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cc: Paul Jenkins
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Public Inquiries

You requested advice on the establishment of a judicial inquiry to explore the findings of the Culture, Media and Sport Select Committee into Press Standards, specifically those relating to phone-hacking and blagging, published in February.

This note covers five areas:

- The grounds for an inquiry
- Necessary steps to establish an inquiry
- The merits of an inquiry in this case
- The appropriate departmental sponsor
- Alternatives to an inquiry

Summary

(1) Ministers may instigate an inquiry on grounds of public interest, but such a decision is open to judicial review.

(2) The arguments – based on the Committee's report – in favour of the public interest test may weigh against an inquiry on the grounds that
   a. The Committee did not appear to believe the practices were still continuing.
   b. The time elapsed may make it unlikely that an inquiry would reveal more information than discovered by the police inquiry and the Committee's work.
   c. It would be challenging to specify the scope of the inquiry: arguably, the Committee's findings would not justify a wide-ranging review; however an inquiry targeted only at the 'News of the World' could be deemed to be politically motivated, making it more likely that any judicial review would be successful.

(3) Were there to be a judicial review of the inquiry, this could be held before an election.

(4) There are a number of alternatives to a public inquiry.

Detail

The grounds on which a judicial inquiry might be launched

The Inquiries Act 2005 provides for **statutory public inquiries**.

Section 1 of the Act provides that:

"A Minister may cause an inquiry to be held ...in relation to a case where it appears to him that-

(a) particular events have caused, or are capable of causing, public concern, or
(b) there is public concern that particular events may have occurred".

The first point to note is that this section is permissive. The Minister *may* cause an inquiry to be held if he is satisfied by either of the conditions in section 1. In particular, he would need to be satisfied that the case is one where there is **public concern**. A decision to hold an inquiry under section 1 could be challenged by an interested party by way of judicial review and that challenge could be upheld if the court determined that the decision to hold an inquiry was unreasonable bearing in mind the nature of the issue and the level of concern, or that the Minister had taken into account irrelevant considerations in deciding to hold the inquiry.

Historically the cases that have led to the establishment of a public inquiry have ranged from events which suggest a breakdown in the rule of law (such as the *Scott Inquiry*); through to cases where there has been a single death (such as the *Victoria Climbie Inquiry*); to cases that concern many deaths such as the *Shipman Inquiry*.

The common factor is a pressing public concern that something has happened that must be investigated openly and fairly by an independent body.

Certain characteristics can be identified in those public inquiries that have taken place:

- Large scale loss of life
- Serious health and safety issues
- Failure in regulation
- Other events of serious concern

In the last category would fit the Hutton Inquiry into the circumstances surrounding the death of Dr Kelly.

The necessary steps to be taken before an inquiry is launched

An inquiry can be undertaken by a **chairman** alone or by a chairman with one or more members and appointments must be made in writing (s.4). The Act does not require the chairman to be a judge or indeed a lawyer (although that might well be appropriate in this sort of case). If the Minister proposes to appoint a judge he must first consult the President of the Supreme Court or the Lord Chief Justice (depending on the level of the judge) (s. 10).

The Minister responsible for setting up an inquiry is responsible for setting the **terms of reference** (s. 5) but he must consult the person he proposes to appoint, or has appointed before setting the terms of reference (s. 5(4))

Section 6 imposes an obligation on the Minster who proposes to hold an inquiry to "as soon as reasonably practicable" make a **statement to that effect to Parliament.** The statement must include who is to be, or has been, appointed as chairman; whether there are to be any other members and what the inquiry's terms of reference will be.

Whether in this case such an inquiry would be merited

[The following is based only on the Culture, Media and Sport Committee's Report].

The conclusions of the Culture, Media and Sport Committee regarding phone-hacking and blagging are recorded at paragraphs 492-495 of its report. From this, it would appear there are some arguments in favour of an inquiry:

- It is recorded that the Committee's inquiry has revealed further facts, such as the pay offs made to Clive Goodman and Glenn Mulcaire. This might suggest that a public inquiry could be able to discover more about this matter – given, in particular, the way in which such an inquiry would take evidence (e.g. it could require witnesses to given evidence and produce documents – s. 21 – and take evidence under

oath – s. 17(2)). In other words the whole story may not have yet emerged;

- There is a reference to a "culture" existing in the *News of the World* and other newspapers at the time which "at best turned a blind eye to illegal activities ... and at worst actively condoned it". This suggests that there may be a more widespread issue which a public inquiry could look at and also suggests that there may be a systemic failing of the sort that it would be usual for an inquiry to consider (but this would require fairly wide terms of reference);
- The Committee is forthright in its criticism of the present and former executives of News International that it questioned. In particular it criticises the unwillingness to provide detailed information, claims of ignorance or lack of recall and "deliberate obfuscation". As in the point above these conclusions would tend to suggest that there is more in this matter that a public inquiry could profitably look at.

However, the following conclusions tend to argue against an inquiry:

- The Committee is "encouraged" by the assurances it has received that such practices are now regarded as "wholly unacceptable and will not be tolerated". Furthermore the Committee states that "[w]e have seen no evidence to suggest that activities of this kind are still taking place and trust this is indeed the case".
- The report is essentially concerned with a localised issue involving the actions of a small number of people within the *News of the World*. Does that really amount to a matter of "public concern" justifying a public inquiry? On the other hand, if there is concern that the relevant practices may be more widespread, the terms of reference of the inquiry would need to extend to the press generally. But given the conclusion in the previous bullet, would that be justified?
- It is questionable whether a public inquiry would be likely to uncover more evidence than the police and the Committee were able to do, bearing in mind that the events in question occurred in 2005-7. Any documentary evidence may no longer exist. However a statutory inquiry would have the compulsory powers mentioned above.

This conclusion indicates that the Committee was not apparently concerned that the practices it condemned were still occurring (if this concern existed it would be relevant). Furthermore a crucial justification for inquiries is often stated to be the opportunity to learn lessons for the future. In this case it is arguable that sufficient lessons have already been learned. (See for example the terms of reference in the Stephen Lawrence Inquiry "To inquire into the matters arising from the death of Stephen Lawrence on 22 April 1993 to date, in order, particularly, to identify the lessons to be learned for the investigation and prosecution of racially motivates crimes".)

The Committee's Report also has a section on the actions of the police (paragraphs 456 to 472) and the Report contains criticisms of the police's decision not to investigate the holding contract between Greg Miskiw and Glenn Mulcaire (paragraph 467). While these criticisms are serious there does not appear to be any suggestion of a systemic failure by the police and it must be doubtful whether a public inquiry could shine any particular fresh light on the police's actions, which were endorsed apparently by the CPS.

In summary

From the limited information available, it is doubtful whether this case would merit the holding of a public inquiry under the 2005 Act. Any decision to hold such an inquiry could be challenged by judicial review, particularly if the inquiry were extended to the media in general, and it is not inconceivable that such a challenge might succeed.

Other points

- Cost – any inquiry carries costs to the public purse which will depend on the breadth of the terms of reference and the composition of the inquiry panel.
- Setting a precedent – creating an inquiry in this case could increase calls for public inquiries e.g. following future adverse Select Committee reports.
- Timing – the immediate proximity to an election would inevitably raise questions over the motivation and urgency of an inquiry.

The sponsorship for such an inquiry

The power to set up a statutory inquiry applies to any Minister. *Which* Minister is an administrative/political decision, not a legal one. Given the focus on the actions of the media, and the concerns of the Culture, Media and Sport Committee, lead responsibility would seem to lie most naturally with DCMS.

The alternatives to an inquiry

(1) *Non-statutory inquiry*. A Minister could set up a non-statutory inquiry outside the 2005 Act. It would have none of the compulsory powers of a statutory inquiry. Non-statutory inquiries (e.g. Chilcot) are normally used where the actions in question are mainly those of public officials, who can be expected (or to an extent required by government) to co-operate without the need for the inquiry to have powers of compulsion. If such co-operation is not forthcoming a non-statutory inquiry can be turned into a statutory one, with the relevant powers. The witnesses in this case are private individuals whom the Select Committee has accused of "collective amnesia", so it is difficult to see that a non-statutory inquiry would be appropriate here or would succeed in uncovering information where the Committee failed.

(2) *Invite the police to consider re-opening their investigation*. It could be said that the Select Committee report is a new factor justifying this. It would remain an operational decision for the police. It is doubtful whether the evidential and legal problems have changed. Could look weak if the police declined to re-open the investigation.

(3) *Reference to the Independent Police Complaints Commission*. Very doubtful whether this is an appropriate case. This was an operational judgment by the police, apparently supported by the CPS. Such decisions are obviously taken independently of Government and Parliament. Inevitably Government and Parliamentarians will not always agree with them. This does not mean there is systemic failure. Any intervention could appear politically motivated.

(4) *Reference to Information Commissioner*. ICO is responsible for enforcing the Data Protection Act but the real concern here is phone hacking/tapping, which is dealt with by the

Regulation of Investigatory Powers Act which is a matter for the police, not the ICO.

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