

# Public inquiries: Guidance for Ministers and officials on whether an inquiry should be established

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## **Abbreviations**

|              |                                                                              |
|--------------|------------------------------------------------------------------------------|
| COPFS        | The Crown Office and Procurator Fiscal Service                               |
| ECHR         | European Convention on Human Rights                                          |
| FAI          | Fatal accident inquiry                                                       |
| SCTS         | The Scottish Courts and Tribunals Service                                    |
| The 2005 Act | Inquiries Act 2005                                                           |
| The 2016 Act | Inquiries into Fatal Accidents and Sudden Deaths etc.<br>(Scotland) Act 2016 |

## Introduction

This guidance has been prepared by the Civil Law and Legal System Division (Justice Directorate) which has policy responsibility for public inquiries and is responsible for maintaining this guidance.

It is aimed at officials who are preparing advice for Ministers, on whether a public inquiry should be held. Separate guidance is provided for Scottish Government teams who are sponsoring public inquiries and for the independent teams who are setting up and running public inquiries under the direction of the inquiry's chair.

### Public inquiries

Inquiries may be necessary to:

- investigate the events causing public concern (public concern is the test for 2005 Act inquiries);
- establish the facts;
- determine the explanations for, and causes of, things which have gone wrong;
- establish the lessons to be learned from what has happened;
- make recommendations intended to correct the deficiencies for the future.

The chair of the Fingerprint Inquiry<sup>1</sup> outlined that a successful public inquiry would have the following features.

- Interested parties would believe that a thorough inquiry into the issue which had caused public concern had been conducted, with obvious fairness, and that the final report was not over-written or under-researched.
- Interested parties would feel that they have been given an opportunity to present their views.
- The inquiry reaches conclusions that are justified by the evidence in a way that is cost effective.
- The inquiry produces a report that people understand.

Advice to Ministers will need to consider the public interest in holding an inquiry and the most appropriate form for any such inquiry. Directorates will need to be able to put forward robust reasoning to support any decision and in doing so consider whether an inquiry is likely to be successful.

Public inquiries can operate on a statutory or non-statutory basis. The majority of statutory inquiries will be established in accordance with the Inquiries Act 2005 ('the 2005 Act') and the Inquiries (Scotland) Rules 2007. The 2005 Act covers the setting up of inquiries, appointments to them, their procedures and powers, the submission of evidence, and the publication of reports. Other types of inquiries and reviews are summarised later in this guidance.

Whether to hold an inquiry – and whether it is statutory or otherwise – will be affected by:

- the likely duration and cost;

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<sup>1</sup> Also known as the Campbell Inquiry. This related to the case of HM Advocate v McKie and the steps that were taken to identify and verify the fingerprints associated with that case

- whether it will need to compel witnesses and the release of documents;
- whether it will need witnesses to give evidence on oath;
- whether Ministers will need to exclude documents or require evidence gathering sessions to be in private (for example, for national security reasons);
- the level of formality that is needed; and
- whether a particular type of inquiry is likely to satisfy those affected by the issues in question.

There is no duty on Ministers to establish an inquiry on any specific issue, simply because there are requests for an inquiry. However, there may be a duty on the State to conduct an effective investigation or inquiry under one of the articles of the European Convention on Human Rights. In the case of fatalities, a mandatory Fatal Accident Inquiry (FAI) is required in certain circumstances. The circumstances in which an FAI would be convened are covered by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016.

#### What to consider before deciding to hold a public inquiry

The following matters should be considered by Ministers, and the officials advising them, before coming to a decision to hold a public inquiry in Scotland.

- Are the events of the case in question giving rise to serious and widespread public concern? Is that concern justified?
- Is it likely that a public inquiry, its report and recommendations, will satisfy that public concern?
- Are there any other forms of inquiry or investigation under way, or expected, which are likely to address or satisfy the same public concerns?
- How long is the inquiry likely to last?
- What is the likely cost of the inquiry?
- What powers are required by the inquiry?

It should be borne in mind that it is not the purpose of a public inquiry to determine civil or criminal liability. Rather inquiries can investigate issues and make findings and recommendations. A public inquiry is different to a court or tribunal hearing and is an inquisitorial rather than adversarial process. The inquiry will not 'hold to account' any party as is sometimes suggested, though the conclusions of the inquiry may permit certain inferences to be drawn.

Before any decision is made to establish an inquiry, the Executive Team should be involved in discussions given the issues at stake. If time is an issue, then as a minimum DGs and the Permanent Secretary should be consulted.

## Considerations

### 2005 Act powers and duties

One of the principal differences between statutory and non-statutory inquiries are, *that for those convened under the 2005 Act, there is a clear statutory framework for the conduct of the statutory inquiry.* They are subject to the powers and duties under that Act.

In these statutory inquiries, the Chair or inquiry panel is appointed by Ministers in terms of section 4 of the 2005 Act. The 2005 Act provides powers to require witnesses to appear at hearings, or for documents or evidence to be provided. In addition, an inquiry can take statements under oath. This has obvious advantages where cooperation could be an issue, but it can also appear heavy handed or formal and therefore the need for the powers should be carefully considered before any decision is made.

The 2005 Act also requires the chair to make arrangements for the public to have access to inquiry proceedings and information. This can be limited by way of notices made by Ministers or orders made by the chair themselves, but these should only be used in exceptional circumstances, as set out in section 19 of the 2005 Act. The presumption is for the inquiry to operate with transparency. This can be critical in building trust in the inquiry, which in turn is necessary for the inquiry to be successful in addressing public concern. However, the subject matter of the inquiry should be carefully considered in light of this presumption, as some areas of policy do not lend themselves well to the publication of evidence (for example, issues of national security).

### Independence

2005 Act inquiries are, once established with agreed terms of reference in which Minister have final say, completely independent of Ministers. Terms of reference are defined in section 5(6) of the 2005 Act, which states that:

*“In this Act “terms of reference”, in relation to an inquiry under this Act, means—*  
*(a) the matters to which the inquiry relates;*  
*(b) any particular matters as to which the inquiry panel is to determine the facts;*  
*(c) whether the inquiry panel is to make recommendations;*  
*(d) any other matters relating to the scope of the inquiry that the Minister may specify.”*

The government bears the costs of an inquiry, and therefore has a ‘sponsor’ role, but the inquiry is run by the independent chair who is appointed at the outset.

That can, of course, also be true of a non-statutory inquiry but establishing a 2005 Act inquiry can put it beyond doubt. This can be an especially important consideration where the actions of government are the subject of public concern.

### Timing

For some events, it might be necessary to let some time pass before an objective, dispassionate public assessment of the events in question can be made, such as the

calling of the Covid-19 inquiry. Policy teams should consider whether the holding of a public inquiry is likely to allow a suitable amount of time to pass.

In other circumstances, there may be a need for more urgent consideration of the issues. A public inquiry is unlikely to report in under a year and very possibly will take a lot longer than that. If rapid reporting is critical, it may that a different option is more appropriate.

### Cost

When considering any inquiry, Ministers will need to judge whether the circumstances of the matter in question justify the considerable expense of an inquiry. The Directorate which deals with the subject matter of an inquiry (known as the sponsoring directorate) will be liable for the costs of the inquiry.

Although there is a duty on the chair of a 2005 Act inquiry to act with regard to the need to avoid any unnecessary cost, there are many unavoidable costs incurred at any public inquiry:

- the salary of the chair (unless the chair is a serving judge who remains on their judicial salary) and other members of the panel (if any);
- the salaries of the solicitor and secretary (and, if appointed, counsel) to the inquiry;
- the salaries of other inquiry support staff, either employed by the inquiry or services bought in (including lawyers);
- fees for subject experts;
- the expenses of core participants and witnesses, etc. attending the inquiry;
- the cost of office accommodation for the inquiry team and accommodation for the public hearings;
- IT equipment (including document management and reporting on hearings) and other support services;
- website, communications and public relations; and, above all,
- the legal costs of the core participants<sup>2</sup> at the inquiry which are always met by the Government unless the core participant is a corporate body.

All of these costs fall on the sponsoring directorate and who will provide advice to Ministers on the holding of a public inquiry. In the event that two or more Directorates have a sponsoring interest – or there is a joint inquiry co-sponsored by the UK Government – an apportionment of costs will have to be agreed.

Ministers may determine qualifications and conditions to be applied in respect of awards for the legal representation of core participants and witnesses at the inquiry,

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<sup>2</sup> Core participants are defined in the 2006 Rules at rule 4 as persons who–

(a) played, or may have played, a direct and significant role in relation to the matters to which the inquiry relates;

(b) have a significant interest in an important aspect of the matters to which the inquiry relates; or

(c) may be subject to significant or explicit criticism–

(i) during the proceedings at the inquiry, or

(ii) in the report (or any interim report) to be delivered under section 24 of the Act (submission of reports).

known as a Section 40 determination. These costs are often a significant proportion of the costs of running an inquiry. A Section 40 determination can therefore be an important check on the contribution that these costs make to the overall costs of an inquiry. It does not however control the overall costs, which will be influenced by a number of factors, not least the length of time the inquiry runs.

### Length

The length of time that an inquiry runs is one of the most significant factors in how much an inquiry has cost by the time it reports – the longer the inquiry, the more it is going to cost. The length itself is influenced by a number of factors, including how much documentary evidence is gathered, how many hearings are held, and how complex the report drafting process is (including the process of warning those who are criticised in it, which can take a great deal of time).

However, the length of time an inquiry takes to report can have other impacts, for example lessening the impact of any conclusions drawn by an inquiry. Given that most public inquiries take some years to report, it may be that another type of investigation, which will report more quickly, is more appropriate.

The lessons learned report from the Fingerprint Inquiry noted that

“It is neither realistic nor fair to expect any particular inquiry to replicate the kind of timescales achieved by other inquiries. The time taken will reflect many things – including the nature of the subject matter, the methodology adopted by the chair (once appointed), the availability of key players (both among the inquiry team and core participant teams), the demands of the evidence (gathering, collating and assessing) and the practicalities of compiling a report”.

It is difficult to predict how long an inquiry will take, and therefore how much it will cost. For example, it was suggested that the Fingerprint Inquiry would cost around £1.5 million and would be carried out within a year. Ultimately, it cost around three times that figure and took nearly four years. The Vale of Leven Hospital and Penrose (Hepatitis C) Inquiries cost over £10 million and £12 million respectively.

## **Inquiries Act 2005**

### Parameters

Scottish Ministers have a power to cause an inquiry to be held under the 2005 Act where it appears to them -

- that particular events have caused or are capable of causing public concern or
- that there is public concern that particular events may have occurred.

Note that there is no requirement for the event to have actually occurred.

Scottish Ministers may only hold an inquiry into Scottish matters, meaning matters which relate to Scotland and are not reserved under the Scotland Act 1998. Inquiries may be held jointly with the UK Government where the issues involved relate to reserved and devolved matters— the ICL Stockline Inquiry is an example.

A 2005 Act inquiry will investigate the event(s) causing public concern which have caused the inquiry to be held, consider the evidence, and determine the facts. It may also make recommendations in connection with that case, but it cannot establish criminal or civil liability of any persons.

### Interaction with other investigations

It is possible that any civil action for damages might be brought and concluded, possibly by settlement, before a public inquiry might report. This is particularly the case if personal injuries and/or deaths were involved in the events at issue, because personal injury actions must be raised within three years. A 2005 Act inquiry can be suspended during civil action proceedings. Alternatively, a civil action might be brought and sisted (paused) whilst the inquiry proceeds.

It may be that there are other forms of inquiry or investigation under way, or expected, the reports or findings of which are likely to address the same public concerns. For example, a fatal accident inquiry in the case of a death or deaths, or a criminal investigation and associated criminal proceedings (the system of investigation of sudden, suspicious and unexplained deaths and the system of the investigation of crime both being matters that fall within the functions of the Lord Advocate).

Careful consideration should be given to any other investigations that are under way, or expected, before a 2005 Act inquiry is announced. Whether the eventual decision is to hold an inquiry or not, it is likely that questions will be asked about the interaction with any other investigations.

### Inquiry powers and duties

A 2005 Act inquiry is conducted by a chair, who may be assisted by panel members. Although the appointment of panel members is relatively rare, a panel was appointed in the Grenfell Tower Inquiry and initially in the Scottish Child Abuse Inquiry.

The chair, and any panel members, are appointed by Ministers. In most inquiries the chair will be legally qualified, often a retired judge, however this is not always appropriate and very much depends on the circumstances of the particular inquiry.

When appointing the chair, there are a number of questions that Ministers should consider.

- Is there an impartial inquiry chair available (and willing to be appointed) who can command sufficient public confidence in determining the facts and making associated recommendations?
- If it is proposed to appoint a judge or legal officer (e.g., a Scottish Law Commissioner) to a public inquiry, has the Lord Advocate been consulted<sup>3</sup>?
- If the inquiry chair is to be a serving judge, sheriff principal, sheriff, or summary sheriff, has the Lord President been consulted on their appointment?
- Is the inquiry chair competent and sufficiently skilled to ensure the efficient conduct of the inquiry?

It should be borne in mind that there have been occasions when an inquiry appointment has drawn adverse public, media or political reaction or the initial appointee has been subsequently replaced.

The House of Lords Select Committee recommended that the inquiry panel should consist of a single member (the chair) unless there are strong arguments to the contrary and it has been rare for more than one member to be appointed to the inquiry panel.

The chair will usually be assisted by an advocate or advocates as counsel to the inquiry who are responsible for providing legal advice to the chair (and the inquiry) and, if the inquiry proceeds to a hearing, will cross-examine witnesses on behalf of the inquiry.

In a statutory inquiry there will also be a solicitor to the inquiry. They will work with the Secretary and Counsel to the Inquiry in providing legal advice to the Chair. Some of their duties will include assisting with drafting inquiry protocols and statements of approach, liaising with Core Participants and assisting Counsel in preparing for oral hearings.

There will usually be a secretary to the inquiry, who will administer the inquiry, managing its budget and progress. This is usually a civil servant who is seconded or on loan from the sponsor Directorate but who works independently for the inquiry.

A public inquiry (and the chair) under the 2005 Act is granted powers that may not be available to other forms of public or private inquiry. The chair can require, by notice, the attendance at the inquiry hearing of witnesses and may also require the production of documents and evidence for examination to the same extent as would be the case in the Court of Session. The inquiry may also require evidence to be

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<sup>3</sup> See para. 5.11 of the Scottish Ministerial Code

taken under oath. Persons who do not comply with such a notice are guilty of committing an offence under section 35 of the 2005 Act.

It is possible for a non-statutory inquiry to be converted to a statutory inquiry under the 2005 Act, so that the chair can use powers to require that witnesses or evidence are brought forward at the inquiry. This was done at the Edinburgh Tram Inquiry owing to lack of co-operation by certain core participants.

Subject only to certain specified restrictions, a public inquiry under the 2005 Act must ensure that members of the public (including reporters) are either able to attend the inquiry in person or to hear a simultaneous transmission of the proceedings and are also able to obtain or view a record of the evidence presented<sup>4</sup>. The circumstances in which restrictions could be applied are covered in section 19 of the 2005 Act. This sets out that regard must be had to the following matters when considering applying a restriction:

*“(a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;*

*(b) any risk of harm or damage that could be avoided or reduced by any such restriction;*

*(c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;*

*(d) the extent to which not imposing any particular restriction would be likely—*

*(i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or*

*(ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).”*

### Minister's powers

2005 Act inquiries are independent of Government; however, Ministers establish them and can put in place certain controls. This includes:

- Setting the date on which the inquiry will begin.
- Setting the inquiry's terms of reference.
- Appointing the chair to the inquiry, and any additional panel members.
- Determining the fees and expenses to be paid to the inquiry team.
- Determining conditions or limits on the expenses to be paid to core participants and witnesses.
- Making notices restricting public access to hearings or evidence.

The terms of reference should always make clear:

- to whom the inquiry should report;
- the purpose of the inquiry; and
- whether the inquiry is being invited to review policy in a given area, consider the facts of a particular case, and/or make recommendations.

Terms of reference are specific to every inquiry, however there are some fundamental principles that are common to all inquiries.

- Ministers should consider whether the terms of reference restrict the scope of the inquiry to the issues which have caused concern. They should not be

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<sup>4</sup> An exception to this is privileged information which is covered in section 22 of the 2005 Act.

wider than necessary, or open ended, as that can have profound consequences for both the time taken to report and the cost of conducting the inquiry.

- The chair of the inquiry must be given an opportunity to discuss the proposed terms of reference of the inquiry with Ministers before they are finalised and published.
- Terms of reference must be finalised before the start of the inquiry.
- Legal advice should always be sought before the terms of reference are announced.
- Ministers may at any time change the terms of reference of the inquiry but must consult the chair of the inquiry before so doing and inform Parliament.

Beyond setting the terms of reference, the controls imposed by Ministers on the operation of an inquiry are limited. This is essential if the inquiry is to operate in an independent manner. However, the 2005 Act does provide for some involvement:

- Ministers may determine the fees and expenses to be paid to the inquiry team, including its chair. This is good practice, as the Government bears the cost of an inquiry.
- Ministers can also determine conditions or limits on the expenses to be paid to core participants and witnesses, which will otherwise be paid at the discretion of the chair. (Expenses paid to witnesses may include expenses actually incurred, compensation for loss of time and legal representation.) This is also good practice.
- Ministers may impose restriction notices in relation to the disclosure or publication of any evidence or documents given, produced or provided to an inquiry. This should only be considered in exceptional circumstances but can be one means by which Ministers can disclose particularly sensitive information to the inquiry to aid its work, in the knowledge the information will not be made public. Ministers must consider the harm or damage that could be avoided or reduced by such restriction, including:
  - o death or injury;
  - o damage to national security or international relations;
  - o damage to the economic interests of the UK or any part of the UK; and
  - o damage caused by disclosure of commercially sensitive information.

Once established, inquiries may be suspended or ended by Ministers. However, this is subject to some limitations.

- Ministers may suspend an inquiry to allow for the completion of any other investigation or the determination of civil or criminal proceedings but must consult the chair of the inquiry before so doing and provide a notice or statement to Parliament.
- Ministers may also, for any reason, end the inquiry entirely, but must first consult the chair and provide a notice or statement to Parliament.

## **Other types of inquiry**

### Fatal Accident Inquiries

The normal form of inquiry into a death or deaths in Scotland is an inquiry under the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 ('the 2016 Act'), commonly referred to as a fatal accident inquiry or FAI.

FAIs are specialist inquiries held in the sheriff courts quite routinely and they are considerably cheaper to the public purse than 2005 Act inquiries. The purpose of an FAI is to establish the circumstances of the death and consider what steps, if any, might be taken to prevent other deaths in similar circumstances. A single FAI may be held into more than one death, even where the deaths were in different sheriffdoms or sheriff court areas. FAIs, like other forms of inquiry, are inquisitorial rather than adversarial, they are therefore very well suited to inquiring into deaths that are sudden, suspicious, or unexplained, or that otherwise occurred in circumstances giving rise to serious public concern.

The Lord Advocate is the head of the system of investigation of sudden, unexpected and suspicious deaths in Scotland, as well as for the prosecution of crime. These are functions performed independently of any other person. Where a death is reported to the Crown Office and Procurator Fiscal Service (COPFS), procurators fiscal, acting on behalf of the Lord Advocate, consider whether a death requires further investigation, attempt to ascertain the cause of death, and consider whether criminal proceedings and/or an FAI are appropriate.

- Some 11,000 sudden, suspicious or unexplained deaths are reported to COPFS each year.
- COPFS carry out death investigations in around half of these cases. Some of these will result in criminal proceedings.
- 50-60 FAIs are conducted each year.

The 2016 Act makes an FAI mandatory in the cases of deaths which occurred in Scotland in legal custody, the death of a child required to be kept or detained in secure accommodation, or as a result of an accident that occurred in the course of employment or occupation. Other FAIs are held on a discretionary basis where the Lord Advocate considers that the death was sudden, suspicious, or unexplained or occurred in circumstances giving rise to serious public concern, and that holding an FAI is in the public interest. Even in circumstances that would usually lead to a mandatory FAI, where the Lord Advocate is satisfied that the circumstances of the death have been sufficiently established during the course of certain specified legal proceedings, including an inquiry under the 2005 Act, the FAI might not be necessary.

The Scottish Courts and Tribunals Service (SCTS) handle administrative arrangements, while COPFS investigates the death and handles family liaison, Crown witnesses, etc. Parties who were participants in the FAI, to whom sheriffs direct their recommendations, are required to respond in writing to SCTS to indicate whether and to what extent they intend to implement the recommendations. If they do not intend to implement the recommendations, they are required to explain why

not. Recommendations will otherwise be considered by the relevant regulatory bodies, whether devolved or reserved.

Where there is an active question of whether an FAI or an inquiry under the 2005 Act should proceed, it should be brought to the attention of the Civil Law and Legal System Division within the Justice Directorate which has policy responsibility for FAIs and other inquiries. As the Lord Advocate's functions are exercised independently of the Scottish Government, great care must be taken to ensure that COPFS' investigations are not undermined or impliedly criticised should interested persons be aggrieved and calling for Ministerial action. An FAI may only be held in relation to a death which either requires a mandatory FAI or meets the criteria for holding a discretionary FAI. FAIs are not an alternative to a public inquiry in cases where public concern is unrelated to the occurrence of deaths.

### Inquiries under other legislation

In very specific circumstances, an inquiry may be established under other legislation, such as the Financial Services Act 2012, the Merchant Shipping Act 1995, Health and Safety Act 1974, Gas Act 1965 and the Energy Act 2013.

### Non-statutory inquiries

Aside from statutory inquiries, it is open for Ministers to consider the establishment of a non-statutory inquiry. They can be very similar in form and style to a 2005 Act inquiry; however, they are not able to wield the same powers and they are therefore essentially reliant on the cooperation of those involved. There is also no specific statutory obligation to make the proceedings or findings public. In some cases, for example those cases involving national security or other reasons of sensitivity, which may be the appeal for establishing a non-statutory inquiry.

Some of the reasons given for using a non-statutory approach include:

- to facilitate a more inquisitorial and less formal approach and
- to enable an inquiry to take evidence in private.

Examples include the Hutton Inquiry (an investigation into the circumstances surrounding the death of the Ministry of Defence scientist, Dr Kelly) and the Morecambe Bay Investigation (investigation into serious incidents in maternity hospitals).

### Non-Statutory Committees or Commissions

A Commission or Committee may be established to act independently of Ministers to investigate a set of circumstances and, if properly appointed, can command as much public confidence as a public inquiry.

However, there could be concerns that Ministers will exert improper influence over the committee or commission, including in the provision of resources and funds. Such bodies will have no powers to compel the appearance of unwilling witnesses or the production of evidence and are not required to be conducted in public.

### Royal Commissions or Committee of the Privy Councillors

Royal Commissions tend to be held into constitutional matters or broad public policy (for example the 1973 Kilbrandon Report on how to deal with children in trouble which influenced the establishment of the Children's Hearing System), rather than into a particular event or series of events. Scottish Ministers tend to set up non-statutory reviews, e.g., the review into legal services.

A Royal Commission or an inquiry of Privy Counsellors may be established to act independently of Ministers to investigate a set of circumstances and, if properly appointed, can command as much public confidence as a public inquiry.

A Committee of Privy Counsellors is essentially a variation on the non-statutory ad hoc form of inquiry although its composition allows for security information to be seen by the Committee that the Government could not otherwise make available. Royal commissions, like non-statutory departmental inquiries, are ad hoc investigatory or advisory committees, established by Government initiative (albeit with greater formality) and without statutory powers to compel the attendance of witnesses or the production of documents.

### Independent review with a public hearings element

Occasionally, Ministers might commission an investigation of some matter or event by a judge or a QC. It is also possible for there to be a review with a public hearings element. An example of both of these is the independent review into the impact of policing on communities during the Miners' Strike in 1984-85 conducted by John Scott QC.

### Regulatory investigations

Some areas of public service are overseen by regulatory authorities who are granted powers of investigation. The Scottish Public Services Ombudsman and various Accident Investigation authorities, for example, have substantial powers to compel documents and evidence from the relevant authorities within their respective remits, while planning inquiries have all the powers of a tribunal and are usually required to be held in public.

### Internal investigations

Any public authority may establish an internal investigation to determine the facts of a case and learn lessons from the experience to improve their future performance. Such investigations are entirely reliant on a commitment to good practice and transparency. Such forms of self-regulation are normally able to establish all the necessary facts and make relevant recommendations, because all the necessary evidence and witnesses are already at the disposal of the public authority.

However, they are rarely held in public, and the authorities are not immune from suits of action arising from the conduct of an investigation, as public inquiries are. The potential for conflict of interest is evident, so self-regulated internal investigations may be subject to criticism for their lack of independence. They may

not assuage public concerns, especially if the commissioning authority is itself found (or, perhaps more pertinently) not found to have been at fault.

In some cases, it may be possible to engineer some distance between the part of the authority in question and the part carrying out the inquiry, in order to increase confidence in the independence of the inquiry. For example, a critical incident investigation carried out by a Health Board other than the one where the incident took place.

### Independent investigation

Ministers may commission an independent investigation into events without establishing a public inquiry in order to minimise the elements of conflicted interests described in internal investigations, but it would be difficult to entirely remove the potential conflict if Ministers themselves were accountable for the actions giving rise to the events under investigation.

### Police investigations and criminal prosecutions

The Lord Advocate is the head of the system of prosecution of crime and investigation of deaths. Only the Lord Advocate, or Procurators Fiscal acting on his or her behalf, can direct the police in the investigation of crime. Ministers cannot.

Police Scotland and COPFS have sufficient powers to investigate any criminal matters and if they have taken the decision so to do, it is unlikely that a public inquiry could determine the facts of a case any more efficiently – or more quickly. A public inquiry is unlikely to serve a useful purpose until criminal proceedings have concluded, and indeed the holding of a public inquiry may even hamper the efficient conduct of criminal proceedings since the disclosure of evidence at a public inquiry may prejudice the rights of the accused at criminal proceedings.

The Lord Advocate may decide that the circumstances of a death have been sufficiently established by proceedings, such as a criminal trial, and that it is unnecessary to hold an FAI which would otherwise be mandatory. The same principles might be said to apply to a 2005 Act public inquiry – if criminal or civil proceedings have already determined the facts in public there may be no strong case for a public inquiry. In the case of the inquiry into the explosion at the ICL Stockline factory, however, an inquiry was held in spite of the fact that a prosecution had already taken place under health and safety legislation.

### Police Investigations and Review Commissioner

The purpose of the Police Investigations and Review Commissioner (PIRC) is to independently investigate incidents involving the police and independently review the way the police handle complaints from the public.

The Lord Advocate, as head of the system of prosecution in Scotland, is responsible for investigations into criminal allegations against the police. The PIRC can investigate the circumstances in which an officer may have committed an offence when directed to do so by the prosecutor.

### Truth and Reconciliation Commission

No such commission has ever been held in Scotland. Their aim is to establish the facts of a case and to reconcile the parties involved, such as the commission established to investigate the apartheid regime in South Africa. Such a forum raises a number of legal difficulties, with questions arising around the incrimination of witnesses and the defamation of the deceased.

## European Convention on Human Rights (ECHR)

The decision to hold, or not hold, an inquiry is a government decision that may be subject to judicial review. The ECHR contains obligations under Articles 2 and 3 that could be relevant to the establishment of an inquiry. Article 2 of the European Convention on Human Rights is the right to life and is interpreted as meaning that states have to have a system in place for the practical and effective investigation of the circumstances surrounding any death and the determination of responsibility.

Lord Cullen summarised that obligation in his review on Fatal Accident Inquiry Legislation<sup>5</sup>

“The European Court of Human Rights has also interpreted article 2 as imposing on member states a procedural obligation. [...] What is required to satisfy the procedural obligation depends on the particular case. [...] As regards Scotland, Lord Hope of Craighead pointed out that the ECtHR had made it clear that an FAI was a means of carrying out an investigation which would satisfy article 2. The same should apply to a public inquiry into the circumstances in which a death occurred. [...] The practical difference which article 2 makes is that it may require an FAI or a public inquiry where neither would otherwise have been held.”

This has been given judicial consideration in the following two cases.

### The Kennedy and Black case -

The original decision: <http://www.scotcourts.gov.uk/search-judgments/judgment?id=7ea286a6-8980-69d2-b500-ff0000d74aa7>.

Reverend David Black and Mrs Eileen O'Hara were two people who had become infected with the Hepatitis C virus as a result of NHS treatment and subsequently died. The Petitioners for judicial review, who were relatives of Reverend Mr Black and Mrs O'Hara, did not think that sufficient investigation of the deaths had taken place, and claimed that Article 2 of the European Convention on Human Rights required an FAI or a public inquiry to be held. This case involved a challenge to a decision of the Lord Advocate to decline to exercise his discretion to hold an FAI and of the Scottish Ministers not to cause a public inquiry to be held into the deaths.

In the context of deaths that occur in the course of NHS treatment, Article 2 broadly obliges the State to have in place mechanisms that allow for a practical and effective investigation of the facts (this obligation also applies in other contexts, but deaths related to NHS treatment were the focus of the case). The Article 2 obligation might be satisfied, for example, by the availability of criminal investigations and proceedings, civil proceedings such as a medical negligence action, professional disciplinary proceedings, a fatal accident inquiry, a public inquiry, or any combination of these.

Lord Mackay of Drumadoon decided that in this case criminal or civil type proceedings were unlikely or not viable and that an FAI or public inquiry were the

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<sup>5</sup> <https://www2.gov.scot/Resource/Doc/290392/0089246.pdf>

only available routes to meeting the Article 2 obligation. He overturned the decision not to order an FAI and gave the Lord Advocate and Scottish Ministers some time to decide what to do about the Article 2 obligations. Following the change of Government in 2007, Scottish Ministers ordered a public inquiry into the transmission of Hepatitis C through blood and blood products to NHS patients in Scotland. The Penrose Inquiry was established to investigate, among other matters, the circumstances of the deaths of Reverend Mr Black and Mrs O'Hara. The Lord Advocate took no further decisions about an FAI.

This case does expose, to some extent, how the inquiries available to the state interact with Article 2 obligations. It should not, however, be over interpreted.

It does not mean that a public inquiry is required for all deaths in the course of NHS treatment. Lord Mackay was satisfied that the various mechanisms in place (criminal/civil proceedings, critical incident investigations, etc.) would be capable of satisfying the Article 2 obligation in relation to the majority of deaths following treatment in hospital. It was only in the limited circumstances of these cases that he decided that an inquiry in public was required.

In addition to the original considerations, the petitioners in the Black and Kennedy proceedings continued to challenge aspects of the proposals to hold a public inquiry. They asked Lord Mackay to make detailed orders regulating how the inquiry should be set up and conducted in order to ensure Article 2 compliance. Lord Mackay decided, however, that it was the role of Ministers to set up the inquiry in accordance with the statutory framework and for the independent chair of the inquiry to conduct it in compliance with that framework. The Court was therefore careful not to usurp the statutory roles of Ministers and the chair.

This does not mean, however, that the actions of Ministers or the chair in setting up or conducting an inquiry cannot be challenged. Although Lord Mackay was not prepared to prejudge how the inquiry should be set up or conducted, decisions of Ministers or the chair in the setting up or conduct of an inquiry can be judicially reviewed after they have been taken.

### The Emms case

The case of Emms petitioner further refined and clarified the position. In this case, the mother of the deceased petitioned for judicial review seeking to overturn the Lord Advocate's decision to refuse to hold an FAI and for a declaration that the Lord Advocate's refusal was incompatible with Article 2. The Court concluded that Article 2 rights had been met by virtue of the thorough and impartial investigation carried out by the procurator fiscal, even although an FAI had not been held.

In relation to FAIs, the Emms decision highlights that the decision as to whether to hold an FAI is one for the discretion of the Lord Advocate and is not one which is readily subject to interference. Also, that FAIs are designed for particular situations where the public interest is engaged.

It set out that not every death in a medical setting engages Article 2.

Also, that there is a distinction between failings identified in an investigation which are indicative of a one-off situation (or a single error of judgment) and those which have arisen as a result of a serious systemic failure. In the latter, questions of public concern may be raised if there are concerns that the system and procedures in operation at the hospital were so deficient that there may have been a number of deaths attributable to them or, that if these deficiencies are not addressed, there may be more deaths in the future.

The converse of the above is that if appropriate remedies following a death or deaths are put in place to address systemic deficiencies, to the satisfaction of Crown Counsel (normally supported by independent expert opinion), there is a prospect of minimising the numbers of similar deaths in the future, and thus the public concern is lessened.

It also noted that the availability of civil litigation should be considered as part of the overall picture, when assessing whether Article 2 is satisfied, whether the petitioner has chosen to use that option or not.