Ministry of JUSTICE

Memorandum to the Justice Select Committee:

Post-Legislative Assessment of the Inquiries Act 2005

October 2010

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Post-Legislative Assessment of the Inquiries Act 2005

Presented to Parliament
by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2010

Cm 7943 £5.75

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This publication is also available on http://www.official-documents.gov.uk/ and on our website at www.justice.gov.uk

ISBN: 9780101794329

Printed in the UK by The Stationery Office Limited
on behalf of the Controller of Her Majesty's Stationery Office

ID P002391881 10/10

Printed on paper containing 75% recycled fibre content minimum.

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Introduction

1. This memorandum provides a preliminary assessment of the Inquiries Act 2005 (2005 c12) and has been prepared by the Ministry of Justice for submission to the Justice Select Committee. It is published as required by the process set out in the document Post Legislative Scrutiny – The Government's Approach (Cm7320).

Objectives of the Inquiries Act 2005

2. The Inquiries Act 2005 received Royal Assent on 7 April 2005. The Act provides a comprehensive statutory framework for inquiries set up by Ministers to look into events that have caused or are capable of causing public concern. The aim of the new framework was to ensure that inquiries were conducted efficiently within a reasonable timeframe and at a reasonable cost and that they were effective at making findings of fact and delivering valuable and practicable recommendations.

3. The 2005 Act gave effect to the proposals contained in the then Department for Constitutional Affairs' consultation paper entitled "Effective Inquiries", which itself arose out of a memorandum, submitted to the House of Commons Public Administration Select Committee as part of its "Government by Inquiry" investigation (HC 51 2004–05). In summary, these proposals were that the Tribunals of Inquiry (Evidence) Act 1921 was less than ideal for modern inquiries, that subject-specific legislation would not always provide a full and suitable basis for inquiries, and that therefore a new legislative framework was needed.

4. The 2005 Act repealed the 1921 Act and other subject-specific legislation on inquiries that had grown up over the last century in various subject areas such as policing and health, and which gave Ministers power to order inquiries in particular areas, thus implementing these proposals. The 1921 Act was intended only for the most substantial inquiries into matters of urgent public importance but it was cumbersome and an affirmative resolution of both Houses was needed to establish an inquiry. Although the 1921 Act contained powers to compel witnesses and the production of evidence, it contained no provision to control the costs of inquires. This meant that the Government was unable to control the costs on inquiries set up under the 1921 Act such as the Bloody Sunday Inquiry. Indeed, some of the momentum for the 2005 Act arose specifically from the Bloody Sunday Inquiry which took twelve years to conclude and cost £192m. The Government noted in 1998, in reference to the conduct of the Bloody Sunday Inquiry, that there had been cases where inquiries had been marred by arguments about procedure, or had taken much longer or cost more than originally expected. In addition, there was no provision in the 1921 Act for procedural rules.

5. Subject-specific legislation, on the other hand, did not cover all areas where inquiries might be needed. Some inquiries did not fit easily into the range of statutory options offered by the subject-specific legislation either because of lack of legislation covering the particular subject of the inquiry or because the inquiry ranged across more than one subject or more than one Government Department's remit. Whilst different pieces of subject-specific legislation had been used successfully as a basis for some inquiries, too much disparate law and policy was contained within different sources. The then Government considered that there was a danger that difficulties could arise with such an approach in the future in view of the increasing complexities of modern society and the interaction and communication amongst different activities and services. The then Government considered that there was a clear case for addressing these difficulties in one piece of legislation.

6. The measures introduced in the 2005 Act thus aimed to make inquiries swifter, more effective at finding facts and making practical recommendations, and less costly whilst still meeting the need to satisfy the public expectation for a thorough and wide ranging investigation. They also aimed to restore public confidence in the inquiry process particularly given the concerns and controversies generated by the conduct of inquiries such as the Bloody Sunday Inquiry and other earlier pre-2005 Act inquiries.

7. The 2005 Act codifies best practice from previous statutory and non statutory inquiries such as the need to ensure that those conducting inquiries are impartial and have appropriate expertise. It sets out clearly in statute for the first time the process of setting up an inquiry, and the respective roles of the inquiry chairman and the Minister. It contains a specific requirement for the inquiry chairman to consider the cost to all those involved in any decision and requires the inquiry to publish final costs to provide a greater level of accountability and transparency in the inquiry process. It empowers the inquiry chairman to make procedural rules on issues such as legal representation, taking evidence and assessing costs as part of the chairman's role in controlling costs.

8. The 2005 Act also puts in place a robust structure for decisions on public access and privacy by setting out clearly the factors a commissioning Minister and chairman must take into account in reaching these decisions. It stipulates that inquiry proceedings are to be in public unless there are good reasons for restrictions on public access being imposed by either the Minister or the chairman. Unlike previous legislation, the Act specifies the grounds on which access can be restricted.

9. The Act creates a UK-wide inquiry framework that reflects the Devolution Settlements providing a new structure for all the devolved administrations to conduct inquiries into matters within their respective remits. There are also provisions allowing for joint inquiries across administrations.

10. The web link to the Inquiries Act 2005 and its explanatory notes is at **Annex A**.

Implementation

Inquiries Act 2005

11. All the provisions of the Act have been commenced. Sections 51 to 55 came into force on 7 April 2005. Sections 1 to 50 and the Schedules to the Act were brought into force on 7 June 2005.

12. A list of the relevant Statutory Instruments that brought the sections into force is at **Annex A**. The overview of the Act's key provisions in the following paragraphs (13 to 20) demonstrate how these meet the Act's objectives.

13. Sections 1 to 14 of the 2005 Act provide for the constitution of an inquiry. They empower Ministers to set up formal and independent inquiries into events which have caused or have potential to cause public concern, or where there is public concern that particular events may have occurred. They also provide for Ministers to set Terms of Reference and appoint an Inquiry Chair including a judge as Inquiry Chair. They also allow for the appointment of additional panel members and assessors where appropriate, thus giving Ministers the flexibility to appoint an inquiry panel that is appropriate to the circumstances under investigation.

14. Section 2 specifically provides that an inquiry is *not* permitted to determine civil or criminal liability of those appearing before it. Inquiries are inquisitorial rather than adversarial but they are not courts and their recommendations cannot and do not have legal effect. The aim of an inquiry is rather to help restore public confidence in systems or services by investigating the facts and making recommendations to prevent recurrence.

15. Sections 15 to 16 enable a Minister to convert a non-statutory or statutory inquiry into a 2005 Act inquiry provided that he or she is satisfied that the matter being investigated by the original inquiry falls within the scope of such an inquiry. There is further provision for the Minister to change the terms of reference when converting the inquiry, after consulting the Inquiry Chair.

16. Sections 17 to 23 regulate the conduct of inquiries including the express requirement that the chairman must act fairly throughout the inquiry. Section 18 deals with public access to inquiry proceedings and information and makes it clear that the chairman is required to do what he considers reasonable to ensure public access to evidence, subject to any restriction issued. It also specifically provides that the exemption from the Freedom of Information Act 2000 of inquiry records only applies until such time as the documents have been passed to or held by a public authority.

17. Sections 19 and 20 make provisions in relation to restrictions on public access. They set out the extent to which inquiry proceedings can be held in private and evidence can be withheld. Section 21 gives the inquiry chairman powers to compel witnesses to give evidence or produce documents, whilst section 22 provides that witnesses appearing before inquiries will have the same privileges as witnesses in civil proceedings in relation to requests for privileged information. Thus, an inquiry witness may refuse to provide evidence on the grounds of public interest.

18. Sections 24 to 26 deal with the inquiry report, including setting out what the final report should contain and requiring that the report is laid before Parliament.

19. Section 27 to 34 enable both United Kingdom Ministers and Ministers of the devolved administrations to set up inquiries, allow inquiries to be established jointly by two or more Ministers, including cross border inquiries within the United Kingdom and permit a change of responsible Minister.

20. Sections 35 to 40 contain a number of miscellaneous but important provisions: on offences; enforcing inquiry orders by the High Court of England and Wales, or Northern Ireland, or Court of Session in Scotland and giving members of an inquiry, immunity from civil proceedings. Section 38 imposes a time limit of 14 days for bringing an application for judicial review of a decision (except in Scotland). Section 39 provides for the commissioning Minister to pay the costs of the inquiry panel, any assessors, any counsel and solicitor to the inquiry and anyone engaged to provide assistance to the inquiry. Section 40 contains arrangements for payments of expenses of witnesses, including legal representation, where the Inquiry chairman considers it appropriate to make an award.

Inquiries under the 2005 Act or converted into 2005 Act inquiries

21. To date, thirteen inquiries have been conducted under the Act. Three of these were converted into inquiries under the 2005 Act. Of the thirteen inquiries, four have reported and nine are in train. To carry out our preliminary assessment of the Act, we conducted a review of all thirteen inquiries, meeting with inquiry chairs and teams, as well as sponsor departments and some of those affected by the subject matter of the inquiries.

22. A brief summary of each of these inquiries together with the websites where the terms of reference, inquiry reports and other details can be found are set out at **Annex B**.

23. By way of comparison, we have also considered inquiries which have neither been established under the 2005 Act such as Sir John Chilcot's Inquiry into Iraq, nor converted into a 2005 Act inquiry, such as the Rosemary Nelson Inquiry established under the Police (Northern Ireland) Act 1998.

Secondary legislation

24. The Inquiries Rules 2006 and the Inquiries (Scotland) Rules 2007 were made under section 41 of the 2005 Act by the Lord Chancellor and Scottish Justice Minister respectively. The Inquiries Rules 2006, which apply to inquiries which a United Kingdom Minister causes to be held (but not those converted to statutory inquiries), came into force on 1 August 2006. The Inquiries (Scotland) Rules 2007 apply to inquiries which the Scottish Ministers cause to be held, and came into force on 19 January 2008. No rules have been made for inquiries which the Welsh Ministers cause to be held.

25. A list of the relevant Statutory Instruments is at **Annex A**.

26. The procedural rules were introduced to provide assistance to an inquiry particularly where it has wide-ranging terms of reference, there is complex evidence, or there are many parties whose interests will need to be protected. The overriding aim of the Rules was to help the chairman to focus the inquiry, run it to timetable and control costs. Thus, the Rules deal with issues such as the designation of core participants and recognised legal representatives, the provision of documentation and witness statements, the questioning of witnesses, the provision of funding for expenses, (including legal representation costs) and their assessment, and they outline the factors to be taken into account in making such decisions. These provisions aimed to give witnesses greater clarity about what would be expected of them enabling them to prepare better (with their legal representatives if appropriate) and thus helping to make the inquiry more effective.

Legal issues

27. Some of the powers in the Act have given rise to legal proceedings, particularly in relation to powers to issue restriction notices or orders under section 19 regarding attendance, disclosure of evidence or publication of evidence. The use of powers under section 15 to convert an inquiry or to vary its terms of reference has also given rise to litigation. As well as fact specific consideration of individual cases, a number of key issues of principle have been considered by the courts. These include: the correct approach in deciding whether or not to grant an application for anonymity and compliance of the 2005 Act with Article 2 of the European Convention on Human Rights (the right to life).

Power to convert an inquiry or vary its terms of reference

28. The Billy Wright Inquiry, originally established in November 2004 under the Prisons (Northern Ireland) Act 1953, was converted to an Inquiry under the 2005 Act by the Secretary of State for Northern Ireland in November 2005.

The family of Billy Wright sought leave to judicially review the Secretary of State's decision, arguing that a 2005 Act inquiry would be incapable of meeting the relevant international and domestic human rights law requirements on promptness, thoroughness, independence, impartiality and effectiveness of investigation. Although the Administrative Court ruled in favour of the family, the Secretary of State successfully appealed the judgement.

29. In January 2007, the family of Robert Hamill made an application to the Secretary of State for Northern Ireland to extend the Inquiry's terms of reference to include the role and decisions of the Director of Public Prosecutions (DPP) in the death of Robert Hamill. With the support of the Inquiry, in July 2008 the family applied to judicially review the Secretary of State's decision not to extend the terms of reference on the grounds that it would not be in the public interest to do so. The family was successful and as a consequence, the Secretary of State reconsidered his decision with the result that the existing terms of reference were interpreted to include the decisions made by the DPP but not reach conclusions reached about their merits.

Anonymity

30. The Robert Hamill and the Billy Wright Inquiries attracted a significant number of applications for anonymity and other protective measures. Such applications are more common in inquiries involving military or security intelligence where the inquiry may be dealing with very sensitive and secret information and identifying witnesses may potentially jeopardise military operations or endanger national security or lives. Whether to grant an application for anonymity depends firstly upon whether a refusal would so endanger the life of the witness as to infringe his or her rights under Article 2 of the European Convention on Human Rights and secondly whether such refusal would be unfair.

31. In July 2007 the House of Lords allowed an appeal by the Robert Hamill Inquiry against a judgment of the Northern Ireland Court of Appeal.[1] The Court of Appeal had quashed the Inquiry's ruling to dismiss applications for restriction orders to allow certain witnesses to give their evidence at the Inquiry unnamed and screened from the public.

32. In reaching its decision, the House of Lords held that the Inquiry panel posed the question correctly under Article 2, that is, whether in respect of any of the respondents, an existing level of risk would be materially increased if they were required to give evidence named and unscreened from the public. The House of Lords also decided that the Inquiry panel approached the applications under common law correctly by carrying out a proper balancing exercise between the private interests of the respondents and the public interest of openness of a public inquiry. It was also held that

[1] Re Officer L (Respondent) (Northern Ireland) [2007] UKHL 36.

an inquiry faced with a request for anonymity in future could approach the matter as a single decision under common law having regard to Article 2.

33. The legal process in this case was lengthy but it served the useful purpose of clarifying the law on anonymity both for the Robert Hamill Inquiry in and other 2005 Act inquiries more generally.

34. Although there were no actual judicial review applications in the Baha Mousa Inquiry, there has been a threat of judicial review, again arising out of applications for anonymity. We have been advised by a number of inquiry teams that whilst inquiry chairs are fully aware that anonymity and other protective measures are procedural issues that must be taken seriously and that care must be taken in considering a witness's individual circumstances; the procedure for considering such applications is time consuming, expensive, and distracting to the inquiry process.

Compliance with Article 2 of the European Convention on Human Rights

35. The inquiry into the death of Bernard Sonny Lodge at HMP Manchester in 1998 also raised the issue of compliance with Article 2 of the European Convention on Human Rights. The investigation into the circumstances surrounding the death began as an ad hoc investigation in September 2008 but was converted into a 2005 Act inquiry in February 2009 as the Inquiry Chair needed powers of compulsion to secure the attendance of a key witness. Whilst we consider that this inquiry's procedures complied with Article 2, we are aware that Mr Lodge's family argue that the delay between the death and the inquiry's hearings, including an element of delay in converting the inquiry, meant that it did not fully comply with the Article 2 investigative obligation as required under the Strasbourg jurisprudence.

Other reviews

Non-judicial reviews and reports

36. The operation of the Act is regularly monitored by the British Irish Rights Watch (BIRW). Indeed, the BIRW together with other non-governmental organisations such as Amnesty International and the Committee on the Administration of Justice, were strongly opposed to the introduction of the legislation in 2005. This opposition remains today and is on the grounds that the 2005 Act potentially threatens the independence of the inquiry given Ministers' various powers under the Act, in particular to restrict public access and evidence and the absence of any requirement for victims to be involved in or consulted on the process of setting up an inquiry or formulating the terms of reference. In its 2009 annual report, BIRW observed that the Billy Wright Inquiry might not be able to establish the full truth about Billy Wright's murder given the non-disclosure of evidence at the Inquiry. BIRW's annual reports may be accessed via its website at: http://www.birw.org.

37. Nevertheless, despite its opposition, we understand that the BIRW has not called for the 2005 Act to be repealed. It rather argues that certain sections of the Act should be removed or substantially amended. For example, it considers that Ministers' powers to suspend an inquiry under section 13, to terminate an inquiry under section 14 or to vary or revoke restriction orders or notices are incompatible with Article 2 of the European Convention on Human Rights as they potentially undermine the Inquiry's independence. Its concern about section 2 is that inquiries are often the last forum to address issues that have not been resolved through the courts and there is a danger therefore that wrongdoers, having escaped justice elsewhere, cannot be called to account through the inquiry because of section 2. BIRW, however, welcomes the provisions in the 2005 Act on legal representation and the powers to compel witnesses and to compel disclosure as it considers that these provisions are beneficial to the inquiry's process.

Scrutiny by the Joint Committee on Human Rights

38. The Joint Committee on Human Rights (JCHR) has published a number of reports[2] on the 2005 Act in which it expresses concern about whether a 2005 Act inquiry can comply with Article 2 of the European Convention on Human Rights particularly in respect of inquiries in Northern Ireland. Their issue is with the independence of these inquiries from the Government given ministerial powers in the Act and the ability of family members to participate effectively when they may not have access to all the relevant documentation because the inquiry touches on national security matters. Whilst we note the JCHR's concerns, there has never been such a problem in practice.

Preliminary assessment of the Act

39. Based on the overwhelming evidence from those we consulted in our review, our overall assessment of the 2005 Act is that it operates well in practice, albeit minor amendments may be needed in some aspects. However, several adverse comments have been received in relation to the operation of the Inquiry Rules.

40. We consider that having a single piece of legislation which sets out the scope of the inquiry's powers has been particularly helpful as it has avoided the need to refer to a number of different sources of legislation to enable an inquiry to be held as was the case before the introduction of 2005 Act. We do, however, accept that the 2005 Act can only work well in ensuring that an inquiry is completed successfully in a short timeframe and to budget if other factors are present, such as, the appointment of an inquiry chairman with the appropriate skills set fully supported by an experienced inquiry team. We also welcome the suggestion that it would be helpful to provide inquiry chairs with a clear and all encompassing

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[2] House of Lords, House of Commons, Joint Committee on Human Rights: Monitoring the Government Response to Human Rights Judgements, Thirty-first Report of Session 2007/08 (31 October 2008, HL paper 173, HC 1078, TSO).

guidance at the point of appointment. The guidance should contain information about the broader role they are being asked to undertake, including administrative and management issues as all well finance, staff management and archiving of records.

Disclosure of evidence

41. The powers under section 15 of the 2005 Act have been successful in compelling witnesses to give evidence or disclose documents to inquiries. This has helped a number of inquiries to establish the facts of the matter under investigation. For example, the 2005 Act inquiry into the death of Sonny Lodge secured the evidence of the retired prison officer who had refused to cooperate with the original ad hoc investigation. Without such vital evidence, we believe that the investigation would have been seen as ineffective and risking challenge that the State had not discharged its investigative obligations under Article 2 of the European Convention on Human Rights.

42. In contrast, non-statutory inquiries, such as the Chilcot Inquiry into Iraq, have no power to compel witnesses or documents. These have to rely instead on the goodwill of witnesses for cooperation which could be problematic if a witness were to refuse to give evidence or to re-appear for clarification of his or her evidence.

43. Section 15 has also been successful in converting the Billy Wright Inquiry into a 2005 Act inquiry in that it enabled the Inquiry to be more thorough and wide ranging. The Inquiry was originally established under the Prison (Northern Ireland) Act 1953. That Act is limited to prison related matters and extends only to Northern Ireland so it could not apply to state agencies based outside Northern Ireland and even agencies based in Northern Ireland, such as the Police Service of Northern Ireland, as they were not all connected to the prison and potentially relevant documents held by those agencies were not held within Northern Ireland. The Inquiry took the view that its original terms of reference were too restrictive and used section 15 powers to broaden its remit to cover agencies and documents outside Northern Ireland, thus ensuring that it was able to discharge its role more effectively.

44. The requirement under section 17(3) for the inquiry chairman to act with fairness and with regard to the need to avoid any unnecessary costs in making any decision on the inquiry's procedure or conduct has been a useful tool in facilitating the production of inquiry costs protocols and limiting the overall costs of inquiries. Equally the section 19 power to restrict the disclosure or publication of evidence provided to an inquiry has been useful in encouraging witnesses who might otherwise be reluctant to be frank and open with an inquiry.

Enforcement provisions

45. Similarly, the enforcement provisions under sections 21, 35 and 36 have assisted in securing the attendance of witnesses. The Robert Hamill Inquiry, for example, conducted successful enforcement proceedings in the High Court in Belfast in March 2009 to compel a reluctant key witness who had been served with a section 21 notice to attend the Inquiry to give evidence.

Award of expenses

46. The power of Ministers to impose conditions or qualifications on the awards a chairman may make regarding expenses (including legal costs) of witnesses under section 40(4) has also been helpful in controlling inquiry costs. For example, where a chairman's power to make awards for legal representation at public expense and the hourly rates payable for such representation have been limited by a section 40(4) determination, it can deflect pressure away from an inquiry to provide a greater level of funding. This should free it up to concentrate on the issues it is investigating.

Costs

47. Lessons learned from inquiries such as the Bloody Sunday Inquiry have resulted in pragmatic control measures being introduced within the framework set out in the 2005 Act. Although there had been some experience of public inquiries when the Bloody Sunday Inquiry was set up in 1998, it was difficult to estimate how long it would take, or how much it would cost. As part of the inquiry chairman's specific duty to have regard to costs in procedural decisions under section 17 of the 2005 Act, costs protocols for publicly funded legal representation are now regularly established by inquiries at the outset with hourly rates and the number of hours worked being capped. The costs protocol will typically include maximum hourly fees and a 40-hour weekly cap, extended exceptionally to 60 hours during inquiry hearings.

48. We welcome the suggestion from Inquiry teams that they would like to see a similar provision to section 17 in relation to the management of an inquiry team cost along the following lines below:

    "In carrying out their functions, an inquiry panel shall have regard to the principle that it should act in a way that is efficient, cost-effective and transparent."

49. Inquiries may also control costs through a robust application of the procedural rules. Rule 7 of the 2006 Rules (for England and Northern Ireland) or Rule 6 of the Inquiries (Scotland) Rules 2007 provides that core participants whose interests are similar can be represented by a single recognised legal representative. The aim is to avoid a multiplicity of lawyers carrying out essentially the same role. Rule 21 of the 2006 Rules or Rule 18 of the Inquiries (Scotland) Rules 2007 also provides that an inquiry chairman must have regard to the financial resources of the applicant and whether making an award is in the public interest.

50. In addition, a number of Inquiry teams have arrangements in place which enables their sponsor team to support and monitor the inquiry's expenditure through monthly meetings during which costs issues are discussed and reviewed as part of keeping costs under control.

51. The current costs and projected total spend together with the length of each of the thirteen inquiries are summarised at **Annex C**. By way of comparison, the costs of public inquiries established before 2005 are set out at **Annex D**.

Issues

52. We recognise that some aspects of the Act have been problematic. It has, for example, been pointed out that the concept of "causing public concern" in section 1 is open to interpretation and it may be difficult in some cases to determine whether an incident has caused or is capable of causing public concern. The E.coli outbreak in 2005, for instance, clearly caused public concern given the seriousness of the outbreak and the number of those affected, but there may be instances where it might be difficult to measure whether an incident has actually caused or could cause public concern. That said, there is a general acceptance that there would be no easy way of dealing with this in legislative terms.

53. We are also aware of concerns in relation to the Act's provisions on the composition of an inquiry panel including the inquiry chair. The view of most Inquiry teams is that the duty on Ministers under section 8(1)(b) to have regard to the "need for balance" in the composition of an inquiry panel can sometimes be difficult to achieve in practice, and may even be a disincentive to appointing panel members. In this eventuality, the 'safety-net' available under section 7(3) to appoint a person who is already a member of the panel as a replacement chairman, if necessary, would not be available. This could have extensive costs implications if a new appointment has to be made during the course of an inquiry.

54. On the inquiry chair, we acknowledge judicial concerns as to the practical effect of the powers given to Ministers to control the actions of an inquiry chair. In their view, the principle of the constitutional independence of the judiciary makes it impossible for any serving judge to accept appointment as an inquiry chair. We note that whilst Lord Gill chaired the ICL inquiry in Scotland and Sir William Gage was a serving Lord Justice of Appeal when *appointed* to chair the Baha Mousa Inquiry – he retired during the course of the Inquiry – no serving England and Wales judge has chaired a 2005 Act inquiry to date. However, in practice, 2005 Act inquiries have successfully conducted investigations which are compliant with Article 2 of the European Convention on Human Rights without any ministerial interference.

55. We are equally advised that the prohibition under section 9(1) against appointing a person who has a close association with an interested party may operate to exclude individuals with the necessary expertise to satisfy the suitability requirements of section 8, for example, senior Prison Service

officials or service personnel in inquiries concerning the Prison Service or Ministry of Defence respectively. We share these concerns.

56. We share the concern that there is no specific provision in the 2005 Act about conducting a preliminary hearing and the suggestion that there should be a provision on this given the frequency and regularity of preliminary hearings by most inquiries. Currently, inquiry teams have to rely on the chairman's general power under section 17(1) to justify holding a preliminary hearing and this approach is not ideal. We also agree that the Act could have been more helpful in terms of specifying the tasks to be carried out by an inquiry chairman and those which can be delegated to the inquiry team members. This would ensure that Inquiry chairs are not unduly burdened with administrative tasks which could be handled by team members or would avoid the risk of team members being challenged for carrying out tasks without having the necessary power to do so.

57. We have also been made aware that because public inquiries are not recognised as a legal entity they cannot enter into contractual obligations unless the inquiry chairman enters into such a contract on behalf of the inquiry relying on the immunity provided by section 37. Alternatively, some inquiries have taken the approach of using their sponsor Department's existing contractual arrangements. Although this approach has apparently worked reasonably well, we understand that there may be potential delays especially if an inquiry needs to recruit someone expeditiously or to engage an expert.

58. We have also been advised that Ministers' power under section 20(7) to vary or revoke a restriction notice or order after the end of an inquiry is a potential cause for concern for some interested parties and witnesses. For example, although an inquiry may grant patient or service personnel witnesses' anonymity or impose reporting restrictions to protect such witnesses, these protections may subsequently be lost even though the reason for imposing them may still exist. We agree with the suggestion that it might be prudent to amend the Act or Rules to include some procedural safeguards in relation to the revocation or variation of restriction notices/orders.

59. We accept that the time limit of 14 days under section 38 for bringing an application for judicial review is necessary to reduce possible delays. We note, however, the concern that in practice this time limit is too short particularly given the timeframe for an application for legal aid which can take up to three months. It should be mentioned, however, that section 38 does not apply to Scotland.

60. We note that costs of the ICL, E.coli and the Baha Mousa Inquiries seem relatively low compared to the costs of the two Northern Ireland Office sponsored inquiries – the Billy Wright and Robert Hamill Inquiries. The cost of these two Inquiries appears to be unusually high in comparison with the inquiries conducted outside Northern Ireland.

61. This is due to a combination of factors. First, by their very nature, the Billy Wright and Robert Hamill Inquiries had to deal with complex and sensitive intelligence matters with difficult issues of redaction. Furthermore, questions in relation to Article 2 of the European Convention on Human Rights and national security arose frequently in respect of the evidence that had to be considered. Second, the passage of time since the events being inquired into has made the investigations more difficult and lengthy. Third, there has been a greater tendency towards judicial review of decisions made by the Inquiries and indeed there were several judicial review proceedings in the two Inquiries with the consequential additional costs. Fourth, both the Billy Wright and Robert Hamill Inquiries (and, indeed, the Rosemary Nelson Inquiry) had to work from two locations. Whilst the hearing venues for these Inquiries were in Northern Ireland, their main offices were in London (Hamill and Nelson) and Edinburgh (Wright). Significantly, this led to additional costs in terms of travel and accommodation, which should not be the case where an inquiry is based in close proximity to the witnesses and hearing venue. The delays in determining the issues raised by the terms of reference in the Robert Hamill Inquiry also added to the costs as the Inquiry had to pay retention fees to lawyers in addition to keeping the IT and physical infrastructure functioning whilst these issues were being resolved.

62. While the Act's cost controlling measures above appear to be having the desired impact, there remain concerns over the costs of public inquiries generally. Indeed, coupled with concerns over the cost of inquiries is the concern whether inquiries are necessarily the most appropriate vehicle for addressing the issues they are set up to investigate. The judiciary have noted an increase in requests for retired judges to be appointed to chair inquiries as well as an increase in the complexity of inquiries held under the 2005 Act. In the view of the judiciary, this reflected a general trend towards litigiousness experienced by the courts and tribunals.

63. The Food Standards Agency also takes the view that a forensic investigation into the E.coli outbreak conducted by the Wales Audit Office could have delivered the same level of scrutiny in a way that was more speedy and cost effective than the E.coli Inquiry. That said, we understand that the Wales Audit Office could not have carried out a thorough investigation to the extent that was made possible by the E.coli Inquiry using the powers provided under the 2005 Act. For example, in order to conduct a thorough and wide ranging inquiry, the E.coli Inquiry had to obtain evidence from the police as part of its manslaughter investigation as well as evidence from local authorities as part of their criminal proceedings. This was not a straightforward process given the sensitivity of the materials and risk of prejudicing criminal proceedings.

64. On costs protocols, we accept that capped rates may be subject to challenge if publicly funded parties (Government departments and other public bodies) not receiving their funding through the Inquiry were to pay their legal teams higher rates than those imposed by the Minister on parties funded through the Inquiry.

65. We strongly agree with the suggestion from other consultees that before announcing a public inquiry, a full cost/benefit analysis should be conducted especially where there has already been an investigation or investigations into the same event or issue.

Inquiry Rules

Issues

66. The overwhelming view from consultees based on their experience of 2005 Act inquiries, is that the Rules lack an appreciation of the practical realities of inquiry proceedings, are too prescriptive and can inhibit the chairman's flexibility under section 17 to direct the procedure and conduct of the inquiry. Detailed procedural rules may have some advantage where the chairman is not legally qualified but where that is the case, it is suggested that the same could be achieved by providing him or her with a good legal team. In any event, the majority of 2005 Act inquiries have been chaired by those with considerable judicial experience for whom such detailed procedural rules are not necessary. It is further argued 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. In light of these concerns and their impact on the conduct of 2005 Act inquiries, our review included a consideration of the operation of the Rules alongside the Act given that the Rules are invariably linked to the operation of the Act.

67. The main difficulties and key concerns with the Rules are in relation to the provision they make in the following areas:

- The definition of the inquiry record: The main concern is that Rule 2 refers to "*all* documents given to or created by an inquiry". This is seen as too wide and poses numerous difficulties as it could include anything from all emails and correspondence to documents generated internally by the inquiry including legally privileged material, advice, notes of internal debates and meetings through to early drafts of witness statements and the reports. There are concerns about the consequences of this in identifying those documents which must be retained and those which may properly be disposed of at the end of an inquiry.
- Requests for written statements: Rule 9 of the 2006 Rules (Rule 8 of the Scotland Rules 2007) requires an inquiry to send a written request for a statement to any person from whom it proposes to take evidence. It does not appear to envisage an Inquiry's own legal team being involved in the taking of a witness statement other than in drafting the initial request. There are practical difficulties with this approach because we understand that there are many instances where the only way to obtain a meaningful statement is for an inquiry to arrange for an interview of the witness and take the statement itself. The view is that

where witnesses are likely to face serious or genuine criticism, a helpful, thorough and complete statement is unlikely to be produced by written requests and statements produced in the light of legal advice behind closed doors. The lack of power for an inquiry to take its own statement had been a severe constraint in the Baha Mousa Inquiry and we understand that this is likely to be problematic in the on-going Al-Sweady Inquiry.

- Warning letters: Rule 13 of the 2006 Rules (Rule 12 of the Scotland Rules 2007) sets out the procedure for serving "warning letters" to those facing criticism by an inquiry. We have been made aware that some core participants who have received warning letters have been concerned about how to answer issues raised in the letters in closing submissions without breaching the duty of confidentiality. In recognition of this, some Inquiries have taken the approach that recipients of warning letters must not disclose the letter itself or its content but are free to address the substance of the issues raised in the letter within their closing submissions.
- The post-inquiry interface with Freedom of Information legislation: the wide definition of inquiry record in Rule 2 and the requirement to transfer it at the end of an inquiry raises a number of Freedom of Information issues. This is because section 18(3) of the 2005 Act removes the exemption of certain inquiry records from disclosure under the Freedom of Information Act 2000 after the inquiry record has been lawfully passed to, and is held by, a public authority (such as the sponsoring department or The National Archives). Section 18(4) makes similar provision in relation to section 37(1)(b) of the Freedom of Information (Scotland) Act 2002. There are also significant concerns in relation to the preservation of confidentiality after the end of an inquiry.

68. There are also concerns in relation to provisions in the rules on inquiry report; opening and closing speeches; records management and costs assessment.

69. In the light of these concerns, the Scottish Government is already in the process of revising the Inquiries (Scotland) Rules 2007. Their interim draft amendment paper sets out the issues together with suggested solutions which we plan to consider. We also understand that the UK Government is undertaking a review of rule-making bodies across all jurisdictions, which may offer a possibility for rule-making provisions on inquiries and coronial proceedings to be amalgamated.

Conclusion

70. Having assessed the operation of the Inquiries Act 2005 by reference to all thirteen inquiries either set up under the Act or converted into 2005 Act inquiries, we believe 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.

Annex A

Primary legislation

Inquiries Act 2005 – contents

Inquiries Act 2005 – Explanatory Notes

http://www.opsi.gov.uk/acts/acts2005a

Secondary legislation

Commencement orders

The Inquiries Act 2005 (Commencement) Order 2005 (SI no 1432 2005) – brought sections 51 to 55 into force on 7 April 2005

The Inquiries Act 2005 (Commencement) Order 2005 (SI no 1432 2005) on 7 June 2005)

Procedure Rules made under the Act

Inquiries Rules 2006
(SI no. 1838 came into force on 1 August 2006)
http://www.opsi.gov.uk/si/si2006/20061838.htm

Inquiries (Scotland) Rules 2007
(SSI No. 560, came into force on 19 January 2008)
http://www.opsi.gov.uk/legislation/scotland/ssi2007/ssi_20070560_en_1

Annex B – 2005 Act Inquiries and inquiries converted into 2005 Act Inquiries

1. The Billy Wright Inquiry was chaired by Lord MacLean, a retired Scottish Appellate Judge. The Inquiry was established in November 2004 by the Secretary of State for Northern Ireland under section 7 of the Prisons Act (Northern Ireland) 1953 to inquire into the circumstances surrounding the death of Billy Wright who was murdered at the Maze prison in Northern Ireland on 27 December 1997. The Inquiry was converted into a 2005 Act Inquiry in November 2005 by the then Secretary of State for Northern Ireland. The Inquiry's report was published on 14 September 2010. The Panel found that there was no evidence of, collusive acts or collusive conduct in the murder of Billy Wright. However, the Panel did point to a number of failings which facilitated his death. The website is http://www.billywrightinquiry.org

2. The Robert Hamill Inquiry is chaired by Sir Edwin Jowitt, a retired High Court Judge. It was established by the Secretary of State for Northern Ireland in November 2004 under section 44 of the Police (Northern Ireland) Act 1998 to inquire into the circumstances surrounding the death of Robert Hamill, who died from injuries he sustained during an affray in Portadown, Co Armagh in 1997. The Inquiry was converted to a statutory inquiry under section 15 of the Act in March 2006. The Inquiry is expected to report in the coming months. The website is http://www.roberthamillinquiry.org/

3. An inquiry into an outbreak of E.coli O157 in South Wales was established in March 2006 by the National Assembly of Wales. The Inquiry was chaired by Professor Hugh Pennington, emeritus professor of bacteriology at the University of Aberdeen. It investigated the circumstances that led to the outbreak, looked into the way the outbreak was handled, considered the implications for the future and made recommendations accordingly. The Inquiry concluded in March 2009. It broadly found that there were systematic failures in food safety management at the time of the outbreak, with the exception of the outbreak control and clinical care systems which worked well, and that the requirements for food hygiene should have been sufficient to prevent the outbreak. It made twenty three recommendations covering food safety practice, food hygiene inspections, procurement, health and care services, school and hygiene, with other recommendations concerning review of policies, procedures, systems and food hygiene enforcement, monitoring implementation and technical recommendations on typing of E coli 0157 and identifying "supershedder" cattle. The website is http://wales.gov.uk/ecoliinquiry/report/?lang=en

4. An inquiry was set up jointly by the Scottish and United Kingdom Governments in January 2008 to carry out an investigation into an explosion in May 2004 at the ICL factory in Glasgow which killed nine people. A further 45 people were seriously injured or exposed to the risk of death or injury. The Inquiry was chaired by Lord Gill, Lord Justice Clerk

and reported in July 2009. The inquiry broadly concluded that there were failures in appreciation of the dangers posed by Liquefied Petroleum Gas (LPG) and the condition of the LPG supply at the factory over many years. It also found that a number of factors including unsatisfactory installation of the underground LPG pipe, lack of corrosion protection of the pipe, failure to carry out proper risk assessment of the installation and weakness in the regulatory regime caused the explosion. It recommended that all underground metallic pipework should be replaced with polyethylene, that there should be a permanent and uniform safety regime governing installation, maintenance, monitoring and replacement of all LPG systems and that there should a system of reviewing safety questions. The website is http://www.theiclinquiry.org/

5. The Fingerprint Inquiry was established in March 2008 by the Scottish Government to inquire into the steps taken to identify and verify the fingerprints associated with the case of *HM Advocate v. McKie* in 1999, a perjury case which had given rise to questions about the correctness or otherwise of the identification of fingerprints. The Inquiry is chaired by Sir Anthony Campbell, a retired Northern Ireland Appeal Court Judge. The website is http://www.thefingerprintinquiryscotland.org.uk

6. In April 2008 the Scottish Government established an inquiry to look into Hepatitis C/HIV acquired infection from blood and blood products administered by the NHS in Scotland. The Inquiry is known as the 'Penrose Inquiry' and is chaired by Lord Penrose, a retired Court of Session Judge. The website is http://www.penroseinquiry.org.uk/

7. The Ministry of Defence established an inquiry in August 2008 to investigate the circumstances surrounding the death of Baha Mousa, an Iraqi civilian who died in Iraq in 2003 and the treatment of others detained with him by the British armed forces. The Inquiry is chaired by Sir William Gage, a serving Lord Justice of Appeal when appointed as Inquiry Chair but who retired during the course of the Inquiry. The website is http://www.bahamousainquiry.org/

8. The Northern Ireland Department for Health, Social Services and Public Safety established an inquiry into the outbreak of Clostridium difficile infection in Northern Health and Social Care Trust Hospital in March 2009. The Inquiry is chaired by Dame Deirdre Hine, former Chief Medical Officer for Wales. The website is http://www.cdiffinquiry.org/index.htm

9. An ad hoc investigation into the death of Bernard (Sonny) Lodge at HMP Manchester in August 1998 was commissioned in 2007 following submissions from Mr Lodge's family that the inquest into his death was insufficient to meet the investigative requirements of Article 2 of the European Convention on Human Rights. The Ministry of Justice commissioned an independent investigation to examine the circumstances in which Mr Lodge took his own life and to see whether there are lessons to be learned that might contribute to the care of prisoners at risk of suicide and self-harm. The ad hoc investigation was chaired by Barbara Stow, former Assistant Prisons and Probation Ombudsman, and was converted

into a 2005 Act inquiry in February 2009. The Inquiry reported in December 2009. It broadly found that the clinical care for Mr Lodge's physical health was appropriate and consistent with practice at the time and the clinical record-keeping was generally good. However, there were systematic failures in the psychiatric reassessment, counselling and support provided. There were also failures in the assessment of fitness for adjudication and his segregation, and there were failures to protect Mr Lodge in the last days of his life and the sense of victimisation in the prison environment could have had a harmful effect on his state of mind and contributed to a state of mental ill-health and a desire to end his life. The websites are: http://www.official-documents.gov.uk/document/hc0910/hc01/0127/0127.asp or http://iapdeathsincustody.independent.gov.uk/news/post-5/

10. In October 2009 the Scottish Government established an inquiry to investigate the circumstances surrounding the deaths and illness which occurred at the Vale of Leven Hospital in Dunbartonshire between 1 January 2007 and 1 June 2008 and which were attributed to C. difficile infection at the hospital. The Inquiry is chaired by Lord MacLean, a retired Scottish Appeal Judge. The website is http://www.valeoflevenhospitalinquiry.org

11. The Al-Sweady Inquiry was established in November 2009 by the Ministry of Defence. Its purpose is to investigate allegations that Iraqi nationals were detained after a fire-fight with British soldiers in Iraq in 2004 during which some of those detained were unlawfully killed at a British camp and others were mistreated both at that camp and later at a detention facility. The Inquiry is chaired by Sir Thayne Forbes, a retired High Court Judge. The website is http://www.alsweadyinquiry.org/

12. An inquiry was established in June 2010 by the Ministry of Justice to investigate the death of Azelle Rodney who was shot by a police marksman in North London on 30 April 2005. The Inquiry is chaired by Sir Christopher Holland, a retired High Court Judge. The website is http://azellerodneyinquiry.independent.gov.uk/contact.htm

13. An inquiry into the failings in patient care at Mid-Staffordshire NHS Foundation Trust between January 2005 and March 2009 was established in June 2010 by the Department of Health. The Inquiry is chaired by Robert Francis QC and it is investigating the role of commissioning, supervisory and regulatory organisations and systems to identify the "lessons to be learned" from the poor standards of care at the hospital. The website is http://www.midstaffspublicinquiry.com

Annex C – Cost and length of 2005 Act Inquiries or inquiries converted into 2005 Act Inquiries

Inquiry	Duration	Cost	Projected costs
Billy Wright Inquiry	November 2004 until October 2010	£30m as at October 2010	
Robert Hamill Inquiry	November 2004 to present	£32m as at October 2010	£33m
The E.coli Inquiry	March 2006 to March 2009	£2.35m	
The ICL Inquiry	February 2008 to July 2009	£1.91m	
The Fingerprint Inquiry	March 2008 to present	£3.4m as at 31 March 2010	£4m
The Penrose Inquiry	April 2008 to present	£4m	
Baha Mousa Inquiry	August 2008 to present	£10.87m (excluding VAT) as at 31 August 2010	
Inquiry into the outbreak of C/Difficile in Northern Health and Social Care Trust Hospitals	October 2008 to present	Not yet available	
Bernard (Sonny) Lodge Inquiry	February 2009 to December 2009 (ad hoc investigation began in September 2008)	Not yet available	
Vale of Leven Hospital Inquiry	October 2009 to present	£1.06m as at 31 August 2010	
Al Sweady Inquiry	November 2009 to present	£1.8m as at 31 July 2010	
Azelle Rodney Inquiry	June 2010 to present	£30k	£1.3m
Inquiry into the role of the commissioning, supervisory and regulatory bodies in monitoring of Mid-Staffordshire NHS Foundation Trust	June 2010 to present	Not yet available	

Annex D – Costs of other inquiries established before and after 2005

Inquiry	Inquiry Chairman	Set up date	Duration and Costs
Iraq Inquiry	Sir John Chilcot	2009 Non statutory	Ongoing £2.26m
Contaminated Blood and Blood Products Inquiry	Lord Peter Archer of Sandwell	2007 Non-statutory	2 years £75K
Review of intelligence on weapons of mass destruction	Lord Butler of Brockwell	2004 Private	6 months £452,500
An independent inquiry arising from the Soham murders	Sir Michael Bichard	2004 Private	6 months £2m
Rosemary Nelson Inquiry	Sir Michael Morland	2004 Police (Northern Ireland) Act1998	Ongoing £45m to end-Oct
Investigation into the circumstances surrounding the death of Dr David Kelly	Lord Hutton	2003 Non-statutory	6 months £1.7m
Equitable Life Inquiry	Lord Penrose	2001 Non-statutory	2 1/2 years £2.5m
Victoria Climbié	Lord Laming of Tewin	2001 Children Act 1989, and National Health Service Act 1977	2 years £3.8m
Shipman Inquiry	Dame Janet Smith	2001 Tribunals of Inquiry (Evidence) Act 1921	4 1/2 years £21m
The Bloody Sunday Inquiry	Lord Saville of Newdigate	1998 Tribunals of Inquiry (Evidence) Act 1921	12 years £192m

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ISBN 978-0-10-179432-9