Written evidence from Eversheds Sutherland (International) LLP (STI0016)

Background

1. This is a response to the Call for Evidence made by the House of Lords Statutory Inquiries Committee established to consider the efficacy of the law and practice relating to the Inquiries Act 2005.

2. Eversheds Sutherland (International) LLP is a global law firm with a UK based Inquiries and Investigations team (I&I Team) that was established in the 1990s to undertake both statutory and non-statutory inquiry related work. Eversheds Sutherland was the first law firm to establish a dedicated team of this kind in the UK. The team has been involved in inquiry work ever since and provided input on the drafting of the Inquiries Act 2005 and the Inquiry Rules 2006. We have acted for a number of high profile public inquiries, by providing Solicitors to inquiries, or providing a team answerable to a Solicitor to an inquiry, including on the Bloody Sunday Inquiry, Rosemary Nelson Inquiry, Shipman Inquiry, Mid-Staffordshire NHS Foundation Trust Inquiry and Independent Jersey Care Inquiry. We have also acted for Core Participants to statutory public inquiries. The team currently acts as Solicitor to the non-statutory Angiolini Inquiry, the statutory Independent Inquiry relating to Afghanistan, and represents Core Participants in the Post Office Horizon IT Inquiry, the Infected Blood Inquiry and the Grenfell Tower Inquiry.

3. A number of members of the team have co-authored a book 'The Practical Guide to Public Inquiries', published by Bloomsbury. This was written in conjunction with Emma Ireton, from Nottingham Law School, who has already provided evidence to the Committee.

4. In 2013, the Eversheds Sutherland team made a written submission to the previous House of Lords Committee which carried out post-legislative scrutiny of the 2005 Act. In this response, where relevant, we refer back to and/or repeat some of the views contained in that submission from 2013, and in some cases have reflected on our views as shared ten years ago.

5. The information provided is Eversheds Sutherland's initial views on the issues set out in your call for evidence. If you require any further detailed views or information on the issues discussed, please feel free to get in touch.

Does the 2005 Act provide the right framework for ensuring that inquiries are:

a) Effective
b) Efficient
c) Appropriately overseen; and
d) Followed-up?

Effective

6. Whether or not an inquiry is effective will depend on what its objectives are considered to be.

7. We believe that the overarching reason for establishing a public inquiry could be summarised as fulfilling two main functions. First, to establish the truth about a matter of public concern and to provide accountability to the public in a way that litigation would not – to find out what happened, why and where responsibility may lie (but without making any legal determinations as to liability). The second is to make recommendations so that lessons can be learned for the future.

8. Given one of the primary objectives of an inquiry is to learn lessons for the future, ensuring that recommendations are delivered without a significant passage of time between evidence-gathering commencing and the conclusion of the inquiry's work will be important, to ensure the recommendations made remain relevant. For that reason, one of the measures of effectiveness may be the speed of an inquiry's work.

9. In addition, for members of the public affected by the subject matter of the inquiry, an inquiry can also provide them with a valuable healing process and ensure that public confidence is restored in whatever area of failure is under consideration (in a way that mediation could never do, as suggested by some).

10. We believe that the key to any public inquiry is that it, and the decisions taken about establishing the inquiry, should therefore be public and accountable. Therefore transparency of the processes and procedures adopted and the decisions taken by the sponsoring department, chair, etc, are imperative (this would include, for example, transparency around the appointments process, transparency around why an inquiry is statutory or non-statutory, transparency of intended timescales, timely publication of relevant evidence etc).

11. Whether or not an inquiry is effective can be measured against these principles. We consider that achieving that is down to the

administration and running of an inquiry, rather than whether the 2005 Act provides the right framework.

12. In our view, what is key is flexibility, and we would not advocate for more prescriptive legislation. In our experience, every inquiry has its own unique challenges and, whilst it is true that much is to be gained from sharing experiences from previous inquiries (which we refer to further below), there is a need to be flexible and adaptable to the unique circumstances of each inquiry to allow the Chair the ability to set up and manage the inquiry in an appropriate way.

Efficient

13. We believe that the Act encourages a focus on reducing the length and expense of public inquiries. Chairs and legal teams should be seeking to adopt a proportionate approach to the depth and breadth of an investigation, versus the careful costs-budgeting and timescales within which it can be achieved. There are examples of inquiries being conducted efficiently both in terms of costs and duration. This requires abandoning any notion that an inquiry can leave 'no stone unturned', given a Chair's obligations under s.17 of the Act to act with regard to the need to avoid unnecessary costs when making any decision as to the conduct of the inquiry.

14. In a world where volumes of data, and therefore volumes of potentially relevant disclosure, are increasing exponentially, as are alternative forms of electronic communication, proportionality must be the cornerstone of every inquiry decision, and this is critical to achieving efficiency. There is still a way to go in this respect, particularly in relation to disclosure, the management of which dominates an inquiry's time. In our view, the biggest challenge for many inquiries is the speed at which it can progress its disclosure. We consider that much can be done to address this.

15. IT systems is an area where real costs and efficiency savings can be made. In our experience, IT systems, both for documentation storage and review, as well as for managing witnesses and correspondence, are the lifeblood of an inquiry. An inordinate amount of time (and costs) can be spent by the chair, counsel to the inquiry, the inquiry's lawyers, and Core Participants and their legal representatives in managing the IT issues, and dealing with disclosure.

16. The IT systems should have the ability to manage the gathering, taking, analysis and use of evidence, manage communications between the chair, counsel, Core Participants and witnesses, including allowing annotations on particular documents to be electronically shared. They should be used to manage the

publication of evidence to Core Participants and the redaction or restriction of confidential material, and support the production of documents and live evidence during the hearings. Bespoke systems also have the potential to do very much more, such as run reports on the progress of the inquiry/evidence gathering process, schedule interviews/hearings, coordinate this with witness files and email accounts, create bundles of evidence for counsels use, establish a separate platform for Core Participants, analyse all oral, written and documentary evidence by issue, witness, date range etc to allow the report writing process to be as smooth as possible.

17. Well designed and managed IT systems can drastically reduce the costs and increase the efficiencies of an inquiry. In our experience, making do with existing systems simply because they have been used before is not enough and leads to tremendous inefficiencies during the inquiry process, causes delay and increases costs. What public inquiries need is a bespoke system, set up for the purposes of an inquiry, which can be rolled out on any ongoing basis, with personnel that are experienced in using and managing such systems, i.e. no reinvention of the wheel. There is often a reluctance at the start of an inquiry to make proper provision for investment in the best IT systems, which often results either in delays or inefficiencies. Proper investment in IT systems at the outset would ultimately deliver significant time and financial savings to an inquiry.

18. The rapidly changing landscape of AI also presents a significant opportunity for future inquiries to harness this technology and revolutionise the way they analyse the documents they receive and create. There is no doubt that this has the potential to create further efficiencies.

19. Efficiencies can also be driven by learning from previous inquiries (we refer to this further below). As the Committee has heard in the various oral hearings taken place to date, there is an element of 'reinventing the wheel' at the establishment of each inquiry under the 2005 Act and there is a noticeable absence of practical guidance/procedures in place to guide those running inquiries. This was partly the motivation for members of the Eversheds Sutherland team co-authoring a book looking at the practical side of working on inquiries.

<u>Appropriately Overseen</u>

20. In terms of oversight, the Act provides Ministers with significant powers of oversight over the work of the inquiry, to include the Chair and any appointed panel members or assessors. Some would argue that a Minister has significant powers over the work of the

inquiry which could leave the Minister open for criticism of inappropriate influence or interference with the independent work being conducted by the inquiry. Whilst the Act provides these significant powers for the Minister we cannot recall an instance where these powers have been used. A Minister would need to consider their actions very carefully before exercising these powers for fear of public outcry.

21. In terms of public oversight, historically some Chairs have been criticised for the length and expense of the inquiries being undertaken. Despite the public nature of inquiries, as the inquiry team works tirelessly in fulfilling its terms of reference, externally the progress may appear to be slow due to the lack of public hearings, for example. Silence on the part of inquiry teams often leads to concern and consternation from victim groups, and others, of lack of progress. One way to allay such concerns and to ensure a more public level of oversight, could be to require inquiry Chairs to provide regular progress updates that are provided to the public and not just Core Participants. Caution would however need to be exercised in respect of the subject matter of an inquiry and whether public updates would be possible. Expectations would also need to be managed in respect of the detail of such updates to ensure that the inquiry resource was not unnecessarily diverted from the substantive investigation.

Followed up?

22. In our experience, the Act does not ensure that recommendations are adequately implemented. The recommendations of an inquiry are non-binding, and possibly for good reason, but other than facing potential public criticism, there is no recourse if Government, or other bodies, fail to implement recommendations or fail to explain their reasons for non-implementation.

23. The consequences of this can be seen quite starkly if one compares the recommendations made by the Bristol Royal Infirmary Inquiry to that of the Mid Staffordshire NHS Foundation Trust Public Inquiry. Arguably, if the recommendations from Bristol had been fully implemented, many of the issues and failures that were identified ten years later during the Mid Staffordshire inquiry would not have occurred.

24. Inquiry chairs no doubt feel personal responsibility to ensure that their recommendations are implemented. There are examples of inquiry chairs who have voluntarily sought to impose procedures by which the implementation of recommendations is monitored.

25. Clearly therefore, in practice, chairs of inquiries do not feel that there is adequate procedure to monitor the implementation of recommendations. Many victim groups no doubt feel the same.

26. Many Chairs would be willing to return at a later date to review the implementation of their recommendations, however, given that the Act states the inquiry 'ends' upon publication of its final report, the Chair would have no locus to return to review the implementation of recommendations. The 2005 Act does not therefore provide the right framework for ensuring that inquiries are followed up.

27. We consider that the concept of building in a mechanism to ensure that the work of the Chair isn't concluded until there has been a degree of the recommendations being embraced and sufficient progress having been made in relation to implementation is worthy of consideration.

28. That is something we have been able to adopt in a non-statutory context – as solicitors to the Independent Inquiry into Telford Child Sexual Exploitation. The Terms of Reference for that inquiry built in a two year review for the Chair to review the implementation of recommendations.

29. What has also been successful on that particular inquiry is embedding those at the heart of an inquiry, e.g. the victims group, into the oversight process, for monitoring the implementation of recommendations, acting as a check and balance. We consider that is worthy of further consideration and may be suitable for other inquiries.

How could the following be improved?

a) The Inquiries Act 2005

b) The Inquiry Rules 2006 and the Inquiries (Scotland) Rules 2007

30. In relation to the Inquiry Rules, in our view these are too prescriptive. Section 17 of the Act gives the chair of an inquiry the freedom to determine the procedure and conduct of the inquiry as he / she sees fit (subject always to fairness and having regard to costs). However, the chair is then shackled by the overly prescriptive provisions in the Rules. For example, Rules 13 to 15 of the Inquiry Rules 2006[1] afford the Chair very little flexibility (and create practical and logistical difficulties) when sending warning letters.

[1] Rules 12-13 of the Inquiry (Scotland) Rules 2007

31. If the intention behind the legislation was to provide Chairs with the freedom to conduct inquiries as they deem appropriate, bearing in mind the subject matter, scope, public expectation, relationship with Core Participants, costs etc, then the express provisions as to the procedures to be followed should be removed, or it should be made clearer on the face of the Rules that s17 has primacy in that is the true legislative intent. In our experience, the Rules have proved largely unwieldy.

The 2014 House of Lords report made 33 recommendations to the Government, of which 19 were accepted.

a) How effectively have the accepted recommendations been implemented?

b) Do any of the rejected recommendations still have merit?

32. We have set out below thoughts on some of the 2014 Recommendations:

Recommendation 11

33. Recommendation 11 advised that interested parties, especially victims and victims' families, be provided with an opportunity to make representations about an inquiry's final terms of reference. This was accepted by the Government and since 2014 there has been a shift, with more inquiries conducting consultation processes before finalising their terms of reference (e.g. Infected Blood Inquiry, Covid-19 UK Inquiry).

34. In our experience, however, the extent and scope of such a consultation exercise can be at odds with the efficiencies of an inquiry and a Chair's s.17 obligation to act with regard to fairness and the need to avoid unnecessary costs when making any decision as to the conduct of the inquiry.

35. As set out in our previous submission to the House of Lords scrutiny committee in 2013, we consider there is a place for liaison with the affected victims group, to ensure their views around the scope of an inquiry's work are taken into account. However, a formal consultation process on terms of reference can result in the scope being widened to such a degree as to create costs and delays. The perspective of victims groups, and indeed other stakeholders, are important to take into account and reflect on, but a formal consultation process can increase scope and care needs to be taken with how such a process is conducted and what commitments are made by the Chair. While engaging and hearing views is important, particularly for fostering public confidence and ensuring that those most affected are heard, a Chair needs to

ensure that appropriate boundaries are set for how an inquiry will take decisions, and the extent to which they should be influenced by a multitude of different stakeholders. A balance has to be struck, ultimately ensuring that the Chair remains independent and meets their obligations under s.17. As outlined above, this includes delivering an inquiry in good time, so that recommendations made are worth the paper they are written on and haven't gone out of date by the time they are published, and any expansion on scope increases this as a risk.

Recommendation 12

36. Recommendation 12 suggested that the Government make resources available for a unit to be established within the Courts and Tribunals Service, which will be responsible for the practical details of setting up an inquiry.

37. As stated above, there is invariably a period of reinventing the wheel at the outset of each inquiry. The current lacuna in the system is that once an inquiry Chair has completed their terms of reference, such experience (and that of his / her co-panellists / assessors) is lost. There is still no forum for retaining the lessons learned in running a public inquiry with a view to conveying that knowledge and experience to subsequent inquiry chairs. The same is true of those who provide inquiry secretariat teams and legal teams. This reinvention of the wheel is wasteful and expensive.

38. Any central inquiries unit would need to remain independent of Government and could be a central hub of information to assist in the initial set up phase of each inquiry, to include assisting with the procurement of properties, IT systems and the implementation of policies and protocols. How such a unit should be set up would need some thought. Each inquiry, and its individual challenges, is different and therefore care would need to be taken to ensure that a central unit understood this, and why it would not always be appropriate to simply replicate previous protocols/IT systems.

39. That said, having access to the knowledge of the infrastructure of and practical and logistical challenges to previous inquiries would be enormously valuable.

Recommendation 13

40. Recommendation 12 feeds in to Recommendation 13, which suggested that any inquiries unit should ensure that a full lessons learned paper was prepared at the conclusion of an inquiry. In our experience, that does not happen in any formal way, but rather in a more ad-hoc manner.

41. One possibility could be to create an obligation on Chairs, secretaries, solicitors and counsel to produce lessons learned material at the conclusion of inquiries so that material can be drawn on by future inquiries. This lessons learned process could form part of decommissioning and winding up of an inquiry.

Recommendation 15

42. Recommendation 15 advocated for an inquiries unit to retain the contact details of previous secretaries and solicitors, so that these could be shared and their experience could be drawn on by future inquiries.

43. Again, in our experience, this has happened in an ad-hoc manner. We would endorse the establishment of a more formal, wider network of personnel that have inquiry experience as a way to share knowledge.

Recommendation 16

44. Recommendation 16 stated that an inquiries unit should collate procedures, protocols and other processes issued by inquiries and make them available to subsequent inquiries.

45. In many cases, these documents (e.g. protocols) are, or should be, publicly available. Having a central source of the documents would however still be valuable for future inquiries. As indicated above, future inquiries should however proceed with caution and not rely too heavily on previous protocols and procedures; there could be a temptation to simply adopt what was used before. But, an inquiry's protocols and procedures should be tailored to its specific needs and reflect a changing landscape in how an inquiry's work should be delivered. For example, GDPR has changed how inquiry's approach the management of data, and this had to be reflected in protocols and procedures.

Recommendation 25

46. Recommendation 25 advised that Rules 13-15 of the Inquiry Rules 2006 should be revoked and a rule should be implemented wherein, if the Chair wishes to include a particular criticism of someone in his/her report, he/she is required to give that person a warning letter and reasonable opportunity to respond. For the reasons set out above, this continues to be a recommendation we would endorse.

Since the publication of the 2014 Lords report, how has the use and operation of the 2005 Act changed?

47. A mentioned above, the 2005 Act provides a Chair of an inquiry with sufficient flexibility to adopt inquiry procedures that he/she sees fit for that specific inquiry. As a result of that wide discretion, the operation of the 2005 Act has not changed per se. However, over the last ten years, the way in which inquiries are being delivered has evolved, and set out below are a few preliminary thoughts on this evolution:

a. Involvement of victim groups – over the last ten years there has been more of a shift towards placing victim groups at the heart of inquiries and ensuring their voices are clearly heard by using different methods to involve them in an inquiry's work. This can be seen in the way that inquiries have, for example, used pen portrait hearings (e.g. Grenfell Tower Inquiry, Infected Blood Inquiry, Manchester Arena Inquiry).

b. Catharsis – in a similar way, inquiries are now fulfilling the objective of providing catharsis to victim groups outside of formal inquiry proceedings. We have seen this particularly with some inquiries using 'listening exercises' to gather experiences of those most affected by the subject matter of an inquiry (e.g. the Truth Project on IICSA, and 'Every Story Matters' on the Covid-19 Inquiry). This allows a mechanism for the victim groups to be heard by the inquiry, and can provide useful, anonymised data to be drawn on in an inquiry's report, but without this producing formal evidence, to be tested by the inquiry.

c. Rule 10 - Operation of the Rule 10 procedure has also developed with inquiry Chairs seemingly permitting more cross-examination by Counsel for Core Participants as is the case in the Post Office Horizon IT Inquiry and also the Undercover Policing Inquiry. In both those inquiries Rule 10 questions needed to be submitted to the inquiry in advance of a witness being called to provide oral evidence however recognised legal representatives were able to pose the questions themselves as opposed to counsel to the inquiry or the Chair being the only ones asking questions.

d. Virtual hearings – undoubtedly the pandemic had a significant effect on how inquiries deliver their hearings. A number of inquiries continued their hearings through the height of the pandemic using virtual hearings, and in many cases these are now continuing in hybrid form. This has removed the need for a room full of lawyers to congregate at every hearing, with greater flexibility to attend hearings remotely as and when needed.

Ministers have recourse to statutory and non-statutory inquiries. Should the 2005 Act be amended to reflect or change this in any way?

48. Recommendation 1 of the 2014 Lords report suggested that "*inquiries into issues of public concern should normally be held under the Act. This is essential where Article 2 of the ECHR is engaged. No inquiry should be set up without the power to compel the attendance of witnesses unless ministers are confident that all potential witnesses will attend".* This recommendation was rejected in 2014.

49. The legislative framework under which a public inquiry operates also makes the inquiry accountable to the public in a way that a non-statutory inquiry cannot.

50. There will however be circumstances where a non-statutory inquiry may be more appropriate. We have been fortunate enough to act as solicitors to both statutory and non-statutory inquiries. In our experience, there is a place for both. Whilst there will be situations where powers of compulsion will be necessary from the outset, there may be others where reliance on the voluntary cooperation of witnesses or organisations is sufficient. Other levers can also be pulled which, while not amounting to powers to compel, can be extremely persuasive. As mentioned above, inquiries should also be abandoning any notion that they can, or should, leave 'no stone unturned' (if they don't they will be very costly, lengthy, and their recommendations are likely to be out of date by the time they report), and this means an inquiry can usually fulfil its terms of reference without speaking to every potentially relevant witness or obtaining every potentially relevant document. If some documents are not forthcoming or some witnesses refuse to speak to an inquiry, this does not always mean it cannot fulfil its brief.

51. A non-statutory inquiry's procedures are not dictated by legislation, which gives its more flexibility in how it carries out its work. For example: it doesn't need to have hearings, or if it does these could, in theory, all be held in private, which may be important for inquiries that are managing a large quantity of sensitive data; the evidence it gathers does not need to published in the same way as a statutory inquiry, removing the challenges (and drain on time and costs) that redacting disclosure can bring; it does not have Core Participants in the same way as a statutory inquiry; it is also not shackled by the Inquiry Rules, and in particular Rules 13-15 – its only obligation in this respect is to give an individual or organisation an opportunity to respond to a proposed criticism, and this can happen at any stage.

52. The flexibility of the non-statutory model means that an inquiry can conduct its work at pace, and usually more efficiently, compared to a statutory inquiry. While a non-statutory inquiry does not have powers to compel witnesses or evidence, this model can also result in witnesses feeling able to give more frank and open evidence.

53. That is not to say that it should be the preferred model. It will depend on each individual inquiry as to which is most appropriate, and statutory inquiries offer a level of accountability and transparency that a non-statutory inquiry cannot. Beyond requiring witnesses to attend or evidence to be produced, powers of compulsion may also be helpful for organisations that want to provide information to an inquiry, but need a mechanism to overcome any barriers that GDPR may present.

54. Where an inquiry is established on a non-statutory basis, it is also important that this is not a static position. A number of non-statutory inquiries have been set on a non-statutory basis, but with the ability to convert to a statutory inquiry if that is proving to be a barrier to meeting its terms of reference.

55. In our view this does not require amendment to the legislation. It just requires an open mind and a willingness on the part of the Chair and the Minister to keep the basis of the inquiry under review and to be flexible if needed.

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

56. The Act itself does not provide for Core Participants and wider stakeholders to be involved in an inquiry's proceedings; the mechanisms that enable involvement are set out in the Rules.

57. In our experience, the extent to which those mechanisms result in sufficient and appropriate involvement will be driven by the extent to which the inquiry proactively establishes a collaborative working relationship with those Core Participants and wider stakeholders. Doing that in a way that assists the inquiry's work, while also ensuring it remains independent at all times and that the boundaries are clear, is paramount. We consider that to be one of the key roles of the inquiry's lawyers - to establish a cooperative and effective working relationship with Core Participants and their legal representatives. This is key in order to assist the work and smooth running of the inquiry.

58. In a similar way, the contribution of the lawyers for Core Participants should be to assist the inquiry and its staff and not be to

provide evidence that could be viewed as counter-productive to the inquiry’s progress.

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