Written evidence from Professor Sir Malcolm Evans (STI0024)

I am grateful for the opportunity to submit evidence to the House of Lords Statutory Inquires Committee. In doing so, I draw on my experience as a Panel Member of Independent Inquiry into Child Sexual Abuse (IICSA), which reported in October 2022, the views expressed being my own. I shall not address all questions asked but will focus on those which I feel I am most able to comment upon.

Question 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 answers to these questions depends on the subject-matter of the Inquiry. Section 1 of the Act refers to 'particular events' that have caused, or may cause, public concern. As drafted, the Act provides a serviceable framework within which to examine matters of a largely factual nature relating to specific situations, involving a defined range of interested parties. It is questionable whether it serves as well as it might the interests of conducting an Inquiry into systemic questions which do not have so well defined, or easily discernible, parameters. Essentially, the Act allows Inquiries to delve deeply into the factual background of the 'particular events' they are established to consider. This is reflected in the powers provided by S 21 of the Act which, in effect, permits an Inquiry to compel the production or giving of evidence. It is further reflected in the Act's reference to the Report setting out the 'facts' and accompanying recommendations, suggesting that those recommendations are to respond to the facts as found. Reduced to basics, the Act is geared towards determining 'what' has happened and making recommendations in the lights of these findings. This is a very valuable function.

What is it less good at facilitating is reflection on 'why' something has occurred. This need not be a problem for Inquiries with a limited or focussed remit: it is, however, more of a problem in relation to Inquiries which are intended to learn systemic lessons to improve future practice. Understanding the causes of a problem is essential to understanding the best responses to it – and the methodologies under the Act are not always well suited to this. For example, one of the great strengths of IICSA was its commissioning of research to inform its understanding of key issues, which was made public. Yet this could not be treated as

evidence and so directly impact upon thinking concerning possible future-facing recommendations unless formally admitted as such in public hearings concerning factual events to which it was, strictly speaking, largely irrelevant. This is certainly not efficient, and hampers effectiveness. Generally speaking, however, it seems to me that it is the Rules, rather than the Act, which present the greater handicap to effectiveness (and efficiency).

One further point concerns follow-up. Whilst Inquiries end with the submission of the Final Report, in some ways this is a new beginning. If the purpose of an Inquiry is to go beyond fact finding and to make recommendations for the future, then the dissolution of the Inquiry at that point is a weakness. Naturally, decision-making concerning the implementation of recommendations lies with those to whom an Inquiry's recommendations are addressed. The 2014 Report correctly noted that an Inquiry has no responsibility as regards implementation (para 278). Yet this does not preclude an Inquiry from having an important role following the submission of its Report. If it were to continue its existence in some residual form, it could help ensure that those decisions were made in a timely fashion by those tasked with doing so. It would allow it to offer clarifications if needed and, if requested, assistance during the process of consideration. Importantly, it would offer the public independent assurance that its recommendations, generated at considerable public expense, were being properly engaged with in an appropriate and timely fashion. Effective mechanisms for monitoring effectiveness are an essential feature of most processes. IICSA benefitted from its having issued a stream of reports related to its various investigation strands over a number of years, being able to receive information from those to whom the recommendations contained in those reports were addressed and being able to disseminate this information to those concerned.

2. How could the following be improved?

a) The Inquiries Act 2005.

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

My response is limited to aspects of the Inquiry Rules 2006 which I consider impede the effective and efficient – and, indeed, fair - conduct of Inquiry proceedings.

The first relates to the designation of core participants. For some Inquiries this will be a relatively well-defined group, capable of relatively objective identification. In others, particularly those addressing broad-ranging topics of more general public concern, the category of core participants may be ill-defined, indeterminate, and quite possibly subjective. Given the procedural rights enjoyed by core participants, and the time and costs

associated with their enjoyment of them, it is important that core participants may engage with the Inquiry process efficiently and effectively. However, the ability of core participants to do so is surprisingly limited, being largely through questions usually presented through legal counsel to the Inquiry and through the presentation (through their own Counsel) of opening and closing statements which, given time constraints, are often of a rather general nature. One hazards that little is learnt from the latter that could not have been learnt equally effectively through a written procedure. The utility of the former as means of allowing witnesses to be challenged by core participants is limited, given that such questions are often presented by Inquiry Counsel as something of a 'coda' to their own lines of questioning.

The second general observation relates to the participation of witnesses. Despite the framing of their participation being that of giving evidence to the Inquiry, it is difficult to disguise the reality that, for some, it is akin to a trial – with their being called to account on the basis of the materials available to the Inquiry, their own witness statements, and the witness statements of others. It is axiomatic that an Inquiry cannot make determinations of civil or criminal liability (Inquiries Act, S 2(1)). However, its findings of fact have consequences, some of which can be severe. The ability of witnesses to effectively challenge the perspectives placed upon their actions by Counsel to the Inquiry is limited, to say the least. Given that some factual findings are, one might say, 'quasi-judicial' in their impact, this raises issues of procedural fairness. I am aware that the 2014 Report (para 235) felt that such concerns were sufficiently addressed by the powers of the Chair, but I respectfully suggest that this is inadequate response to the adversarial structuring of the 2006 Rules which shape what ought to be an inquisitorial (or, perhaps better, an inquisitive) approach into what is, *de facto*, an adversarial process.

This points to a central flaw in the Rules. They conceptualise the process as being quasi-judicial in nature rather than in a spirit of open inquiry, making it difficult for some giving evidence to give self-reflective responses to questions, as doing so can easily become detrimental. As a result, learning can be lost, limiting the ability to understand *why* actions were taken and losing the benefits of such reflection for the generation of future recommendations. Taken overall, the Rules gravitate towards an adversarial approach, not reflecting an 'equality of arms', and run the risk of inhibiting understanding of *why* something happened, or was done. This, in my view, hampers the effectiveness of public inquiries for which the question 'why' should be at least as important as questions concerning 'what' occurred. As I result, I respectfully disagree with the conclusion of the 2014 Report (para 215) which, whilst supporting an inquisitorial approach, felt that the Act (and Rules) was well suited to achieving this. I do not consider the Rules apt to facilitate a truly inquisitorial approach at all; quite the contrary – it gravitates towards the adversarial, or indeed, the accusatory.

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?

I limit my comments to 3(b). I believe that the recommendations made in the 2014 Report and rejected by the Government concerning the establishment of a Central Inquires Unit continue to have much merit. The establishment of such a Unit would provide a source of expertise to assist newly established Inquiries. This should enable them to get 'up and running' more quickly than is currently the case, allowing Inquiries to get on with the job and saving considerable sums of money – both of which are in the public interest. A Unit would also be a natural place for the sharing of experience between Inquiries. At the moment, too much learning appears to be lost. Certainly, as a Panel Member myself, I have had no opportunity to share my perceptions of the efficacy of the Inquiries system. All Inquiry Chairs and Panel Members should be afforded such an opportunity at the end of their office. It is not to be assumed that perceptions relayed through current mechanisms are necessarily the perceptions of all: indeed, there is no way of knowing.

Conversely, I believe that one of the recommendations accepted by the Government in 2014 ought to be revisited, this being Recommendation 7 which expresses a preference for a single member Inquiry unless there were good reasons to the contrary. I consider the opposite to be the case. The value of a multidisciplinary panel, with varied expertise and experience reflecting on the merits of recommendations cannot be underestimated. There may well be a place for single member Inquiries but I believe that the presumption should be in favour of more broadly based, rather than single member, panels, particularly where an Inquiry's terms of reference direct it towards the consideration of broad-ranging matters.

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

Some of the more recently established Inquires – notably IICSA and the COVID-19 Inquires – have had so broad a scope as to defy the possibility of undertaking an exhaustive examination of all possible matters falling within their remit. This does not mean that such Inquiries ought not to be established – their importance is (I hope) self-evident. However, the changing nature of Inquiries – and of the public perception of Inquires – has implications for Inquiry methodology and which are yet to be reflected in the Rules. There is, then, a mismatch between the expectation of what some Inquiries are meant to deliver and the processes through which they are constrained to deliver them.

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

I see no need to limit the flexibility of approach which the current system permits. Indeed, one of the problems with the 2005 Act, it seems to me, is that it imports into the Inquiry process procedures and powers of compulsion which can inhibit the spirit of 'inquiry' which those very procedures and powers are intended to enhance. There may well be greater benefit to be had from undertaking non-statutory inquiries which, whilst not able to compel evidence, might be able to get closer to the heart of what has occurred by being able to use processes which are more truly investigatory in nature.

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

The current rules fail core participants in several regards whilst adding significantly to the length and cost of Inquires, neither of which is in the public (or core participant's) interest. Either better provision should be made to enable core participants to engage more effectively with the Inquiry process or the provisions concerning their involvement should be recalibrated to reflect the role that they are in fact able to play. Currently there seems to be the worst of both worlds – holding out, at great expense, the prospect of meaningful engagement whilst offering only a limited opportunity of so.

Concluding Observation

All Statutory Inquiries are different and should be configured to operate in the manner best suited to fulfil their terms of reference. This would suggest that there ought to be scope for variation in their *modus operandi*. In my experience as Panel Member the Inquiry Rules do not make this easy. The debate between an inquisitorial or adversarial inquiry process misses the point: the problem is that the Inquiry process can have too much of a trial-like hue about it. I believe the effectiveness, efficiency and economy of Statutory Inquires would be enhanced by their embracing a more truly inquiring approach which seeks to *learn* from the past and make recommendations for the future based on that learning.

26th March 2024