

What do I do? Answering requests from a public inquiry

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Introduction

- What are public inquiries?
- What rights do they have to seek information from my client?
- What rights do they have to ask questions?

First step: what is a public inquiry?

- A call for a public inquiry is common where an event of major public concern has happened or a controversial policy has been enacted or gone wrong. There are different ways in which an Inquiry can be set up: Cabinet Office guidance does not presume one or another is preferable.
- Three types of possible inquiry.

What sort of Inquiry is it?

- A statutory inquiry: set up and operates under the rules of the Inquiries Act 2005 and the Inquiry Rules 2006 – for example: Grenfell, Blood Inquiry, IICSA. Also powers in other Acts to have public inquiries –
- s3 of the Children Act 2004 – Inquiry to be carried out by the Children’s Commissioner :
- s14 of the Health and Safety at Work Act (incidents and accidents)
- S68-72 of the Financial Services Act 2012 (serious failure of regulatory system)
- Merchant Shipping Act 2005 (deaths/serious incidents) .
- Schedule 1 of the Coroners Act 2009 enables inquests to be converted into Inquiries under the 2005 Act.

- A non statutory inquiry: this includes “ad hoc” inquiries, committees of Privy Counsellors or Royal Commissions : the Chilcot Inquiry is the most recent of these – earlier example - Profumo.
- Third type: Parliamentary Commissions of Inquiry.

What is the purpose of the Inquiry ?

- Establish the facts – a full and fair account of what happened , or the causation of events : or /and
- Learning from events – so helping to prevent their recurrence by synthesising or distilling lessons to change practice.
- Catharsis of therapeutic exposure – to provide reconciliation/resolution – to bring protagonists face to face with their perspectives.

What is the purpose of an inquiry ?

- Reassurance – to rebuild public confidence after a major failure by showing that it is being fully investigate and dealt with.
- Accountability, blame and retribution – holding people to account, either directly or indirectly – contributing to the assignation of blame and providing a mechanism for retribution
- Political considerations – serving a wider political agenda for government either in demonstrating that something is being done or to provide a motive/lever for change.

Non Statutory Inquiries

- Have more flexible procedures : can be less adversarial
- Can hear evidence in private (given that many public inquiries revolve around national security or intelligence issues, this can be a significant advantage – eg Chilcot)
- Cannot compel witnesses – so compliance is voluntary (albeit that the informal pressure can be considerable)
- It cannot take evidence on oath.
- Has no power to compel the production of documents.
- Does not have to be in public.
- Does not have to provide monies for legal representation and do not have legal representation for witnesses
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Non statutory Inquiries

- Will provide opportunities for comment/to respond to critique at some point.
- Report likely to be published and laid before Parliament.
- May well be streamed live/information published on a website (for example Hutton published everything on a website)
- May well be questioning only by counsel to the inquiry, or also witnesses, may be several stages eg neutral questioning first, and then xx

Committee of Privy Counsellors

- Variation on the non statutory inquiry – although as it is made up of Privy Counsellors, it enables security information to be seen e.g. Intelligence assessments.
- Most common recent examples – Butler Inquiry – 2004 – review intelligence into WMD and Chilcot.
- Can be sworn in as privy counsellors for the task (the Butler Inquiry did this)

Royal Commissions

- Again ad hoc investigatory/advisory committees
- No power to compel witnesses
- No power to compel the production of documents
- Used where time is not of the essence.
- Usually used for issues of broad policy: seem to be less popular than they used to be – most recent well known are – Royal Commission on Long Term Care – established Dec 1997 and the Commission on the Reform of the House of Lords .

Dealing with a non statutory inquiry

- What stage is the Inquiry at – is this a request for information: a request for evidence: a possible criticism of my client?
- What information does the Inquiry already have about the client either by way of internal documents from other individuals/companies or government departments ?
- What are the terms of reference of the Inquiry – and does the information requested fall within them? (Terms of reference are usually very broad : if large inquiry , different aspects may have different “scope” documents which may set out the interpretation of the terms of reference and are more detailed – ask for them or to be pointed to them to check that the requests are “in scope”).

If dealing with a non statutory inquiry

- What will be the impact upon the reputation of my client if I do not answer this request ? Is there political/moral/commercial pressure?
- Do I need to put my client's side of the story to be fair?
- Is the process suggested for gathering evidence/responding fair - think of general public law principles of procedural fairness – eg allowing people to comment, knowing the case they have to answer, being provided with sufficient material to be able to provide appropriate advice, being given sufficient time etc.

Things to think about

- No requirement to provide legally privileged documentation.
- Can refuse to provide information if would involved breaches of confidentiality/lead to the risk of civil proceedings by others for the provision of that information
- Likely to be assurances or creation of confidentiality processes to enable documentation to be obtained.
- Find out what is going to be sent, to whom, when, how it is kept, what will happen to it afterwards?
- Who else will see this documentation?
- Can it be redacted/ciphered and how will that process work?
- Can a lawyer be present during examination/can they ask questions?

Statutory Inquiry

- Set up under the Inquiries Act 2005 which provides the framework for the taking of evidence and the production of a report
- Also provides for the payment of expenses.
- 24 Inquiries have been established under the 2005 Act – 8 of which are currently ongoing. Five by the UK government and three by the devolved administrations. If devolved, cannot compel individuals outside the territorial jurisdiction to attend: if UK wide can look at devolved issues but must consult the devolved administration before doing so.
- Established by a Minister, who then goes before Parliament saying who is to be the chair and panel and provides the terms of reference.
- Once established, they are independent of the government department : have their own Secretary and secretariat.

Statutory Inquiries – when are they set up

- Cabinet Office guidance note suggests where:
 - Large scale loss of life
 - Serious health and safety issues
 - Failure in regulation
 - Other events of serious concern.

Speaking in 2015, the Government said that non statutory inquiries may be quicker and more proportionate.

Select Committee in 2014 recommended changes to the Inquiries Act 2005 as has an Institute for Govt report in 2017 to make the processes more flexible and to establish a permanent secretariat to staff and provide resource for public inquiries: so far has not happened.

Statutory Inquiries

- Must comply with the Act and the Rules
- But otherwise are masters of their own procedure.
- It is not litigation: it is not about confrontation and must not be seen like litigation.
- The job of the Inquiry is to pursue lines of investigation; material that may not be of immediate or burning relevance, if part of the line of investigation, can be provided to an Inquiry.
- Unless it is going off on a frolic of its own, it can pursue a line of questioning .
- Inquiries do not usually involve the determination of civil rights and obligations and so do not usually engage Article 6.

Answering a request: public inquiry

- Is it within the terms of reference (s5 of the Act defines the terms of reference as):
 - (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 Panel is to make recommendations
 - (d) Any other matters relating to the scope of the Inquiry.
- Do you want to judicially review the terms of reference? (this has happened – Billy Wright inquiry) .
- There is a practice of consulting on the terms of reference before recommending them to the Minister (although that is not invariably the case)

Which stage of the Inquiry is the request being made?

- Stage 1: a preliminary investigation of what evidence is available.
- Stage 2: the provision of evidence relevant to the subject matter of the Inquiry.
- Stage 3: The provision of evidence to others who are likely to be affected by the Inquiry (core participants)
- Stage 4: the hearing of evidence in public and the publication of associated evidence/documents.
- Stage 5: the preparation of the report setting out the findings and recommendations.

Does the Inquiry compromise other investigations?

- An inquiry cannot make a finding of individual civil or criminal liability
- But may well end up making findings about credibility or events which could then lead to criminal or civil liability
- No hard and fast rule that must wait for the outcome of a criminal investigation (or other disciplinary/regulatory investigation) before investigating it in the course of a public inquiry – but prejudice to a criminal investigation is likely to be a strong reason to delay investigation or publication of findings until such has been finalised (see for example Grenfell)
- If the criminal investigation and the inquiry deal with different aspects of failure , then could have both running in parallel.

Do they have power to compel my client to give this information?

- S21 of the 2005 Act permits the compulsory provision of documents or the giving of oral evidence: if documents are intentionally suppressed or concealed, then this is a criminal offence under s35 of the Inquiry Act 2005 (max 51 weeks in prison in England and Wales: 6 months in NI and Scotland) – current max fine is £1,000.
- Some Inquiries use the power of compulsion ab initio: others ask for the information on a voluntary basis, and only use the powers under s21 if the organisation/person asks for such or if a voluntary request has been refused.
- No power of search and seizure.
- No power of surveillance.

Provision of information at stage 1

- Often called the “scoping phase”
- Requests for information to preserve documentation.
- To review documents to see what the scope of the Inquiry should be.
- To decide what documents may be needed in the future
- To decide which witnesses may need to be called.
- May well be significant material sought at this stage which may never be ultimately used for a hearing.

Provision of information at stages 2 -4

- Likely to be more focussed requests for evidence and/or witness statements.
- May well also involve asking to comment upon material gathered from others.
- May involve the production of material/discussions with experts appointed by the Inquiry.
- Issues of confidence/putting material into the public domain are most likely to be of concern.

Provision of information at stage 5

- Will be commenting upon warning letters sent under Rule 13 of the Inquiry Rules
- Unlikely to involve a request for further information, but request for comment upon possible criticisms. This may, even at this stage, mean bringing to the attention of the Inquiry either material they have but have overlooked, or fresh material which has a direct bearing on the criticism (although this is something to be avoided if at all possible).

Consideration 1 – fairness and unnecessary cost?

- Is this request necessary, fair and has it been formulated with regard to the need to avoid unnecessary cost (Chair has a duty under s17 to act proportionately) ?

Consideration 2 : is it material within custody and control?

- This can include documents both in the clients possession but also those where he can obtain possession of it.

Consideration 3 : Grounds for refusal under s21(4)

- S21(4)(a) – The client is *unable* to comply – doesn't have the information, or cannot provide it (for example it is intercept evidence).
- S21(4)(b) – It is *unreasonable* to expect someone to comply. This could include:
 - (a) It is too difficult to get the information.
 - (b) It would take too much time.
 - (c) It would involve spending too much money .
 - (d) The evidence will not be of material assistance to the Inquiry

Consideration 4: is the material privileged?

- S22 of the 2005 Act provides that an inquiry cannot require someone to provide a document if he would not be required to do so by a Court in the UK.
- Examples would be:
 - (a) Owed a duty of confidence – (but often these confidences are overridden by the public interest – eg disclosure of medical records held in confidence – Lewis v SS Health [2008] EWHC 2196)
 - (b) Subject to legal professional privilege – both litigation privilege and legal advice privilege . But you may wish to consider whether to waive that privilege and/or to be careful about what is actually the subject of such privilege, and the limits of such (ENRC [2018] EWCA Civ 2006).

Consideration 5: is the material subject to public interest immunity?

- S22(2) enables material subject to PII to be withheld.
 - Where it would cause real damage or real harm to the public interest
 - Wide variety of “public interests” and categories are not closed but include:
 - (a) Relating to national security
 - (b) Diplomatic relations
 - (c) Formulation of government policy
 - (d) Activities of informants/ criminal intelligence
 - (e) Police surveillance
 - (f) Impact on the administration of justice.
- There is a balancing exercise as to whether the information should be withheld to be carried out by the Chair/Panel.

PII (2) – the balance to be struck

- When examining any claim for PII, the Chair/Panel will examine;
 - (a) Exactly what is being sought to be withheld
 - (b) What is the risk of serious prejudice to an important public interest
 - (c) Can disclosure be ordered in a way to protect those interests – eg anonymisation/gisting/redaction/closed session.
 - (d) Is the proposal the minimum derogation needed to protect the public interest.
 - (e) Would the limits of the disclosure prejudice or seriously impact upon the fairness of the inquiry procedure.
- (see for an example *Bancoult v FCO* [2010] EWCA Civ 158).

Would the material lead to self incrimination?

- No –one has to answer questions if it would expose the person to a criminal charge - s14 of the Civil Evidence Act 1968.
- This is evidence which is directly incriminatory – i.e. I did kill him.
- Or evidence which is indirectly incriminatory – so information which may be required to prove the criminal offence – so for example exculpatory pieces of information or facts could then be used in a criminal prosecution or to contradict material then given during a trial.
- Or evidence that may be used in prosecutorial decision making .

Only relevant to the laws of the UK.

Grant of immunities by the AG

- Where public inquiries may then lead to criminal proceedings or involve a requirement for the privilege against self incrimination to be waived, a request can be made to the Attorney General for an undertaking as to the future use of information given to the Inquiry.

Used frequently – eg Baha Mousa, Bloody Sunday , Rosemary Nelson.

Spousal privilege

- S14 of the Civil Evidence Act 1968
- Spouses and civil partners (s84 of the CP Act 2004) can refuse to give evidence if it would lead to criminal proceedings against a spouse and/or in bankruptcy examinations.

Parliamentary privilege

- Defined as the peculiar rights enjoyed by both Houses of Parliament.
 - (1) Article 9 of the Bill of Rights –. This may be relevant if Ministers have answered questions in Parliament or MP's have spoken in debates. Article 9 is only concerned with prohibiting questioning of proceedings in Parliament if they are going to be “impeached or questioned” – ie that they were untrue, improper or misleading. But there is no objection to asking what was said and done in Parliament (usually by Hansard).
Public Inquiries may also be set up in particular to breach Parliamentary privilege.
 - (1) The exclusive jurisdiction of Parliament – i.e. Where matters should be dealt with by Parliament rather than the courts/judicially.

Breach of EU law

- S22(1)(b) exempt from disclosure matters which would be incompatible with a Community obligation
- So anything arising from the Treaties, Regulations, Directives or decisions.

Restrictions on disclosure of material received

- S18 – duty to provide the public with access the record of evidence and documents given.
- Duty is not absolute – the Inquiry only needs take such steps as are reasonable (so does not need to disclose irrelevant material). Also does not provide for when the information has to be provided.
- But no right to disclosure of information contained in inquiry documents – Public Inquiries are not the Subject of FOIA requests if they are statutory (but would be subject to FOIA if non statutory).
- Some information provided may end up in the National Archives.
- S19 – provides a right of restriction.

S19 – restrictions

- The Inquiry can restrict attendance, permit evidence to be given in private
- Can also restrict the disclosure or publication of evidence.
- Can only happen by the Chair issuing a “restriction notice” or “restriction order” . Such restrictions are only permitted:
 - (a) As required by statute , EU law or rule of law
 - (b) A the chair considers to be conducive to the inquiry fulfilling its terms of reference.
 - (c) As the chair considers to be necessary in the public interest.

S19(4) What are the restrictions?

- The extent to which any restriction on attendance, disclosure might inhibit “the allaying of public concern”
- The risk of harm or damage that could be avoided/reduced – described as “including” – death, injury, national security, economic interests of the UK, commercially sensitive materials.
- The conditions of confidentiality subject to which a person received information to the Inquiry
- The extent to which failing to impose a restriction would cause delay, impair the effectiveness of an Inquiry or otherwise result in additional cost.

Giving evidence to an Inquiry

- Rule 9 permits an inquiry panel to send a written request for a written statement. This must include a description of matters or issues to be covered in the statement.
- Sometimes this is done by the Solicitor to the Inquiry or his team.
- Sometimes this is orchestrated by Solicitor to the Inquiry but carried out by a legal team instructed on behalf of the witness.
- Sometimes the witness writes his own witness statement.

Practice varies depending upon the subject matter, importance, means and timing.

There is no power for an Inquiry to compel someone to attend an interview to give a statement (simply to attend to give evidence or a written statement).

Information given before an interview/statement

- Some inquiries provide an interview plan in advance
- Some inquiries will give documents in advance of any witness statement to enable them to comment upon them.
- Some inquiries ask very broad questions
- Others ask very detailed questions.
- Some inquiries ask for a draft of any statement which is then commented upon by the Inquiry before finalisation.

Giving evidence

- Remind the client that this is an inquisitorial process
- Work out if your client may qualify for funding under s40 of the Act
- Remember that the rules of evidence do not apply to proceedings (s17).
- Find out which model the Inquiry is running to – standard adversarial model, a model which restricts questioning, or a mixture of the two.
- Find out about the possible areas of questioning in advance and ask if other participants have asked questions under Rule 10.
- Remember that it may be live streamed.
- The nature of the inquiry may determine how far cross examination is permitted and who is allowed to ask questions.
- Must ensure that individuals are allowed to participate fairly in the process to safeguarding their interests.

Giving evidence (2)

- No power in the act to compel the giving of evidence from abroad
- Video link is frequently used.

Warning letters

- Under rule 13 – 15 a public inquiry may send letters providing information (and if necessary documents) about the express criticisms that may be made, a statement of the facts which substantiate the criticism and refers to the evidence.
- No express requirement that must send warning letters: all depends upon context.
- The client then has a chance to respond.
- The Inquiry may or may not adopt the proposals set out in the warning letter and may or may not respond to the concerns raised.
- Further evidence/further warning letters can also be sent on occasions.