Written evidence from Matthew Hill (STI0021)

The Author

I am a barrister practising from 1 Crown Office Row, London, who specialises in public inquiries and inquests. I have worked on major inquiries and inquests more or less continually for the last twenty years. My first role was as historical research consultant to the Bloody Sunday Inquiry, a position I took before I came to the Bar and on the back of postgraduate historical research. At the end of the Bloody Sunday Inquiry I pursued a career in law and have since worked on the following public inquiries and inquests:

- The Al-Sweady Inquiry (representing a state core participant)
- The Detainee Inquiry (as counsel to the inquiry)
- The Hillsborough Inquests (as counsel to the inquests)
- The Independent Inquiry into Child Sexual Abuse (as counsel to the inquiry)
- The Birmingham Inquests (1974) into the Birmingham pub bombings (as counsel to the inquests)
- The Infected Blood Inquiry (as counsel to the inquiry)
- The Reading Terror Attack inquests (representing the bereaved families)
- The Covid Inquiry (representing a state core participant)
- The Post Office Horizon IT Inquiry (representing a state core participant)

I have worked extensively as counsel to the inquiry (and to major inquests), which has given me an insight into how inquiries are run and the challenges they face. Often, commentators and the media fail to understand the legal constraints that inquiries face because of the Inquiries Act 2005 and associated Rules. I have also represented core participants – both state bodies and bereaved families – and so also have experience of the different pressure and perspectives that core participants face.

I am grateful to the Committee for allowing me an extension of time to provide this submission. I do not seek to answer all the questions and focus on three areas in which I may be able to offer evidence that has not been given by others.

Questions

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

a) Effective

b) Efficient

c) Appropriately overseen, and

d) Followed-up?

The Inquiries Act 2005 allows for inquiries to be effective (if properly run), but does not encourage efficiency. It is overly-prescriptive and its provisions too widely drawn. More should be left to the discretion of the chair as to how to run the inquiry.

To give a few examples, the recent tendency to establish inquiries with exceptionally broad terms of reference has led to large number of core participants all of whom are entitled to disclosure and representation at hearings: see the Independent Inquiry into Child Sexual Abuse (IICSA) and the Covid Inquiry in particular. The 2005 Act and 2006 Rules prohibit sensible case management, such as allowing different modules to go ahead under one member of a panel but not others, or allowing panel members other than the chair to make case management decisions (which would help to alleviate bottle-necks in the running of the inquiry and allow for the appointment of non-legally trained chairs who could then be appropriately supported by legally-trained panel members). The rules on warning letters (Rules 13 to 15) are exceptionally broadly drafted, leading to a cumbersome and lengthy process at the end of an inquiry before the report can be produced. The role of counsel to the inquiry is undefined, opaque and inconsistently applied.

The result is that 2005 Act inquiries are slow-moving, overly-lawyered, cumbersome machines. They cost vast amounts of public money and take much longer than anticipated to produce reports. This could be improved by allowing the chair more flexibility in case management, in particular by repealing or reforming requirements and rules concerning core participants' roles, warning letters, and case management decisions (discussed further below).

However, it should not be thought that all these problems are a consequence of the 2005 Act. The principal reason why recent inquiries have taken so long and cost so much is because that have been asked to consider wide, amorphous topics: child abuse in the UK, undercover policing in the last 50 years, the entirety of the UK response to Covid-19 (in effect the workings of the larger part of the UK state over a two year period). These grand thematic inquiries are not what the 2005 Act was intended for and the Act is ill-equipped to deal with them. It is also questionable why inquiry chairs (who are usually judges) are thought to

have relevant skills to opine on such a range of matters that may suit better someone trained in historical research and analysis, social science, or the relevant scientific disciplines. The simplest way to improve the overall effectiveness and efficiency of the 2005 Act would be to use it more wisely.

Related to this is the tendency of inquiry chairs, core participants and sponsoring ministers to grant expansive Terms of Reference and then interpret them broadly. If an inquiry's scope is expanded in this way it will inevitably come at the cost of greater time and length or a more superficial examination of the relevant matters, or both. Inquiries are at their most effective, most efficient and most forensic when they are focussed in their efforts.

A third element that detrimentally affects the efficiency and effectiveness of inquiries is the immense amount of disclosure involved. This is not a function of the Act and is a problem in all aspects of legal work. Although great hopes are placed in AI solutions, these remain hopes at present. There is no legislative fix for the problems caused by extensive disclosure, but there is a need for inquiries to be more realistic and more open, making it clear that there is a trade-off between the inquiry being conducted in a timely manner and a more proportionate approach being taken to disclosure. To this end, the approach of the Covid-19 Public Inquiry in focussing on "key" documents is to be welcomed.

Others will be better placed then me to speak to the oversight of inquiries. There is a role for a degree of financial oversight, but it is extremely difficult to divorce this from the case management decisions that are – and should remain – decisions for the chair/panel alone, to be made without oversight beyond judicial review. Giving a sponsoring minister a greater role here will inevitably undermine the independence of the inquiry. It is the independent nature of a public inquiry which gives the whole endeavour its purpose and worth.

In terms of follow-up, once an inquiry has produced its report and made its recommendations it is for others – government, Parliament, the media, the public – to determine what should be done. While there is a strong argument for a permanent body in the Cabinet Office to retain learning from inquiries and to report at various point son what has and has not been done, this can be achieved outside of the 2005 Act.

2. How could the following be improved?

a) The Inquiries Act 2005.

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

Please see answers to Q1 and Q5.

The 2005 Act provides that only Ministers can establish inquiries. This is a change to the position under the preceding legislation (the Tribunals of Inquiry (Evidence) Act 1921), which vested that power in Parliament. While ministers should retain the power to establish statutory inquiries, providing an equivalent power to Parliament would be a welcome alternative route to allow for inquiries to be established in circumstances where the Executive is unreasonably reluctant. Such an alternative may have led to earlier scrutiny of, for example, matters relating to the Infected Blood Inquiry.

3. 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?

Others will be better placed than me to answer this question.

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

I have not detected any notable changes in the way in which Inquiries operate since the publication of the 2014 Report, other than in two respects.

First, there is now a greater willingness to consult publicly on the Terms of Reference. This is a welcome development although it comes with two costs. First, the process takes time and costs money. Second, there is a tendency always to wider the Terms of Reference and for consultees always to be suggesting additions. For the reasons given elsewhere in this submission, broader Terms of Reference are not always welcome. These reasons do not outweigh the benefits of a public consultation, but an inquiry chair/panel, and the sponsoring minister, should not consider themselves bound to widen the scope and inquiry once the consultation is

complete. A more open dialogue explaining the benefits of focussed Terms of Reference and speedier resolution of an inquiry would be welcome.

Second, some inquiries now greater efforts to engage with those whose interests are engaged by the inquiry through various measures of outreach and communication. Both IICSA and the Infected Blood Inquiry developed mechanisms to allow those who had been affected by the matters relevant to each inquiry to tell their stories either through evidence or by other routes. Considerable efforts were made by both, and by other inquiries, to consult with core participants and potential core participants at an early stages. I do not know how much of this can be attributed to the 2014 Report and how much to a broader development in practice (which was also reflected in inquests, such as the Hillsborough Inquests). Again, this is a welcome development, though care must be taken to ensure that the inquiry remains independent (and is seen to be independent) and that the resources deployed to this end are reasonable in terms of time and cost. It is also important to make clear to all concerned what constitutes evidence that may be used in the inquiry and what is not.

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

At present, there is an unwelcome gap between a full bells-and-whistles 2005 Act inquiry and a non-statutory inquiry. That gap could be filled, with minimal legislative change, with a nimbler form of hybrid inquiry.

<u>The problem</u>

Full 2005 Act statutory inquiries are clunky, costly, slow and overly-lawyered machines, for the reasons given above. Ministers are often reluctant to commit to the time and expense of establishing a full statutory inquiry both for these reasons and out of self-interest. The immense costs involved in the numerous inquiries that have been established under the 2005 Act would be a matter of far greater public concern if the full measure of those costs was more widely known. The expense and length of time an inquiry takes to complete its work also undermines media and public confidence in its processes, as numerous examples have shown.

In such circumstances, a non-statutory inquiry may emerge as a preferred alternative. However, these have a separate set of problems.

They lack the statutory powers that may be necessary for the job they are asked to do, and/or for ensuring public confidence that they are doing it. Most notable among these is the inability to compel the production of evidence. The Lampard Inquiry into mental health provision in Essex was established because voluntary provision was not effective, and other non-statutory inquiries have struggled to overcome this limitation. The absence of a power equivalent to s.21 of the Inquiries Act 2005 may also prohibit disclosure of material on grounds of data protection, privacy or journalistic practice even from material providers who would otherwise be minded to co-operate. A piece of secondary legislation had to be passed to provide legal cover for the way in which the Hillsborough Independent Panel had handled sensitive personal data: Data Protection (Processing of Sensitive Personal Data) Order 2012 (SI 2012/1978).

Non-statutory inquiries have also failed in some instances to win public confidence. There are two main reasons for this. First, there is often a perception that this is an "inside job", where a minster appoints a member of the Establishment to produce a favourable answer. This is often misplaced and unevidenced, but it is very difficult for a non-statutory inquiry to overcome this concern, particularly if it is largely conducted in private and without the engagement of those most affected by the issues that it is investigating. One exception to this – the Hillsborough Independent Panel – has faced criticism for having too little independence in the other direction, namely that it was independent of government but not of those who had campaigned on the issue (several of the Panel members would, for example, have been excluded from serving as jurors at the subsequent inquests). Second, the processes adopted by non-statutory inquiries are undefined and subject to little or no oversight and scrutiny, resulting in little faith in their outcome: see, for example, the (unsuccessful) judicial review of the Magnox Inquiry, *R (on the application of Clarke and Others) v Holliday* [2019] EWHC 3596 (Admin)

For these reasons, non-statutory inquiries have often failed to fulfil their intended purposes, leading to ongoing calls for further inquiries, inquests or other means of public investigation: see, for example, the Stuart-Smith scrutiny into the Hillsborough disaster, the Da Silva review into the death of Pat Finucane, the Henriques review into the investigation of allegations of child sexual abuse by Lord Janner and others.

<u>The proposal</u>

Is there a way of creating a hybrid form of investigation that bridges the gap between statutory and non-statutory inquiries, without replicating their flaws or creating others? It is proposed that there is and that it could be achieved with minor legislative changes.

Such hybrid inquiries should have the statutory powers contained in the 2005 Act and 2006 Rules, but with the following amendments and exemptions:

- Greater discretion for the chair/panel to conduct proceedings in private (through modest amendment to s.18(1));
- Removal of the requirement to send rule 9 requests for written evidence, with the chair/panel left to determine the processes they adopt (r.9);
- An unfettered discretion as to whom the chair/panel wishes to appoint as core participants (r.5);
- Removal of the right for core participants to make open and closing statements, though these could be invited at the discretion of the chair/ panel (r.11);
- Removal of the requirement for warning letters, with the chair/panel left to determine (subject to review by the court) what is a fair process for dealing with potential criticisms either in evidence or through warning letters (rr.13-16);
- Simplified rules for the funding of core participants legal representation;
- Express provision for the chair to delegate some aspects of case management decision making, and/or the hearing of evidence to other panel members;
- Requirement for the chair/panel to publish a statement or statement(s) on the approach taken to obtaining disclosure, evidence from witnesses, the questioning of witnesses, and the process for compiling the report.

It will be the case that some inquiries will still need to be conducted under the more stringent provisions contained in the 2005 Act and 2006 Rules, most notably when that is required to ensure the confidence of the public and those providing evidence. The hybrid inquiries are intended to allow for a more streamlined process to achieve a quicker outcome in cases where this is appropriate.

As important as any changes to the statutory provisions and rules will be a difference in approach by the inquiry chair and panel, with a greater emphasis on achieving a pragmatic, proportionate investigation and completing the work as quickly as is practicable. This will only be achievable, though, if the Terms of Reference and scope of the inquiry is sufficiently focussed.

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

The necessary architecture is there in the Act and the Rules to allow for appropriate involvement of the core participants and others. Whether this is achieved will largely be down to the way in which the inquiry is run.

I would strongly oppose any suggestion that core participants should have any role in determining who should be appointed to the chair and panel of any inquiry. This would fundamentally erode the independence of the inquiry. While the present arrangements are opaque and could be improved, they are better than putting this aspect of an inquiry out to consultation.

I am less concerned about core participants involvement in the appointment of assessors, who fulfil a different function to the chair and panellists.

12th April 2024