Public inquiry guidance: advice for sponsor teams

This is guidance only. Although it is written for future inquiries created under the statutory framework of the Inquiries Act 2005 (the 2005 Act), the advice could also assist those who are considering the establishment of future non-statutory inquiries and reviews.

It is therefore not intended to provide a prescriptive list to be followed in all circumstances, particularly in the case of non-statutory inquiries and reviews. It seeks to ensure that inquiries are conducted as effectively and rigorously as possible, whilst assisting those who are conducting them to be in as strong a position as possible to deliver justified conclusions.

This guidance, and the Guidance for Inquiry Teams document, represents our collective knowledge to be considered at each stage and represents an attempt to avoid the repetition of the problems which have been encountered by previous statutory inquiries. Sponsor teams should familiarise themselves with this guidance and the Guidance for Inquiry Teams and lessons learnt reports from previous inquiries. They should also make sure that they understand the statutory framework within which the statutory inquiry will operate (being the Inquiries Act 2005 and the Inquiries (Scotland) Rules 2007).

Unless otherwise specified, references to inquiries should be taken to be references to public inquiries established under the 2005 Act.

Contents

- **Abbreviations and acronyms**

2005 Act	The Inquiries Act 2005
2016 Act	The Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016
2007 Rules	The Inquiries (Scotland) Rules 2007
FAI	fatal accident inquiry
FOI	freedom of information
GDPR	General Data Protection Regulation
HR	Human Resources
NRS	National Records of Scotland
PQ	Parliamentary question
PR	Public relations
SG	Scottish Government
SGLD	Scottish Government Legal Directorate

- **Inquiry stages**

Inquiries all tend to follow similar stages, and sponsor teams should be familiar with what will be expected of the inquiry teams that they are liaising with. This chapter outlines those stages, although it should be noted that more complex inquiries may have good reason to repeat stages or to run stages concurrently.

Before looking at the detail of how inquiries are established it is important to note at the outset that 2005 Act inquiries are, once established with agreed terms of reference in which Minster have final say, **completely independent of Ministers.** 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 (more on which at page 12). **An inquiry also has no ‘legal personality’** and cannot therefore be sued or judicially reviewed in its own name. Notwithstanding the lack of legal personality, inquiries are still likely to need to put in place various operational workarounds (e.g., entering into contracts for essential services or accommodation), and this guidance aims to help explain how this can be done by sponsor teams.

- Establishing an Inquiry

Before an inquiry can begin, the following should be done:

- establishment of inquiry sponsor team within Scottish Government;
- announcement of the inquiry by Ministers;
- appointment of the chair and agreeing terms of reference; and
- appointment of secretary and solicitor to the inquiry.

After the appointment of the secretary and solicitor to the inquiry, the chair and the core inquiry team should meet as early as possible to agree processes and a work schedule for the inquiry.

A provisional work schedule should, at the minimum, include:

- dates of milestones for witness statements being submitted to the inquiry;
- dates of oral proceedings; and
- if possible, the proposed date for publication of the report (or the proposed date for delivery of the report to the Minister).

In addition, the following administrative tasks should be completed:

- Finding and setting up inquiry office(s),
- recruitment of staff; and
- obtaining technical support.

- Initial/preparatory work of the inquiry

While hearings and calls for evidence tend to be the visible and widely reported stages of an inquiry, there is often a significant amount of preparatory work to be undertaken by the inquiry team before those can take place, including:

- retrieving and reviewing public documents in order to scope what future investigative work is required;
- meeting with the key personnel involved in the project;
- recovering and reviewing all relevant documentation from parties who have an interest;
- identifying core participants, potential witnesses, expert specialists, and potential areas for further consideration;
- obtaining written statements from potential witnesses if necessary; and
- determining the uncontested facts.

An inquiry should resist being pressurised into early oral hearings, in particular to ensure that the above steps can be completed before hearings take place. This should allow for hearings to be carried out by a well-informed inquiry team.

- **The inquiry record**

Rule 16 of the 2007 Rules set out the requirements placed on the chair in relation to transferring the inquiry record to the appropriate public records office. In Scotland this is the Keeper of the Records of Scotland.

The rules aim to ensure that the chair keeps a comprehensive and well-ordered record and, in the case of Scottish inquiries, requires them to consult with the Keeper at the earliest opportunity on creating, maintaining and transferring the record. This means that, ultimately, there will be a comprehensive permanent record of the work carried out by the inquiry. NRS can provide the inquiry with guidance on how to manage its records throughout the inquiry process to mitigate end-of-life issues. Any sensitivity review work will be less onerous if records have been managed for sensitivity over time.

- <u>Formal call for evidence</u>

Once background documents have been obtained, the inquiry can begin to commission written statements or oral evidence from interested parties. This will be the opportunity for people to provide evidence to the inquiry. The parties who have been identified as core participants[1] will have the opportunity to make their views known, but other interested parties may also submit their views. The opportunity for people to provide written evidence to the inquiry is likely to continue throughout the duration of the inquiry. Section 21 of the 2005 Act states that the chairman can require a person to attend a hearing to give evidence, produce any documents in his custody or under his control that relate to a matter in question at the inquiry, and/or

[1] Core participants are defined in Rule 4 of the Inquiries (Scotland) Rules 2007.

to produce any other thing in his custody or under his control for inspection, examination or testing by or on behalf of the inquiry panel.

- Preliminary hearing

A preliminary hearing should be held as soon as possible after the setting up of the inquiry, at which the chair can set out what has already been done, set out basic procedures, specify the focus of the inquiry and when and how the inquiry hearings will operate. These matters will need to be written and agreed by the Inquiry team in the first instance. The chair can reiterate the invitation to submit evidence and make clear the arrangements for core participants, legal representation and public funding.

At this stage, depending on the information already received, an interim report may be published focussing on the work of the inquiry on specific areas of concern or contention – or it may determine how the inquiry is going to address separate, specific issues, in what order and when.

- Oral hearings

It is anticipated that there will be some oral hearings in virtually all inquiries, at which specified witnesses will be asked to appear. Not everyone who lodges written submissions will be invited to give oral evidence.

Once it has been established how many hearings will likely be needed and the subject area for those hearings, a witness schedule should be drawn up to feed into the inquiry timetable and to make optimum use of available sitting times for the oral hearings.

The 2007 Rules contain more detailed provision on the conduct of oral proceedings for inquiries held under the 2005 Act.

- Publication of evidence

All documents (subject to any restrictions or redactions) presented at the oral hearings, transcripts of the hearings, and any written evidence submitted to the inquiry will be published on the inquiry's website.

- Final report and recommendations

The chair will review all of the evidence submitted and information obtained by the inquiry, in order to produce a final report. Most 2005 Act public inquiries are also required to make recommendations; this is usually set out in the terms of reference. Even when recommendations are not required, they can still be included in a final report if the chair considers them to be relevant to the inquiry's terms of reference.

- **Starting up an inquiry: summary of initial steps**

- Whether to hold a 2005 Act inquiry

An inquiry is one of a number of options open to Ministers where there is an issue of public concern. Advice to Ministers on whether to hold an inquiry under the 2005 Act should be drafted by the policy lead(s) for the subject area of the issue in question. Separate guidance is available for putting together this advice.

Comments on the draft advice, should be sought from the relevant government departments, such as legal, the relevant Communications team(s), the portfolio finance team, accommodation services, ICT services and HR advisors. Early engagement with these colleagues will alert corporate support functions and more readily identify the operational and budgetary constraints requiring to be overcome, thereby facilitating a more efficient set-up period after any review or inquiry is announced. It should be borne in mind, however, that the ultimate choice of accommodation, IT functions, and other services will be for the chair of the inquiry once appointed.

- The inquiry sponsor team

After Ministers decide to hold an inquiry, it will be necessary to establish a sponsor team within the Scottish Government.

The sponsor team should usually be situated within the policy area of the subject matter of the inquiry, i.e., the area which provided advice to Ministers on the holding of an inquiry. This is essential because the budget for the inquiry will be provided from the budget of that directorate. However, consideration should be given to potential conflicts of interest if historical actions of the Scottish Government or Ministers are likely to be the subject of the inquiry.

The prompt establishment of a sponsor team within the Scottish Government will facilitate the establishment of the inquiry and will thereafter co-ordinate actions across Government interests and provide ongoing liaison with the inquiry team.

The skill mix and selection of the sponsor team should reflect the scale and complexity of the nascent inquiry and enable the rapid completion of immediate tasks. They will likely have regular communications, ministerial correspondence, PQ, and FOI work for the Scottish Ministers' interest in the inquiry. It may be that dedicated legal support is likely to be required, this should be explored with SGLD.

A smaller, possibly different, sponsor team can provide ongoing sponsorship and monitoring once the inquiry has been established, though the experience of the Child Abuse Inquiry was that the sponsor team had to scale up to respond to issues arising from the inquiry.

Once the inquiry team itself is established, the sponsor team should instigate regular meetings with the inquiry secretary for the duration of the inquiry to discuss, at least:

- progress

- budgetary requirements
- resourcing matters (in particular as regards SG staff assigned to the inquiry and monitoring the status of any leases and premises).

Constructive interaction between the sponsor team and the inquiry team is a key part of the system.

The sponsor team should draw any novel, contentious or difficult issues arising during the course of the inquiry (which relate to the conduct of the inquiry) to the attention of Civil Law and Legal System Division. They may be able to provide overarching advice on inquiries or have experience of issues previously raised by other inquiries. Where issues relate to staffing, People Directorate should be contacted.

- <u>Immediate tasks</u>

The sponsor team will have to undertake, or at least begin, the tasks listed below.

Most of these will require early contact with those who have expertise within SG (for example People Directorate, Finance, Property Division). Some of these will overlap with the inquiry team itself being established. The sponsor team must therefore work closely with the key members of the inquiry, as they are appointed, to ensure that division of responsibility is clear as the inquiry is set up.

- Announce the inquiry
- Appoint the inquiry chair, agreeing draft terms and conditions
- Draft the proposed inquiry terms of reference for discussion between Ministers and the chair
- Agree terms of reference
- Recruit the inquiry solicitor, secretary, and counsel (as required) - agreeing draft terms and conditions with relevant interests
- Identify assessors that Ministers may wish to consider for appointment.
- Draft framework documents
- Consider costs
- Resource the inquiry: identify and secure necessary staff and other resources and co-ordinate corporate support functions including HR.
- Begin the process of sourcing office accommodation
- Provide induction and other guidance materials to the chair and any other members of the panel

- **Announcing an inquiry**

There may be significant pressure to be seen to act promptly in relation to matters of serious public concern, where they have led to calls for an inquiry.

If Ministers, have agreed that an inquiry should be held then a swift announcement, following Cabinet agreement, may help establish a message that Ministers are taking firm, positive, timeous action.

It is, however, important to make sure that the Crown Office and other authorities' decision making is not pre-empted, for example if the Crown Office were considering holding a fatal accident inquiry. Also, if the events under inquiry took place, even in part, under a previous administration, former Ministers should be consulted before the announcement.

Section 6 of the 2005 Act stipulates that a Minister who proposes to cause an inquiry to be held, or who has already done so without making a statement, must as soon as is reasonably practicable make a statement to that effect to the relevant Parliament. In most cases this will be the Scottish Parliament, but in the case of a joint inquiry this may include another Parliament or Assembly.

Section 6 requires that the announcement state:

- who is to be, or has been, appointed as chair of the inquiry
- whether the Minister has appointed, or proposes to appoint, any other members to the inquiry panel, and if so, how many, and
- what are to be, or are, the inquiry's terms of reference.

The House of Lords Select Committee which carried out post-legislative scrutiny of the 2005 Act recommended that the fact that an inquiry is to be held and the name of the chair should not necessarily be the subject of the same statement and that section 6 should be amended. The UK Government accepted this recommendation as a practical suggestion since Ministers may wish to announce the intention to establish an inquiry before being in a position to announce who is to chair it. However, the 2005 Act has not been amended to date.

Advice from justice colleagues should be sought in advance of an inquiry announcement to ensure the most up-to-date legislative position is adhered to. A practical approach may be for an initial statement to Parliament announcing an intention to establish an inquiry and a second statement formally initiating the inquiry and announcing its Terms of Reference and who is to be its chair.

- **Appointing the inquiry chair and panel members**

The chair of an inquiry has the following general duties:

- To consider the draft terms of reference before the final decision is taken by the responsible Minister.
- To determine the procedure for, and conduct of, the inquiry, bearing in mind the need to have regard to fairness and the need to avoid unnecessary cost.
- To consider public access to proceedings or evidence of the inquiry.
- To request provision of evidence or production of documents relating to matters within the inquiry's scope.
- To deliver a report of facts determined and, where required, recommendations to the responsible Minister.

The chair is accountable for the effective management of the inquiry budget and costs.

- <u>Expertise</u>

The 2005 Act requires Ministers to have regard to the need to ensure that the inquiry panel as a whole has the necessary expertise to undertake the inquiry. The chair should be not just competent and sufficiently skilled to ensure the efficient conduct of the inquiry but should also be able to command sufficient public confidence that they will determine the facts and make associated relevant recommendations.

Depending on the circumstances, the chair may need to be legally qualified, a judge or senior KC, or may need to have expert professional or sectoral knowledge. It may also be worth considering the appointment of a judge from another jurisdiction who may be an expert in the relevant field. Legal advice on Scots law can then be provided to such a judge by the solicitor and/or counsel to the inquiry as required.

- <u>Impartiality</u>

The 2005 Act makes it clear that Ministers must not appoint a person as a member of the inquiry panel if it appears that the person has:

- a direct interest in the matters to which the inquiry relates, or
- a close association with an interested party,

unless, despite the person's interest or association, the appointment could not reasonably be regarded as affecting the impartiality of the inquiry panel.

A prospective appointee must inform Ministers of any matters that could affect their eligibility for appointment. They must also inform Ministers if they become aware (before or during the course of the inquiry) of any interest or association which might affect their impartiality. They must not, during the course of the inquiry, undertake any activity which could reasonably be regarded as affecting their suitability to serve.

- Availability

Clearly any suitable, impartial inquiry chair must be available for appointment, and willing to be appointed, but availability should not be considered just in terms of the prospective appointee being available at the start of the inquiry. Sometimes it is more appropriate to appoint a non-legal chair, for example when particular technical expertise is required. This can however also be addressed by the appointment of a panel and/or assessors.

Inquiries can, and often are, held over a number of years. In addition, they can involve stressful and pressurised oral hearings and inquiry panel members can find themselves the focus of intense public scrutiny. Consideration should be given to all of these factors, both by the sponsor team when identifying possible chairs, and also by those offered the role.

The House of Lords Select Committee which carried out post-legislative scrutiny of the 2005 Act noted that there were often significant advantages in the appointment of a serving or retired judge to chair an inquiry, especially in inquiries where the need for independence, proven integrity and authority are the greatest.

There may be particular advantages in the appointment of serving judiciary who are more used to case and project management (and would remain on their existing salary, which would be a saving to the overall cost of the inquiry, albeit not to the public purse overall). Full time appointment to the inquiry may not be necessary, but the removal of a member of the Scottish judiciary even for part of the period of the inquiry would require backfilling for that judge in court. In some cases, the appointment of a non-judicial chair might be more appropriate.

Taking all of these factors into account, the choice of chair will depend, at least in part, on:

- the subject matter of the inquiry;
- the expertise of the proposed appointee;
- the anticipated resilience of the proposed appointee; and
- whether the appointment of a judge, serving or retired, would meet public expectation.

- Serving judiciary

If the inquiry chair is to be a serving (or retired) Court of Session judge, sheriff principal, sheriff or summary sheriff, the Lord President must be consulted on their appointment. (Similar requirements are in place for judiciary from other UK jurisdictions). Alternatively the Lord President may be asked for their opinion on a suitable appointment from the judiciary.

Sponsor teams should contact the Judicial Appointments team in Justice Directorate in order to arrange for that consultation and, in line with best practice, consult with the Lord President.

- Other appointments

Once Ministers have appointed a chair the 2005 Act permits the appointment of other members to the inquiry panel, and any expert assessors who may be required to assist the inquiry. Before appointing any other panel members or assessors, the Minister must consult the chair. One or more persons may be appointed to act as assessors to assist the inquiry panel. A person may be appointed as an assessor only if it appears to the Minister or the chairman (as the case requires) that he has expertise that makes him a suitable person to provide assistance to the inquiry panel.

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 an inquiry panel. A compromise position can be to appoint an assessor to assist the chair. After an inquiry has been established, it is for the chair to appoint any further assessors.

- Terms of appointment of inquiry panel/chair

Sponsor teams should engage with People Directorate and SGLD (the subject area solicitor, civil justice and the employment team), as early as possible in relation to these proposed appointments and the terms and conditions to be issued to appointees. It is recommended that the terms of appointment are agreed and finalised prior to any public announcement regarding the appointment of the chair.

It is important that a reasonably consistent approach is taken to such appointments. HR and SGLD will be able to provide guidance to the sponsor team on these matters (and also more generally on the obligations owed as employer to any SG staff assigned to the inquiry).

- Terminating the appointment of a panel member

Although Ministers may terminate the appointment of an inquiry panel member under section 12 (following consultation with the chair), they may only do so on certain limited grounds including:

- physical or mental illness (such that the member is unable to carry out their duties);
- failure to comply with duties imposed by the Act;
- lack of impartiality owing to a direct interest in the subject matter of the inquiry or a close association with an interested party which the Minister was not already aware of at the time of their appointment; and
- any misconduct that makes them unsuited to membership of the inquiry panel.

Should a chair or other member lose the confidence of stakeholders, they may wish to resign.

- **Terms of reference**

The chair of the inquiry is appointed by an instrument in writing and the Minister must specify in the instrument or by a notice to the chair within a reasonable time afterwards the date which is to be the setting up date of the inquiry and must, before that date, set out the terms of reference of the inquiry.

The setting up date should therefore be set such that the terms of reference can be discussed with the chair before they are finalised. Beyond the setting up date, the inquiry will truly become independent of the Scottish Government, with the sponsor team remaining with the Scottish Government and being accountable to Scottish Ministers.

Although the chair of the inquiry must be consulted about its terms of reference, these will be drafted by the sponsor team. Ideally draft terms of reference should be offered to Ministers as part of the advice on whether to hold an inquiry. This draft and any proposed amendments to the terms of reference must, however, be discussed with the chair before being finalised.

- Purpose

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.

The House of Lords Select Committee recommended that the consent of the chair should be required before Ministers set or amend the terms of reference. The UK Government rejected this recommendation, noting that any amendments to the terms of reference are invariably discussed and agreed with the chair, but that it was necessary for Ministers to retain control of the detailed purposes of the inquiry.

The chair should agree that the proposed terms of reference for the inquiry will enable the determination of facts required by Ministers and may want to wait until advice from the solicitor to the inquiry team is available. The chair should be permitted a reasonable period to consider the terms of reference.

The terms of reference will be specific to each inquiry, but they are in all cases an important limit on their scope. They will need to satisfy the relevant matters of public interest but it is important to avoid all-encompassing or open-ended remits as these can have profound consequences for the time taken to complete, and therefore the cost of conducting, the inquiry. Taken alongside the requirements placed on the chair, to avoid unnecessary delay and expense and stay within scope, the terms of reference should assure Minsters that the inquiry will deliver value for money.

As an example, the terms of reference of the Edinburgh Tram Inquiry may be found at: http://www.edinburghtraminquiry.org/terms-of-reference/.

Changes to the terms of reference after an inquiry has been announced are undesirable, as they are likely to significantly undermine confidence in the process, but changes may become unavoidable if the original terms of reference are too broad (or too narrow).

The 2005 Act allows for Ministers to change the terms of reference of the inquiry at any time should the Ministers consider that this is required in the public interest, but it also requires them to consult the chair of the inquiry before doing so and to make a statement to Parliament.

- Budget

It is worth noting that in the terms of reference for the Edinburgh Tram Inquiry, and in those for other recent inquiries in Scotland, there is no mention of a budget for the inquiry.

It will be extremely difficult to make a meaningful estimate of the likely cost of an inquiry over its lifetime and an early, probably wholly unrealistic, estimate is likely to simply constrain the inquiry's ability to perform its function.

- Timescale

Whilst the terms of reference for some inquiries do not contain any projected timescale, those set for the Child Abuse Inquiry required that it report within four years. An estimated timeline may help to maintain focus and speed, but it may become a source of criticism of the inquiry if it runs over the timeline due to delaying factors, such as the volume of evidence to be considered being far greater than first thought or the chair of the inquiry becoming ill.

- **Recruiting the inquiry team**

In line with the 2007 Rules, the secretary and solicitor to the inquiry are appointed by the chair. In practice, these posts are often filled by civil servants on assignment from the Scottish Government. It is recommended that protections are put in place for any seconded staff to ensure that their treatment is as per expectations of any other civil servants. This could be done via the terms of appointment of the chair setting out standards of behaviour towards SG staff.

Advice should be taken at the earliest opportunity from People Directorate as to the potential inquiry set up and supply of staff, to ensure that any issues are flagged, and mitigation is put in place.

Where SG staff are assigned to an inquiry, their day-to-day responsibilities are to advise the chair and not their home department. The Scottish Government, however, remains their employer. As such, it is imperative that all assigned staff receive an assignment letter from Scottish Government People Directorate which sets out the terms on which SG staff are assigned to the inquiry.

- <u>Secretary to the inquiry</u>

The key tasks for the secretary are to:

- review all relevant SG guidance, including Lessons Learned Reports;
- write and agree Inquiry procedures and policies;
- establish an inquiry office, liaising with the sponsor department to ensure that it is adequately equipped, staffed and resourced. This includes viewing of properties and project management of design and fit-out, which can take some time;
- agree arrangements with the sponsor department for the preparation, management, monitoring and publication of the budget;
- make contact with SGLD to arrange for the appointment of the inquiry solicitor if necessary;
- work with the chair and solicitor to produce a timetable and work plan covering issues including evidence, hearings, drafting the report, and key dates (such as when to send out warning letters to involved parties);
- ensure the inquiry team is properly inducted and familiar with the inquiry's procedures, the conduct expected of inquiry members and their responsibilities (including the need for confidentiality), as well as HR policies, including performance and appraisal, grievance procedures, security and health and safety;
- provide advice and support to the chair on general policy issues and inquiry procedures and in drafting the report;
- devise, implement, and deliver appropriate mechanisms for obtaining, handling, and secure storage of documents and evidence provided to and generated by the inquiry in line with guidance from the National Records of Scotland;
- liaise with interested parties to the inquiry;
- ensure that any hearing room(s) is/are fully equipped and operational;
- submit a 'Lessons Learned' report to Justice Directorate on conclusion of the inquiry. This report will be used to inform the operation of future inquiries and future refinements of this guidance.

- <u>Solicitor to the inquiry</u>

The solicitor to the inquiry will usually be assigned from within SGLD and will be the main source of advice on legal and procedural issues.

The key tasks for the solicitor are to:

- share past inquiry experience with the inquiry team (if they have any);
- provide legal advice and advice on procedures to the chair (including drafting warning letters where appropriate), handle the evidence and in some cases perform advocacy at any hearings;
- work with the chair and secretary to draft a work plan and procedures for the inquiry;
- prepare, with counsel where appropriate, an 'Issues List' setting out the issues for consideration by the inquiry and contribute to compiling the programme of witnesses;
- where counsel is to be appointed, take control of the selection process, instructions and manage their remuneration and expenses;
- manage the witness statement process for the inquiry;
- assess applications for awards of expenses or compensation by way of public funding and, if granted, agree and verify awards before payment;
- advise on any possible or actual judicial review; and
- draft evidential chapters for the inquiry report.

- Combining roles

The roles of secretary and solicitor can be combined.

For the ICL Stockline inquiry, which was a joint inquiry with the UK Government, the two roles (secretary and solicitor) were undertaken by an English qualified solicitor appointed by the Treasury Solicitor and supported by a deputy solicitor on assignment from SGLD. For the Fingerprint Inquiry the roles were combined, undertaken by a solicitor on secondment from SGLD. The Vale of Leven and Penrose Inquiries had separate appointees as secretary and solicitor, but all were on assignment from the Scottish Government. Deputies were also appointed to both posts. Clearly drafted appointment/assignment letters will ensure clarity as regards respective roles and responsibilities including on final decision-making.

It seems to be more common in non-statutory inquiries to appoint a secretary and to seek legal advice as necessary. However, the larger and more complex the inquiry, whether statutory or non-statutory, the less feasible this would appear to be in practice. In addition, it should be noted that the role of solicitor to an inquiry includes some responsibilities set out in the 2007 Rules, therefore the person appointed must be qualified to assume those responsibilities.

Advice should be taken from People Directorate on staffing matters including line management and the interaction with SG HR policies.

- Counsel to the inquiry and their fees

Where complex and voluminous issues which the inquiry has to consider lie outside what the solicitor can reasonably be expected to deal with, the inquiry chair may appoint an advocate as counsel.

The question may arise as to whether counsel to the inquiry is needed at all; no counsel was appointed at the Chilcot Inquiry. Without counsel to the inquiry, however, the chair must take on the burden of preparing for the evidence sessions and asking the questions, which is a large and time-consuming undertaking. It was suggested to the House of Lords Select Committee that matters were not pursued to a sufficient degree at the Chilcot Inquiry to enable legal certainty to permit appropriate findings in facts to be made.

It is understood that other inquiry chairs have valued the role played by counsel to the inquiry, as it allows the detail to be pursued by counsel, leaving the chair to concentrate on assessing the direction and quality of the evidence. It also avoids any suggestion that a robust line of questioning from the chair demonstrates that they have come to a view on a particular matter, whereas the intention will simply be to verify evidence.

Counsel to the inquiry is appointed by the chair. It is expected that the chair will consult the Scottish Government to confirm rates of remuneration and expenses proposed to be paid to counsel to the inquiry as Ministers pay these costs which will be outlined in a determination.

- **Framework, and other, documents**

The framework documents for an inquiry are:

- Terms of Reference (see separate Terms of Reference section)
- Management Agreement
- Section 39 determination
- Section 40 determination

The Terms of Reference and the Management Agreement set out what the inquiry will be asked to do, and how it will interact with the Scottish Government for the duration of its life. Drafts of these documents should be prepared in sufficient time to be made available to the person being approached to chair an inquiry. This will facilitate productive discussions with candidates for the role of chair.

Under section 39 of the 2005 Act, Ministers may agree to pay members of the inquiry panel, any assessor, counsel or solicitor to the inquiry and any person engaged to provide assistance to the inquiry such remuneration and expenses as they determine. Ministers must pay any award of expenses to witnesses to the inquiry determined by the chair and must also meet any other expenses incurred in holding the inquiry unless such expenses are considered by the Minister to be outside the inquiry's terms of reference.

Although funding of witnesses in relation to statutory inquiries is principally a matter for the chair there are limits to the chair's discretion including Ministers' power in section 40(4) to impose conditions and qualifications on the chair's power to make an award. The chair has a general statutory duty under s17(3) to "act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or witnesses) or others”.

Section 40 of the 2005 Act sets out detail regarding the award of compensation or of inquiry expenses and the inquiry’s payment of witness expenses. These determinations can be made at varying stages. They can be drafted alongside the draft management agreement or, for example, following consideration of how many legal staff the inquiry will engage and how many core participants and witnesses will take part in the inquiry.

It is essential to remember that, once established, the inquiry is independent from Government and will be conducted in accordance with the directions of the chair. It is, however, also important to remember that the inquiry terms of reference and the powers to impose conditions and qualifications under section 39 in respect of the payment of inquiry expenses are the only significant controls over an inquiry that are made available to Ministers, and Ministers remain responsible for meeting the costs of an inquiry.
It is therefore important that any initial draft documentation retains the capacity for flexibility, and for the sponsor team to support discussion of the issues raised with the person being invited to chair an inquiry (including their own remuneration) before they are finalised.

- Management Agreement

The management agreement should be clear about the responsibilities and liabilities between the Scottish Government (in the main the sponsoring Directorate) and the inquiry itself. It should explain who the different key players in the inquiry are and what the independence of the inquiry should mean. It should be clear about the financial controls relating to the inquiry.

As an example, the management agreement of the Undercover Policing Inquiry may be found at: https://www.ucpi.org.uk/wp-content/uploads/2017/03/151214-UCPI-Management-Statement.pdf

The agreement should also clarify some points of detail, such as how the SG People Directorate will engage with the inquiry to support the operation of the inquiry from an HR perspective and fulfil the duty of care owed by the Scottish Government to any assigned SG staff.

There should be agreement on how monitoring of the progress of the inquiry will be carried out, including regular budget monitoring. This is generally carried out by way of a monthly monitoring meeting between the sponsor team and the inquiry team (though any important or emergency issue should be reported immediately).

- Section 39 determination

Section 39 of the 2005 Act sets out that Ministers may determine the remuneration and expenses of the members of the inquiry panel, any assessor, counsel or solicitor to the inquiry and any other person engaged to provide assistance to the inquiry. The ability to set these rates is clearly an important tool for Ministers in seeking to control the budget of an inquiry. Section 39 also requires Minsters to publish the total amount that has been paid to the chair and the rest of the inquiry team following the end of the inquiry, although FOI requests may lead to earlier disclosure of the rates that are paid.

The process for making these payments should be agreed at the earliest opportunity in discussion with SG Finance and People Directorate.

- <u>Section 40 determination</u>

In general, legal support should be available for any individual against whom allegations may be made in the course of the inquiry and/or who may be the subject of criticism.

On 29 January 1990, in answer to a Parliamentary question, the then Attorney General set out the basis upon which the Government would exercise its discretion to pay costs of participants at public inquiries:

> "So far as the costs of legal representation of parties to any inquiry are concerned, where the Government have a discretion they always take careful account of the recommendations on costs of the tribunal or inquiry concerned. In general, the Government accept the need to pay out of public funds the reasonable costs of any necessary party to the inquiry who would be prejudiced in seeking representation were he in any doubt about funds becoming available. The Government do not accept that the costs of substantial bodies should be met from public funds unless there are special circumstances."

This is still the convention followed. The inquiry may be asked to consider requests for public funding from interested persons outside of Government but is not obliged to agree.

Legal aid is not available for inquiries.

Instead, the 2005 Act sets out, at section 40, the power for the chair to make awards. It states that the chair of an inquiry is permitted to award reasonable amounts to persons for:

- compensation for loss of time;
- expenses properly incurred, or to be incurred, in attending the inquiry (or otherwise); and
- legal representation of core participants and witnesses (including parties who are required to produce any document or other evidence).

The legal costs of Government witnesses might be met by the sponsoring department under the mechanism set out in section 40 of the 2005 Act, but not necessarily. If the witnesses were from a different department, their own department might pay for their representation, putting them in the same position as any other large organisation, to whom the inquiry would not usually grant funding.

Expenses can also be paid to others - a person who, in the opinion of the chairman, has such a particular interest in the proceedings or outcome of the inquiry as to justify such an award.

The chair will need to assess witness costs and award reasonable expenses, provided that they were incurred solely to enable the witness to give evidence to the inquiry. The power to make such awards is subject to such conditions and qualifications as may be determined by Ministers. It should also be noted that separate arrangements are in place for current government officials[2]. The civil service management code does not extend to former civil servants so if their legal costs were to be funded from the public purse, a different power to do so would have to be identified.

Although consideration should always be given to the specifics of a particular inquiry the determinations by Ministers under section 40 for recent inquiries in Scotland have all been very similar. While the hourly rate for counsel and solicitors may have to be uplifted to take account of inflation, the conditions would appear to be relatively standard and may not require significant amendment from inquiry to inquiry.

A clear section 40 determination will control costs for ongoing legal representation and permits the inquiry to set specified amounts for particular pieces of work.

An example of a section 40 determination may be found at:
[Scottish Child Abuse Inquiry | Determination by Scottish Ministers]

SGLD advice should always be taken when drafting such a determination.

- Finalisation and publication of a determination

Sponsor teams will draft determinations. As a matter of good practice, the chair will be consulted on the terms of any determination before they are finalised. Ministers will be asked to agree to their terms, though they do not require to sign them.

The chair should be sent final versions and should make arrangements for the determination to be posted on the inquiry's website to ensure that they are accessible by the public.

- Revision of a determination

Scottish Ministers may revise a determination at any time, though this should be in consultation with the chair.

If a determination is revised, the inquiry team will need to give consideration to anything that might have been done in reliance on the previous determination, particularly if the new determination might treat parties in a less favourable manner. It is therefore good practice for the sponsor team to alert the inquiry team, at the earliest opportunity, to any potential or actual changes.

[2] https://www.gov.uk/government/publications/civil-servants-terms-and-conditions

An example of revised determination can be seen in the Scottish Child Abuse Inquiry, where a section 40 determination was amended in relation to the payment of travel time for legal representatives - [Determination by Scottish Ministers — Scottish Child Abuse Inquiry](#).

- Restriction notices and orders

The 2005 Act places a duty on the chair to secure public access to inquiry proceedings and information. This[3] is subject to any restrictions on attendance or disclosure or publication of evidence or documents imposed by either

- a notice made by Ministers or
- an order made by the chair

both provided for in section 19 of the 2005 Act.

These restrictions may be imposed, varied or revoked at any time before the end of the inquiry. As such they are not framework documents although, once in place, they do frame how the inquiry operates.

A restriction notice by a Minister should be considered an exceptional occurrence as it may be perceived as impinging on the inquiry's independence. It is a matter to be considered carefully in conjunction with the chair. Depending on the circumstances, the chair may prefer to make a restriction order of their own volition. If the chair feels that it is likely to be helpful, given the subject of the inquiry, they can develop a protocol to set out the approach that they will take in relation to these matters.

A restriction notice or order may only specify restrictions if they are required by law, or the chair considers them to be conducive to the inquiry fulfilling its terms of reference, or otherwise to be in the public interest. Section 19(4) and (5) set out the matters to be taken into account in making this judgment. A section 19 notice could be one means by which particularly sensitive information could be disclosed to the inquiry to aid the inquiry but in the knowledge the information will not be made public.

Section 19 was discussed in the cases of BBC v Chair of the Scottish Child Abuse Inquiry [2021] CSOH 35 and Bilfinger Construction UK Ltd v Edinburgh Tram Inquiry [2018] CSOH 46 and [2018] CSIH 48.

- **Inquiry costs**

Ideally, Ministers will be provided with realistic indicative costs as part of the factors which they consider when coming to a decision on whether to hold an inquiry and prior to any announcement.

In reality, it is difficult to calculate how much an inquiry will cost. The number of factors which will be unknown at the point when holding an inquiry is being

[3] s18 of the 2005 Act and s18(2) makes provision in respect of broadcasting proceedings.

considered, and even later when the inquiry team itself comes into existence, mean such predictions are likely to be incomplete and thus inaccurate, especially if made too early in the process. The experience of recent inquiries in Scotland shows that an early estimate of the likely cost of an inquiry is probably going to be optimistically low. Ministers should be provided with updates on the financial position as the inquiry progresses and informed of any significant changes to anticipated costs. The budget requirements will need to be considered as part of the Spending Review process.

- Likely inquiry costs

Although it will be possible for the Scottish Government to set the rates of pay of the chair and inquiry staff, the main factors which affect the overall cost of an inquiry are:

- the volume of evidence to be considered by the inquiry; and
- the length of time required to consider written evidence, to hold public hearings, to formulate conclusions and to write up the final report.

It is virtually impossible to predict these factors at the outset of the inquiry and thus to make a meaningful estimate of the overall cost of the inquiry.

The inquiry budget is undoubtedly one of the most sensitive issues for the sponsoring directorate within the Scottish Government. Inquiries should adhere to the guidance set out in the Scottish Public Finance Manual (SPFM) on the proper handling and reporting of public funds. Weak financial management can lead to excessive public expenditure and the inquiry adopting inefficient procedures, including excessively long evidence gathering or hearings, or the final report being over-written.

The attitude of the chair will be the critical factor in the working procedures and practices of an inquiry, since they will set the tone and example at the outset. It can be beneficial for the relevant Minister to meet the chair of the inquiry at the start to emphasise the need to avoid unnecessary cost (as is required by section 17(3) of the 2005 Act). Such an interview took place at the outset of the ICL Stockline inquiry which was a joint inquiry set up by the Scottish and UK Governments.

Reminding the chair of an inquiry of their duty to avoid unnecessary cost does not interfere with the independence of the inquiry. It remains a matter for the chair to decide how the inquiry is to meet the requirements of the terms of reference, whilst remaining mindful of the need to put in place proper financial controls to meet their statutory duty on costs.

There are areas in which the costs of an inquiry arise are reasonably predictable, even if the final total cost is not. Although the unit costs of the legal representation of witnesses and core participants can be controlled under the section 40 determination, this is still likely to be the major and most variable cost element at any inquiry.

Other substantial costs that will be incurred in any inquiry will almost always include:

- remuneration and expenses for chair and/or panel;

- salaries and expenses for inquiry staff including the secretary and solicitor;
- fees for assessors and inquiry counsel;
- legal representation of core participants and witnesses (under a section 40 determination as mentioned above);
- other witness expenses (for loss of earnings/time, travel and subsistence or other expenses of attending the inquiry);
- accommodation for offices and hearings, including fitting out and furnishing, the cost of which will be influenced by the availability of suitable premises and their condition;
- IT equipment, including for document management and reporting hearings;
- website, communications and media relations; and
- costs for supply of SG corporate services, for example HR services and costs relating to the supply and support for staff.

- <u>Sponsoring directorate's budget estimates</u>

All of these costs fall on the sponsoring Directorate. This is usually the Directorate within whose areas of responsibility the subject matter of the inquiry lies, who will have provided advice to Ministers on the holding of an inquiry.

The sponsor team will, therefore, have to make some estimate of the potential cost of the inquiry for its own budgeting purposes. This will depend on the remit of the inquiry, the number of core participants or other witnesses, the required staff and accommodation, and the complexity or peculiarity of the issues being investigated.

A system for controlling and monitoring cost should be agreed between the sponsorship team and inquiry team. The following model could be helpful to ensure that arrangements are in place for the inquiry team to provide regular high quality budget monitoring and forecast information:

- Initial forecast of costs (sponsor team).
- Revised forecast (inquiry team – after initial deliberations of chair).
- Adjusted forecast (inquiry team – after incurring actual initial costs).
- Adjusted forecast (inquiry team - after core participants identified).
- Adjusted forecast (inquiry team - after initial hearings).
- Adjusted forecast: subsequent periods.
- Final forecast.
- Report of accounts.

In line with normal rules on accounting for the use of public funds, the inquiry will be required to make public a summary of its accounts. This has, in the past, been done in the inquiry's report or at the point where the inquiry reports. The costs of an inquiry can be of interest to the public and become the subject of Freedom of Information requests. It is worth considering whether regular reporting on the costs, throughout the life of the inquiry, would be beneficial.

The chair should prepare a preliminary forecast of costs for review and challenge by the sponsor directorate within a reasonable timeframe agreed with the sponsor team. As a minimum, the sponsor team should ask for estimates to be prepared for the following:

- Total amount the sponsor department is likely to be required to pay.
- Administration – size of the inquiry team, grading, payments to the panel or experts, SG corporate services.
- Legal costs – including expenses and remuneration for any inquiry legal staff, and payments for the legal representation of core participants and witnesses.
- Travel costs – including training and visits for the inquiry team.
- Accommodation costs – office/space for inquiry team and evidence sessions.
- Running costs – stationery, postage, facilities, equipment.
- IT system and telecommunications.
- Publication costs – e.g. design, editorial, typesetting, proof reading of the report(s).
- Information Management costs – including maintenance of documentation for as long as required.
- Any other significant expenditure, including contingent liabilities such as potential lawsuits. For further advice on contingent liabilities please see the SPFM.

Ministers are required to publish a broad breakdown of the costs of the Inquiry as soon as practicable after completion of the inquiry. Therefore, an accurate record needs to be maintained.

- Administration of the inquiry costs

The Fingerprint Inquiry operated on the basis of a zero-based budget (i.e., one that is based on prospective actual costs, rather than a budget being assigned to the inquiry). It is expected that future inquiries will adopt the same approach.

It is, therefore, essential that the sponsor team and the inquiry team meet on a regular basis to monitor the progress of the inquiry and its budget which will largely be determined by how long the inquiry will take.

A statutory inquiry under the 2005 Act has no separate legal personality and cannot therefore enter into contracts in its own right (for example with the provider of accommodation or IT systems). Any such contracts will usually be in the name of the sponsoring department which will have to comply with the relevant procurement rules in the usual manner This does not prevent the chair personally from entering into contracts on behalf of the inquiry (although they may be reluctant to do so given the risks involved in being personally liable under the terms of the contract). Section

37 of the 2005 Act states that no action lies against a member of an inquiry panel, an assessor, counsel or solicitor to an inquiry, or a person engaged to provide assistance to an inquiry, in respect of any act done or omission made in the execution of their duty. This immunity does not prevent judicial review proceedings being raised against the inquiry.

The legal status of an inquiry is separate from and different to the notion of the independence of an inquiry. Once established by government, the chair directs the procedure and conduct of an inquiry independently and separately of government despite the Scottish Ministers being responsible for payment of the expenses of the inquiry.

As a result of this legal status of an inquiry, it makes sound financial sense for an inquiry to use Scottish Government financial systems. An inquiry will, as a result, be subject to the same level of scrutiny as any other cost centre within Scottish Government. It can use SEAS, EASEbuy and the Government Procurement Card which will be familiar to any inquiry staff assigned from the Scottish Government and which provide a high level of security.

An inquiry should strive to adhere to the Scottish Public Finance Manual financial limits and processes, but a degree of flexibility is required. Complications may still arise, and these will require to be considered on a case-by-case basis. For example, it may be administratively cumbersome to adhere to strict limits when making payments in a way which allows the inquiry to progress.

The sponsor team should make the inquiry aware of any changes to financial policy or processes in the Scottish Public Finance Manual.

- **Staffing and resources**

As already highlighted, it is important that the sponsor team, before the inquiry team itself comes into being, enter into dialogue with key service providers within SG. Discussing staffing, funding, property and IT issues before the setting up date for the inquiry will pay dividends in the long run.

A single point of contact should therefore be established between the sponsor team and the respective disciplines of People Directorate, Finance, Digital, iTECS, and Property (who will also establish contact with Workplace Division). The sponsor team may need to liaise with more than one division of SGLD (notably the teams that provide advice on the policy area and separately the employment law team in relation to staffing matters).

Scottish Government support for the inquiry in the provision of resources should be flexible and able to respond constructively to inquiry requests for assistance. These may include requests in relation to HR, library services, accommodation, and the provision of equipment such as furniture and stationery, but reasonable time needs to be given for these to be dealt with. iTECS will provide the necessary support for any ICT services it supplies to the inquiry and will be subject to charge back arrangements.

The sponsor team has, as mentioned above, no say or influence in the running of the inquiry once it is set up. This is entirely the responsibility of the chair.

- Staffing

As well as the critical appointments of the chair, secretary, solicitor and, if required, counsel to the inquiry, a wider inquiry team will have to be established who have the right skills to undertake the various functions which the efficient operation of the inquiry will require.

The lessons learned report for the Fingerprint Inquiry noted that an independent inquiry is, during its lifetime, relatively isolated both physically and in terms of the need to have operational and decision-making distance from Government. All members of the team have to have the resilience to cope with this isolation and they must all work well together as part of a small team. Often the team is built gradually, mainly by the secretary of the inquiry under the direction of the chair.

Inquiry staff may be assigned from the Scottish Government or other public bodies or legal firms, be self-employed individuals, or be recruited externally through recruitment agencies.

In particular, staff with specialist skills, for example in statement taking and document management, may need to be recruited externally. Some may only be required for a specific period of time (for example for the period over which statements are being gathered).

Building on the experiences of previous inquiries, required personnel are likely to include:

- Those with knowledge of financial systems.
- Those with knowledge of document management systems (for example, knowledge of information management principles and practices), particularly where the inquiry may be considering large volumes of paper.
- Senior personnel should have a proven track record of leading and managing teams.
- Those with knowledge of IT systems, including systems for simultaneous transmission of inquiry hearings.
- Paralegals, or other precognition agents, to take witness statements.
- A Scots law qualified deputy solicitor, if the solicitor to the inquiry is not Scots law qualified.
- Administrative and clerical support, particularly during hearings.
- Public relations consultants to deal with media relations throughout the inquiry up to the day of publication of the inquiry report.
- Consultants for short term functions, such as acquisition and set-up of accommodation.
-

- Scottish Government staff

In practice, Scottish Government staff are commonly assigned to inquiries. Any assignment should be underpinned by documentation that sets out the terms on which SG staff are assigned to the inquiry and such documentation should make clear, amongst other things, that they remain SG staff but are accountable to the inquiry chair for certain and specific aspects of their assigned role. Early engagement with HR, will ensure appropriate underpinning of these assignments.

- Procurement

When a public inquiry is contracting for services to assist in its work, this is likely to constitute a public services contract within the meaning of procurement regulations. Therefore, where a procurement issue arises, related to the running of the inquiry, procurement advice should always be sought to ensure that the inquiry complies with up-to-date procurement legislation. Advice should be sought from Scottish Government Procurement Team (SGPT) in the first instance.

As an inquiry is established and becomes operational, decisions need to be taken as to what continuing resource is required to manage the inquiry's procurements. This can include services from SGPT and/or working with a Delegated Purchasing Officer within the sponsor Directorate. There is a cost for SGPT support which will be charged to the inquiry. When determining what continuing resource to put in place, all options should be considered against the duty placed on the chair to control inquiry costs. Agreed procurement resources, the local Delegated Purchasing Officer or SGPT should be clearly set out in the Management Agreement between the inquiry and the Scottish Government.

For this reason, sponsor teams should make contact with SGPT at the earliest opportunity to discuss the forthcoming inquiry and its likely needs.

- Accommodation: office

Property Division, in liaison with Workplace Division, will provide guidance regarding the identification and acquisition of suitable office accommodation for the inquiry team. Owing to the overall imperative that the inquiry should be independent of Government, and should be seen to be independent of government, this office accommodation should not be within the Scottish Government core operational estate although initial consideration should be given to any surplus estate property and suitable premises available on the wider public sector estate. This process can take a great deal of time, it can take up to 18 months to procure and fit out offices, so early contact with Property Division is essential. It is also worth keeping in mind that some inquiries have moved into SG property for the final stages of their inquiry.

Property Division will act as the initial point of contact for the accommodation requirement and assess the accommodation needs. Property Division will liaise with Workplace Division to identify whether there is any surplus estate property that may be suitable and to agree what initial advice may be required for setting up.

A business case for new accommodation will be required as the lease will normally be taken in the name of Scottish Ministers. This is prepared by the sponsor team and checked by Property Division, prior to seeking approval of Ministers.

A number of factors should be considered when choosing the inquiry venue. These will differ for different inquiries, but factors are likely to include:

- Able to meet the security needs of the inquiry and capable of secure storage for inquiry papers, electronic records and evidence.
- Able to cable for any electronic systems (an example might be LiveNote).
- Space for private, secure and appropriately equipped offices for the chair, panel (if any) and inquiry team.
- Accessible, including for disabled people.
- Proximity to affected persons.
- Proximity to public transport.
- Cost.

- <u>Accommodation: hearing</u>

The location of accommodation for hearings, where witnesses will give oral evidence, will be dependent on their frequency and likely duration. Consideration should be given to whether separate and larger premises are likely to be required or if those can be accommodated within the inquiry's offices.

Several inquiries have used the Maryhill Community Centre for oral hearings which was kitted out for the ICL Stockline Inquiry and has also been used for fatal accident inquiries, as have the City Chambers in Aberdeen. The use of such a venue or working with other live inquiries to share a hearing venue, can save time and a considerable amount of money given expensive leased accommodation can otherwise be sitting largely unused and empty for long periods of time.

In addition to the requirements mentioned above for the offices used by the inquiry, the hearing venue will also require:

- Support rooms for the parties involved in the inquiry (core participants and witnesses) and their counsel.
- Space for transcript writers, audio-visual engineers, IT support, and media.
- Reception area for the general public, with toilet facilities.

Apart from a large room where the oral evidence is heard, separate smaller rooms are also required for use by the chair and the inquiry team. Some element of security will be required and this should be discussed with Workplace Division and Office of Protective Security in relation to access controlled doors.

- <u>IT</u>

Inquiries have a choice of using SCOTS including eRDM or procuring their own IT and case management systems. If the inquiry opts for SCOTS, iTECS have a template agreement (drafted for SCAI) which includes contribution on cost recovery basis and covers data processing.

The sponsor team, HR and iTECS should discuss these issues at an early stage of setting up the inquiry and if SCOTS is to be installed, it is essential that Scottish Government's Security is consulted as part of the assessment of accommodation. Property Division should be informed of the decision as it might require landlord's consents for the installation of new cabling which can take 6 to 9 months to obtain.

- Data protection

An early determination should be made as to whether the inquiry is a data controller for the purposes of the UK GDPR and Data Protection Act 2018 (DPA 2018).

A controller is defined as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.

The key question to ask is whether the inquiry team are processing information and data on behalf of the commissioning Minister (in which case Scottish Ministers would be the controller) or (as is more likely) they, as a matter of fact, determine the manner and purposes for which personal data is processed. This will involve consideration of matters such as the sources of information, whether it constitutes personal data and the degree of independence.

If the inquiry is deemed to be a controller, then it must register with the Information Commissioner's Office (ICO) and pay a fee. However, as inquiries do not have a separate legal personality it will be necessary to identify which individual(s) will be the data controller. This may be the chair or another member(s) of the inquiry team. It may be the same person(s) who has been identified as being able to enter into contracts and undertake other legal acts on behalf of the inquiry.

Guidance from the ICO in respect of organisations lacking legal capacity provides that for convenience the organisation as a whole (i.e., the inquiry) may be identified as the controller but for legal purposes the controller will actually be the relevant member(s) who make the decisions about the processing by the organisation.

Art 37 UK GDPR sets out when it is mandatory for a controller to appoint a data protection officer. One of the conditions is that the processing is carried out by a public authority or body. Another condition is that the controller processes on a large-scale special category data (as defined in Art 9) or data relating to criminal convictions. Inquiries should therefore appoint a DPO who may be internal or external.

The inquiry will be obliged to comply with the requirements of the UK GDPR and DPA 2018 and this may include undertaking Data Protection Impact Assessments (DPIA) and publishing a privacy notice.

If Scottish Government e.g. iTECS provides services to the inquiry and this involves the processing of personal data then Scottish Government will be a data processor acting on the instructions of the inquiry as controller and a legally binding data processing agreement must be entered into between Scottish Ministers and the legally entity which is the controller e.g. the chair. This can be incorporated into any services-type agreements entered into such as the iTECS service agreement.

The Information Assurance and Data Protection team can provide support to the sponsor team but, should they require it, the inquiry team must seek their own data protection advice independent of the Scottish Government.

- Freedom of Information

An inquiry is not subject to the requirements of freedom of information (FOI) legislation whilst the inquiry is in progress since it is not a Scottish public authority as defined by the Freedom of Information (Scotland) Act 2002 (FOISA) or the Environmental Information (Scotland) Regulations 2004 (EIRs).

However, once the inquiry has closed and the record is passed to the National Records of Scotland (NRS) for archive or temporarily to the Sponsor team. At that point any part of the record may become subject to a request under FOISA or the EIRs made to NRS. The inquiry team must therefore liaise with NRS to ensure that they have considered the potential for FOI requests in relation to the record once it is passed to NRS.

The inquiry must carry out a thorough sensitivity review of all records prior to transfer to NRS to determine whether they can be opened immediately, whether any FOISA exemptions apply, and if so, for how long. This needs to be done at document level; it should also note where information is in the public domain (e.g., published on the inquiry website). The sensitivity review needs to be carried out according to NRS standards/guidance/instructions.

If this is not done properly, and records are closed unnecessarily to public scrutiny, there is a serious risk of lack of public confidence in the findings and integrity of an inquiry. The Dunblane (Cullen) Inquiry shows the negative impact of large numbers of public inquiry documents being closed for 100 years due to sensitive personal info, and this required a large-scale redaction exercise by the Crown Office - but only after adverse publicity.

Information held by the sponsor team is not exempt from FOI requirements merely by virtue of being linked to an ongoing inquiry, therefore the sponsor team should be familiar with SG FOI procedures and ready to respond to any appropriate requests at any time during or after the inquiry.

- Risk registers

An inquiry should identify and manage risk by the maintenance of a detailed risk register. Some risks will be common to all inquiries, such as judicial review of the inquiry's significant decisions and the warning letter process. Others will be more specific to that inquiry or a particular stage of the process.

The sponsor team might also maintain a risk register.

- Legal indemnity for the inquiry team

Section 37 of the 2005 Act states that the chair, and any other members of an inquiry panel, an assessor, counsel or solicitor to an inquiry and any person engaged to provide assistance to an inquiry, are immune from civil proceedings in relation to any act or omission made in good faith as part of their inquiry duties during the course of the inquiry. The immunity is not limited to any certain types of proceedings or causes of action – it is a general immunity that extends to all civil proceedings. It does not, however, exclude judicial review proceedings against the inquiry.

In relation to the law of defamation, statements made in inquiry proceedings (including the inquiry's report) benefit from the same legal privilege as if those proceedings were before a court.

Indemnity is essential in order to ensure a strong candidate for chair, and it is explicitly provided for in the 2005 Act.

- Website

A website should be created for the inquiry and branded with its corporate identity to emphasise its independence from the Scottish Government. The Digital Communications Team can provide advice and guidance and generally an external developer is required to create and manage it.

The website should be easy to navigate and designed as a permanent feature. The site will remain in place for a number of years even after the inquiry is concluded.

The website address should be 'dot org', or equivalent, rather than 'dot gov' in line with its independence, but it should otherwise adhere to the Digital First Service Standard: https://resources.mygov.scot/alpha/service-standard/digital-first/ .

Sponsor teams should consider whether the Scottish Government website should be updated with any information relating to the inquiry. See the page relating to the Scottish Child Abuse Inquiry as an example. https://www.gov.scot/policies/child-protection/scottish-child-abuse-inquiry/

The record of the inquiry' includes the website, which must be archived. The website will also remain a crucial tool for public access after an inquiry has reported. NRS will archive the website throughout the lifespan of the inquiry - not just at the end. There is SG guidance on creating websites, ensuring domain names are not appropriated after the inquiry closes.

- Judicial review

Decisions taken by the chair of the inquiry, including those taken by inquiry team members on the chair's behalf, may be liable to judicial review. The solicitor to the inquiry will provide advice on the requirements of administrative law in the context of the decisions that must be taken by the inquiry and its procedures.

Although it may be rare that an inquiry will be judicially reviewed, measures may be put in place to manage the impact of any such challenge. The Vale of Leven Inquiry lodged caveats at the Court of Session, Edinburgh Sheriff Court and Glasgow Sheriff Court so that the inquiry would be warned in advance if anyone applied for interim interdict against the inquiry. Consideration may have to be given to how the inquiry would be represented in the event of judicial review.

Time limits for applying for judicial review set out under section 38 of the 2005 Act do not extend to Scotland.

- Travel and subsistence

An inquiry should adopt the latest Scottish Government Guidance on Travel and Subsistence expenses for the payment of these costs to core participants and witnesses. Processes for making travel and subsistence payments should be agreed at the earliest opportunity in discussion with SG Finance and People Directorate.

An application for such funding may be made using a form along the lines of: https://childabuseinquiry.scot/media/3718/protocol-and-form-expenses-current.docx

- Induction and guidance for the inquiry team

The sponsor team should provide induction guidance to the core inquiry team, including, as a bare minimum, the Scottish Government guidance for inquiry teams as well as any other background materials which may be specific to that particular inquiry.

The guidance given by the sponsor team should cover the conduct expected of inquiry panel members and their responsibilities, including the duty on the chair to act with fairness and with regard to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others) as under section 17(3) of the 2005 Act.

The guidance should cover the confidentiality of the inquiry's consideration of the issues before it.

- **Communications and relationships**

The chair of the Fingerprint Inquiry suggested that a successful 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; and
- The inquiry produces a report that people understand.

Clearly a significant aspect of the work of an inquiry, separate from but crucial to its investigative role, is to communicate effectively with all interested parties during the inquiry.

- Relationships with interested parties

In most cases there will be specific interest groups which have pressed for the establishment of an inquiry. They will often have clear expectations about what they wish to see come from the inquiry and how it should be conducted. Such groups may have had relatively frequent previous contact with officials and Ministers. As these groups often have insight into the issues being discussed, it can be helpful if their perspective can be considered from the earliest stages, for example when the terms of reference are being developed.

It is important for Government to be as open and inclusive as possible with interested stakeholders while it considers the need for an inquiry and then, if appropriate, moves to establishing one. This will include careful management of expectations if interest groups expect to receive apologies or compensation or expect wrongdoers to be punished. Inquiries are inquisitorial and not adversarial in nature; they cannot apportion blame or guilt in the civil or criminal sense.

It will also be important to remember, however, that the aims and priorities of these groups may be very different to those of Ministers. Equally the views of the chair need to be taken into account and, after appointment, their personal style and approach will determine the relationship with interest groups. Once the inquiry is established it is independent of Government, and sponsor teams should not use existing relationships with officials or Ministers to influence the inquiry.

Issues such as the exact terms of reference of an inquiry, and legal representation and costs, can become quite contentious and need to be handled carefully bearing in mind potential conflicts of interest. There is also always a risk of judicial review when establishing an inquiry or setting its parameters, and sponsor teams should handle relationships in a way that reflects that risk. This could include documenting meetings or setting out where external views have fed into decision making processes.

- Consultation with the UK Government

Where an inquiry is likely to touch on, or have significant implications for reserved areas, there should be discussion and consultation with the UK Government (even if it is not a joint inquiry). Generally, this should follow the appropriate Concordat or Framework for UK relations. Early contact should be made with the UK Relations team in Constitution and UK Relations Division, to seek advice.

There is the potential for an inquiry to raise sensitive issues over policy and the handling of documents and evidence. Often the UK Government may be willing to co-operate with an inquiry, but this may not always extend to fully releasing all relevant documents or providing evidence. It will be important to establish formally and publicly at an early stage the position of the UK Government and the degree of co-operation they are willing to offer in providing documents and evidence. This should, if possible, be through an exchange of letters at Ministerial or Permanent Secretary level.

- Relationships between the sponsor team and the inquiry team

It is important that the sponsor team and the inquiry have a strong relationship. It allows for Ministers to be kept informed of progress and for monitoring of issues that could impact costs.

In some cases, the Scottish Government will be a party to an inquiry, and its actions and decisions will come under scrutiny. It is essential, in order to avoid any conflict of interest, that the sponsor team, responsible for effective monitoring of the inquiry and relationships with the inquiry team, is kept distinct from the Scottish Government response team which is responsible for providing any evidence to the inquiry and representing the Scottish Government.

- Arrangements for media handling

Since inquiries are set up owing to public concern over a specific incident, there is likely to be significant and continuing media interest in the work of any inquiry. There is also a need to be aware of the sophistication of interest groups' ability to influence the media.

The inquiry must ensure that its independence is clear and understood. Its media strategy must be separate from the advice given to Ministers on media handling of issues surrounding the inquiry. For many inquiries, there will be close media scrutiny of its processes, its fairness, and of the evidence that is given to it. The inquiry should therefore normally arrange for its own media advice and support to respond to any media coverage or queries rather than seeking support from SG Communications teams.

- **Disclosure of information to inquiries by Scottish Government**

An inquiry can formally ask for information from the Scottish Government (section 21 of the 2005 Act). It may hold a range of information relevant to the inquiry which could be on old paper files or held electronically. If an inquiry is likely to require information from the Scottish Government, early consideration should be given to establishing a response team separate to the sponsor team.

The relationship between the inquiry team and the sponsor team should allow discussion to take place in advance of any formal request.

- Agreeing processes for the release of information to an inquiry

A memorandum of understanding can be agreed between sponsor team and inquiry team, which sets out how the inquiry proposes to handle and treat information held by the Scottish Government. It can cover practical issues such as an agreed timetable for informal notifications preceding formal requests, for release of information and the form in which information is released to the inquiry and any controller-to-controller data sharing issues in respect of any personal data.

It is likely that an inquiry will want original information, though this may have to be provided in a redacted form. Redaction will require careful consideration, both in terms of what is to be redacted and how, and the likely resource implications, of both redaction and transfer of documents, where a lot of information is involved.

SGLD should be consulted on the terms of any such memorandum of understanding.

Ultimately the views of Ministers are likely to require to be sought on the release of information. There may also be protocol issues to consider where the release includes release of information that would normally be withheld from publication, such as Cabinet Papers.

- Legal advice material

Officials involved in the set-up of an inquiry, or working in an inquiry sponsor/ response team, should familiarise themselves with the provisions about legal advice in the latest version of the Scottish Ministerial Code.

Scottish Government legal advice benefits from legal professional privilege, which means that a court cannot compel its disclosure. Section 22 of the 2005 Act provides that a person has the same privileges in relation to requests for information as they would have in civil proceedings – they cannot be compelled to release privileged legal advice material. Section 22 also covers other forms of privilege, on which SGLD can advise.

When providing information to an inquiry, the Scottish Government has the following broad options:

- to decline to provide legal advice material in line with the usual rules as set

out in the Scottish Ministerial Code;
- to provide certain material in confidence, with the inquiry undertaking to return, destroy or delete it at the end of the inquiry so that it retains its privileged character; or
- to waive privilege in certain material and provide it to the inquiry, which means the information will no longer be privileged for FOI or other purposes.

When considering whether, or how, to provide information to an inquiry, section 19 of the 2005 Act should be considered (section 19 provides for notices or orders to be made, restricting the public access aspect of an inquiry). A section 19 notice could be one means by which Ministers can disclose particularly sensitive information to the inquiry to aid the inquiry but in the knowledge the notice ensures that the information will not be made public. Rather than exercise Ministerial powers, it may be preferable to explore if the chair would make a section 19 restriction order of their own volition. Alternatively, the chair may be amenable to giving Ministers fair notice of a proposal to publish information, giving Ministers time to make a section 19 notice.

Legal advice should always be taken when considering the disclosure of legal advice material and Ministers, including the Law Officers, should be briefed in detail to decide on the approach to be followed. Conceivably, material could be sorted into different categories with different approaches adopted for different categories. Great care should be taken by sponsor/response teams given the ease of forwarding on legal advice material and the risk of inadvertently waiving privilege.

There are also other sensitive types of information, for example relating to vulnerable individuals, where SGLD can advise as to handling.

- <u>Possible legal issues</u>

There may be data protection, confidentiality, privilege or human rights issues to consider in relation to release of information, for example, where a duty of confidentiality is owned to third parties in relation to information held by the Scottish Government. Such information may have to be supplied in confidence. In some instances, the Scottish Government may lawfully refuse to send on privileged information requested by an inquiry.

These are matters to discuss with SGLD on a case-by-case basis, the issues likely specific to each inquiry.

- <u>Information from previous administrations</u>

Information may have been created by previous administrations and indeed by pre-devolution administrations. Former Ministers should be informed about the release of information for inquiries.

Liaison may also be required with the Office of the Secretary of State for Scotland and relevant Whitehall contacts.

- Use of information by the inquiry

Inquiries are required to make the information they gather public. Section 18 of the 2005 Act, requires the chair take reasonable steps to ensure that members of the public (including the press) are able to:

- attend the inquiry hearings or to hear a simultaneous transmission of the proceedings; and
- obtain or view a record of evidence and documents given, produced or provided to the inquiry.

There will, however, be circumstances in which information released to the inquiry is not made publicly available. The duty to secure public access to inquiry proceedings and information can be subject to restrictions either in a notice given by the Minister to the chair of the inquiry, or in an order made by the chair. See the section on Restriction notices and orders.

- **Inquiry report**

The 2005 Act at section 24 requires the chair of an inquiry to deliver a report to Ministers.

The report should set out the facts as determined by the inquiry and, if the terms of reference include a requirement for the making of recommendations, those recommendations should also be included. The inquiry may include recommendations in its final report even if the terms of reference did not require them.

The chair should be content that the report is consistent with evidence given and decisions taken throughout the inquiry, that it gives a proper evidential base to recommendations and that the contents do not go beyond the inquiry's terms of reference.

The chair also has the option of delivering one or more interim reports. The production of an interim report may delay the production of a final report, but there may be occasions when the use of an interim report and interim conclusions may provide updates on progress or focus the rest of the work of the inquiry.

- Producing the report

Drafting the report is formally the responsibility of the chair, but they are likely to ask other members of the inquiry team to assist. If an inquiry panel is in place, each member of the panel must also sign the report. This does not preclude the submission of notes of dissent where panel members consider them necessary. If the panel is unable to produce a unanimous report, the report must reasonably reflect the points of disagreement (section 24(5)).

Owing to the need to consider all of the oral and written evidence which is before an inquiry, the actual production of the final report can take a great deal of time.

Sponsor teams should be mindful of the continued costs of the inquiry as the drafting is carried out, although the costs at this stage should be lower than, for example, while hearings were being held. Delays in the drafting process can also have a significant impact on any plans that the sponsor team are responsible for in relation to the Government's response to the report.

It is worth setting out the comments from the Fingerprint Inquiry (in its "lessons learned" report) in relation to production of the final report of the inquiry:

> "The editorial process is exacting. A rigorous version control process for each of the report's chapters is essential. Ours was based on a process for the preparation of a major piece of legislation. It's helpful to have a note of vocabulary and styling tips from the chair to assist with the editorial task. Even when there is a coherent and well-ordered set of texts in a good state of development there is likely to be further shaping. The order of the chapters can be a big decision, and subject to some change. We were pleased we'd used an editing code to 'name' each chapter until very late on when these could be replaced by actual chapter numbers. This also helped when sharing text in the warning letter process.
>
> "The chair's recommendations may take time to emerge, as some at least may need him to have done the detailed review work first. There are many levels of detail e.g., how to present the recommendations – in the chapters or only at the end – whether to have footnotes and if so how to present these and ensure their consistency. Once texts are becoming settled get a handle on word count overall and per chapter and decide where to reduce – considerable culling may help the overall product.
>
> "Speak early to the printers and publishers and allow enough time for them. You will be asked to make decisions about numerous points of detail on presentation and layout, some of these perhaps earlier than you'd ideally like, in order that they can produce mock-ups. There may be particularities to your inquiry – for example for us how best to present the visual evidence which was of central importance to the opinion evidence.
>
> "We'd been advised to allow at least 3 months from completion of the final report to publication. We did not have that amount of time in the end. It was very tight. A huge effort was needed by the remaining admin team with the publishers to get us to the final finishing line."

- Responsibility for publishing the report

The inquiry's terms of reference should specify to whom the report should be delivered. Sections 24 and 25 of the 2005 Act set out the responsibilities of the Minister and chair with regard to submitting and publishing reports of inquiries conducted under that Act.

If Ministers advise the chair before the setting up date of the inquiry that the chair is responsible for publishing or, if at any point after that the chair is invited to take responsibility for publishing and accepts, then the chair has the duty to publish the report. Otherwise, that duty falls to Ministers.

It is recommended that full consideration is given to where this responsibility should lie prior to the setting up date of the inquiry. If it is considered that the chair should have this responsibility it could (although such inclusion is not mandatory) usefully be included in their letter of appointment as a means of providing clarity from the outset.

Publication by the chair can be perceived to better maintain the independence of the inquiry and for that reason publication by the chair should be the norm. Additionally, the duties placed on the publisher (see below) may be more easily fulfilled by the author of the report.

If Ministers are responsible for publication this could result, for logistical reasons, in some delays in publication.

- Duties of the publisher

The publisher must decide whether any material should be withheld under any statutory provision or rule of law, for example personal information such as medical reports, as required by the Data Protection Act 2018. These decisions must also be considered against the background of what is in the public interest. The public interest will be considered in terms of 'harm or damage', including death or injury, damage to national security or international relations, economic interests or damage caused by disclosure of commercially sensitive information.

Redaction guidance may be found at:
http://www.nationalarchives.gov.uk/documents/information-management/redaction_toolkit.pdf.

Publishing information guidance may be found at:
https://www.nationalarchives.gov.uk/information-management/producing-official-publications/.

The National Archives may also be contacted at:
email: official.publishing@nationalarchives.gsi.gov.uk
phone: 020 8392 5218

Published reports should be available online. The inquiry team are responsible for making the published report available on the inquiry website. If a report is a Parliamentary Paper, then it will be published by the Office of the Queen's Printer for Scotland. In addition, print on demand copies should be available to order and purchase for publication and afterwards through TSO.???

- Role of Ministers

Ministers must lay the report in Parliament at the time of publication or as soon as possible afterwards. Consideration should be given to whether a Parliamentary Question is required to announce publication[4].

- <u>Advance access for Ministers</u>

Sight of an advance copy of the report will allow the responsible Minister to prepare a statement to Parliament on the day of publication. Sponsor and inquiry teams should make efforts to reach an agreement on how and when embargoed copies of an inquiry report could be shared.

This was done in relation to the Vale of Leven Inquiry, and at the request of its chair, the Scottish Government developed a protocol for handling of the report and provided a list of staff who would have access to the report.

A reading team was established with responsibility for identifying the key issues in the embargoed report for Scottish Ministers and NHS Scotland. The reading team was housed in a dedicated, secure area in St Andrew's House and the inquiry team were reassured that the confidentiality of the report was maintained.

When discussing such an agreement, sponsor teams should keep in mind how long they will need before publication in order for this to be meaningful.

Where advance access is given to Ministers, consideration should also be given to permitting the leaders of the main opposition parties access to the report prior to any statement in Parliament. This should be discussed, in the first instance, with the responsible Minister's Private Office.[5]

- <u>Publication Event</u>

The publication of the report should be planned carefully. Publicity for the recommendations of an inquiry, which may have lasted some years (and cost a lot of money), is essential to conclude the process.

It is likely that the inquiry team will put in place detailed plans, including any special arrangements for core participants and other interested parties. It is beneficial for sponsor teams to be aware of all of the detail of planning, in order to ensure that Government's activities on the day support (rather than detract from) the inquiry report's publication.

- <u>Advance access for core participants</u>

[4] This requirement is found in section 26 of the 2005 Act.

[5] There is a long-established protocol at Westminster for the Prime Minister to allow the leaders of the main opposition parties access to a report prior to any statement in the House of Commons. The Cabinet Office assist with access by opposition parties.

The 2007 Rules [6] place a duty on the chair to provide core participants and their legal representatives with a copy of the report prior to publication. The recipients are placed under a signed obligation of confidence owed to the chair (and actionable by the chair) until such time as the report is formally published.

If the duty to publish lies with Ministers, the sponsor and inquiry teams will have to work especially closely to ensure that the requirement to give advance notice and the publication are well co-ordinated.

In that case sponsor teams should rely on the advice in the inquiry team guidance relating to the advanced access for core participants.

- Disposal of material

The question arises as to what should happen to material which is not considered worthy of permanent preservation and therefore does not form part of the record that is transferred to the Keeper of the Records of Scotland. If the inquiry has chosen to use eRDM, decisions on disposal must be taken ahead of storing, as file types determine retention and destruction schedules. NRS will agree with each inquiry which eRDM files should be permanently preserved, often this can't be finalised until close to the end of an inquiry's lifespan as new record types are created, but eRDM retention/disposal schedules can be altered if NRS agree a file needs to be preserved.

The inquiry team will have to decide whether:

- material should be returned to the person who provided it to the inquiry;
- destroyed (with the agreement of the person who provided it to the inquiry where relevant); or
- transferred to the Scottish Ministers to be retained until such time as the Scottish Ministers see fit to destroy it.

All decisions on whether records are transferred to NRS or destroyed must be agreed in advance with NRS. These decisions will clearly depend on the kind of material the inquiry has been considering, and its sensitivity. This will be judged on a case-by-case basis. If a formal commitment has been given by the inquiry to return, destroy, or delete information provided at the end of the inquiry, such a confidentiality undertaking should be adhered to and there should be no question of the confidential information being passed to National Records Scotland or Scottish Ministers. If there was an information asset list where disposal action had been agreed with the Keeper, and the inquiry had maintained its records in accordance with that, there would be no decisions for the inquiry team to make at this stage.

Whatever happens to the material, a schedule must be prepared by the inquiry team listing the method of disposal of all this material. The schedule should detail disposal decisions for all records including those transferred to NRS for permanent preservation, to sponsor, destroyed etc; and this schedule will be part of the

[6] Rule 15

permanent record at NRS. If the decision is that there is a part of the record that should transferred to Scottish Ministers, early discussion between the inquiry team and the sponsor team helps to ensure an efficient transfer.

- **Closing down an inquiry**

Once the inquiry report is published, and records are suitably disposed of, the inquiry team will still have a number of tasks to complete before the inquiry can be closed down. This will include tasks that can incur significant costs, if mismanaged, such as ending leases for accommodation.

It is the role of the sponsor team to support the inquiry team as much as possible, keeping in mind that salaries continue to be paid from the public purse until it is closed down.

- <u>Suspending or ending an inquiry</u>

Although an inquiry will normally end once its report is published, Ministers may suspend an inquiry to allow for the completion of any other investigation (for example a fatal accident inquiry) or the determination of civil or criminal proceedings. Ministers may also, for any reason, end the inquiry entirely[7].

In both cases Ministers must first consult the chair and a notice or a statement is required to be provided to the Parliament. Any such action should be considered very carefully, it will likely prove to be controversial and may also have knock on effects for the public's perception of the inquiry process as a whole.

- <u>Expenses claims</u>

Final expenses claims should be assessed and paid, assuming that they are agreed. If the claims for legal representation are not agreed, then it may not be possible to formally close the inquiry until these have been reviewed by the Auditor of the Court of Session.

- <u>Staff</u>

It is important that at the end of an inquiry, any parent organisation helps to ensure the appropriate redeployment of staff who have been assigned to that inquiry and facilitates redeployment. If this is not done, staff may be reluctant to become involved with inquiries as they may come to believe that such an assignment can be a retrograde step in their careers.

It may be that many of the inquiry's staff will be self-employed (e.g., counsel to the inquiry) or may be employed by a commercial entity or agency which has contracted to provide certain services to the inquiry. Those staff will simply be released by the inquiry as the need for their services disappears.

[7] Under section 13 of the 2005 Act.

It is likely, however, that many of the inquiry's staff will be on assignment from the Scottish Government or another public body. The redeployment of these staff must be properly managed with adequate preparation in advance. The link to the relevant policy for such staff can be found here - http://saltire/my-workplace/vacancies-and-recruitment/Restructuring-and-reassignment/Pages/Restructuring-and-reassignment-policy.aspx

The sponsor team should ensure that regular contact is maintained with People Directorate in order to allow for workforce planning. The inquiry team itself should be encouraged to release staff if opportunities arise towards the end of the inquiry.

- Inquiry accommodation

The office used by the inquiry will have to be closed. Any larger premises used for oral hearings may only have been rented for the duration of those hearings, but the office used by the inquiry team for the other work of the inquiry will have to be vacated and cleared out. There may be cost implications if the accommodation needs to be reinstated back to its original condition and service contracts (such as cleaning and utilities) will need to be terminated.

A record should be kept of important dates, for example when legal notices should be served timeously (e.g., for a lease break notice), and ensure that measures are in place to reduce exposure to unnecessary expenditure. Guidance should be obtained from Property Division on rights and obligations, especially in relation to the termination of a lease and options to relocate when the full extent of accommodation is no longer required. They will also recommend when legal advice or other professional building services should be sought.

- Office furniture and equipment

It is assumed that, in the interests of minimising expense to the public purse, office furniture and equipment will be lent to an inquiry by the Scottish Government where it may have suitable surplus available, and that this will be returned at the end of the inquiry should it be requested and subject to its condition. Associated supply and removal costs will fall to the inquiry and, therefore, the sponsor Directorate.

- Publishing inquiry expenses

Section 39(6) of the 2005 Act requires Ministers to publish, within a reasonable time after the end of an inquiry, what they have paid (or are liable to pay) in line with any determination about remuneration and expenses under that section. Sponsor teams should have been keeping track of amounts paid throughout the inquiry process and should ensure that plans are in place for publication of the total as soon as possible.

- Lessons learned report

Whilst each inquiry is unique, there are common features to them all. This guidance has partly been drawn from the experience of previous inquiries and in particular the lessons learned papers drawn up by some of the secretaries of those inquiries.

It will always be the case that new inquiries will meet different and new challenges and will devise innovative ways to meet and overcome them. That experience and expertise should not be lost. There is no substitute for the knowledge accumulated by inquiry teams therefore Secretaries of inquiries should, at the very end of the inquiry process, write a lessons learned paper on their experience. That paper should be submitted to Civil Law and Legal System Division in order for the guidance to be reviewed and updated (if necessary).

The paper, which should focus on the process of the inquiry and difficulties that were experienced and overcome, should be submitted within two months of the inquiry finishing.

It can be accompanied by a report on the experiences of the sponsor team, in particular where the lessons are different (for example if they relate to the period before the inquiry team was established).