RESPONSE TO CALL FOR WRITTEN EVIDENCE:

HOUSE OF LORDS SELECT COMMITTEE ON THE INQUIRIES ACT 2005

JULY 2013

Response of Rights Watch (UK) (formerly British Irish Rights Watch)

Our Mission: Promoting human rights and holding governments to account, drawing upon the lessons learned from the conflict in Northern Ireland.

Our Expertise and Achievements: Since 1990 we have provided support and services to anyone whose human rights were violated as a result of conflict. Our interventions have reflected our range of expertise, from the right to a fair trial to the government's positive obligation to protect life. We have a long record of working closely with NGOs and government authorities to share that expertise. And we have received wide recognition, as the first winner of the Parliamentary Assembly of the Council of Europe's Human Rights Prize in 2009 alongside other honours.

RW (UK) engagement with Inquiries:

- Extensive engagement and advice with the families of those involved in the Bloody Sunday Inquiry
- Extensive engagement and advice to the family and legal representative of Patrick Finucane
- Work with David Wright (father) in his engagement with the Billy Wright Inquiry, submissions to the Billy Wright Inquiry, advice to David Wright in his legal challenge to the statutory basis of the Billy Wright Inquiry when subject to conversion under the Inquiries Act 2005 (the Act)
- Work with the family of Rosemary Nelson in their engagement with the Rosemary Nelson Inquiry including written submissions and oral testimony to the Rosemary Nelson Inquiry
- Work with the family of Robert Hamill in their engagement with the Robert Hamill Inquiry
- Work with the families engaged with campaigning for inquiries into the Ballymurphy Massacre 1971 and the Omagh Bomb 1998.
- Submissions throughout the legislative progress of the Inquiries Bill 2005 and submissions to the Ministry of Justice consultation on the Inquiry Rules 2006.
- Submissions to the Baha Mousa Inquiry and a BIRW Report into the Baha Mousa Inquiry and its Report
- Submissions to the Iraq Inquiry (Chilcot)
- Lobbied as part of the NGO consortium against the Detainee Inquiry (Gibson)
- Advice to the legal representatives of the family Azelle Rodney in their engagement with the Azelle Rodney Inquiry.
- Submission to the Mid-Staffordshire NHS Foundation Trust Public Inquiry (Francis).
- Submission to the Consultative Group on the Past (Northern Ireland) on Dealing with the Past
- Monitoring witness treatment and the application of the Istanbul Protocol during the Al-Sweady Inquiry (Thorbes).

Rights Watch (UK) views the statutory inquiry established under the Act (forthwith the statutory inquiry) as an independent investigation into state violations of human rights including the failure by the state to protect human rights. This would include the human rights of an individual (Baha Mousa), a group of individuals (press standards) or a community (Mid-Staffs).

We follow the questions asked by the Committee in its Call for Evidence.[1]

[11] See: http://www.parliament.uk/documents/lords-committees/Inquiries%20Act%202005/Call%20for%20Evidence_2_final_version.pdf

1. What is the function of public inquiries? What principles should underlie their use?

A statutory inquiry established by a Minister is a fact-finding mechanism which leads to recommendations. The establishment of facts enables recommendations to be made when facts are analysed against a range of criteria to recommend change. The statutory inquiry established under the Act exists together with the non-statutory inquiry (for example, The Iraq Inquiry (Chilcot)), the inquest (for example, Alexander Litvinenko), the public body inspection (for example, Her Majesty's Inspector of Constabulary (HMIC)) or specific mechanisms responding to particular circumstances (for example, the Ministry of Defence Iraqi Historical Allegations Team (IHAT) and the Police Service of Northern Ireland Historical Allegations Team (HET)) and should also include the work of the various Ombudsman.[2]

The statutory inquiry should be a fact finding investigation with the power to make recommendations to the establishing authority or to a relevant prosecuting authority or other relevant body. The principles of the statutory inquiry should be:

- Independence
- Promptness
- Thoroughness
- Subject to public scrutiny (the presumption of openness)
- Capable of attributing responsibility
- Capable of allowing victim participation (to safeguard their legitimate interests)

These are the principles developed by the European Court of Human Rights (ECtHR) through its judgments on human rights violations in relation to the right to life (Article 2) of the European Convention on Human Rights (the Convention). We would suggest these principles would also apply to inquiries engaging Article 3 (the right not to be ill-treated) and Article 8 (the right to private and family life). In relation to violations of Article 2 and 3 the statutory inquiry should also adopt the principles of the Istanbul Protocol and the best practice set out in the UN Special Rapporteur for Torture Report on Commissions of Inquiry.

Two further comments can be added. First, we are minded of the comment of Lord Butler that a government inquiry can be "a lightening conductor for the anger of the public, and particularly of those who have been bereaved or suffered personally". Second, we note the comment of Dr Karl Mackie in his evidence to this Committee on 17 July 2013 when he said that the inquiry is both jewel in the tool box of public accountability and that in addition to offering redress and repair, the inquiry could be an aspect in a restorative justice process in offering a form of catharsis to the victims.

2. To what extent does the Inquiries Act 2005 reflect those principles?

The Act partially reflects these principles.

- Statutory inquiries are not independent in that they are established by a Minister of the government who retains extensive residual powers in relation to the timing, conduct, funding and conclusion of the inquiry and the publication of its findings and recommendations.

[2] On an historical note we remember the 'spirit of public good' that infused the work of Royal Commissions and the maintenance of probity in public life as captured within the spirit of the Salmon Principles.

- The promptness requirement has been adhered to in relation to the inquiries established under the Act. However, litigation between victims and the government has resulted in delays by the Minister responsible for establishing an inquiry when the Minister's Department has been a litigant.
- Inquiries under the Act are not by default public. The establishing Minster retains powers to restrict public access (by restriction notice section 19(2) (a)). Matters of national security and victim protection can restrict access.
- Section 2(1) states that an inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability. Section 2(2) states an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

3. Does the Act achieve the right balance between the respective roles of Ministers, Parliament, the courts and inquiry panels themselves in making decisions about inquiries?

Given the above it cannot be said that the right balance has been struck between the executive, the legislature, the judiciary and the inquiry panels themselves. Given that the executive maintains residual control over the key elements of statutory inquiry process they cannot be said to be independent. One recent example of political interference is the decision to refuse the Coroner's request for the establishment of an inquiry into the murder of Alexander Litvinenko. The request was refused, despite the weight of authority. The government acknowledged that political and diplomatic considerations contributed to its decision.[3]

4. In particular, is it right that ministers should have the power to set up, or not to set up, an inquiry, to set its terms of reference, appoint the chairman and members, suspend or terminate the inquiry, and restrict the publication of documents?

It cannot be right that a Minister has the power to establish, set the terms of reference, appoint the members and to suspend, terminate or otherwise restrict public access and ultimately to decide to restrict the publication of documents including the final Report of a statutory inquiry. The key power here is the decision to establish an inquiry under the Act, the role of the Cabinet Secretary and the civil service in this decision and the fact that it is the Minister's Department which will be the subject of the investigation of the statutory inquiry as it was that Department which carries the procedural obligation to discharge the duties arising out of the relevant Articles of the Convention, if applicable. These extensive powers, if exercised at all, would be politically embarrassing for a Minister of the government in that their exercise would look like political interference (Lord Richard commented during the oral evidence session of the Committee on 17 July 2013: "In all the evidence you have given us is that decisions as to whether to have an inquiry or not to have one are capricious or they are self-serving. They are basically a Government defence mechanism.")

5. Should other persons have any of these powers in addition to or instead of ministers?

The decision to establish a statutory inquiry could be taken by:

- A decision of an appellant judge; there might also be a role for the Attorney-General
- A decision of a Parliamentary Committee on Inquires (which could be *ad hoc*)
- A statutory authority such a Permanent Commission of Inquiry
- A quasi statutory authority such as a Public Truth Commission

[3] As reported at: http://www.theguardian.com/politics/2013/jul/19/theresa-may-alexander-litvinenko-inquiry

We suggest that Parliament could be restored with the powers to approve or disapprove both the establishment and termination of a statutory inquiry (see section (1) (1) of the Tribunals of Inquiries (Evidence) Act 1921).

6. Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but ministers declined to set one up? Are there cases where an inquiry has unnecessarily been set up to deflect or defer criticism?

This question engages with both statutory and non-statutory inquiry forms. We are of the opinion that the 15 inquiries established under the Act have been needed (this includes the Al-Sweady Inquiry (Thorbes) which is in session). Two non-statutory inquiries (called Privy Council Inquiries) relating to the Iraq War 2003 and the "War on Terror" were established by the Cabinet Office: The Iraq Inquiry (Chilcot) is still to report because of government intransigence relating to disclosure and The Detainee Inquiry (Gibson) was suspended because of concerns by NGOs and potential core participant victims about its independence, its terms of reference and transparency, in addition to the fact that its work was affected by on-going police investigations and pending prosecutions. An inquiry into systemic human rights violations by (and against) members of the British Army in Iraq (and Afghanistan) would have stemmed continuing litigation at public cost. Civil servants at the Department of Health advised the then Secretary of State against a public inquiry in relation to human rights violations at Mid-Staffordshire NHS Foundation Trust, the then Secretary of State did not follow this advice. In some quarters of the Executive and the civil service there seem to be a presumption against inquiries (As Lord Trefgarne commented during the oral evidence session of the Committee on 17 July 2013: "The predisposition is always against a public inquiry, I can tell you that for nothing")

7. Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?

We are concerned that as Ministers, civil servants and the Cabinet Office become more attuned to the impact of statutory inquiries there will be greater potential for political interference. As a consequence inquiries will lack the independence and transparency required to gain and maintain the trust of participants and the wider public.

8. Is the degree of involvement of the judiciary in inquiries appropriate?

It is not a prerequisite that the judiciary are required to service statutory inquiries under the Act. As to date inquiries under the Act have been serviced in a number of ways. The most high profile have been chaired by a judge sitting alone (e.g. Baha Mousa) (Gage), or by judge led panel (e.g. Rosemary Nelson) or by a QC (Mid-Staffs) (Francis). The statutory inquiry into the death of Bernard Lodge was chaired by a non-lawyer (Stow). Nevertheless, inquiries under the Act have been serviced by a Counsel to the Inquiry, a solicitor to the inquiry and a civil servant as secretary to the inquiry.

We are of the opinion that if the fact finding examination is to have integrity it must be inquisitorial and the forensic skills of counsel are necessary to elicit the facts. In addition, we are of the opinion that a judge led inquiry has the authority to annotate the facts and make recommendations thereon. Therefore, we consider the level of judicial involvement, certainly when human rights violations are engaged, is appropriate.

9. Do lawyers acting for the inquiry or representing those complaining or complained against make an appropriate contribution? Is an inquisitorial or an adversarial process more appropriate for argument before inquiries? Is it easy enough for people to represent themselves?

We are of the opinion that an inquisitorial process is the most suitable model of fact-finding within the statutory inquiry framework (although not exclusively for other forms of investigation). Facts evidenced through written or oral testimony must be examined (tested) forensically but not necessarily through the model of cross-examination and re-examination. The model adopted by the Baha Mousa Inquiry was successful; the model adopted by the Rosemary Nelson Inquiry was not successful. This was because all questions from the legal representatives of the core participants were directed through Counsel to the Inquiry and therefore witnessnesses could not identify the source or motive of the line of examination. Given that an inquiry can attribute responsibility (wrongdoing) it is necessary that a witness be protected by legal representation. Whilst we agree that the Salmon Principles require examination as to their contemporary relevance we consider that Article 6 (right to a fair trial) of the Convention must be read together with the Salmon Principles to ensure procedural fairness which includes legal representation met out of public funds (see also: *Re A,* the Bloody Sunday Inquiry case dealing with anonymity of soldiers).

10. Some inquiries set up before the Act was passed were both lengthy and inordinately expensive. An aim of the Act was to make inquiries briefer and less costly. Has it achieved this? If not, what could be done to improve this?

The duration of an inquiry cannot be proscribed as the extent of a statutory inquiry's examination will depend on the complexity of the facts under scrutiny. Our experience is that inquiries under the Act have been efficient and cost effective. However, a key reason for this has been the nature of the facts and the character of the panel, specifically of the chair. Another factor which has contributed to delays in the work of statutory inquiries has been the issue of the disclosure of material by the government.

11. Inquiries are often asked to report by a particular date, and often fail to do so. Should there be a power to curtail an inquiry's proceedings? If so, exercisable by whom?

See our response to question 5 above.

12. Is it right that ministers can and do continue to set up inquiries otherwise than under the Act? Is there any justification for this?

See our response to question 6 above. We are of the opinion that non-statutory inquiries (Privy Council Inquiries) can be the result of political agendas which undermine their credibility, for example the example of The Detainee Inquiry (Gibson). When a human rights violation is engaged, either individual or systemic, then a statutory inquiry is required in order to discharge the procedural obligation attaching to duties under Article 2 of the Convention (the limitation to absolute discharge being the requirement of independence).

13. Is there a role for independent reviews to be established otherwise than under the Act (like the Hillsborough Independent Panel)?

See our response to Question 1 above regarding the plethora of fact finding mechanisms available of which the statutory inquiry is one. However, independent reviews should not be used as lesser-alternatives to statutory inquiries if the gravity of the factual circumstances of wrongdoing demands the public scrutiny of a statutory inquiry. The independent review could both usefully inform a

statutory inquiry but it could also serve to obfuscate the work of a statutory inquiry in its attribution of responsibility (wrongdoing) role if responsibility has been summarily determined previously.

14. Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?

In relation to the statutory inquiries we have observed or contributed to, we conclude that the confidence of the core participants in the system has been varied. This confidence is measured by both the results of the statutory inquiry and the treatment of them as witnesses within the inquiry process. The core participants in the Northern Ireland statutory inquiries Rosemary Nelson and Billy Wright) (the respective family members as victims) were not satisfied. The core participant to the Baha Mousa Inquiry (Colonel Douad Mousa) was satisfied but he demanded further post-inquiry action which has not manifested itself. The results of the Mid-Staffs Inquiry have divided the local community serviced by this NHS Trust.

15. Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?

The allocation of responsibility (both individually and corporately) (wrongdoing) must be dealt after the conclusion of the statutory inquiry by the relevant prosecuting authority and the evidence assessed in making the decision to allocate responsibility must be tested by that prosecutor in criminal proceedings (or by a litigator in civil proceedings) or by those responsible for a professional disciplinary panel of examination. The evidence will be tested subject to the relevant standards of proof for those different forms of proceedings. It is not a question of admissibility but rather of probative value of evidence adduced by a statutory inquiry. We reiterate in this regard the role of a judge and Counsel to the Inquiry when evidence will be used elsewhere.

16. Are the recommendations made by inquiries adequately implemented? Should there be a procedure for an inquiry to reconvene to consider this?

It is not for a statutory inquiry to monitor the implementation of its recommendations. Neither can the relevant Minster establishing a statutory inquiry be expected to implement the recommendations. We refer you to our response to question 5 above and the institutional arrangements which could be introduced so as to discharge the procedural obligation arising when Article 2 of the Convention is engaged including the monitoring of implementation of the recommendations by the executive and holding the executive to account through parliamentary process. There need to be clear guidelines for government on this process of consideration and implementation of recommendations.

17. The Inquiry Rules 2006 have been criticized, not least by the Ministry of Justice, as being too prescriptive and not allowing an inquiry panel sufficient freedom to regulate their own proceedings. Do you agree with this view? How might the Rules be improved?

The Inquiry Rules 2006 (the Rules) should be reviewed so as to reflect best practice as being developed through the statutory inquiry process. We do not consider the Rules to be overly prescriptive as they in part provide guidance to the treatment of witnesses.

18. At present, certain inquiry records become subject to the Freedom of Information Act 2000 after the inquiry has ended. Should an inquiry's record be kept confidential after the inquiry has concluded? How else might the interface between the Inquiries Act 2005 and the Freedom of Information Act 2000 need to be changed?

In the spirit of securing probity in public life and with regard to the public scrutiny principle, the presumption should be that the records of a statutory inquiry should be made available to the public and that it would be for authority under the institutional arrangement proposed at question 5 above to rebut that presumption with due regard to the provision of the Freedom of Information Act 2000.

RW (UK) 31 July 2013