice Select Committee: Post Legislative Scrutiny of the Inquiries Act 2005, October 2010, Page 16

enquiries about availability and remuneration. Careful planning of legal input, for example short-term contracts or contracting out of the gathering of witness statements, can help in containing costs.

Costs and section 40 of the 2005 Act

24. Legal Aid is not available for inquiries. In general, legal support should be available for any individual against whom allegations may be made in the course of the inquiry and/or who may be the subject of criticism. Support may also be appropriate for others.
25. As a guide to general policy, in response to a question on 29 January 1990, the then Attorney General stated that:

In general, the Government accept the need to pay out of public funds the reasonable costs of any necessary party to the inquiry who would be prejudiced seeking representation were he in any doubt about funds being available. The Government do not accept that costs of substantial bodies should be met from public funds unless there are special circumstances.

26. The inquiry is not obliged to agree to public funding. Circumstances where it is unlikely to be appropriate include where the applicant's interest in the inquiry is insufficient to warrant public funding, or they belong to an organisation which should pay their own costs, or there is an umbrella group which could adequately represent their interests which is already being funded.
27. For inquiries conducted under the 2005 Act, the power for the Chair to make awards is set out in the Act and may be subject to qualification by Ministers under section 40. In practice, requests under section 40 will be in writing by the Secretary to the Inquiry to the sponsoring Department giving details of changes to the cost of legal representation. The Minister will then take a decision on whether to agree the budget increase.

**Ministry of Justice
July 2013**

**Annex 1 – References/timetable
Annex 2 – Mid-Staff letter**

Government Response (part I – Annex I)

Date	Event	Link
24 Feb 2004	PASC announces an inquiry into 'Government by Inquiry'	
06 May 2004	DCA publishes consultation paper: <i>Effective Inquiries</i>	http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/inquiries/inquiries.pdf
28 Sep 2004	DCA publishes summary of responses: <i>Effective Inquiries</i>	http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/consult/inquiries/inquiriesCPR-12-04.pdf
25 Nov 2004	Bill is introduced (House of Lords)	http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo041125/text/41125-01.htm#column_161
9 Dec 2004	2 nd reading (House of Lords)	http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo041209/text/41209-04.htm#column_984
27 Jan 2005	PASC report published: <i>Gov't by Inquiry</i>	http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/51/51i.pdf
28 Feb 2005	3 rd reading (House of Lords)	http://www.publications.parliament.uk/pa/ld200405/ldhansrd/vo050228/text/50228-04.htm#column_13
March 2005	CO publishes response to PASC report: <i>Gov't by Inquiry</i>	http://www.archive2.official-documents.co.uk/document/cm64/6481/6481.pdf
15 Mar 2005	2 nd reading (House of Commons)	http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050315/debtext/50315-07.htm#column_149
22-24 Mar 2005	Standing Committee (House of Lords)	http://www.publications.parliament.uk/pa/cm200405/cmstand/cminq.htm
5 Apr 2005	3 rd reading (House of Commons)	http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050315/debtext/50315-07.htm#column_14
7 Apr 2005	Royal Assent	http://www.publications.parliament.uk/pa/cm200405/cmhansrd/vo050407/debtext/50407-23.htm#column_1641
October 2010	MoJ submits 'Memorandum to Justice Select Committee: Post Legislative Scrutiny of the Inquiries Act 2005'	http://www.justice.gov.uk/downloads/publications/moj/2010/Post-Legislative-Assessment-Inquiries-Act.pdf

Government Response (part I, Annex 2)

*From the Rt Hon Andy Burnham MP
Secretary of State for Health*



POC1_443438

Robert Francis QC
3 Serjeants Inn
London
EC4Y 1BQ

Richmond House
79 Whitehall
London
SW1A 2NS

Tel: 020 7210 3000

10 SEP 2009

Dear Robert,

Thank you for updating me last week about the initial progress with the Mid-Staffordshire Inquiry. I am pleased you have already met with many of the key interested parties and gathered initial views about the work of the Inquiry.

We discussed two main points: the legal status of the inquiry and its terms of reference.

Legal Status

I announced the Inquiry to assist with both learning and healing in Mid-Staffordshire, for staff and patients. As such, and, given all the other reports that have been produced on Mid-Staffs, I remain of the view that it would be best served by an inquiry set up under the NHS Act rather than the Inquiries Act.

I do of course appreciate that the attendance of those witnesses you feel are pertinent to these aims is very important. Therefore, I do not rule out looking again at the status of the Inquiry once it has proceeded for a reasonable period, should you feel the co-operation of witnesses makes a compelling case to do so. However, I do hope that all concerned will understand that we will move on more easily in a spirit of co-operation and I would be grateful if you could emphasise this as your Inquiry proceeds.

Terms of Reference

We also spoke about the Inquiry's Terms Of Reference. You explained it has been suggested that the Inquiry's scope be expanded to also look beyond the Trust - at the wider system - in relation to the events at Mid-Staffordshire. I have been clear that the Inquiry's main purpose is to provide the opportunity for patients or their families to air their experiences and for any further lessons to be learned. In light of the reports already produced by the Healthcare Commission, Professor Sir George Alberti and David Collin-Thome - and the fact I am due to receive advice from the National Quality Board - I remain firmly of the view that an expansion of the scope is unnecessary and would detract from the need to focus on listening to families and patients

Moreover, any expansion in scope would risk preventing the Inquiry from being completed within the timescale I have set out. A swift Inquiry is important so as not to unduly distract staff at the hospital from delivering the improvements in services necessary for local



people. However, following the hearings, you could – if evidence compelled you to - offer additional observations in your final report, as long as they are set in the context of the changes that have been made since the events took place.

We also touched on the time period under consideration. You said you felt there was a need to extend it up until the date the Healthcare Commission's report was published in March 2009 – both as it seems a logical end point but also because of further cases brought to your attention. When we chose the timescale we had the following in mind:

- the need for the inquiry to be focused on lessons learned for the Trust today, and for a swift outcome so as not to distract hospital staff unnecessarily from delivering improvements;
- the fact that Dr David Colin-Thorne's report considered information going further back than 2005 and that Professor Sir George Alberti's report considered the standard of care in the Trust post 2008; and
- that certain ICRs will fall outside the dates 2005 – 2008 but will still be able to contribute to any analysis of key themes and lessons to be learned arising from that process

I am concerned that any increase in the time period could have repercussions for the tight timescale we have set out for the Inquiry's completion. However, I am content to accept your suggestion of moving the end point to the date of publication in March 2009 to allow it to consider individual cases up to that point - on the understanding that this does not jeopardise the timescales for the final report and that it does not lead to any expansion in the issues covered by the scope.

I am very grateful for the work you are undertaking and look forward to receiving your report by the end of the year.

Best wishes,

A handwritten signature in black ink that reads 'Andy Burnham'.

ANDY BURNHAM

Government Response to the House of Lords Select Committee on the Inquiries Act 2005 (part 2 of 2)

Introduction

1. This is the second of two responses, prepared by the Ministry of Justice (Moj) and Cabinet Office (CO) on behalf of Her Majesty's Government, to:
 - the Committee's Call for Evidence issued on 13 June 2013;
 - questions provided to Moj officials ahead of their appearance before the Committee on 25 June 2013; and
 - further points arising during the session on 25 June.
2. CO has produced guidance for Departments on establishing inquiries, drawing on experience to date and providing assistance with the practical application of the 2005 Act. This guidance will be made available to the Committee and published in due course.
3. HMG welcomes the work of this Committee and an Moj Minister will be pleased to answer further questions when they appear before the Committee on 11 December 2013.

2010 Post Legislative Assessment

4. Moj submitted the Post Legislative Assessment (PLA) of the 2005 Act to the Justice Select Committee in October 2010. The PLA concluded that:

...overall the Act has been successful in meeting its objectives of enabling inquiries to conduct thorough and wide ranging investigations, as well as making satisfactory recommendations. We do, however, take the view that the Act can only enable effective inquiries if the inquiry is conducted by a chairman with the appropriate skill set and who is supported by an appropriately experienced inquiry team. We have no evidence of any serious suggestion that the Act should be repealed in any substantive way. The overwhelming evidence, however, is that the Inquiries Rules as currently drafted are unduly restrictive and do not always enable the most effective operation of the Act.⁷⁵
5. HMG continues to monitor the progress of inquiries and the effectiveness of the 2005 Act and agrees with the conclusions of the 2010 PLA. In producing this response Moj consulted a number of 2005 Act inquiry teams and their views also supported the findings of the PLA in relation to the 2005 Act.
6. One issue that has arisen since the PLA is that the 2005 Act makes no provision for delegation of functions pending the temporary absence of the chairman. The chairman of the Vale of Leven Inquiry was absent from duty through illness for several months. During this period the work of the Inquiry continued but no awards of expenses could be made under section 40, and no other matters requiring the chairman's specific instructions could be taken forward. Section 11 only provides for the Minister to terminate the chairman's appointment in such circumstances, and not to put in place any interim measure. HMG plans to keep this issue under review.

The Inquiry Rules 2006

⁷⁵ Memorandum to the Justice Select Committee: Post Legislative Scrutiny of the Inquiries Act 2005, October 2010, Page 18

7. The 2010 PLA of the Inquiries Act 2005 noted that the Inquiry Rules 2006:

...lack an appreciation of the practical realities of inquiry proceedings, are too prescriptive and can inhibit the chairman's flexibility...⁷⁶
8. In a climate of reducing resources, revising the current rules has not been a legislative priority. However, ongoing discussions with inquiry teams have continued to show areas in which the 2006 Rules could be improved and this issue will be kept under review.
9. HMG will also consider the findings of the Scottish Government which launched a consultation in March 2012 on a set of draft amendments to the Inquiries (Scotland) Rules 2007 with a view to making them more user friendly and relevant.
10. **Annex 1** sets out issues with the 2006 Rules which have been raised with HMG by chairmen, inquiry teams and sponsor teams.

Cost of inquiries

11. The issue here is not so much whether inquiries are funded, but rather the most effective way of funding them. Indeed, as HMG continues to work in a climate of reducing budgets, scrutiny of the cost of inquiries and the need for them to be controlled grows in importance. **Annex 2** gives the cost of all 2005 Act inquiries which shows that recent inquiries have tended to be cheaper and quicker than earlier ones.
12. HMG has continued to receive feedback that section 40 of the 2005 Act is useful as a means of controlling witness costs and that section 17(3)⁷⁷ is an important guiding principle when considering the proportionality of undertaking certain tasks. There have also been pragmatic solutions to controlling costs, such as using Government premises.
13. It is also important that accurate financial records are kept and robust financial projections are made as well as ensuring close scrutiny of the day-to-day expenditure of the Inquiry, with the secretariat challenging it where necessary. To assist with these processes HMG has strengthened the sections on controlling costs in the CO guidance, along the following four themes:
 - a. Requiring terms of reference to provide explicitly that the inquiry will proceed speedily and that an account of expenditure will be provided at six monthly intervals.
 - b. Choosing an appropriate chairman and making it clear that they will be accountable for costs. Sometimes an expert is more appropriate than a judge. Chairmen should become familiar with texts on costs protocols so that they can be involved in the inquiry's costs from the outset and maximise chances of keeping costs under control.
 - c. Reining in legal costs. Alongside running costs, legal costs are an inquiry's biggest expense and limits should be established at the outset. Lessons learned from the Bloody Sunday Inquiry (when lawyers began work before their fees were

⁷⁶ Memorandum to the Justice Select Committee: Post Legislative Scrutiny of the Inquiries Act 2005, October 2010, Page 16

⁷⁷ Inquiries Act 2005 section 17(3) : "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.)"

agreed) have led to pragmatic control measures being introduced in other inquiries. It is for consideration whether awards of funding made under section 40 of the 2005 Act could be capped at legal aid rates whilst Rule 7 of the 2006 Rules provides that a single legal representative can represent core participants with similar interests.

- d. Giving inquiry costs greater transparency. Once an inquiry is established, it is very difficult to limit the inquiry through its budget and ministers are rightly reluctant to act in a way which could be seen as trying to fetter or control it. Inquiries have always guarded their budgets as a sign of their independence but there is no reason why they should not be required to be more transparent and take greater responsibility in this area. This could include management statements, financial memoranda and costs protocols being put in place alongside efficiency measures such as sharing premises.

Whether preliminary hearings are held

14. It is normal practice for chairmen to hold preliminary hearings to invite evidence, set out basic procedures and, where appropriate, provide for core participants, representation and public funding.

Ministerial powers

15. The Inquiries Act 2005 codified existing, confusing legislation which allowed for the setting up of inquiries. It clarified the respective roles of the responsible Minister and the inquiry chairman, increasing accountability and transparency. Ministers have the power to set up, or not to set up, an inquiry, to set its Terms of Reference, appoint the chairman and inquiry members, suspend or terminate the inquiry and to restrict the publication of documents. HMG believes that the responsibilities set out for Ministers in the 2005 Act are still appropriate as is the balance of power with the chairman and inquiry panel. HMG does not believe that a proliferation of these powers would be appropriate.
16. When considering whether to establish an inquiry under the 2005 Act, Ministers must consult the Prime Minister, as set out in the Ministerial Code. The decision is not made in isolation by an individual minister, but through consultation with the Prime Minister, other Government Departments and Ministers, where relevant, and other stakeholders. Once established an Inquiry is independent of HMG and is not liable to interference or restriction by Ministers other than as provided under the Act.
17. Section 14 of the Act gives Ministers a power to bring an inquiry to an early end by issuing a notice to the chairman. The Minister must also lay a copy of the notice before the relevant Parliament or Assembly. That notice must contain the reasons for the early end to the Inquiry. HMG believes the power in section 14 is sufficient to bring an inquiry to an earlier end where necessary and that the Act contains appropriate safeguards against the inappropriate use of such a notice.

Establishing an inquiry

18. Ministers take a number of factors into account when deciding whether to establish an inquiry, including whether the public interest will be served by an inquiry rather than another form of investigation and whether that public interest will outweigh the costs. Ministers will consult Ministerial colleagues and other interested parties when considering whether to set up an inquiry. The Ministerial Code states that Ministers

Government Response to the House of Lords Select Committee on the Inquiries Act 2005 (part 2 of 2)

must consult the Prime Minister. The 2005 Act make it clear that inquiries must be set up only where the public interest is served and Ministers are guided by this principle when making their decision.

19. Ministers can, and continue to, set up inquiries otherwise than under the 2005 Act. In some circumstances the greater procedural freedom available to inquiries established otherwise than under the 2005 Act is appropriate. As noted in the 2010 PLA, the Iraq Inquiry provides a good example of where an inquiry set up outside the 2005 Act was able to create procedures best suited to the evidence that was to be taken.

Inquiry recommendations

20. We do not believe it would be desirable, or necessary, to introduce a requirement for an inquiry chairman to review the implementation or effectiveness of recommendations after the inquiry has ended. At the point that the inquiry report is published the inquiry ceases to function and it is the role of Parliament, through the work of Select Committees, to provide further scrutiny.
21. It would seem more prudent for the chairman to recommend that an organisation periodically publishes a report detailing progress in relation to actions, as Robert Francis QC did upon the conclusion of the Mid-Staffordshire Inquiry. This would also avoid the expense of reconvening the inquiry.

Freedom of Information Act 2000

22. The wide definition of 'inquiry record' and the requirement to transfer it to a keeper at the end of an inquiry raises a number of freedom of information issues. This is because section 18(3) of the Inquiries Act 2005 removes the exemption of certain inquiry records from disclosure which is provided under section 32(2) of the Freedom of Information Act 2000 after the inquiry records have been lawfully passed to, and are held by, a public authority in accordance with the Inquiry Rules 2006. There are also significant concerns in relation to the preservation of confidentiality after the end of an inquiry.
23. Under section 19 of the 2005 Act, restrictions may be imposed on the disclosure or publication of any evidence or documents given, produced or provided to an inquiry by being specified in a restriction notice or order. Under section 20(5), restrictions imposed under section 19 continue in force indefinitely, unless the terms of the relevant notice or order expire at the end of the inquiry or at some other specified time. However, section 20(6) provides that restrictions do not apply to a public authority (or a Scottish public authority) in relation to information that has lawfully been passed to the authority. This raises concerns in relation to anonymity decisions where witnesses have been granted anonymity, supposedly for all time. At present, the documentation surrounding such applications and determinations is included within the definition of inquiry record. It is difficult to see how these documents could subsequently be lawfully retained by a Government department because that of itself might breach the anonymity granted. HMG plans to keep these issues under review.

Inquiry Evidence

24. HMG is of the view that evidence given to an inquiry is admissible in any subsequent civil or criminal proceedings unless there is a legal prohibition on the disclosure of particular types of evidence, or specific arrangements have been made e.g. witnesses giving evidence which may lead to self incrimination.

The contribution made by lawyers

25. HMG supports the position that was put to the Committee by the Azelle Rodney Inquiry, namely:

“We believe that the inquisitorial approach, led by Counsel to the inquiry, is the best model. The alternatives are to adopt an adversarial approach or to have the questioning led by the panel. The adversarial model is not suited to discovering the truth, and would add stress to what is almost inevitably a charged atmosphere of public concern. Having the panel lead the questioning would tend to give rise to an impression that it has made its mind up about some issues. Further, without the meticulous preparation and mastery of the materials that is expected of Counsel to the inquiry, matters may be overlooked. Finally, because Counsel to the inquiry is able to discuss the evidence with witnesses and other lawyers involved, he or she is able to discern what evidence may be capable of agreement. It follows that we believe that lawyers acting for the inquiry generally make the appropriate contribution.

We have more mixed views about the contributions made by lawyers representing those complaining or complained against. That role is by its nature either aggressive or defensive, and some lawyers are incapable of fulfilling it positively so as to aid the inquiry to allay public concern by demonstrably airing all the evidence. In our experience, those lawyers with a public-law background are best able to advance their clients’ interests while assisting the panel.

It is easy enough for people to represent themselves provided that the inquiry team makes provision for that. We have experience of appointing team members dedicated to witness handling and witness support, which proved successful.⁷⁸”

Involvement of the judiciary in inquiries

26. HMG believes that the current level of judicial involvement in inquiries is appropriate. When appointing a chairman, each inquiry should be considered on its own merits, and a judge or retired judge should not necessarily be the default position. Depending on the circumstances, the chairman and panel may need to be legally qualified or have expert professional knowledge.

Ministry of Justice September 2013

Annex 1 – Cost and length of 2005 Act Inquiries Annex 2 – Issues with the Inquiry Rules 2006

⁷⁸ Michael Collins, Judi Kemish and Ashley Underwood QC – Written evidence to Select Committee on the Inquiries Act 2005

COST AND LENGTH OF 2005 ACT INQUIRIES

Inquiry	Dates	Duration	Cost
The Billy Wright Inquiry	November 2004 to October 2010	5 years 11 months	£29.8m
The Robert Hamill Inquiry	November 2004 to February 2011	6 years 3 months	£33m
The E. coli Inquiry	March 2006 to March 2009	3 years	£2.35m
The ICL Inquiry	February 2008 to July 2009	1 year 5 months	£1.91m
The Fingerprint Inquiry	March 2008 to December 2011	3 years 9 months	£4.75m
The Penrose Inquiry	April 2008 to present (final report expected by end of 2013)	4 years 4 months (ongoing)	£9m at May 2012
The Baha Mousa Inquiry	August 2008 to September 2011	3 years 1 month	£13m
Inquiry into the outbreak of C. difficile in Northern Health and Social Care Trust Hospitals	October 2008 to March 2011	2 years 5 months	£1.8m
The Bernard (Sonny) Lodge Inquiry	February 2009 to December 2009 (ad hoc investigation began in September 2008)	10 months	Not yet known
The Vale of Leven Hospital Inquiry	October 2009 to present (target end date autumn 2013)	3 years 10 months (ongoing)	The costs will be published at the conclusion of the Inquiry.
The Al Sweady Inquiry	November 2009 to present (target end date in 2014)	3 years 9 months (ongoing)	£19m at 31/07/13
The Azelle Rodney Inquiry	June 2010 to July 2013	3 years 1 month	£2.46m at 30 June 2013
The Mid Staffordshire NHS Foundation Trust Public Inquiry	June 2010 to February 2013	2 years 8 months	£13.7m

Government Response to the House of Lords Select Committee on the Inquiries Act 2005 (part 2 of 2)

The Leveson Inquiry	July 2011 to November 2012	1 year 4 months	£5.4m
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ISSUES WITH THE INQUIRY RULES 2006

The issues set out in this document reflect feedback on the Inquiry Rules 2006 received from inquiry chairs, inquiry teams and sponsor Departments. They do not necessarily reflect the view of HMG.

Rule 2: Interpretation of “Inquiry record”

- The reference to ‘*all documents given to or created by an inquiry*’ is considered too wide. It could include anything from emails and correspondence to documents generated internally by an inquiry, including legally privileged material, advice, notes of internal debates and meetings through to early drafts of witness statements and the report.
- This may create difficulties in identifying the documents to be retained and those which may properly be disposed of at the end of an inquiry.
- The definition of ‘Inquiry records’ could be amended to include only materials which merit permanent preservation but not day-to-day working papers and papers and general administration.

Rule 9: Request for written statements

- This rule requires an inquiry to send a written request for a statement to any person from whom it proposes to take evidence.
- Rule 9 currently does not provide for instances where the inquiry would want a witness to attend at a specific place and time to provide further evidence by way of a statement taken by the inquiry panel, counsel or solicitor.

Rule 10: Oral evidence

- The rationale for this detailed rule is that witnesses should not be cross-examined by all legal representatives to avoid lengthy, expensive hearings.
- Comments have been received that this rule is too prescriptive and decisions on oral evidence could be left to the chairman’s general power of discretion under section 17(1) of the 2005 Act.

Rule 11: Opening and closing speeches

- Some argue rule 11 is inconsistent with section 17 of the 2005 Act as the entitlement for core participants to make opening and closing statements is contrary to the principle under section 17(1) of the Act; that the chairman is responsible for directing the conduct and procedure of the Inquiry.

Rule 13: Warning letters

- This rule stipulates that the inquiry must not include any significant or explicit criticism of a person in the report unless the chairman has sent that person a warning letter and the person has a reasonable opportunity to respond.
- In the interest of consistency, rule 13(1) should be amended so that a warning letter is also sent to the legal representatives of a person who is to receive a warning letter.
- It has been suggested that rule 13 be amended so that warning letters should only be sent if the criticism in the report is both significant **and** explicit, rather than either/or.
- Some core participants who have received warning letters have not been clear how they could answer the questions being raised and properly defend themselves without breaching the duty of confidentiality.

Rule 17: Inquiry Reports

Government Response to the House of Lords Select Committee on the Inquiries Act 2005 (part 2 of 2)

- This rule provides for core participants and their legal representatives to have access to the final or interim report prior to publication.
- Some inquiry teams consider this creates a risk of the report leaking, and would prefer to allow privileged but private access in the hours prior to publication.
- Others have noted that the rule could benefit from specifying a time limit for how far in advance of publication the copy must be given.
- It could be changed simply to require the chairman to 'make the report available' which would allow the inquiry team to devise pragmatic solutions, such as private reading sessions, based on the circumstances and physical location of the inquiry.
- Some argue that this rule conflicts with section 24 of the 2005 Act which requires the chairman to deliver his report to the Minister and publication is thereafter a duty of the Minister.

Rule 18: Records management

- This rule requires the chairman to ensure that the record of an inquiry is comprehensive and well-ordered, and, at the conclusion of the inquiry, transfer custody of the record to the appropriate public records office.
- This makes the scope of the duty upon the chairman very broad given the definition of 'inquiry record' explained above under Rule 2.

Rule 31: Cost Assessments

- This rule sets out detailed provisions on costs assessments where agreement cannot be reached over a disputed bill. This includes a requirement to engage a costs assessor or call on the solicitor to issue a final assessment.
- Amending this rule to give the chairman the discretion to be the final arbiter in disputes on costs would be a more efficient approach.
- NB Some Inquiry teams felt the current provision operated successfully and should be retained.

Government Response – supplementary evidence submitted by Shailesh Vara MP, Parliamentary Under-Secretary of State for Justice

i. Stephen Lawrence murder, Operation Herne and the Mark Ellison QC Review

The Committee asked why the Home Secretary decided against a 2005 Act inquiry to investigate allegations that undercover police officers were deployed to attempt to smear Stephen Lawrence's family after Stephen's murder, instead deciding to investigate the allegations under Operation Herne and the Mark Ellison QC Review.

I understand that the Home Secretary considered a range of options including a statutory inquiry under the 2005 Act, to ensure that these very serious allegations were investigated thoroughly. The needs and wishes of the Lawrence family were a vital part of her decision-making. The Home Secretary decided the most effective option was to investigate the allegations firstly as part of Operation Herne's investigation into undercover deployments by the Metropolitan Police Special Demonstration Squad led by Chief Constable Mick Creedon; and secondly within Mark Ellison QC's review into allegations of corruption in the original investigation into the death of Stephen Lawrence.

The reasons for the Home Secretary's decision were that:

- the allegations were potentially criminal in nature, Operation Herne was already a criminal investigation and a public inquiry cannot determine criminal liability;
- any public inquiry could not commence until after Operation Herne had reported to avoid prejudicing a subsequent trial; and
- the Ellison review had already been looking into the Stephen Lawrence murder investigation and the Macpherson Inquiry and would be able to report before an inquiry would be likely to start.

In her statement to the House on 24 June 2013, the Home Secretary explained that she had spoken to Mr Ellison to encourage him to go as far and wide as he would like in his investigation. She had also spoken to Chief Constable Mick Creedon to make sure that Mr Ellison would have access to any relevant material uncovered in the course of Operation Herne.

The Home Secretary will consider the findings and recommendations of both reports before coming to a conclusion as to possible next steps, which she will announce as soon as possible.

Government Response – supplementary evidence submitted by Shailesh Vara MP, Parliamentary Under-Secretary of State for Justice

ii. Cabinet Office Guidance for Inquiry Chairs and Secretaries, and Sponsor Departments

The Committee asked which Cabinet Office Minister and Permanent Secretary had responsibility for inquiries under the 2005 Act.

Cabinet Office has subsequently confirmed its guidance role and its role in securing the Prime Minister's approval for an inquiry under the Act. It has advised that, therefore, ultimately the responsibility falls to the Prime Minister and, at official level, to the Cabinet Secretary.

The Committee also asked whether there had been any informal lessons learned exercises following inquiries carried out under the 2005 Act. Cabinet Office has advised that, while the guidance encourages departments/inquiry secretaries to complete such an exercise, this is a matter for individual departments on the completion of inquiries.

iii. Inquiry Into Historical Institutional Abuse Act (Northern Ireland) 2013

The Committee asked why the Northern Ireland Assembly passed the Inquiry Into Historical Institutional Abuse Act (Northern Ireland) 2013 instead of making use of the 2005 Act.

Having subsequently checked with the Northern Ireland Office I am afraid that I have little to add to the answers I gave on 11 December. I understand that, while the Northern Ireland Office worked with and supported the Northern Ireland Assembly on this issue, it was ultimately the decision of the Office of the First and Deputy First Minister to introduce the Bill in the Northern Ireland Assembly, rather than to use the 2005 Act.

Rt Hon Dame Janet Paraskeva – Written evidence

1. Public inquiries should be a response to matters of considerable public concern and provide information about, and greater transparency and understanding of the events under investigation.
2. Setting up inquiries by ministers could restrict the remit of the Inquiry team in relation to that minister's own and other related departments. It allows for collusion and might affect the choice of panel member.
3. The balance of the power of roles is skewed towards ministers as they decide what is published.
4. The outline of the inquiry could be handed to the judiciary and all other matters, terms of reference, appointments and publication of documents etc, be in the hands of the appointed judge. There does not seem to be any other appropriate institution and the appointment of an individual would likely revert to choice by a minister.
- v. Certainly the decisions on publication should be in the hands of the panel/judge in the chair and not the initiating minister .
6. Don't know
7. There is a danger that the role of ministers could prevent the setting up of inquiries into their own departments. Ministers can also use convention to prevent information coming into the public domain and can assert their authority either directly or through their senior team.
8. Judicial involvement might be increased to give greater independence to the panel.
9. Lawyers make a vital contribution to the work of inquiries. Their training and experience is far more appropriate than that of civil servants especially in sourcing, scanning and referencing documents which might be needed for further investigation and in taking evidence itself. Inquisitorial processes search for the truth and are therefore more appropriate. Individuals concerned should be afforded some legal representation.
10. Inquires could be made more efficient by the provision of swiftly appointed and well qualified support teams. Potential conflict in support teams e.g. for civil servants eventually returning to their home department which itself might be under investigation, should be minimised.
11. Curtailing procedures is already in the minister's gift. It might be a power available to the chair of the panel or to an independent observer whose role would be to monitor progress and hear any concerns of those involved. Such an observer, for example, might be a subject specialist.
12. Yes. Non statutory inquires can play an important role although their status might be limited.

13. Yes

14. Inquiries are controlled by the executive and it is often the actions of that executive which are under investigation. Greater transparency in early actions setting up the inquiry could help a little, but ultimately, the Act seems to empower the executive not the judiciary in any decision relating to public awareness and therefore any public confidence that might follow.

15. Evidence should be available in confidence if necessary to protect those individuals involved from inappropriate press comment.

16. There needs to be a procedure involving the inquiry panel/chair to monitor the implementation of any recommendations with the possibility of a review after a year with published results.

17. The panel must be given greater freedom to organize its affairs with safeguards of confidentiality of proceedings if it deems that appropriate. A panel might also want/need to change/amend its support mechanism or indeed its own membership within any protocol agreed at the start of the inquiry.

18. There are clearly some matters which should be kept confidential and not subject to FOI requests. These matters would, in the opinion of the judge as chair of the panel, be those which could endanger national security or bring about danger to life. However some information is over classified and those making the decisions on classification so junior that the level of risk to national security might be over played. The rules of engagement with other partner countries may also need review as such classification deemed to affect e.g. the special arrangement with the US could lend itself to over use.

Rights Watch UK, Inquest and Liberty – Oral evidence

Rights Watch UK, Inquest and Liberty – Oral evidence

[Transcript to be found under Inquest](#)

Rights Watch – Written evidence

RW (UK) engagement with Inquiries:

- Extensive engagement and advice with the families of those involved in the Bloody Sunday Inquiry
- Extensive engagement and advice to the family and legal representative of Patrick Finucane
- Work with David Wright (father) in his engagement with the Billy Wright Inquiry, submissions to the Billy Wright Inquiry, advice to David Wright in his legal challenge to the statutory basis of the Billy Wright Inquiry when subject to conversion under the Inquiries Act 2005 (the Act)
- Work with the family of Rosemary Nelson in their engagement with the Rosemary Nelson Inquiry including written submissions and oral testimony to the Rosemary Nelson Inquiry
- Work with the family of Robert Hamill in their engagement with the Robert Hamill Inquiry
- Work with the families engaged with campaigning for inquiries into the Ballymurphy Massacre 1971 and the Omagh Bomb 1998.
- Submissions throughout the legislative progress of the Inquiries Bill 2005 and submissions to the Ministry of Justice consultation on the Inquiry Rules 2006.
- Submissions to the Baha Mousa Inquiry and a BIRW Report into the Baha Mousa Inquiry and its Report
- Submissions to the Iraq Inquiry (Chilcot)
- Lobbied as part of the NGO consortium against the Detainee Inquiry (Gibson)
- Advice to the legal representatives of the family Azelle Rodney in their engagement with the Azelle Rodney Inquiry.
- Submission to the Mid-Staffordshire NHS Foundation Trust Public Inquiry (Francis).
- Submission to the Consultative Group on the Past (Northern Ireland) on Dealing with the Past
- Monitoring witness treatment and the application of the Istanbul Protocol during the Al-Sweady Inquiry (Thorbes).

Rights Watch (UK) views the statutory inquiry established under the Act (forthwith the statutory inquiry) as an independent investigation into state violations of human rights including the failure by the state to protect human rights. This would include the human rights of an individual (Baha Mousa), a group of individuals (press standards) or a community (Mid-Staffs).

We follow the questions asked by the Committee in its Call for Evidence.⁷⁹

I. What is the function of public inquiries? What principles should underlie their use?

A statutory inquiry established by a Minister is a fact-finding mechanism which leads to recommendations. The establishment of facts enables recommendations to be made when facts are analysed against a range of criteria to recommend change. The statutory inquiry established under the Act exists together with the non-statutory inquiry (for example, The Iraq Inquiry (Chilcot)), the inquest (for example, Alexander Litvinenko), the public body inspection (for example, Her Majesty's Inspector of Constabulary (HMIC)) or specific mechanisms responding to particular circumstances (for example, the Ministry of Defence Iraqi Historical Allegations Team (IHAT) and the Police Service of Northern Ireland Historical Allegations Team (HET)) and should also include the work of the various Ombudsman.⁸⁰

⁷⁹ See: http://www.parliament.uk/documents/lords-committees/Inquiries%20Act%202005/Call%20for%20Evidence_2_final_version.pdf

⁸⁰ On an historical note we remember the 'spirit of public good' that infused the work of Royal Commissions and the maintenance of probity in public life as captured within the spirit of the Salmon Principles.

The statutory inquiry should be a fact finding investigation with the power to make recommendations to the establishing authority or to a relevant prosecuting authority or other relevant body. The principles of the statutory inquiry should be:

- Independence
- Promptness
- Thoroughness
- Subject to public scrutiny (the presumption of openness)
- Capable of attributing responsibility
- Capable of allowing victim participation (to safeguard their legitimate interests)

These are the principles developed by the European Court of Human Rights (ECtHR) through its judgments on human rights violations in relation to the right to life (Article 2) of the European Convention on Human Rights (the Convention). We would suggest these principles would also apply to inquiries engaging Article 3 (the right not to be ill-treated) and Article 8 (the right to private and family life). In relation to violations of Article 2 and 3 the statutory inquiry should also adopt the principles of the Istanbul Protocol and the best practice set out in the UN Special Rapporteur for Torture Report on Commissions of Inquiry.

Two further comments can be added. First, we are minded of the comment of Lord Butler that a government inquiry can be “a lightning conductor for the anger of the public, and particularly of those who have been bereaved or suffered personally”. Second, we note the comment of Dr Karl Mackie in his evidence to this Committee on 17 July 2013 when he said that the inquiry is both jewel in the tool box of public accountability and that in addition to offering redress and repair, the inquiry could be an aspect in a restorative justice process in offering a form of catharsis to the victims.

2. To what extent does the Inquiries Act 2005 reflect those principles?

The Act partially reflects these principles.

- Statutory inquiries are not independent in that they are established by a Minister of the government who retains extensive residual powers in relation to the timing, conduct, funding and conclusion of the inquiry and the publication of its findings and recommendations.
- The promptness requirement has been adhered to in relation to the inquiries established under the Act. However, litigation between victims and the government has resulted in delays by the Minister responsible for establishing an inquiry when the Minister’s Department has been a litigant.
- Inquiries under the Act are not by default public. The establishing Minister retains powers to restrict public access (by restriction notice section 19(2) (a)). Matters of national security and victim protection can restrict access.
- Section 2(1) states that an inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability. Section 2(2) states an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

3. Does the Act achieve the right balance between the respective roles of Ministers, Parliament, the courts and inquiry panels themselves in making decisions about inquiries?

Given the above it cannot be said that the right balance has been struck between the executive, the legislature, the judiciary and the inquiry panels themselves. Given that the executive maintains residual control over the key elements of statutory inquiry process they cannot be said to be independent. One recent example of political interference is the decision to refuse the Coroner’s request for the establishment of an inquiry into the murder of Alexander Litvinenko. The request

was refused, despite the weight of authority. The government acknowledged that political and diplomatic considerations contributed to its decision.⁸¹

4. In particular, is it right that ministers should have the power to set up, or not to set up, an inquiry, to set its terms of reference, appoint the chairman and members, suspend or terminate the inquiry, and restrict the publication of documents?

It cannot be right that a Minister has the power to establish, set the terms of reference, appoint the members and to suspend, terminate or otherwise restrict public access and ultimately to decide to restrict the publication of documents including the final Report of a statutory inquiry. The key power here is the decision to establish an inquiry under the Act, the role of the Cabinet Secretary and the civil service in this decision and the fact that it is the Minister's Department which will be the subject of the investigation of the statutory inquiry as it was that Department which carries the procedural obligation to discharge the duties arising out of the relevant Articles of the Convention, if applicable. These extensive powers, if exercised at all, would be politically embarrassing for a Minister of the government in that their exercise would look like political interference (Lord Richard commented during the oral evidence session of the Committee on 17 July 2013: "In all the evidence you have given us is that decisions as to whether to have an inquiry or not to have one are capricious or they are self-serving. They are basically a Government defence mechanism.")

5. Should other persons have any of these powers in addition to or instead of ministers?

The decision to establish a statutory inquiry could be taken by:

- A decision of an appellant judge; there might also be a role for the Attorney-General
- A decision of a Parliamentary Committee on Inquiries (which could be *ad hoc*)
- A statutory authority such as a Permanent Commission of Inquiry
- A quasi statutory authority such as a Public Truth Commission

We suggest that Parliament could be restored with the powers to approve or disapprove both the establishment and termination of a statutory inquiry (see section (1) (1) of the Tribunals of Inquiries (Evidence) Act 1921).

6. Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but ministers declined to set one up? Are there cases where an inquiry has unnecessarily been set up to deflect or defer criticism?

This question engages with both statutory and non-statutory inquiry forms. We are of the opinion that the 15 inquiries established under the Act have been needed (this includes the Al-Sweady Inquiry (Thorbes) which is in session). Two non-statutory inquiries (called Privy Council Inquiries) relating to the Iraq War 2003 and the "War on Terror" were established by the Cabinet Office: The Iraq Inquiry (Chilcot) is still to report because of government intransigence relating to disclosure and The Detainee Inquiry (Gibson) was suspended because of concerns by NGOs and potential core participant victims about its independence, its terms of reference and transparency, in addition to the fact that its work was affected by on-going police investigations and pending prosecutions. An inquiry into systemic human rights violations by (and against) members of the British Army in Iraq (and Afghanistan) would have stemmed continuing litigation at public cost. Civil servants at the Department of Health advised the then Secretary of State against a public inquiry in relation to human rights violations at Mid-Staffordshire NHS Foundation Trust, the then Secretary of State did not follow this advice. In some quarters of the Executive and the civil service there seem to be a presumption against inquiries (As Lord Trefgarne commented during the oral evidence session of the

⁸¹ As reported at: <http://www.theguardian.com/politics/2013/jul/19/theresa-may-alexander-litvinenko-inquiry>

Rights Watch – Written evidence

Committee on 17 July 2013: “The predisposition is always against a public inquiry, I can tell you that for nothing”)

7. Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?

We are concerned that as Ministers, civil servants and the Cabinet Office become more attuned to the impact of statutory inquiries there will be greater potential for political interference. As a consequence inquiries will lack the independence and transparency required to gain and maintain the trust of participants and the wider public.

8. Is the degree of involvement of the judiciary in inquiries appropriate?

It is not a prerequisite that the judiciary are required to service statutory inquiries under the Act. As to date inquiries under the Act have been serviced in a number of ways. The most high profile have been chaired by a judge sitting alone (e.g. Baha Mousa) (Gage), or by judge led panel (e.g. Rosemary Nelson) or by a QC (Mid-Staffs) (Francis). The statutory inquiry into the death of Bernard Lodge was chaired by a non-lawyer (Stow). Nevertheless, inquiries under the Act have been serviced by a Counsel to the Inquiry, a solicitor to the inquiry and a civil servant as secretary to the inquiry.

We are of the opinion that if the fact finding examination is to have integrity it must be inquisitorial and the forensic skills of counsel are necessary to elicit the facts. In addition, we are of the opinion that a judge led inquiry has the authority to annotate the facts and make recommendations thereon. Therefore, we consider the level of judicial involvement, certainly when human rights violations are engaged, is appropriate.

9. Do lawyers acting for the inquiry or representing those complaining or complained against make an appropriate contribution? Is an inquisitorial or an adversarial process more appropriate for argument before inquiries? Is it easy enough for people to represent themselves?

We are of the opinion that an inquisitorial process is the most suitable model of fact-finding within the statutory inquiry framework (although not exclusively for other forms of investigation). Facts evidenced through written or oral testimony must be examined (tested) forensically but not necessarily through the model of cross-examination and re-examination. The model adopted by the Baha Mousa Inquiry was successful; the model adopted by the Rosemary Nelson Inquiry was not successful. This was because all questions from the legal representatives of the core participants were directed through Counsel to the Inquiry and therefore witnesses could not identify the source or motive of the line of examination. Given that an inquiry can attribute responsibility (wrongdoing) it is necessary that a witness be protected by legal representation. Whilst we agree that the Salmon Principles require examination as to their contemporary relevance we consider that Article 6 (right to a fair trial) of the Convention must be read together with the Salmon Principles to ensure procedural fairness which includes legal representation met out of public funds (see also: *Re A*, the Bloody Sunday Inquiry case dealing with anonymity of soldiers).

10. Some inquiries set up before the Act was passed were both lengthy and inordinately expensive. An aim of the Act was to make inquiries briefer and less costly. Has it achieved this? If not, what could be done to improve this?

The duration of an inquiry cannot be proscribed as the extent of a statutory inquiry's examination will depend on the complexity of the facts under scrutiny. Our experience is that inquiries under the Act have been efficient and cost effective. However, a key reason for this has been the nature of the facts and the character of the panel, specifically of the chair. Another factor which has contributed to delays in the work of statutory inquiries has been the issue of the disclosure of material by the government.

Rights Watch – Written evidence

11. Inquiries are often asked to report by a particular date, and often fail to do so. Should there be a power to curtail an inquiry's proceedings? If so, exercisable by whom?

See our response to question 5 above.

12. Is it right that ministers can and do continue to set up inquiries otherwise than under the Act? Is there any justification for this?

See our response to question 6 above. We are of the opinion that non-statutory inquiries (Privy Council Inquiries) can be the result of political agendas which undermine their credibility, for example the example of The Detainee Inquiry (Gibson). When a human rights violation is engaged, either individual or systemic, then a statutory inquiry is required in order to discharge the procedural obligation attaching to duties under Article 2 of the Convention (the limitation to absolute discharge being the requirement of independence).

13. Is there a role for independent reviews to be established otherwise than under the Act (like the Hillsborough Independent Panel)?

See our response to Question 1 above regarding the plethora of fact finding mechanisms available of which the statutory inquiry is one. However, independent reviews should not be used as lesser-alternatives to statutory inquiries if the gravity of the factual circumstances of wrongdoing demands the public scrutiny of a statutory inquiry. The independent review could both usefully inform a statutory inquiry but it could also serve to obfuscate the work of a statutory inquiry in its attribution of responsibility (wrongdoing) role if responsibility has been summarily determined previously.

14. Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?

In relation to the statutory inquiries we have observed or contributed to, we conclude that the confidence of the core participants in the system has been varied. This confidence is measured by both the results of the statutory inquiry and the treatment of them as witnesses within the inquiry process. The core participants in the Northern Ireland statutory inquiries (Rosemary Nelson and Billy Wright) (the respective family members as victims) were not satisfied. The core participant to the Baha Mousa Inquiry (Colonel Douad Mousa) was satisfied but he demanded further post-inquiry action which has not manifested itself. The results of the Mid-Staffs Inquiry have divided the local community serviced by this NHS Trust.

15. Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?

The allocation of responsibility (both individually and corporately) (wrongdoing) must be dealt after the conclusion of the statutory inquiry by the relevant prosecuting authority and the evidence assessed in making the decision to allocate responsibility must be tested by that prosecutor in criminal proceedings (or by a litigator in civil proceedings) or by those responsible for a professional disciplinary panel of examination. The evidence will be tested subject to the relevant standards of proof for those different forms of proceedings. It is not a question of admissibility but rather of probative value of evidence adduced by a statutory inquiry. We reiterate in this regard the role of a judge and Counsel to the Inquiry when evidence will be used elsewhere.

16. Are the recommendations made by inquiries adequately implemented? Should there be a procedure for an inquiry to reconvene to consider this?

Rights Watch – Written evidence

It is not for a statutory inquiry to monitor the implementation of its recommendations. Neither can the relevant Minister establishing a statutory inquiry be expected to implement the recommendations. We refer you to our response to question 5 above and the institutional arrangements which could be introduced so as to discharge the procedural obligation arising when Article 2 of the Convention is engaged including the monitoring of implementation of the recommendations by the executive and holding the executive to account through parliamentary process. There need to be clear guidelines for government on this process of consideration and implementation of recommendations.

17. The Inquiry Rules 2006 have been criticized, not least by the Ministry of Justice, as being too prescriptive and not allowing an inquiry panel sufficient freedom to regulate their own proceedings. Do you agree with this view? How might the Rules be improved?

The Inquiry Rules 2006 (the Rules) should be reviewed so as to reflect best practice as being developed through the statutory inquiry process. We do not consider the Rules to be overly prescriptive as they in part provide guidance to the treatment of witnesses.

18. At present, certain inquiry records become subject to the Freedom of Information Act 2000 after the inquiry has ended. Should an inquiry's record be kept confidential after the inquiry has concluded? How else might the interface between the Inquiries Act 2005 and the Freedom of Information Act 2000 need to be changed?

In the spirit of securing probity in public life and with regard to the public scrutiny principle, the presumption should be that the records of a statutory inquiry should be made available to the public and that it would be for authority under the institutional arrangement proposed at question 5 above to rebut that presumption with due regard to the provision of the Freedom of Information Act 2000.

Rights Watch – Supplementary written evidence

Rights Watch (UK) thanks the Select Committee for affording it the opportunity to make supplemental submissions.

Two issues emerged during our evidence on 6 November, 2013 which prompted a brief supplement, especially in light of the evidence provided to the committee by Shailesh Vara MP, Richard Mason and Judith Bernstein on 11 December 2013.

I. The need for criteria to be applied when deciding whether to order an inquiry

We highlighted the need to establish criteria for deciding whether to order an inquiry, after consultation with other NGOs working in this field. As the Select Committee considers amendments to the Inquiries Act 2005 we urge you to consider inclusion of the following criteria:

- The extent to which documents may be difficult to obtain without the power of compellability;
- The extent to which the cooperation and evidence of individuals may be difficult to obtain without the power of compellability;⁸²
- The circumstances under which the best evidence is likely to be obtained from witnesses;⁸³
- The likelihood of the process raising systemic issues that need to be addressed in order for public confidence to be restored; and
- The extent to which there are alternatives that can both establish the truth and address systemic failings.

II. The need for criteria to apply when deciding whether there is a conflict of interest within the relevant Ministry which necessitates outside referral.

It seems clear that provisions should be made for assessing the level of conflict of interest, both at the point of deciding whether an inquiry should be ordered and once the inquiry is underway. As noted in our evidence, we believe that such referrals would be the exception

⁸² The decision-maker may want to consider whether a witness is likely to give evidence that might tend to lead to that witness being criticised (in which case compellability may be useful) or is likely to give evidence that might tend to lead to someone else being criticised (in which case compellability may not be useful).

⁸³ In *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, the court noted that "restoration of public confidence [was] a matter of high public importance" and that there were positive known advantages from taking evidence in public, namely (a) witnesses are less likely to exaggerate or try to pass on responsibility; (b) others come forward; (c) openness helps to restore confidence; and (d) the absence of significant risk of leaks leading to distorted reporting.

rather than the rule. And the process of acknowledging and assessing potential conflict will itself go a long way to ensure that the public has confidence in whatever decision is taken. Since conflicts are not binary it is vital to consider the severity of any conflict, with particular focus upon (1) the likelihood that decisions made under the relevant circumstances would be unduly influenced by a secondary interest and (2) the seriousness of the harm or wrong that could result from such influence.⁸⁴ This is not our area of experience or expertise and would refer the Select Committee to the work done in this field by the Organisation for Economic Co-Operation and Development (OECD).

⁸⁴ See <http://www.ncbi.nlm.nih.gov/books/NBK22937/> accessed 17 January 2014.

Rt Hon Sir Stephen Sedley and Professor Adam Tomkins – Oral evidence (QQ 22- 48)

Evidence Session No 2

Heard in Public

Questions 22 - 48

WEDNESDAY 10 JULY 2013

Members present

Lord Shutt of Greetland (Chairman)
Baroness Buscombe
Baroness Gould of Potternewton
Baroness Hamwee
Lord King of Bridgwater
Lord Morris of Aberavon
Lord Richard
Baroness Stern
Lord Trefgarne
Lord Trimble
Lord Woolf

Witnesses

Rt Hon Sir Stephen Sedley, former Lord Justice of Appeal, and **Professor Adam Tomkins**, Professor of Public Law at Glasgow University

Q22 The Chairman: Good morning. This is the second meeting of the Select Committee on the Inquiries Act 2005 by the House of Lords Committee. We are delighted to welcome Sir Stephen Sedley and Professor Adam Tomkins to give evidence to us this morning. The session is open to the public and a webcast of the session goes out live as an audio transmission and is subsequently accessible via the parliamentary website. A verbatim transcript will be taken of the evidence and will be put on the parliamentary website. A few days after this session you, who are giving evidence, will be sent a copy of the transcript to check it for accuracy. It would be helpful if you could advise us of any corrections as quickly as you can. If after this evidence session you wish to clarify or amplify any points made during your evidence or have any additional points to make, you are welcome to submit supplementary evidence to us.

I do not believe I have any interests to declare, so I would like to ask our witnesses to introduce themselves for the record and make any opening remarks if they wish.

Sir Stephen Sedley: I am Stephen Sedley. I was a Queen's Bench judge for six years and a Court of Appeal judge for 11. At the bar before that I practised largely in the field of public law. One of the privileges I suppose I could say I had was appearing at all three of Lord Scarman's mainland inquiries. He did a fourth one in Northern Ireland, you will remember.

Scarman set a magisterial tone for inquiries and was a superb choice of judge to do it because he combined authority with humanity in a very visible way, but you cannot pluck people like Scarman out of the judiciary every day of the week.

In 1986 to 1987 I chaired a local authority inquiry, which was set up not under statutory powers but under its inherent powers, into the death of a child called Tyra Henry, who had been in local authority care. I have drawn to the Committee clerk's attention that we included a 12th chapter about whether there should ever be an inquiry like ours again. It was a multi-party, multi-handed piece of, in effect, litigation with every interested party separately represented. It was not a good way to conduct an inquiry at all. We perhaps could come to what we thought was a better way of doing it. I found in the copy on my shelf a note from Lord Hutton agreeing with what we had proposed.

Perhaps one other thing I could mention by way of introduction is that I am currently chairing a voluntary, non-statutory international inquiry—I have a panel of three other judges from three other countries—into the air crash in which Dag Hammarskjöld was killed in 1961. We are reporting to an ad hoc trust, constituted actually by a Member of this House, not on what we think happened but on whether there is now enough new evidence to justify the United Nations reopening its own inquiry, which had adjourned without a conclusion in 1962. Like the local authority inquiry, it works on an entirely voluntary basis. We have no statutory powers. We have to write to people and say, “You have no obligation to tell us anything but we would be interested to know what you can tell us”. An astonishing number of people are still alive 52 years later and have things to offer, and it works very well. My experience generally has been that putting people on oath has a reverse effect in eliciting useful information; it scares honest people and it does nothing to deter liars.

The Chairman: Thank you for that. Perhaps I ought to declare the interest that Lord Lea of Crondall discussed that inquiry with me on many occasions and I gave him bits of advice, but whether that was any use is another matter.

Sir Stephen Sedley: I am sure it was.

Professor Tomkins: Good morning. I am Adam Tomkins, John Millar Professor of Public Law at the University of Glasgow. I should say that I am also one of the legal advisers to the House of Lords Constitution Committee, but I am sure you will all understand that I am here today purely in a personal capacity and nothing I say is meant to indicate or represent the views of any member of the Constitution Committee. I have no opening statement.

Q23 The Chairman: Thank you very much indeed for that introduction. If I might just start off, it was in 1989 that you, Sir Stephen, wrote, “If public inquiries are to be known by their fruits and if their proper fruits are reforms and improvements in law and practice, there is probably not a great deal to be said for them”, but you argue that public inquiries play a significant part in the management and government of this country. Is this still your view 24 years later and, Professor Tomkins, do you agree?

Sir Stephen Sedley: My views change with time; everybody's views do, I hope. It remains the case, I think, that departmental and ministerial policy has the last word on most questions of reform. Those policies may very well have been formed before the inquiry took place so that the inquiry will either endorse what was already intended or simply be shelved if it does not meet the existing policy objectives. That is why I was rather sceptical in what I said in that lecture at Nottingham that you were quoting from.

Professor Tomkins: I think that public inquiries are an important component of our system of administrative justice in the UK, but they are just one component. They are probably best

understood in the light of the other components of our system of administrative justice, which include, of course, the courts that Sir Stephen worked in through his career but also tribunals, the ombudsmen and auditors. I would see these as the five principal components of our system of administrative justice, and public inquiries have a very important constitutional role to play within that system. My answer to your question is that I think that public inquiries are capable of playing a very significant role constitutionally in our public law system but when understood as one of the components of our system of administrative justice.

Sir Stephen Sedley: If I could add to that, the one particular form of public inquiry that sometimes gets marginalised is the coroner's inquest. Coroners' inquests were historically so bizarre—you find accounts of them in Dickens in *Bleak House*, for example—that the courts refused to admit their verdicts even as evidence of liability, much less as anything conclusive. That is longstanding common law.

With the introduction of the Convention on Human Rights, inquests have had to become article 2 compliant so that the right to life is safeguarded by proper inquiries into the loss of life. That means, I think, that a properly conducted inquest nowadays is a worthwhile institution and is capable of reaching findings—I do not know whether Lord Woolf agrees with this: he has a lot of experience in this field—but there is no reason why they should not form either evidence or even a conclusive finding in a court of law subsequently. That used not to be the case but I think it could be now.

Lord Woolf: Lord Chairman, this is a matter that comes up later, and other than making reference to the fact that, of course, Sir Stephen and myself served together as judges, which perhaps should be formally on the record, I would prefer to deal with them as a whole, if that is convenient to you.

Q24 The Chairman: It does seem to me that the second question that we have marked down, in effect the fruits of inquiry, is what Lord Bichard was hinting at when, in evidence to the Public Administration Select Committee, he explained why he had reviewed progress on his recommendations six months after publication of his report. Are the recommendations made by inquiries adequately implemented? Should there be a procedure for an inquiry to be reconstituted at a future date in order to review progress?

Professor Tomkins: My answer to that question would be, with respect, why can Parliament not do that? I absolutely agree that one of the critically important ingredients of effective administrative justice is the ability of someone to do some serious follow-up where recommendations have been made or where judgment has been given. This is notoriously difficult in the courts of law. A court gives a judgment and it then effectively washes its hands of the matter. It is very difficult institutionally and it would not be constitutionally proper for the court then to seek to revisit the matter on its own initiative. Parliament, of course, can do that; select committees can do that; parliamentarians can do that on the floor of the House in either House.

It seems to me that there is no reason at all why we could not have a presumption, for example, perhaps one might even say a convention, that an appropriate select committee could decide that after an inquiry has reported it will revisit the recommendations and conclusions of that inquiry six, nine or 12 months later and ask Ministers to account for the extent to which they have and have not implemented the recommendations or acted on the conclusions of that inquiry. I do not see that it would necessarily have to be done through a formal reconstitution of the inquiry itself. Public inquiries, it seems to me, are likely to be at

their most effective when they are plugged into the other ingredients of administrative justice that we have in the UK, and at the apex of that system, of course, is Parliament.

Sir Stephen Sedley: Against this question in your memorandum I have written, “Yes, but”. The “but” is that, first of all, people die, people retire, and, secondly, people change their minds. If you reassembled a royal commission, for example, five years after it had reported and asked it further questions, you could perfectly well find that a lot of them had changed their minds about the essential recommendations and you are back on the merry-go-round. So I agree very much with Professor Tomkins that an inquiry needs a timeline. It needs some finality. It reports to the best of its ability and if further questions arise or things change then either that has to be ministerially or departmentally dealt with if there is a minister or department responsible, or at the worst you assemble a fresh inquiry.

The Chairman: It is just the point that the people who are conducting the inquiry have lived the experience, they have produced the results, and I would have thought they would be desperate that something happens and that perhaps for the people who really have that as a desperate issue it might have been useful to come back six months later, but I understand that you are saying that it should be somebody else’s job.

Professor Tomkins: Indeed, but let us take a specific example of an Inquiries Act inquiry. Let us take, just because I happen to know it better than some of the others, the Baha Mousa inquiry. If the chairman of the Baha Mousa inquiry was of the view six or nine or 12 months after his inquiry had reported that his recommendations had not been adequately acted upon by the Ministry of Defence then he could surely contact the chairman of the House of Commons Defence Committee, or whatever other relevant committee or committees he thought it should be, to bring that to the attention of the committee and to invite the committee to take the matter further. I think that seeing public inquiries or seeing a particular public inquiry in a silo and imagining that all of the work of that inquiry has to be done by the inquiry itself and that it cannot somehow be plugged into the parliamentary system would be, if I may say so, a serious mistake.

Q25 Baroness Hamwee: I entirely take the point about silos, but have you had this conversation with those who organise Commons business? The Commons Select Committees are notoriously overloaded, I was going to say with work but certainly with ambition as to what they can cover. Is there sympathy at that end for what you are saying?

Professor Tomkins: I do not know. My sense of it informally is that some committees are busier than others. My sense of it also is that if you were the clerk to or the chairman of a select committee and you received a letter from a chairman of a public inquiry expressing concern as to the non-implementation of recommendations that that inquiry had made then you would probably find time in your no doubt overcrowded, busy diary for a meeting and an evidence session and at least a letter to the Minister to ask for an account.

Lord Morris of Aberavon: The issue seems to me that Lord Bichard deciding to review the progress of his recommendations, unless I am told to the contrary, is a one-off event. I take the point in evidence today that once the inquiry is finished it ceases to function. Others have to act thereafter. Do you know of any other inquiry that, after it has completed, of its own volition or at anybody else’s suggestion restarts, relooks, makes further recommendations?

Professor Tomkins: I do not know of any example of that off the top of my head, Lord Morris. An example of what I would call good parliamentary practice occurred after the publication of the Scott report in 1996 when the then Public Service Committee of the

House of Commons, which has now evolved into the Public Administration Select Committee of the House of Commons, took on a number of the recommendations of the Scott report, particularly the recommendations about ministerial responsibility, and produced its own report into ministerial accountability and responsibility, which led to the resolutions of the House of Commons and the House of Lords, which are now in turn enshrined in the ministerial code. I know it is not an Inquiries Act inquiry because it predated the Inquiries Act, but there is an example of Parliament taking forward the recommendations that were sketched by a public inquiry or that were made by a public inquiry and making something of them, and in this instance something of some serious constitutional import. There are examples of what I am talking about in terms of Parliament taking these matters on. I do not know whether there are other examples of inquiries reconvening to look at their own recommendations. Select committees do that from time to time.

Lord Morris of Aberavon: But your view is that the inquiry itself has come to an end; it is for others then to take whatever action is necessary and not, because of obvious difficulties, for the inquiry itself?

Professor Tomkins: I would not lay that down as an absolute rule but it might be a presumption.

Q26 Baroness Buscombe: I think what you are saying about a possible convention is a very good idea, because this goes back to the question of what happens if the fruits do not actually fit the political narrative. We all know how extraordinarily difficult it is to see recommendations go any further than a debate on a Friday morning or a late Thursday afternoon if what comes out of that inquiry does not fit the political narrative. Can I just push you a little further in terms of what we could really do to ensure that these inquiries are not something that can simply be shelved because they are uncomfortable in terms of policy and do not fit a narrative?

Professor Tomkins: It does depend on the instance, does it not? Most of the time, it seems to me, the recommendations of inquiries, recommendations of thoughtful select committees, are designed to have some kind of resonance in the political system. They are not designed to be so jagged or so jarring that the Ministers will just want to resist them or ignore them or object to them in principle. Something has likely gone wrong with the system if that is the case.

Both Houses of Parliament do have the ability to keep pressing, to keep going, to return to issues, to bring issues up in debate. There are all sorts of different parliamentary means available in both Houses for that to happen. I know it is difficult and if the Government have the numbers, and they do not always, and if the Government have the political will to resist then there is very little that Parliament can do apart from making noise, authoritative noise but noise. It does not seem to me that it is an accurate reflection of the record for us to do as if it is an automatic or necessary or to be expected reaction to an adverse finding in a public inquiry that it will simply be shelved.

Lord Trefgarne: I was going to ask Professor Tomkins whether he would identify the parliamentary proceedings that followed the Scott inquiry, which I do not recall having read, I have to confess. As I was a witness before the Scott inquiry, I would like to do that.

Professor Tomkins: Indeed. The report was presented to Parliament by the Secretary of State for DTI, who was Ian Lang I think at the time.

Lord Trefgarne: Yes, I remember that.

Professor Tomkins: There was a debate on the floor of the Commons. There was a vote at the end of that debate, which I think the Government won by a single number. What was, in Bagehotian terms, efficient rather than dignified in the response to the Scott inquiry took place up here in the committee corridor and it was the work of the Public Service Committee. I can certainly send the Committee references to the reports if that would be helpful.

Lord Trefgarne: I would be most grateful if you would.

The Chairman: We all know of all sorts of reports that get written and then get put on a shelf. I understand what you are saying about not reconvening and this, that and the other, but bearing in mind the various routes that there are, do you believe it should be that the authors of a public inquiry in the final paragraph should say, “These are the things that we believe ought to happen and this is the way in which we think that somebody ought to pick this up and run with it”?

Professor Tomkins: I would not want to be overly prescriptive about that, but it would be odd, would it not, to get to the end of a 1,500 or 1,800-page report—Baha Mousa was 1,500, Scott was 1,806 pages—to find that there was no sense in that report of what should happen next? There was a clear sense in the Scott report of what should happen next, and what should happen next in the Scott report happened next, to the Government’s and to Parliament’s credit. There was a serious re-examination of the fundamental principles of individual ministerial responsibility, which resulted in a rewrite of the ministerial code, a rewrite that is still in force all these years later. There was also, of course, a significant change in practice in the way in which the Government claimed public interest immunity, which is the other element of the Scott report, such that the Government will no longer make—this is a bit jargonistic—class claims to public interest immunity but only contents-based claims. These were significant changes in constitutional practice and in constitutional law, which were the direct result—or perhaps I ought to say the indirect result—of recommendations in the Scott report.

In the Baha Mousa inquiry, which was the other one that I have mentioned in my evidence this morning, again the recommendations that Sir William Gage arrived at in terms of training, instruction and guidance issued to military personnel have been revised, have been reformed. None of us can say that we know that there have been no further incidents of mistreatment or torture in Iraq or Afghanistan since Baha Mousa. I do not think we know for sure that the culture has changed, but we do know that senior military personnel are of the view that the culture has changed. It seems to me that again more than that one cannot reasonably ask of a public inquiry.

It may be that some members would disagree because they were involved or saw it from different points of view, but from a constitutional point of view, which is my expertise, it would seem to me that both of these inquiries, which are the examples I have been using, were successful rather than unsuccessful in terms of having their recommendations implemented effectively, notwithstanding the fact that the implementation of those recommendations was difficult for the Government of the day.

Q27 Baroness Gould of Potternewton: May I go back to the point that Baroness Buscombe raised, because I am a little concerned about the prospect of very important issues being raised, perhaps in a debate in the Commons or in the Lords, just by asking questions? It does seem to me that if in fact the recommendations are going to be followed

through they should be followed through by a procedure and that procedure should be very clear. That is why I think you are right about the select committees because the select committees, first of all, are all-party, secondly, the Government has to respond to them and then the details can be examined. I was a bit anxious about your very opening parts where you talked about the possibility of asking questions and so on. Of course one can ask the questions, but they are not, it seems to me, the avenue at which one should be looking and making sure recommendations are actually followed through. I would like us to be a little bit prescriptive about how that happens.

Professor Tomkins: I agree with what you say about select committees. I have a slightly upside down view of Parliament. I regard what happens on this corridor as being important and what happens downstairs as being a bit less important. Dramatic often but, in terms of effectiveness, select committees are Parliament at its best, for all of the reasons that Baroness Gould identified.

Sir Stephen Sedley: Perhaps I could add something, Lord Chairman. An example of a report that was implemented wholesale and could only usefully be implemented wholesale was the Leggatt report on administrative justice. It has been a wholly beneficial exercise. Nobody in the department was allowed to pick it apart.

The Chairman: Which report was that?

Sir Stephen Sedley: Sir Andrew Leggatt's report on the tribunal system. The legislation that resulted has been of real constitutional importance. Looking by way of contrast at the first recommendation that my non-statutory Tyra Henry inquiry made, what had happened to this child was that she was known to be at risk and nobody did anything much about it. A care order was made putting her in the care of her grandmother, who could not cope. It became perfectly apparent she could not cope but nothing was done to revise the care order because the law appeared to be that once a care order was made the magistrates' court lost all jurisdiction. It did not matter if the arrangements fell apart the following week, nobody had to bring it back to court to take care of the child's interests. Our first recommendation was this, and perhaps you would allow me to read it out, "We recommend a change in the law so that the means by which an authority seeking a care order proposes to implement it should be placed before the court in summary form and, if approved, annexed to the care order so as to form part of it. If then any significant change is proposed it will require the authority of the court given at a further hearing."

That sank like a stone. The department took no interest in it at all. One result was that some years later, when I was a member of the Court of Appeal sitting with the court's two most experienced family law judges, we had exactly this problem before us. We held that whether the statute said it or not it was implicit that this must be done. If the care arrangements fell apart then you must go back to the court to sanction new arrangements. I am sorry to say, not for the first time, we were firmly overturned by your Lordships' House on the ground that it required legislation.

That brings one back to your point, my Lord Chairman, that unless there is some mechanism for following through and holding somebody to account for taking no notice of a perfectly sane recommendation, the fruits of an inquiry become dissipated. While I have no formula for it, and particularly for non-statutory inquiries where it is difficult, it seems to me to be an entirely relevant and proper concern.

The Chairman: I think there is quite a bit for us to bite on to on what has been said. Do you want to come in again?

Q28 Lord Woolf: I have not really come in on this. Obviously, if what you recommend as a result of an inquiry is implemented, that is a very good thing, at least in the eyes of those who are responsible for the recommendation. I do think one would have to be, would we not—and I want to hear the witnesses’ reaction to this—a little bit careful in changing the role of those who conduct inquiries. So far as my own experience goes, I have always taken the view that your job is to make a report and then the person to whom the report is made has the responsibility to see that was implemented. That is quite helpful in practice because the media often want to ask you about what is in your report and I have always taken the view that what is happening to my report is not my responsibility. I am not an advocate for what is in the report; I merely give the report. I think that is a very important safeguard for somebody conducting a matter of this sort. Would you agree with that?

Professor Tomkins: Yes, Lord Woolf, I would agree with that. I do not think I am qualifying my agreement by—

Lord Woolf: No, I am not suggesting that. I am just saying that is a distinction that has to be borne in mind.

Professor Tomkins: Yes, I think it has to be borne in mind, but at the same time what I would additionally say is that if a chairman or chairwoman of an inquiry took the view that their recommendations had been inappropriately or impermissibly ignored, then there ought to be some kind of avenue for that to be—

Lord Woolf: I fully accept the weight in that, but I am just—

Professor Tomkins: But no obligation.

Lord Woolf: Equally, I would say that it is very important it is understood that is not the chairman of the inquiry’s responsibility, because sometimes the chairman is only one member of the inquiry team. He sits with two other people who may not take the same view as he or she does and, if some form of reconstitution occurs, it is going to lead to problems. If it was a judge who conducted the inquiry, there would be a risk of his being drawn into a political situation, which I would suggest would be highly undesirable. I am going to ask your views later about a broader approach to inquiries, which very much depends on what Sir Stephen said about coroners, that perhaps is needed in this area. If I may, I will not take up the time of the Committee more at this moment.

Q29 Baroness Stern: Can I start by declaring an interest in that my husband was a member of the panel of the Billy Wright inquiry? Sir Stephen, you said in an excellent article of 1989, which has not aged at all, if I may say so, “Public inquiries have curative properties, which cannot be found elsewhere”. You also talked in that article about healing and you also said that, and I think it is worth getting this on the record, “They are a way of organising controversy into a form more catholic than litigation but less anarchic than street fighting”. On the basis of that, can I ask both of you whether the Inquiries Act specifically has succeeded in getting confidence in inquiries from the core participants and the wider public? That would be my first question but there are others that follow on. Do you want to start with that?

Sir Stephen Sedley: I think I am going to pass the ball to Professor Tomkins on this because I have very little, in fact no, on-the-ground experience of post-2005 inquiries and I think he probably does.

Professor Tomkins: I have not been a core participant in any public inquiry and I do not know any core participants in any Inquiries Act inquiry, so my answer is necessarily impressionistic. My impression, Baroness Stern, is that I know of no evidence that suggests that there is a problem with public confidence in the context of Inquiries Act inquiries. Indeed, it would seem to me that if and insofar as there is a problem of public confidence in inquiries it is in non-statutory inquiries that have been established since 2005 rather than in statutory inquiries, the obvious examples being the Iraq inquiry and the Detainees inquiry. I do not know whether problems about public confidence, if I am right that those exist, with regard to those inquiries are problems that are caused by the fact that they were established other than under the legislation or not. I know of no evidence that suggests that there is a problem with public confidence with regard to statutory inquiries under the Inquiries Act.

Lord Trefgarne: The public do not know the difference, Lord Chairman.

Baroness Stern: They would not have a clue if Iraq was non-statutory.

Lord Trefgarne: Would not have a clue.

Professor Tomkins: I suspect that it is subject matter rather than laws.

Baroness Stern: May I perhaps press on with this train of thought for a moment to ask you whether, if you agree with Sir Stephen's view, you could say a bit more about how exactly public inquiries, whether under the Act or not, are curative and in what way the word "healing" comes into the debate? What exactly is it that makes them curative and helps them to heal?

Sir Stephen Sedley: I meant that at the time and I think it is still true. Indeed, it is one of the silently recognised purposes for which Government I think often does set up an inquiry. There is an issue that has people at each other's throats. It is something that is not going to go to the courts but it is not going to go away either. An inquiry that brings everybody under the same roof and lets them have their say and then reaches reasoned conclusions about it, first of all, gives things time to cool off and, secondly, appears to provide some sort of resolution of a controversy. It may be that for those rather elementary reasons it has a value.

Certainly Lord Scarman's inquiries, Brixton and Red Lion Square, were classics of that kind, really very heated arguments on the point of erupting into violence—in fact, in Brixton they had erupted into violence—and by bringing people together under a single roof he was able at least to defuse the situation for the time being. Whether that is a sufficient justification I do not know. Sir Ian Kennedy, when he conducted the Bristol inquiry, actually went to the trouble—I think it was a brilliant idea—of getting a designer physically to lay out the forum so that it was impossible for parties to eyeball each other and by adopting a more or less circular pattern made it much more possible to control what went on to conciliate among the parties. There is a lot to be said for it.

Professor Tomkins: I agree with everything that Sir Stephen has just said about curative and healing. I do not really have anything to add to that.

Q30 Baroness Hamwee: I was going to ask you about our adversarial traditions of litigation and whether this impacts the style of an inquiry and, therefore, the effect on the participants and those who come needing different types of solution, if I can use a rather jargonistic phrase. Would you like to say anything about that?

Sir Stephen Sedley: It is a very good question. The answer is it does if you let it. The Tyra Henry inquiry, as I said, was multi-party. It was conducted like litigation and it was awful. It was not helpful. Every barrister had their own client's position to defend against eight or nine adversaries.

The alternative that we suggested for child abuse inquiries has its drawbacks, too. We said that these inquiries should in future take place in private. The press do not like that but, although they make a fuss about it, in fact, they are only ever there on day one, then they get bored and wait for the report and whatever editorial policy dictates is written about the report. The idea was that witnesses should come one by one before the committee. They should be asked those questions that the committee knew were relevant. They should be allowed to have somebody with them, a lawyer or a friend—it did not matter who—who might wish to say, “I do not think that is a fair question” or, “Do you not think you ought to ask this rather than that?” and protect their interests in that way without allowing them to become aggressors towards other parties. There is more than one very experienced lawyer here in the room. I do not know whether they would agree, but the litigation model is not a very good model for an inquiry.

Baroness Hamwee: If I may follow that up, is this something that should be entirely in the hands of the chairman or is there any formal recommendation that we might make to encapsulate that?

Sir Stephen Sedley: Yes. It is the chair who has responsibility. Again, many of these inquiries are conducted by a single person, but where you have a panel the chair needs input all the time from the panel members. In Tyra Henry I had a huge panel, and in fact they were extremely valuable to me. I could not have done the job without them. Was Lord Woolf's prison inquiry conducted solo?

Lord Woolf: I had advisers, but I conducted it solo.

Sir Stephen Sedley: The model probably fitted very well.

Q31 Lord Trimble: You were talking about the curative capacity or tendencies or whatever of inquiries and you referred, with approval, to Lord Scarman's inquiries in Brixton and Red Lion Square but deliberately did not mention his inquiry in Northern Ireland, of which I should say I attended several days simply as a member of the public. My impression is that the Scarman inquiry did not have a curative effect in terms of Northern Ireland. Do you have any views on that?

Sir Stephen Sedley: Very little did, I suspect, at that time. The one thing it did do was include as an appendix maps that you could not get from the Stationery Office and which accounted for very high sales of the report.

Professor Tomkins: Can I say something about the question of adjudication and investigation? I think that even when they are chaired by judges it is important that inquiries move as far away from the adjudicative model as possible, and I think that by and large they do. It was for this reason, among others, that I am afraid I was on Lord Scott's and not Lord Howe's side in the argument about the fairness of the Scott inquiry in the early and mid 1990s. I understand the argument that Lord Howe made and I understand also that it was made on the basis of the Salmon principles. I think the Salmon principles have long since passed their sell-by date or use-by date and they come from an era when we used to talk of something called tribunals of inquiry, when we did not know what the difference was between a tribunal and an inquiry. One of the many benefits of Sir Andrew Leggatt's work

that resulted in the Tribunals, Courts and Enforcement Act 2007 is that we now do know much more about the differences between tribunals and inquiries.

Tribunals are mini courts and they are adjudicative and they do not add very much of value to our system of administrative justice beyond what we can already get from courts, apart from the fact that they are supposed to be a little bit quicker and a little bit cheaper; query whether they are either of those things. Inquiries are quite different from courts and tribunals. They are much more like what we are doing here today. They are much more like what the ombudsman does in terms of conducting investigations. One of the things that I think, if I may respectfully say so, your Committee could usefully do is officially junk the Salmon principles and replace them—I do not know whether they would be the Shutt principles or quite what you would want to call them—with principles that are fit for a 21st century understanding of the distinctive role that investigative inquiries can play in terms of supplying a demand for administrative justice in circumstances where there is, as the statute says, sufficient public concern to set one up in the first place and in circumstances where neither the courts nor Parliament nor any other of our components of administrative justice can fill the gap.

My sense of it is that inquiries are at their best, strongest and most effective, even when they are chaired by judges, when they move far away from the adjudicative model. That does not mean to say that their procedures will be unfair if you are denied legal representation or if you are denied the ability to cross-examine the other side, because there often is not another side. There is sometimes another 182 sides and you are not going to cross-examine them all. It means that what we need is a different model of procedural fairness, a model of procedural fairness that is fit for investigations and not fit for adjudication.

Q32 Lord Richard: You may say we should have a new model. Do you have a new model?

Professor Tomkins: Do I have a new model?

Lord Richard: Yes. Do you have alternative Shutt principles to the Salmon principles? Salmon at least was fairly clear in what it said. You may say we should junk it, but if you were to junk it and you want to replace it with something, I was wondering what it was you wanted to replace it with.

Professor Tomkins: I think it would be difficult for me to produce that off the top of my head, but I can certainly write it down and write back to you.

Lord Richard: That would be very helpful.

The Chairman: There is plenty of time. You have the “Shutt”. Send us a document for October; we would be delighted to have it. Have you another point?

Baroness Stern: Yes, I do, just very quickly.

Sir Stephen Sedley: I am so sorry, I did not mean to cut across Baroness Stern. I would just add a point. I do not have quite the same root and branch antipathy to the Salmon principles as Professor Tomkins, but there is one trope of the Salmon principles that has certainly become a hostage to fortune. That is the sending out of chapters in draft to those affected by them in order that they can comment. Lord Scott did this, with the catastrophic result that every single Minister to whom it was sent went straight in private to the press with

their own spin on the text, not bothering to respond to the Salmon letter but responding to—

Lord Trefgarne: With respect, Lord Chairman, that is offensive. I did nothing of the sort.

Sir Stephen Sedley: I am so sorry, I did not realise I was speaking to a—I shall rephrase myself then. A number of Ministers did that and the result was, in effect, trial by press anticipating Lord Scott's report. It seems to me that that particular principle has outlived its usefulness because the use of the media by certain Ministers has outstripped it.

Lord Woolf: It certainly also does have the effect, if I may say, Lord Chairman, of lengthening the procedure sometimes to an extreme extent.

Sir Stephen Sedley: Yes, absolutely.

The Chairman: I would like to invite Baroness Stern to finish and then we ought to move on.

Q33 Baroness Stern: I would like to thank you very much for what you have said so far. Could you sum up in a very few sentences, following the discussion we have just had, what you think makes an inquiry effective and what you think makes it less effective? What is an effective inquiry? What are the elements? A little list would be very helpful.

Professor Tomkins: I suppose the first and core function of an inquiry is to find the facts. An inquiry that cannot get to the bottom or realises that it cannot get to the bottom or is perceived not to have got to the bottom of the facts is unlikely to be deemed to be effective. The second function of an inquiry is to make recommendations and then an effective inquiry would be one whose recommendations are at least taken seriously, if not always implemented to the letter. The third function of a public inquiry is the curative or healing function that we have been talking about. Again, these are the three different domains in which effectiveness might operate in the context of a public inquiry.

Sir Stephen Sedley: Effectiveness has to include recommendations being at least taken seriously and probably given effect, but an inquiry is only able to do its best. What it proposes may not be politically acceptable. It may turn out to be economically not feasible. One has to allow some clear water between the outcome of the inquiry and the possible implementation of its recommendations.

What seems to me to be capable of bridging the gap is the sort of thing that we have been taking about in embryo this morning, which is somebody who is neither the chairman of the inquiry nor the Minister or whoever it is to whom the report is addressed but who can have the role of - I suppose it would be called championing now - the recommendations of the inquiry in order to ensure that either they are implemented or, if they are not implemented, that there is a good reason for not implementing them.

Q34 Lord Trimble: My impression is that the 2005 Act has not been used all that often, and certainly the last inquiry to be set up under the 2005 Act was Leveson two years ago in July 2011. Are inquiries under the legislation set up when they are needed or have there been cases where inquiries should have happened but have not happened? Do you have any views on that?

Professor Tomkins: It is sometimes a struggle to get an inquiry set up. The Baha Mousa inquiry was set up I think only after litigation. There has recently been successful litigation in I think the Court of Appeal, certainly in the divisional court here, that an inquiry in the Ali

Zaki Mousa case should be established, which the Government had been resisting. Just because a litigant says an inquiry should be established does not necessarily mean that the litigant is right that the inquiry should be established, but there is certainly evidence in recent times that at least in the national security and armed forces fields the Government is slower than might be ideal to establish inquiries. I do not think there is any doubt now that the Baha Mousa inquiry was needed. I have certainly not seen anybody argue that it was unnecessary or otiose and yet it was a struggle to get it established. It was only after litigation that went all the way to the House of Lords that that inquiry was established.

Lord Trimble: Is it just in the national security area that Ministers are reluctant to set up statutory inquiries or might that reluctance be in other areas as well?

Sir Stephen Sedley: No. One recalls the young man who was beaten to death by a fellow cellmate in Feltham. It took litigation under article 2 of the Convention on Human Rights all the way to the House of Lords— with a landmark judgment of Lord Bingham—to get an inquiry set up, and it turned out to be a very important inquiry.

Q35 Lord Morris of Aberavon: We tried to discover from witnesses from the Ministry of Justice at a previous hearing why sometimes statutory inquiries are set up and sometimes non-statutory inquiries. I have sensed over the years that there is reluctance by Her Majesty's Governments and advisers to have statutory inquiries. Can you enlighten us a little as to why some inquiries are statutory and some are non-statutory?

Professor Tomkins: Well, it is a bit of a puzzle, is it not? It is untidy. We have the Inquiries Act. The Inquiries Act, however, is not the only means whereby Ministers may lawfully establish public inquiries. Parliament could legislate in those terms if Parliament wanted to, but Parliament has not legislated in those terms because presumably Ministers did not want Parliament to when the Inquiries Bill was going through. It is an untidiness about the British constitution, but so much of the British constitution is untidy. Tidiness is not one of the characteristics of the constitution and I am not actually sure that it should be. I am not sure that the untidiness of this is problematic. But I share your puzzlement, Lord Morris, as to why in particular instances you sometimes see statutory inquiries and sometimes you do not. I cannot tell you why the Detainees inquiry was not established under the Inquiries Act any more than I can tell you why the Iraq inquiry was not established under the Inquiries Act. Only the people who took the decisions to establish those inquiries can tell you that, and good luck getting the answers.

Sir Stephen Sedley: I suspect that the reasons may lie in the fact that the 2005 Act not only provides for a framework but provides for some forms of ministerial control while the inquiry is progressing. That often does not look good. It may be much better to have a freestanding inquiry that is given its terms of reference and allowed to get on with the job. Of course, there are many situations—this may be another part of the answer to Lord Morris's question—in which the body instituting the inquiry has no statutory power to do so and can only use its inherent common law powers. The local authority is the classic example of that; its inherent powers are under the Local Government Act. In the end, it may be that there is not a great deal of difference between the two in practice.

Lord Morris of Aberavon: We know the powers under the Act that the chairman has as regards evidence and the like. Are there any other advantages, in addition to what Sir Stephen has indicated, for setting up a non-statutory inquiry?

Sir Stephen Sedley: There probably are but, as I said at the start, I am not familiar with the detail of the 2005 Act. I do not know how prescriptive it is about the form that an inquiry

under it has to take. Professor Tomkins probably can tell you that, but if it is overly prescriptive then there is an incentive to get away from it.

Professor Tomkins: Under the Inquiries Act, as the Committee will know, statutory inquiries under the Act have the power to require the production of evidence. Non-statutory committees might not have that power. It is an offence under the Inquiries Act not to comply with anything that you are lawfully asked to do by the chairman of a statutory inquiry under section 21. I am not sure that there are like offences in the context of non-statutory inquiries. I am not sure that this means that the Inquiries Act is overly prescriptive, which was Sir Stephen's language, but it might be that there are circumstances in which it is reasonably felt in Government that the use of these powers would be inappropriate in a particular context. Again, the witnesses to whom this question needs to be directed, it seems to me, are those who have been responsible for establishing inquiries other than under the Inquiries Act since 2005.

Lord Morris of Aberavon: Are non-statutory inquiries effective?

Professor Tomkins: They can be. I do not see any reason in principle why non-statutory inquiries could not be effective, could not be every bit as effective as statutory inquiries. There are big question marks over both of the big post-2005 examples, the Iraq inquiry and the Detainees inquiry. We do not know very much about the effectiveness of the Iraq inquiry yet because it has not reported. The Detainees inquiry was obviously ineffective because it was abandoned for various reasons not long after it was established. Even before it was abandoned, there was grave controversy about its procedures and the relevant—well, perhaps they were relevant, perhaps they were not relevant—NGOs who thought that they were relevant to the inquiry had decided, so far as I understand it, to boycott it, which was indicative perhaps that it was unlikely to be effective even if it had gone further. Again, I do not know whether that is because that particular inquiry was non-statutory.

Q36 Baroness Buscombe: Going on from there, as you suggested earlier, one of the key elements, with which I agree entirely, of an effective inquiry is that it should elicit the truth. It should bring out the facts. Why should the public or anybody have any trust in a non-statutory inquiry when, as you say, the very people who were behind that legislation instantly chose to avoid it when, for example, setting up the Iraq inquiry? They do not have to give evidence under oath. Not all evidence has to be produced. Can we not read from that, being cynical, that this means that some of the truth can be avoided where the inquiry is non-statutory? It becomes too uncomfortable, particularly for Ministers.

Professor Tomkins: I would be very reluctant for myself to go so far so quickly because if one were to go so far so quickly one would also say that every investigation by an ombudsman is liable to be ineffective because there is no requirement to tell the ombudsman the truth. Every select committee inquiry is liable to be ineffective because there is no requirement—Sir Stephen and I are not here under oath today. We are under no legal obligation to tell you the truth, the whole truth and nothing but the truth, so far as I understand it. I am trying to tell you the truth so far as I can, lest there should be any doubt about that. I would be very reluctant for there to be any kind of general presumption that goes right across the board, irrespective of whether we are talking about a court, a tribunal, an ombudsman, an inquiry, or anything else, that only evidence that is given under oath is true and that only those investigative bodies that have powers of compulsion and strict coercion are worth our time.

Baroness Buscombe: However, at the same time, as we suggested earlier, the public do not necessarily know that that inquiry is non-statutory and therefore are being asked to trust that the inquiry has been set up in a way that might demand an oath, and evidence is produced. Therefore, the truth could be masked in that sense because the public are totally unaware in large part, I suggest, as to whether it is statutory, particularly also when you are suggesting that it should be non-adversarial. Does that really elicit the truth?

Professor Tomkins: I certainly think that the truth can be elicited in non-adversarial environments and I equally believe that the truth will not necessarily be elicited in an adversarial environment. As I think Sir Stephen said earlier this morning, people who want to lie can lie, whether they are on oath or not. I hope I am not putting words into your mouth.

Sir Stephen Sedley: No.

Professor Tomkins: I would not make any necessary connection between adversarial procedures and the truth, or between evidence on oath and the truth. It may be that these are helpful ingredients, it may be that these are nudges in the right direction, but there is no necessary connection, it seems to me, between the two.

Perhaps the answer is not so puzzling. In the two examples that we are talking about, perhaps there would never have been an Iraq inquiry and there would never have been a Detainees inquiry at all if the only machinery available was machinery under the Inquiries Act, because the Government simply would not accede to giving a judge, in the case of the Detainees inquiry or a panel in the case of the Iraq inquiry, the powers that are contained in Section 21 of the Inquiries Act, given the sensitive subject matter of the issues that those inquiries were asked to investigate. Perhaps there is no great puzzle there at all, in fact. Then the question becomes, I suppose: is it better to have a flawed inquiry if you think that an inquiry without powers of compulsion is a flawed inquiry, or is it better to have no inquiry at all? That is a judgment call. That is a political judgment.

Q37 Lord King of Bridgwater: I was struck, when looking at the subject matter for this scrutiny committee, by the extraordinary contrast in the inquiries that we are talking about. You are comparing the rules for something where four soldiers may have been killed in, as we know, the Deepcut inquiry, and then trying to see if we can apply the same rules to the Iraq inquiry in which hundreds of thousands of people were killed, in which a foreign regime was overthrown and eventually their president was executed, and which involves a whole range of different countries. I was wondering rather flippantly while you were talking that if you were doing it under oath, how many different oaths might you have had to administer in the Iraq inquiry and how many people would have been bound by them. I do not know what nationalities, what religions or how many people would have been involved. One of the criteria here, and I agree with the answer you have given, is that there probably never would have been an inquiry because here nobody knew where it would go and the test of whether it was a good idea will come out in the eating. At the moment, there is not much coming out to tell us whether there is going to be any eating.

But it does seem to me one of the issues here—and it is inevitable for Governments if they are involved in setting them up—is to have some rough idea where it is going to come out. In many ways, I think people can be congratulated on setting up the Iraq inquiry and getting it established, although the jury is still out as to how effective it will be. At least it certainly needed an inquiry and there is probably, would you agree, an argument that it is the only way you could get it going?

Sir Stephen Sedley: The Iraq inquiry may be an example of under-lawyering rather than over-lawyering an inquiry. The problem we have seen in other inquiries, as we have said, is too many lawyers but the Iraq inquiry had none—no counsel to the inquiry and no practising lawyer on the panel. Some of us reading the daily reports of what was going on were almost weeping at the questions that were not being asked.

Lord King of Bridgwater: Understood.

Baroness Gould of Potternewton: Perhaps I should be congratulated because I am probably one of the few non-lawyers and non-Ministers in this room, in fact possibly the only one, who does not qualify for either position. I have been fascinated by the discussion about the value of the non-statutory and statutory inquiries. One of the things that strikes me, just looking at the question of perhaps the Mid Staffs inquiries, is we had one Minister who went for a non-statutory inquiry and another who then went for a statutory inquiry. Do you think that perhaps it was necessary for the second inquiry because the weight of the first inquiry and the weight of the recommendations of the first inquiry, being non-statutory, were not as effective as perhaps they should have been because it was not a statutory inquiry?

Sir Stephen Sedley: I know very little evidence to that effect, I have to say. I think the Crichton Down inquiry—it is mentioned in my *Modern Law Review* article but I have not been able to put my finger on it—was non-statutory and it was one of the most effective inquiries in our constitutional history.

Q38 Lord Trimble: We are talking about statutory and non-statutory inquiries and I am wondering whether it is possible to identify some sort of principles or guidelines as to when one is more appropriate than the other or circumstances with which one would be inappropriate. Just simply to have two things going there and not knowing what takes precedence and how the choice should be made—are there any criteria we can develop?

Professor Tomkins: I think there are criteria that this Committee can develop. I would probably start with the following rebuttable presumption that an inquiry, if it is going to be established by a competent Minister, should be established under the Inquiries Act unless the Minister can explain to Parliament why that is inappropriate. The presumption should be that if an inquiry is to be established, it should be established under the legislation. However, it should not be, it seems to me, a hard-and-fast rule because the consequence of making that a hard-and-fast rule are likely to be that there are some instances where the public would want an inquiry but where a statutory inquiry is impossible, politically or for international reasons, or for reasons of sensitivity with regard to national security or whatever. It might none the less be thought in some instances that it is better to have some sort of inquiry rather than no inquiry, but the presumption should be that we have the statute. Let us use the statute unless there is a good reason for not doing it.

Lord Morris of Aberavon: Why?

Professor Tomkins: Why? I suppose because otherwise there is a question as to why we have the statute at all, but also because of the concerns that Baroness Buscombe raised, which are that the powers of a chairman of a statutory inquiry under Section 21 are quite significant. If you are not going to have a statutory inquiry, presumably—I may be wrong about this—it is going to be because you do not want the chairman to have powers that are as considerable as those under Section 21. If there is sufficient public concern to merit setting up a public inquiry in the first place, then let us make sure that it is a public inquiry

that is more rather than less likely to be effective in the three domains that we were talking about before.

The first and most important domain is that the inquiry has to get to the truth, or as near to the truth as is humanly possible. In those instances, where there is sufficient public concern to have a public inquiry, the presumption ought to be that the chairman is going to need the powers that are conferrable upon him under Section 21. Does that not make sense?

Q39 The Chairman: If there is an event today where the cry goes up, “There must be an inquiry, there must be an inquiry”, and everybody is saying this, and tomorrow an announcement is made, “Yes, there is going to be an inquiry but I am afraid it will not be a statutory inquiry”, would you grimace at that and think, “Hmm, it is not quite right”?

Professor Tomkins: If I was a Member of either House of Parliament, which of course I am not, I would want to come to the Chamber and listen to the Minister explaining why it is appropriate to have a non-statutory inquiry and ask some questions about it. A ministerial decision to establish an inquiry, whether under the Act or not, is a ministerial decision in respect of which that Minister is properly accountable to Parliament. Equally, a Minister deciding not to establish an inquiry is accountable for that decision, or non-decision, to Parliament. It is up to parliamentarians to do their constitutional job of holding Ministers effectively to account for their decisions and non-decisions, I would say.

Baroness Gould of Potternewton: Would it not relate to why the Minister is taking that decision? There may be political decisions or reasons, or all sorts of other reasons, why the Minister is taking that almost instant decision because of the outcry and, therefore, it is much simpler and easier for the Minister to go for a non-statutory inquiry.

Sir Stephen Sedley: I wonder if I could express some disagreement with Professor Tomkins about this. I do not think there is a very great difference and I do not see the case at the moment for laying down a preferred channel and an exceptional channel for inquiries. The statute is there, as I understand it, to provide a format and a basis if a format and basis are wanted. The things that seem to me to matter are, first, the input and, secondly, the output. I do not think anybody suggests that the input depends on the power to compel evidence. People come and give evidence if they are willing and they will find an excuse not to do so if they are not willing. The output is the same whether the inquiry is statutory or non-statutory; it is the answer to the question posed in the remit. The statute does not—and it may be a lacuna in the statute—give any powers of follow-up, so the question of effectiveness is not affected by whether the inquiry is statutory or non-statutory.

Both the input of a statutory inquiry and the input of a voluntary inquiry, if it is at least conducted under the inherent powers of a department of state or of a local authority, are controlled by the common law. The common law will say that you cannot condemn people unheard and so forth. The standards that the courts have developed are pretty well uniform across the range of inquiries and will not be very much affected by whether they are statutory or not.

Lord Morris of Aberavon: I am grateful for your observations, Sir Stephen, but with the utmost respect, Professor, I do not accept your assertion that there should be a presumption in favour of a statutory inquiry just because there is a statute. I could point out to you three major inquiries that were very effective and non-statutory: the Glidewell inquiry into the Crown Prosecution Service, the Gerald Butler inquiry into deaths in custody and, very much earlier in my political life, the railway crossing inquiry. All were non-statutory. Why should there be a presumption?

Professor Tomkins: I do not think it was an assertion that there should be an assumption so much as a suggestion that there might be an assumption in response to Lord Trimble’s question. It would seem to me, with respect, to be sensible for this Committee at least to consider, at least to think about, the relationship between statutory and non-statutory inquiries. Perhaps the conclusion will be that some are statutory and some are non-statutory and that is fine, but perhaps the conclusion will be different from that and there ought to be some sort of framework of analysis, that I think Lord Trimble was asking us about, that one can bring to bear as to why you might want to have a preference for a statutory or a non-statutory inquiry in any particular case. Why is this important? So that when a Minister makes a decision to set up or not to set up a statutory or non-statutory inquiry, parliamentarians have some framework of analysis against which they can hold that Minister to account. That is all.

Q40 Lord Woolf: The statute sets out what it does set out about the things you can do under a statutory inquiry and it is open in any event for Parliament to be able to say to the Minister, if it is a Minister who sets up the inquiry, that the position here would be better if it had that framework. I know of no situation where a person conducting an inquiry has said once it has happened, “I think this inquiry should be conducted under the statute”—and I am talking about the chairman now—and the Minister has said, “I will not do it” if the chairman wants it. It can happen halfway through an inquiry or three-quarters of the way through an inquiry that it can be put into that form. It only would be put into that form if the person who is conducting the inquiry thinks he needs the powers. Would you dissent from that?

Professor Tomkins: No, I would not dissent from that.

Lord Woolf: Putting it into the reality of the inquiries I have conducted, the chairman designate is asked to go to see the Minister and it is one of the matters you discuss with the Minister as to whether it would be a good idea or not. There can be all sorts of reasons, not least the expense of the inquiry, which cause a Minister to say no to a statutory inquiry. One of the things that we have to deal with hereafter is the cost of inquiries. If we had a presumption as you suggest, I suggest to you it would put up the costs of inquiries substantially.

Professor Tomkins: May I say something about the cost of inquiries then, given that it has been raised? I have to say I am a little bit nervous about the way in which people talk about the cost of public inquiries. Justice is expensive—expensive to administer and expensive to deliver. The courts are expensive. The tribunal system is expensive. It is probably the case that select committees are expensive, but let us not go there. I sometimes wonder why it is that inquiries are singled out and accused of being unreasonably or unnecessarily expensive when our entire edifice of administrative justice is expensive.

Lord Woolf: Forgive me, but at the moment, Professor Tomkins, is it not the case that the whole of the justice system is being singled out for expense and things are being done to cut down the justice because of the expense?

Professor Tomkins: I think I had better not come in on that.

The Chairman: The alleviation of poverty is expensive. Lots of things are expensive. Colleagues and guests, I think we have to be a bit more succinct and we had better move on.

Q41 Lord Richard: Can I raise one or two issues about the way in which Ministers act in inquiries? On this issue of whether it should be an inquiry under the Act or an inquiry not

under the Act, it seems to me that Ministers have been reluctant to set up inquiries under the Act, although paradoxically it seems as if they have much more power to intervene in the conduct of the inquiry if it is under the Act than if it is not under the Act. Do you think it is right, for example, that Ministers should, first, have the power to set up to not to set up an inquiry? Should that remain purely a ministerial decision: to set its terms of reference; to appoint the chairman and its members; to suspend or terminate the inquiry, adjourn it and come back to it; to restrict the publication of documents? Should anybody else, other persons or bodies, have any of these powers in addition to or instead of Ministers? I would be very interested to hear Sir Stephen's views on this, since he has conducted a fair number of inquiries, and the extent to which Ministers have used these powers to channel the way in which the inquiry is going.

Sir Stephen Sedley: As I said earlier, I have not had any experience of inquiries under the 2005 Act. That is partly, of course, because it has not been very much used. The reason why it has not been very much used may well be the reasons that Lord Richard has drawn attention to. It does not look good if you set up an independent inquiry and retain the power to interfere with its proceedings. It is much better to be able to say, "I have set up an independent inquiry and it really is independent". So it may be that the Act is going to turn into something of a white elephant.

Lord Richard: So if you take those things out of the Act, the Act becomes a bit more acceptable, does it?

Sir Stephen Sedley: Yes.

Lord Richard: Can I ask you, from your experience of inquiries not under the Act, did you get much interference from Ministers, gentle of course—a discreet telephone call?

Sir Stephen Sedley: We recounted in the Tyra Henry report how the London Borough of Lambeth, I think not realising what it was doing, had tried to interfere with our terms of reference at an early stage and they accepted very readily when it was pointed out to them that they should not have been doing this. Apart from that, no. My experience has been that the inquiries have been allowed to run their course. That has become a problem where the course has turned out to be years and years long, but it is not the typical pattern. Saville was an exception. My experience is that the authority or Minister that instigates an inquiry is typically very good about keeping their hands off it until it reports.

Lord Richard: I see. So really the burden of what you are telling us is that the provisions in the Act that give Ministers powers to do X, Y and Z are probably unhelpful in terms of the operation of inquiries under the Act.

Sir Stephen Sedley: Yes. It was strongly objected to when the Act was a Bill from a number of public quarters. It went through just the same. It does not look good, if it is a power that is used, which may be a very good thing. It means that press vigilance and public reaction are more powerful than the imperative to interfere.

Lord Richard: Do you share that view, Professor Tomkins?

Professor Tomkins: To some extent, yes. The power to suspend in Section 13 is quite a power. I share the view, subject to these two remarks.

First, Ministers are accountable to Parliament in the exercise of this power. If a Minister is going to set up an inquiry, let the inquiry run some of its course and then suspend it, I

daresay there are going to be a number of parliamentarians who are going to be pretty interested in knowing exactly what the reasons are for a Minister wanting to suspend an inquiry.

Secondly—and I would say this—a certain element of ad hoc-ery is inevitable here. I have said it before. Public inquiries are a component of our system of administrative justice but there is no system of public inquiries. We have a system of tribunals now. Obviously we have a court system. But there is no inquiries system. There is no permanent secretariat. Each inquiry is set up in its own terms by a particular Minister with a particular chairman who brings a particular set of terms of reference. Every inquiry chairman will determine whether he or she wishes to sit alone or with the wing members or with assessors; counsel will be appointed and so forth. An element of ad hoc-ery is inevitable, given the nature of inquiries and the way in which inquiries are different from the other elements of administrative justice that we have. But it may well be that in Section 13 of the Act that ad hoc-ery is going a bit too far.

Q42 Lord Richard: Do you think we should go back to the position of the 1921 Act where it was Parliament that set up the inquiries?

Professor Tomkins: No, I do not. As I understand it, the main reason for the Inquiries Act repealing the 1921 Tribunals of Inquiry (Evidence) Act is because it was so rare to have a resolution in Parliament. I think the appropriate balance is that the decision as to whether to set up the inquiry and how to set up the inquiry is for the Minister, and in respect of those decisions the Minister must expect to be fully accountable to Parliament.

Lord Richard: One last thought on this, if I may. Do you think there is a danger that Ministers will use the powers under the 2005 Act to prevent the setting up of inquiries into their own conduct?

Professor Tomkins: We are getting into Ministerial Code territory here, are we not?

Lord Richard: No, I am not talking about that. I am talking about if there is an instance in which a Minister has made what on the face of it is a mistake, had a rather disastrous result and everybody thinks there ought to be an inquiry into it, the Minister would have the power under the 2005 Act to say he is not going to do it.

Sir Stephen Sedley: He has power to refuse, whatever powers he is said to be deploying. He will simply say, whether it is common law or under the Act, “I do not think this is a suitable case for an inquiry”. There is nothing to stop a Minister, because it is his own discretion, from protecting his own back. I am afraid that is one of Parliament’s functions to oversee. I suppose it is an inevitability unless you have a system in which the decision whether or not to institute an inquiry is taken away from Ministers, even where it has occurred on the Minister’s watch. That is possible but it is not easy.

Q43 Lord Trefgarne: Lord Falconer has said that it was not necessarily right to appoint a judge on every occasion to conduct an inquiry. Are there any special characteristics of a judge that make it right for them always to do so, or can you think of circumstances—there are one or two examples of course—where non-judges are right?

Sir Stephen Sedley: I can quote Lord Scarman’s answer: “I believe that a judge does have special qualifications both for investigating disorder and for speaking about inner cities. He is a trained adjudicator between differing parties. He is a trained investigator of fact. He is by office, and should be by nature, impartial and detached”. It is highly idealised and there are plenty of people who are not judges who can fulfil those criteria.

I have been troubled, and I think a lot of judges, have been, that it appears to be the case that Government will go to the Chief Justice of the day—I am speaking possibly out of turn here because we have a former Chief Justice on the Committee—and ask if they may have X rather than Y, or X to come and conduct an inquiry. It seems to me that if there is to be any approach it should be to the Chief Justice to nominate somebody for a particular job. It is a bit of an imposition on the justice system. It means we lose a judge.

Lord Trefgarne: The Minister consults the Lord Chief Justice?

Sir Stephen Sedley: That would be the situation, yes.

Lord Trefgarne: He is not required to obtain the consent of the Lord Chief Justice.

Professor Tomkins: No, that is correct.

Sir Stephen Sedley: But somebody has to free the judge from his or her responsibilities and that presumably is the head of division, the Lord Chief Justice or another judge.

Lord Woolf: At the time of the Constitutional Reform Act in the concordat I was strongly arguing that the consent of the Chief Justice should be acquired and that was never reduced into law.

Lord Trefgarne: I remember when this Bill went through Parliament, and the Government rejected it.

Lord Woolf: The Government rejected it.

Sir Stephen Sedley: It does deplete the judge power. It means expense is incurred in replacing that judge for an indefinite period of time. But I think more important perhaps is the reason why the Government repeatedly want a judge to come and do this sort of job. That does have to do with Scarman's explanation, I think, as a matter of public perception, even if it is not always true of the individual judge. On the whole I think my colleagues have acquitted themselves extraordinarily well, Brian Leveson among them, in doing a job like this in the public eye. But there must be many other people, particularly practising barristers, who could do it. The Francis report is a work of a practising barrister that is of outstandingly high quality. There is no reason why it has to be a judge who does the work.

Lord Trefgarne: It is the legal training.

Sir Stephen Sedley: That obviously helps. But this goes back to Lord Trimble's concern I think. It may also tend to judicialise a process that is not a judicial process.

Lord Trefgarne: Just following on from that, judges are normally appointed on their own to conduct these inquiries. Is there benefit sometimes perhaps in having what they call wing members, perhaps three people to conduct the inquiry, or is one always preferable?

Sir Stephen Sedley: No. Particularly where you are dealing, as you usually are, with something that is not a conventional litigation matter, you need people to tell you where you are going astray. You need people to point things out.

Lord Trefgarne: They are advisers though, is it not, which is slightly different from having wing members of the inquiry?

Sir Stephen Sedley: Yes. In my experience, wing members' function in very much the same way. They do not try to take over the decision-making process but they are listened to with care.

Q44 Baroness Gould of Potternewton: Two points, if I may, that are relevant to the inquiries themselves. The first is the question of the role of the lawyers within the inquiry and also questions about the chair's power. What are your views about the role of the lawyers representing those complaining or those complained against? Within that, do you think it is easy for people to represent themselves?

Sir Stephen Sedley: It is very difficult. It is always difficult for people to represent themselves. You get the occasional person who turns out to be a natural. They charm the pants off the court or the tribunal, and they do it much better than a lawyer would have done it, but they are very rare. They are one in a hundred. Most people are at sea and need help. The problem with lawyers giving the help is that lawyers' training is adversarial, it is to savage anybody who is going to get in the way, and it frequently makes things worse in the course of the hearing. This is why my Tyra Henry panel agreed that the recommendation should be that lawyers, so far as reasonably possible, are kept out of the process but that the individual witnesses could be accompanied by somebody who might be a lawyer, but need not be one, while they were giving their evidence in private to the committee.

Baroness Gould of Potternewton: Is it not difficult, perhaps, for somebody with very little experience and the aura of where they are going, the whole sort of frightening experience of this, and they do perhaps need that legal advice? The chair, as I understand it, can suggest that they be awarded legal representation. Is that perhaps not the more sensible way of doing it?

Sir Stephen Sedley: Yes, I am sure it is. If it is a well-conducted inquiry, there should be enough funds for the chair to be able to allocate counsel or a solicitor to somebody who needs one—that is a very good idea—without making it the inalienable right of everybody to turn up with lawyers.

Baroness Gould of Potternewton: The other question that I want to ask about in relation to the chair's power is that to be able to award core participants their costs is subject to constitutions laid down by the Minister. Is that right? Do you think the Minister should have that right?

Sir Stephen Sedley: We are talking about statutory inquiries now, I imagine.

Baroness Gould of Potternewton: Yes.

Sir Stephen Sedley: Yes, somebody has to have control of extravagant bills of costs. We have had some experiences in recent years. Since Lord Woolf's reforms came in, the Court of Appeal for the first time has seen the bills of costs from both sides in cases lasting a day or less and they would make your hair stand on end, some of them. These are the bills that are going to be rendered to the clients. It is very important that whatever the client is going to pay should not necessarily be passed on in litigation to the other side or, in an inquiry, to the state.

Q45 Lord Trefgarne: I am rather interested to know more about the role of the counsel for the inquiry, not the individuals. I am not clear about the qualifications needed to become a counsel for the inquiry and in particular about who instructs them. They seem to conduct the inquiry on their own sometimes.

Sir Stephen Sedley: They are the ones who get the limelight, of course. In any inquiry instituted by central government it would be the Treasury Solicitor who instructs counsel. I think that is universally the case.

Lord Trefgarne: It is the Treasury Solicitor, is it?

Sir Stephen Sedley: Yes. Certainly in my experience with the Scarman inquiries it was the Treasury Solicitor.

Lord Trefgarne: Not the chairman of the inquiry?

Sir Stephen Sedley: No. But the Treasury Solicitor of course is acting for the chair of the inquiry and for the inquiry as a whole, and in that capacity is instructing counsel. Counsel's role is an interesting one. It is not be totally bland and neutral. It is to ask probing questions, but it is not to take sides.

Lord Trefgarne: So the client is the chairman; the instructing solicitor is the Treasury Solicitor. Is that right?

Sir Stephen Sedley: The client is the panel as a whole, the tribunal or inquiry.

Lord Trefgarne: If you just have one judge conducting the inquiry?

Sir Stephen Sedley: Then the chair is the client.

Lord Trefgarne: He is the client?

Sir Stephen Sedley: Yes. That is right. But he is not the client in the formal sense of somebody who has a justiciable interest to defend or prosecute. It is a client in the sense that they need your help and in general terms the assistance that is given is asking probing but non-partisan questions.

Lord Morris of Aberavon: It is the chairman who has to agree, if not appoint, counsel to the inquiry, is it not?

Sir Stephen Sedley: Yes, that is right. If I could just add one word, the reason why it is wise to have counsel to an inquiry is that if the chair starts asking all the questions, there is a real risk that at some point he or she is going to look parti pris. It is much better for the counsel to have that much distance from the chair.

Lord Morris of Aberavon: The fact that the Treasury Solicitor instructs him is merely a technical matter, then it is in the hands of the chairman and the counsel?

Sir Stephen Sedley: Yes.

Q46 Baroness Buscombe: I have three questions to do with cost and length, which are really interlinked. We have already touched briefly on cost but if we could just go into a little bit more detail. First, after the Saville inquiry reported, the Prime Minister said there will be no more open-ended and costly inquiries and so one of the aims of the Act was to make inquiries less costly. You may know that last week we, as a Committee, attended a morning session of the Al-Sweady inquiry that, for example, only started taking evidence in March and has already clocked up £16.6 million in costs. Do you think that this aim has been achieved, or what do you feel about this, because that is a huge sum of money?

Professor Tomkins: I have already said something about costs and I think it is fair to understand the costs of public inquiries in the context—and probably, I would say, only in

the context—of the cost of justice at large. Some £16.6 million for a particular inquiry is a lot of money, but it is a lot of money in comparison with what?

Baroness Buscombe: The cost of soldiers that we are cutting to pay for it.

Professor Tomkins: It is a lot of money in comparison with the cost of what other mechanisms of administrative justice? The Al-Sweady inquiry, like any inquiry established under the Act, is established because a Minister has taken the view that there is sufficient public concern to merit that.

Baroness Buscombe: Perhaps if I take you on to the next question, which is linked in a sense, that one of the aims of the Act was also to make inquiries briefer with a view in part to lessening the cost. Do you think there should be a power to curtail an inquiry's proceedings and, if so, exercisable by whom and in what circumstances? Should there be a timeline here?

Sir Stephen Sedley: You cannot prescribe a timeline because if you do you risk wasting all the work that has gone into the inquiry thus far. If you suddenly truncate it, then you have, in effect, aborted the proceedings. But that is not to say that an inquiry cannot be set up with a projected timeline and it be made clear that some good reason has to exist if they are going to go beyond it. I am having experience of this at the moment. I have set my own timeline for the Hammarskjöld inquiry and I can tell you that it is pretty killing to try to keep to it. You are running up the down escalator as time approaches. You do not want things to be sold short, but if you try to put a cost cap on it, you will take an even more arbitrary decision. It seems to me that you have to accept that either you do not set up an inquiry or you recognise that it is going to be a costly thing to do. At the moment I do not see any middle way.

Baroness Buscombe: One of the reasons some inquiries cost so much and take so long is the interruptions for judicial review. What about the shortening of the time limit for applications for judicial review? For example, perhaps shortening the timeframe for application for judicial review to 14 days would help reduce the length of inquiries.

Sir Stephen Sedley: I think we can do better than that. It has always been a principle of judicial review that you have to apply promptly and in any event within the time limit. There have been cases, not inquiry cases but it would apply to inquiries, where unless you apply within 48 hours you are going to find yourself shut out of court. If it is something that is ongoing on which huge interests hang and you know perfectly well that you have a case, then you can be shut out of court if you do not come very rapidly indeed to ask for relief. You can be told it is too late. There are a number of instances one could give of this happening. So shortening the time limit will not help. The court already applies very tight limits where they are needed.

The question is what happens when you get to court. First, you have to get permission to apply for judicial review. That takes some time. You then have to come on in an opposed hearing and you are going to be three months down the road even if everything is expedited. You are absolutely right. It is a genuine concern that everything else has gone into abeyance while this happens. But the risk of not allowing this to happen at the right time is that you get a report that is then struck down because of a failure of due process in the course of arriving at it and that is even worse.

Q47 Lord Woolf: Can I go back? You mentioned right at the start what happened in respect of coroners, how they were not really a process that would be compliant with the

requirements of the European Convention. Now coroners' inquests are much more significant. In the course of the questioning today, problems in the present situation have been identified in respect of the role of the Minister in setting up the inquiry and matters of that sort. Do you think there is any need in respect of inquiries—because they are, as the Professor indicates, so much part of administrative law now—for some body, similar to that which exists in regard to tribunals, to which the responsibility for running inquiries should be handed to take it out of the hands of Ministers? That body would be responsible for ensuring that they were conducted efficiently and appropriately.

Sir Stephen Sedley: A sort of commissioner for public inquiries, do you mean?

Lord Woolf: Yes.

Sir Stephen Sedley: Just to clarify in my mind, someone who would have the power merely to oversee the running of them?

Lord Woolf: Yes, who would oversee the running of them and have the accumulated experience of how they should be conducted.

Sir Stephen Sedley: But not the power to instigate them.

Lord Woolf: I think if it is going to be one that could be consulted upon as to whether it meets the criteria, which could be laid down by Parliament, it should exist before there is an inquiry.

Professor Tomkins: Do statutory inquiries not fall within the remit of the Administrative Justice and Tribunals Council and is that council not scheduled to be abolished? Am I wrong about that? It certainly was the case before the Inquiries Act that public inquiries fell within the remit of the Council on Tribunals, which was the predecessor body of the Administrative Justice Council. I know that because the Council on Tribunals' annual report for 1996 talked about the dispute between Lord Howe and Lord Scott about the procedures of the Scott inquiry and attempted to update the Salmon principles that we were talking about a little while ago. So it certainly has been the case in the past that the Council on Tribunals has played a role, which is I think similar to the role that Lord Woolf is describing.

Lord Woolf: I am not sure that the Council of Tribunals had any specific jurisdiction with regard to inquiries. I think it was for court-like bodies rather than inquiries. But it could be a similar body to that, yes.

Professor Tomkins: If statutory inquiries do not fall within the remit of the Administrative Justice and Tribunals Council and if the Administrative Justice and Tribunals Council is not to be abolished, I think there is a good argument for saying that at least statutory inquiries, and perhaps all inquiries, should fall within the remit of the Administrative Justice and Tribunals Council, but there are a lot of ifs in that answer.

Lord Woolf: That Council is purely an advisory body, is it not, Professor?

Professor Tomkins: From memory I think that is probably right. I would want to go away and check that.

Lord Woolf: I think I would have to do that as well. What I am saying is that there should be some body that is hands on, which we have not had. If you are appointed as the chairman of an inquiry and you have never done an inquiry before, the first question you might ask yourself is, "What should I do?". At the moment you could go and have a talk with the

Treasury Solicitor and you could go and have a talk with somebody who has conducted an inquiry, but there is nobody who could give authoritative guidance.

Professor Tomkins: My memory is hazy on this because it is a long time ago, but my memory is that the Council on Tribunals did publish guidance about procedures at public inquiries following on from the dispute between Lord Howe and Lord Scott about the procedure at the Scott inquiry. That would imply that there is somebody, or was somebody, at the Council on Tribunals to whom an inquiry chairman could turn for advice and guidance about fairness of inquiries. But perhaps I am being naïve.

Lord Woolf: It may be, but I certainly was not aware of that and I have conducted a few inquiries in my time. I do not think people who asked for my guidance as to what they should do were under that opinion.

Professor Tomkins: One of the problems at the Council on Tribunals was that it flew under the radar a bit too much.

Lord Woolf: Yes. It may be that it could be adapted to that now. But do you think there is a need for some body that can play that role?

Professor Tomkins: I think it is difficult, for the reasons to which Lord King alluded earlier. They are that the inquiries that we are talking about, even the inquiries under the Inquiries Act, range across a huge variety of different subjects. Some of them involve questions that get very close to questions of individual liability and some of them do not. Some of them are inquiries in which there will be a need for significant legal representation, if not legal advice, and some do not. Having a body that is capable of generating generic advice that will fit equally all statutory inquiries might be unwise.

Lord Woolf: I was not really suggesting that. I was really suggesting a body that was involved with the majority of inquiries but it did not have to treat them all the same way, as you are envisaging.

Professor Tomkins: I do not know. If you are regarded by a Minister as having sufficient public standing, expertise and independence to chair a multi-million pound public inquiry, should you not be able to get on with the job?

Sir Stephen Sedley: I think possibly what Lord Woolf has in mind is some kind of permanent secretariat that is adaptable and available to one inquiry after another to give some consistency of advice and format but without intervening in what the inquiry is doing. I would have thought that was a very attractive idea. It would mean you had some sort of a matrix on which inquiries operated. It would become even less important whether they were statutory or non-statutory if the services were available to everybody who set one up. But I doubt whether anybody would find the funding in our lifetimes for doing it.

Q48 Baroness Buscombe: I would like your thoughts on whether such a secretariat could well pay for itself if its remit included keeping a strong eye on cost and timelines, absolutely accepting what you have said in relation to not having a fixed timeline that could then destroy the whole purpose of an inquiry but having genuine oversight and accountability in terms of process and procedures and costs of these inquiries, which may perhaps deter some who call for an inquiry in order to defer any political embarrassment to themselves.

Sir Stephen Sedley: Yes. It is obviously a very valuable idea if one could make it happen. But for example, where there are multi-party inquiries, with each party represented—this was the case with the Scarman inquiries—each barrister’s clerk negotiated a daily rate with the

Treasury Solicitor who was responsible, as I recall it, for authorising expenditure out of the Exchequer. They will all have had different rates depending on the militancy of their clerk. Solicitors will have had a similar experience. There may have been a fixed hourly rate for solicitors, I do not know. But you can get a pretty good pre-estimate once that has been gone through of what it is all going to cost per week. What you do not know is how many weeks it is going to last.

Baroness Buscombe: For example, in the Al-Sweady inquiry, why is it necessary to have Queen’s Counsel if we are not talking about a system that is adversarial, if we are talking about something that is going to go on for years, not months? Maybe that secretariat could have a view.

Sir Stephen Sedley: I am entirely in favour of the chair of an inquiry being able to say, “I will only have one advocate in the room for each individual”. If the inquiry itself is paying for those advocates, he could certainly say, “No QCs. A junior of no more than 10-years call could do the job perfectly well”, which may or may not be the case. You could keep costs down that way, yes.

Lord Woolf: Could I speak very shortly, with an eye very much on the clock, and deal with this question of you have an inquiry and you can have all sorts of court proceedings thereafter. They start off no doubt informed, the parties are informed by what the inquiry has revealed, but the findings of the inquiry have no status in litigation. Do you think that there are any circumstances where it might be a good thing that perhaps the findings of an inquiry are prima facie evidence in subsequent litigation?

Sir Stephen Sedley: I have favoured this for a long time. Lord Justice Taylor’s findings at the first Hillsborough inquiry could very well have stood as prima facie evidence of liability in the litigation that followed. I said I think earlier this morning that nowadays, with coroners’ inquests properly conducted and article 2 compliant, there is no reason why their verdicts—particularly coroners’ jury verdicts—should not be evidence in a court of law.

Lord Morris of Aberavon: Coming back quickly to Lord Woolf’s point about authoritative guidance or the source centre, that role could be performed by the Cabinet Office, in which at the last count there were five or six permanent secretaries.

Sir Stephen Sedley: Yes, that is absolutely right.

The Chairman: I think we have perhaps got to the end of things, unless there are any other questions that anybody wants to put. May I thank you very much indeed on behalf of the Committee for giving up your time and coming to see us this morning. Thank you very much indeed.

Sir Stephen Sedley: We are very honoured to have been asked.

Professor Tomkins: Yes. Thank you very much.

Damien Paul Shannon – Written evidence

1. I write this evidence as an individual, but with an academic and/or personal interest in said Act. I have elected not to answer all the questions in the public call for submissions, instead only answering those I feel equipped to or have a particular interest in doing so.

What is the function of public inquiries? What principles should underlie their use?

2. I see the function of public inquiries as being to establish the truth of a given matter of exceptional public importance where alternative means of doing so are either inadequate or inappropriate. I would consider the following principles underlying their use as appropriate guides:
 - a. They should relate to a matter of exceptional public importance;
 - b. “Public importance” ought be taken to mean a matter that has a direct or indirect bearing on the population of the United Kingdom at large, or a sufficiently large proportion of it. An oft used phrase is that matters of public interest and what the public find interesting are not one and the same. Equally that is true here;
 - c. They should relate to matters which require impartial adjudication, that is to say, an inquiry which is, or is seen to be, partial would not, owing to the subject matter which is of fundamental public importance, be the appropriate forum in which to arrive at a comprehensive understanding of the truth of the matter;
 - d. In light of the above, they should be used as a last resort, rather than a first resort.

To what extent does the Inquiries Act 2005 reflect those principles?

3. As regards 2(a) and 2(b) (above), there is practically unlimited Ministerial discretion within the Act as to whether a matter is of sufficient public importance to warrant the establishment of an inquiry. That gives rise to theoretical circumstances under which a Minister may decline to establish an inquiry notwithstanding the public importance of the matter which would *prima facie* provide sufficient cause to establish one. There are no judicial or Parliamentary 'triggers' by which either the legislature or judiciary may cause to be established a public inquiry. Equally a matter of next to no public importance could become the subject of a public inquiry given Ministerial discretion for their establishment (although in practice this is not a likely concern).
4. As regards 2(c) above, Section 9(1) of the Act gives a notional requirement for the Minister establishing the inquiry to appoint to its panel impartial members. However, the language of Section 9(1) is phrased in such a way that what constitutes impartiality can mean whatever a Minister wishes for it to mean (“if it appears to the Minister that the person has”). Although the exercise of the power of the Minister to appoint an inquiry panel codified in Section 4 of the Act is theoretically amenable to judicial review (albeit within the time constraints of Section 38 of the Act), the only legal obligation upon the Minister is to illustrate that *it appears to him/her* that a prospective panel member is impartial. Put another way, it does not seem to me there is any tangible oversight of the exercise of the power to appoint the inquiry

panel by the Minister. The Act in this regard does not ensure to a sufficient degree that the matter of public importance for which an inquiry is established will be considered by (an) impartial adjudicator(s).

Does the Act achieve the right balance between the respective roles of ministers, Parliament, the courts and inquiry panels themselves in making decisions about inquiries? -AND- In particular, is it right that ministers should have the power to set up, or not to set up, an inquiry, to set its terms of reference, appoint the chairman and members, suspend or terminate the inquiry, and restrict the publication of documents?

5. No. Ministers have a considerable degree of control over the production and publication of evidence (Sections 17-23 of the Act). The only positive duty on the Minister with respect to Parliament is to inform (Section 6). The prospects of a Ministerial decision to withhold evidence from an inquiry being judicially reviewed are slim since there is no positive obligation to publicly promulgate decisions to withhold evidence from the inquiry or public. To that end there is no reason to believe Parliament would be any better informed than the general public as regards a decision to issue a Restriction Notice or Order under Section 19(2) of the Act. Thus the prospects of supervision over the exercise of Ministerial powers created by the Act, by either the Courts or Parliament, are slim. Inquiry panels appears to have no discretion other than that granted by a Minister.
6. In light of (5) (above) it is difficult for me to express any degree of confidence in the capacity of public inquiries to arrive at the truth of a matter of exceptional public importance, given the great brevity of control Ministers may exercise over the conduct of and evidence before an inquiry.

Should other persons have any of these powers in addition to or instead of ministers?

7. I would suggest that there ought be Judicial and Parliamentary 'triggers' for the establishment of public inquiries. Individuals, groups or corporate petitioners ought be able to seek an order from a Court of competent jurisdiction for an inquiry to be established. Parliament ought be able to trigger an inquiry by (for instance) an affirmative resolution of both Houses.
8. Equally I would suggest that there ought be a positive obligation on Ministers to inform the House (by written and/or oral statement) when a Restriction Order and/or Notice has been issued under Section 19(2) of the Act to the inquiry panel. This would provide a duty to publicly promulgate such a decision, would introduce scope for interested members of the public to judicially review such a decision and/or in the alternative for Parliament to debate the decision. I would equally be amenable to a power within the Act for Parliament by an affirmative resolution of both Houses to overturn a Ministerial decision to issue a Restriction Order or Notice.
9. The decision to suspend and/or terminate an inquiry should rest exclusively with Parliament.
10. A negative resolution procedure ought be adopted for the approval of inquiry terms of reference.

Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but ministers declined to set one up? Are there cases where an inquiry has

unnecessarily been set up to deflect or defer criticism? -AND- Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?

11. I believe the Gibson Inquiry into allegations of the complicity of Her Majesty's Government in decisions to 'render' dissidents to the Libyan regime of Colonel Gaddafi was abandoned largely after it was publicly revealed that Jack Straw had issued certificates under Section 7 of the Intelligence Services Act 1994 to the Intelligence Officers involved in the decision. As such I believe there is a conspiracy of silence amongst Ministers (past and present) to shield from public scrutiny such behaviours. I have no confidence in the capacity of inquiries established under the Act to hold to account the very Ministers who control both the evidence they are allowed to see and the final report they are allowed to produce (if at all).

Is the degree of involvement of the judiciary in inquiries appropriate?

12. I have explained above how the role ought be expanded to include the power to trigger the establishment of an inquiry. There are unlikely to be persons better placed to conduct an inquiry in many instances than senior members of the judiciary. To this end I find it deeply concerning that there is no positive obligation on a Minister to even include a member of the judiciary in an inquiry panel (a prime example being the Chilcott Inquiry). It perhaps ought be included in the Act that there exists a positive obligation for a Minister to incorporate into an inquiry panel at least one member of the senior judiciary.

Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?

13. I think there is a common public misunderstanding of the difference between what powers a public inquiry has under the Act and would have had prior to the Act's receiving Royal Assent. A common cry on matters of fundamental public importance is for a public inquiry since there is an implicit public assumption that an inquiry established under the Act will be of equivalent quality and rigour as was one established prior. However few such individuals retain confidence in the system of public inquiries if the broad Ministerial discretions codified in the Act are explained. I have even had private conversations with former Ministers (even one who was in the very government which passed the Act!) who do not have a cogent understanding of what the Act entails or the powers it bequeaths to Ministers. As such I believe there is a residual degree of public confidence in inquiries which lingers from the law as it existed prior to the passage of the Act. My best guess is that as the Act continues in law such public confidence will continue to erode. The decision to abandon the Gibson Inquiry has struck the gravest blow for confidence in the Act.

14. I believe public confidence could only be resorted by repealing the Act and returning the law that existed prior (that a public inquiry may exercise all the powers of the High Court). Decisions to resist disclosure of information ought be contested on ordinary Public Interest Immunity grounds.

15. In the alternative, the broad discretion granted to Ministers under the Act must be repealed or substantially curtailed with judicial and/or Parliamentary safeguards.

Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?

16. No. The primary function of a public inquiry ought be to establish the truth of a matter of exceptional public importance. It ought be utilised *as a last resort* – that is, when civil, criminal or Parliamentary inquiry into such matters has proved inadequate or impossible. Any civil or criminal proceedings flowing from a matter of exceptional public importance ought ideally be handled prior to an inquiry's being established. However, that is the ideal scenario and it creates two residual risks.
17. The first is that a Minister may utilise a protracted criminal investigation or civil procedure as justification for deferring the establishment of an Inquiry (all the more reason for judicial and Parliamentary 'triggers' for establishing an inquiry). I believe this is precisely what is happening in the aftermath of the Gibson Inquiry (aforementioned).
18. The second is that a Minister may use a law which exempted the proceeds and evidence of a public inquiry from being the subject of civil or criminal matters before the courts as justification for not pursuing a prosecution where otherwise there would be an overwhelming public interest in doing so.
19. I cannot think of an easy way of mitigating these two residual risks, except to say that provision must be made for individual cases to be judged on their merits.

Dr Judith Smith and Sir David Bell – Oral evidence (QQ 295 – 316)

Dr Judith Smith and Sir David Bell – Oral evidence (QQ 295 – 316)

[Transcript to be found under Bell](#)

The Right Honourable The Lord Thomas of Cwmgiedd, The Lord Chief Justice of England and Wales – Written evidence

I have read with interest some of the evidence that your Committee has received in relation to its investigation into the establishment and operation of inquiries into matters of public concern, in particular under the Inquiries Act 2005, and wish to make three short observations.

First, it is axiomatic that great care has to be exercised in deciding whether a judge should chair an inquiry. I appreciate that in chairing inquiries, judges perform an important public service. There are two guiding principles.

- a. It is generally appropriate to consider asking a judge to conduct or chair an inquiry when the inquiry is directed at establishing what happened in relation to an event or course of events. It is, of course, likely that in such an inquiry a judge will be asked to make recommendations, but the terms of reference can address the scope of any recommendations that the inquiry can make.
- b. However it is generally not appropriate to ask a judge to conduct or chair an inquiry into issues of policy (other than policy related to the operation of the courts and the administration of justice), particularly if the issue might be the subject of political controversy. By convention judges have always been able to express views on policy and legislation relating to the courts and the administration of justice. I have seen in draft the evidence of Lord Justice Beatson to the Committee and endorse his assessment of the risks in cases where a judge is asked to conduct an inquiry into issues of policy.

I do not consider it would be desirable to set out any guidance beyond that I have expressed in general terms. In my view, judgement has to be exercised on each occasion and, as I observe in my third comment, the involvement of the Lord Chief Justice will act as a sufficient check.

Second, it is not right as a matter of constitutional principle that a judge who conducts an inquiry should be subject to questioning by Parliament in relation to the inquiry's recommendations. As a Minister makes the appointment, the Minister cannot constrain Parliament. However, it would be highly desirable that there be a convention that Parliament would not question a judge in relation to any recommendations that they might have made in an inquiry.

Third, it is an imperative that the consent of the Lord Chief Justice should be required before a Minister can appoint a judge to chair an inquiry. Whilst it is said that, in practice, no judge would agree to conduct an inquiry if the Lord Chief Justice did not agree, there is, of course, no formal obligation for the Lord Chief Justice to concur with a Minister's proposals. There are a number of reasons why this is important: concurrence, not merely consultation, is required for the Lord Chief Justice properly to fulfil his responsibility for judicial deployment and to protect against judicial involvement in areas of political controversy. Furthermore, the direct appointment of a judge by a Minister runs contrary to the normal system of judicial appointments, in which, for reasons of constitutional propriety, the role of the executive is limited. Similarly, it is my view that the Lord Chief Justice's consent must be

The Right Honourable The Lord Thomas of Cwmgiedd, The Lord Chief Justice of England and Wales – Written evidence

required to the terms of reference of a committee which is chaired by a judge. Again, while as a matter of practice the Lord Chief Justice's concurrence to terms of reference is likely to be sought, the lack of formal obligation in this regard is inappropriate and anomalous as there is no other context in which a Minister can direct a judge how to act.

Professor Adam Tomkins and Rt Hon Sir Stephen Sedley – Oral evidence (QQ 22- 48)

Professor Adam Tomkins and Rt Hon Sir Stephen Sedley – Oral evidence (QQ 22- 48)

[Transcript to be found under Sedley](#)

Ashley Underwood QC, Michael Collins and Judi Kemish – Oral evidence (QQ 248 – 271)

Ashley Underwood QC, Michael Collins and Judi Kemish – Oral evidence (QQ 248 – 271)

[Transcript to be found under Collins](#)