Written evidence from Dr Raphael Schlembach (STI0002)

HOW IS THE LAW AND PRACTICE OF INQUIRIES WORKING?

1. Introduction

1.1 I am a Principal Lecturer in Criminology at the University of Brighton. Over the past decade, I have observed and researched the Undercover Policing Inquiry (2015-)[1] and the Brook House Inquiry (2019-2024)[2]. I have interviewed core participants in both as to their expectations and experiences in inquiries.

1.2 My research focus has been on the preliminary matters with which inquiries are concerned (for example, scope, participation, standards of proof and public access). My submission is informed by the perspectives of non-state and non-institutional witnesses in inquiries; that is, private citizens and charities without the backing of state institutions or large corporations who participate in inquiries as (or in support of) victims of accidents, failures and/or abuse.

1.3 My evidence addresses the practice of inquiries, in particular the challenges and risks faced by inquiries. The submission focuses on the following question in the call for evidence:

> *Does the Act ensure that official core participants and wider stakeholders are sufficiently and appropriately involved in the proceedings?*

2. Overview

[1] Schlembach, R. (2024) Spycops: Secrets and Disclosure in the Undercover Policing Inquiry, Policy Press. https://bristoluniversitypress.co.uk/spycops

[2] Schlembach and Hart (2022) Towards a criminology of public inquiries. Criminology & Criminal Justice, https://journals.sagepub.com/doi/full/10.1177/17488958221115797

2.1 There are concerns and risks that an inquiry panel fails to conduct an inquiry's procedure thoroughly, fairly and transparently, *unless it recognises that different core participants have different needs, requirements and interests*.

2.2. Although every inquiry is different, in almost all cases of inquiry practice, more weight should be placed on ensuring that *non-state and non-institutional witnesses* are front and centre, and that they can participate in the inquiry with trust and confidence.

3. Asymmetry, not adversarialism

3.1 In the Committee's meeting on 12 February, Lord Hendy stated:

> *'It seems to me that there are probably three categories of core participant: the people who have suffered, such as the victims, the bereaved, the injured and so on; the people involved in immediately remediating the situation, such as firefighters and so forth; and the other parties who may ultimately bear some responsibility for whatever went wrong.'*

This is a useful characterisation. The core of my submission is to demonstrate that those finding themselves in the first category (I call them non-state and non-institutional core participants) are not always treated fairly and that they are not always given adequate avenues for participation and access to the proceedings. This is despite some emerging good practice such as the Truth Project in the IICSA.

3.2 In most cases, non-state and non-institutional core participants contribute to an inquiry in the interest of the public good. They hope to contribute to lessons learning and the identification of recommendations.

3.3 More than that, however, these core participants often frame their expectations of an inquiry to be an *acknowledgement* of the truth and a public recognition of their experiences. That is, they also contribute to an inquiry in pursuance of their rights, such as their right to learn what has happened to them and who is responsible.

3.4 There is great asymmetry between state/institutional and non-state core participants. An inquiry must therefore be prepared to use its powers and provisions in an "asymmetrical" manner. This is not a call for more adversarialism. To the contrary, adversarial conduct in inquiries frequently emerges where differential interests are not identified or are glossed over.

3.5 When the Jalal Uddin Inquiry opened in December 2023, the Chairman introduced it:

> *It is a strictly inquisitorial process with the object not of adjudicating between competing positions but of investigating and establishing the truth. Core participants are not parties, so their advocates will be expected to conduct themselves in a non-adversarial fashion.*[3]

That is the theory, but the practice is different. Necessarily so. Not all core participants share the same aims of 'establishing the truth', especially if that truth becomes publicly known.

3.6 The Brook House Inquiry demonstrated good practice in this regard, for example in how it treated former detained persons as vulnerable witnesses. By contrast, the Undercover Policing Inquiry has shied away from recognising the special status of victims of police abuse, for example still not allowing key non-state witnesses to give their evidence almost 9 years after it started.

4. Non-state core participants

4.1 The participation of witnesses is crucial to the success of inquiries under the Act. The designation of core participant status is therefore important, and often contested. In the Book House Inquiry, the applications for status by several NGOs with significant working knowledge of immigration detention were refused by the Chair. This refusal would have reduced the cost of the inquiry but impacted on securing the best evidence.

[3] https://juiweb-prod.s3.eu-west-2.amazonaws.com/2023/12/Transcript_07.12.23.pdf

4.2 Where core participant status is granted to non-state and non-institutional witnesses, their legal representation needs to be properly funded. I have heard frequent reports that available funds for these groups are insufficient.

4.3 Inquiries under the Act are welcomed and trusted by non-state and non-institutional witnesses for a number of reasons: (a) they are regarded as thorough; (b) their powers to compel certain witnesses to produce documents in their possession or to compel them to give evidence in public are regarded as essential for 'getting to the truth'; (c) they signal a presumption of openness and transparency.

4.4 Non-state participants are much less likely to consider statutory inquiries to be independent (from government or from other powerful interests). I will deal with this question first.

5. Independence

5.1 There continue to be criticisms of the provisions in the Act that undermine the perceived independence and impartiality of inquiries, especially the ministerial influence over the proceedings. A recent example was the Home Secretary's issuing of a Restriction Notice under Section 19(2a) preventing the publication of some materials by the Dawn Sturgess Inquiry and their disclosure to the Sturgess family.

5.2 Conflicts of interest may arise especially where the sponsoring department of an inquiry can be expected to be subjected to criticism in the inquiry's findings. As Kate Eves told your Committee on 12 February:

> *Obviously, there are issues where a Whitehall department is both a sponsor and a key core participant. Perception-wise, at the very least, that can be difficult.*

This was obviously a major concern at the outset of the Infected Blood Inquiry until the administration of the inquiry was moved from the Department of Health to the Cabinet Office.

5.3 Traditionally, inquiry chairs have been appointed from a narrow pool of retired judges. They are frequently regarded to be too close to the establishment, particularly where they sit alone. There have been calls for more diverse panels.

5.4 There is awareness that ministers may terminate an inquiry and that they may set Terms of Reference that narrow the scope of inquiries and prevent investigations into more systemic failures and wrongdoing.

6. Thoroughness

6.1 It may be thought that a thorough inquiry is incompatible with one that concludes swiftly. However, I have found that non-state core participants tend to understand that a thorough examination of all available evidence takes time.

6.2 By contrast, frustration sets in where delay is caused not by thoroughness but by legal argument and obfuscation on the part of state and other institutional core participants. This is particularly so in the consideration of preliminary matters and before an inquiry moves to hear evidence in public. Non-state core participants understand that the legal teams of state and other institutional core participants have developed adversarial techniques aimed at delay and obstruction while publicly stating that they fully cooperate with the inquiry.

6.3 This is, mostly, not a case of misplaced or unrealistic expectations, especially with regards to the expectation of openness and transparency. For example, a submission to the Undercover Policing Inquiry on behalf of Baroness Lawrence of Clarendon, summarised:

> *She is losing confidence, if she has not already lost it, in this Inquiry's ability to get to the truth. The truth as to why she, her family and supporters were spied upon by the police. This Inquiry is not delivering on what she was promised, and is not achieving what she expected.*[4]

[4] https://www.ucpi.org.uk/wp-content/uploads/2020/11/20201110-ucpi_opening_statements_transcript.pdf

Baroness Lawrence was right to expect transparency and openness from the Undercover Policing Inquiry and her expectations were not misplaced.

Example A: Undertakings

A.1 Inquiries aim to adduce the best possible evidence. To deal with the problem of self-incrimination, it is now common practice to seek an undertaking from the Attorney General that evidence given to the inquiry will not be used in future criminal proceedings. Undertakings of this kind can increase the likelihood of cooperation by key witnesses but can complicate any criminal investigations that may arise independently.

A.2 Problems of fairness arise when the undertaking sought fails to recognise asymmetrical participation in inquiries and offer indiscriminate protection. Non-state and non-police core participants in the Undercover Policing Inquiry impressed this point on the chairperson, but their argument was not accepted:

> *'… an undertaking should be sought to ensure that evidence given to the Inquiry ... could not be used in criminal proceedings or investigations against anyone other than police officers and state officials or employees.'*

The undertaking sought by the chair of the Undercover Policing Inquiry did not differentiate between different categories of core participants.

A.3 In the Grenfell Tower Inquiry, corporate witnesses indicated that they would rely on the privilege against self-incrimination unless an undertaking was granted by the Attorney General. This was opposed by the bereaved and survivors of the disaster. The timing and nature of the undertaking sought was described by a legal representative of bereaved core participants as an attempt to 'sabotage' the proceedings.

A.4 The Solicitor General for Scotland did *not* grant the undertaking sought by the Sheku Bayoh Inquiry. The undertaking requested would have offered protection from self-incrimination to police officers but would have made a future prosecution more difficult. The family of Sheku Bayoh welcomed the Solicitor General's rejection.

A.5 Undertakings of this kind can be justified if they aid an inquiry to discharge its duties of 'getting to the truth'. In particular they can be used to give some protection to vulnerable witnesses. They should not be misused to protect individuals and legal persons who committed blameworthy behaviour from a position of power.

Powers

7.1 Undertakings are in any case not sufficient to overcome the excessive secrecy of some state institutions and their reluctance or inability to disclose relevant documentation. In the Anthony Grainger

Inquiry, for example, Judge Teague encountered what he called a 'disappointing lack of candour' from certain police witnesses and in the firearms unit and the:

> *'unrealistic approach to its applications for anonymity and other protective measures, which seemed to me to reflect a predetermined and excessively rigid policy of maintaining the highest degree of secrecy conceivable'*[5]

7.2 Such a display of obstructive attitudes to public inquiries by police, state and corporate core participants is not universal, but it is not uncommon either. To put it simply, core participants that can expect criticism in the inquiry's report do not routinely share the same interest in 'getting to the truth' or to have that truth publicly known.

7.3 The point made by Brian Altman, in the Committee's session of 12 February is therefore worth considering:

> *'In the process of enforcing to give evidence by somebody who has failed to comply with a Section 21 notice, going to the High Court is cumbersome and clunky. …. Effecting the efficiency of any inquiry is all about getting witnesses before the inquiry, as and when you want them, with the least possible fuss.'*

It appears that inquiries are currently limited in how to use their powers quickly and effectively.

8. Presumption of openness

8.1 There is a presumption of openness in public inquiries, particularly through Section 18. This is one of the most important aspects of the Act. Section 19 sets out the restrictions that may be imposed on this presumption. If Section 19 notices and orders are applied inappropriately, non-state core participants can quickly lose trust in the process and criticisms of a 'whitewash' or a 'secret' inquiry can arise.

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5 https://assets.publishing.service.gov.uk/media/5d27151a40f0b611b680982e/Anthony_Grainger_Inquiry.pdf

Example B: Restriction Orders

B.1 Some inquiries are set up explicitly to deal with matters of national security in confidence, as the Act allows chairs to hear evidence in closed session and to limit the publication of documents. This has led to criticism that some 'public' inquiries are actually 'secret' inquiries.

B.2 Restriction orders under Section 19 have not only been used to protect national security interests. In the Undercover Policing Inquiry, restriction orders were made not on grounds of national security but on the grounds of Art. 8 ECHR rights. The chairperson granted anonymity to a large number of former undercover officers to deal with the risk that an officer could face invasions of their private and family lives, even in cases where said officer had since died.

B.3 It is absolutely right to offer protections against the invasion of privacy of vulnerable witnesses or those who have already endured abuse. This has happened in both the Brook House Inquiry and in the Undercover Policing Inquiry. It is much less clear that state witnesses should receive similar protection. This has undermined the confidence of many core participants in the Undercover Policing Inquiry.

Example C: Public Hearings

C.1 The presumption of openness in Section 18 now includes a presumption that hearings are streamed online and video recordings archived. This should be the norm going forward, especially when hearings involve institutional witnesses. There may be good reasons why victims and other vulnerable witnesses would give evidence without being video recorded. Other than the cost-saving aspect, there is little evidence to suggest that remote hearings should replace (rather than complement) traditional public hearings. Section 18 (2) may need to reflect this new reality.

C.2 In the Brook House Inquiry, formerly detained persons had a clear interest to see Brook House managers and custody staff testify as to their behaviour in public. A non-statutory inquiry was not able to deliver this and the courts recognised this importance of public hearings in respect to the state's investigatory duty under Art. 3 ECHR. Justice May, noting the specific vulnerability of detained persons in immigration removal centres, concluded that:

> *'It is right, in those circumstances, to afford the abused detainee an opportunity to see and confront their abuser on equal terms, as a means of restoring dignity and respect to the person from whom it has been so wholly stripped away"*

The same argument holds for Art. 2-compliant public inquiries that follow the conversions of inquests.

8. Why does this matter?

8.1 If inquiries cannot command the trust of non-state and non-institutional core participants, they may fail to gather sufficient evidence, and of sufficient quality, to meet their terms of reference.

8.2 In the Undercover Policing Inquiry, a large group of non-police core participants who participated as victims of abusive policing in the inquiry contemplated withdrawing from it. Their legal representatives told the inquiry that

> *'we are not prepared actively to participate in a process where the presence of our clients is pure window dressing, lacking all substance, lacking all meaning and which would achieve absolutely nothing other than lending this process the legitimacy that it doesn't have and doesn't deserve'* [6]

8.3 Analysing the expectations that non-state stakeholders placed on the Brook House Inquiry, my research found that

> *'...for our interviewees, the possibility of a satisfactory outcome appeared inherently linked to the procedural side of the inquiry… while legitimacy in the eyes of a wider public may stem from preferences for political independence … those with specific stakeholder interests in our study showed more nuanced preferences for procedural workings perceived as fair, participatory and thorough'* [7]

8.4 While there is some good and innovative practice in securing the trust and confidence of non-state and non-institutional core participants, there are also bad examples where their interests in transparency and fairness are sidelined.

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[6] https://www.ucpi.org.uk/wp-content/uploads/2018/03/20180321-draft-transcript-.pdf

[7] https://journals.sagepub.com/doi/full/10.1177/17488958221115797