CHAPTER 21

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Introduction

21.1 The foremost purpose of this chapter is to consider the relationship between inquests and public inquiries, but also to focus on circumstances where, for a range of reasons, an inquest will either not be possible or otherwise not an appropriate mechanism for investigating a death related subject. In those circumstances, there is an emerging legal framework for establishing whether the government would be under a duty to set up a public inquiry or some other form of independent investigation. That issue also carries with it a separate question of what form the inquiry or investigation should take. In the second part of the chapter we highlight key matters in relation to the conduct of public inquiries from the point of view of bereaved families or other victims of human rights abuse. Overall, since the last edition of this book, this is an area of practice that has become far more developed and intertwined with the main subject matter of the text. We have therefore sought to introduce this topic as a final chapter, but would also commend specialist books on the subject,¹ as well as studying the methodology sections of the reports of the notable public inquiries in recent times, to which we refer below. The content of this chapter also builds upon chapter 18 and its description of the core features of the investigatory obligation under article 2 of the European Convention on Human Rights (ECHR), namely: promptness, independence, adequacy, transparency and effective participation of the next-of-kin. Any public inquiry or investigation concerning a death caused by state agents must be carried out in accordance with those criteria.

Background

21.2 Public inquiries are not a panacea. They can disappoint. Many would say this of the Hutton Inquiry into the death of Dr David Kelly and its exoneration of the government’s treatment of the intelligence dossier that was deployed to justify the invasion of Iraq.² They can take too long and cost too much. Whatever its importance as a distinct component of the Northern Ireland peace process, few would not say

¹ Jason Beer QC, Public inquiries, OUP, 2011.
this about the Bloody Sunday Inquiry. They can make recommendations that are not sufficiently acted upon. The Corston Review into vulnerable women in the criminal justice system made it clear that the way forward for female imprisonment was to dismantle the women’s prison estate and opt for specialist smaller establishments closer to their homes. This fundamental finding of the Corston Review has never been acted upon, with the government recently opting to achieve geographical proximity to the home by tacking women-only units onto existing male custodial establishments.

They can say tremendously important things that very few people ever read. Both Lord Saville’s report into Bloody Sunday and Sir William Gage’s report into the torture and killing of Baha Mousa are incredible chronicles into profound matters of public concern, but they will be fully read only by historians and not by the contemporary societal audience that they were commissioned to report to.

Of course public inquiries can also provide an extraordinary public service. Some become catalysts for cultural change. The inquiry into the death of Stephen Lawrence looms very large in this respect (see paras 2.35–2.36 above). Many inquiries reflect a consensus across society that something has gone unequivocally wrong. The inquiries into the patient murders of Dr Harold Shipman and the misuse of body parts by the Alder Hey hospital in Liverpool reflect this. Other inquiries become politically unavoidable at a tipping point in cultural development where something that was once tolerated despite isolated opponents becomes something that a very broad cross-section of society is no longer prepared to accept. The recent example of this is the inquiry into culture, prac-


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21.4 Any consideration of the role of public inquiries in modern Britain must also consider the inquiries that have not been ordered, as well as the great difficulties that were encountered in persuading governments to carry out inquiries that ultimately became catalysts for major change.

21.5 Inquiries that were campaigned for, but never came about, include the attempt to mandate the Home Office to inquire into the catalogue of abuse that was perpetrated by prison officers in Wormwood Scrubs upon inmates between 1995 and 1999. The government relied on the fact that criminal charges were lodged against some 27 prison officers in connection with 13 separate complainants, resulting in six convictions. There were investigations of the issue by the police, the Chief Inspectorate of Prisons and government agencies, and civil proceedings resulted in the payment of considerable damages. Similarly, the attempt of the family of the child prisoner Joseph Scholes to seek an additional public inquiry to supplement an inquest that was unable to consider the justification for child sentencing law and the availability of secure training unit placements also failed, in part because the government relied on the combination of a properly conducted inquest with a wide-ranging scope, ombudsman reports, local authority audit, further independent review, as well as the fact that there had been both private and public law proceedings. The fact that pressure for a public inquiry in both these cases led to the accumulation of different investigatory processes may be valuable in its own right. Yet it is important to bear in mind that certain subjects

11 Bailey v UK App No 39953/07 (admissibility decision) 19 January 2010, ECtHR. See also R (Scholes) v Secretary of State for the Home Department [2006] EWCA Civ 1343.
– perhaps paradigmatically the welfare of prisoners – do not easily harness the winds of public outcry in their favour. The political will to investigate will always be low. In those circumstances a combination of domestic public law and positive duties under the ECHR may be a critical means of achieving different forms of public investigation.

Inquiries that were a very long time coming, but now represent conventional wisdom, include the Stephen Lawrence Inquiry. A more recent example is the complete transformation of national opinion with regard to the Hillsborough football stadium disaster.\textsuperscript{12} The manner in which the injustice to the bereaved families is now recognised in popular, party political and judicial circles is a very far cry from the way in which the disaster was originally put down to hooliganism as opposed to police failings, and the extent to which the original inquest distorted the historical record by describing the deaths as merely accidental without further comment. The inquest also notoriously limited the scope of the inquiry to the arbitrary 3.15 pm cut-off point, when many of the injured lay dying.\textsuperscript{13} There were investigations by two Lord Justices, Lord Taylor in 1989–1990 and Lord Justice Stuart-Smith in 1997; there was a failed private prosecution in 2000; an unsuccessful application to the Attorney-General for a new inquest in 2006; and an unsuccessful application to the European Court of Human Rights (ECtHR) in 2009.\textsuperscript{14} In one of the very late acts of the Labour government, a decision was made to create an Independent Review Panel that could review all of the available documentation and explain it to the families and the wider public. The Panel that reported in December 2012 found, among other things, that there was evidence to demonstrate that a policing mindset erroneously prioritised crowd control over crowd safety; that further police failings in properly planning the day had contributed to the deaths; and that some of the original police evidence may have been deliberately altered in order conceal those failings.\textsuperscript{15} In the aftermath of the Panel report, the Attorney-General of his own motion sought new inquests under section 13 of the Coroners Act (CA) 1988. The High Court granted the fiat, recognising that it was important to acknowledge publicly the deficiencies in the previous inquiries and to record the

\textsuperscript{12} For the background on Hillsborough, see Phil Scraton, \textit{Hillsborough – the truth}, Mainstream Publishing, 2009.

\textsuperscript{13} \textit{R v South Yorkshire Coroner ex p Stringer} (1994) 158 JP 45.

\textsuperscript{14} \textit{Williams v UK} App No 3256/06 (admissibility decision) 17 February 2009, ECtHR.

\textsuperscript{15} Hillsborough Independent Panel, see: http://hillsborough.independent.gov.uk/.
court’s ‘admiration and respect’ for the families’ ‘determined search for the truth’. 16 A new inquest, to be presided over by Lord Justice Goldring, has now been opened, which will traverse the broad range of issues already identified by the Panel. 17

21.7 The detail in relation to Hillsborough is educative. In various ways, the demand for proper inquiry can progress beyond an inquest that has failed families, engaging different forms of investigation, ultimately bringing information into the public domain that stimulates a new imperative for inquiry. The fact that the Hillsborough imperative has resulted in a new inquest presided over by a senior Lord Justice of Appeal and not some other inquiry mechanism is also indicative of the fact that the distinction between inquiries and inquests has now narrowed considerably beyond the days when an inquest was described as an inquiry in public as opposed to a public inquiry. 18

**Relationship between inquests and inquiries**

21.8 There are five ways in which other forms of public inquiries may become relevant to the inquest practitioner.

1) The first way is where an inquest is mandated under Coroners and Justice Act (CJA) 2009 s8 but it becomes clear for a range of reasons that the inquest will not be able to inquire properly into the deaths without being converted into a more wide ranging public inquiry.

2) The second way is where an inquest has been properly conducted, but there remains an argument that something further requires investigation that is beyond the ordinary scope of inquest proceedings.

3) The third way is where the death is an historic case that was either the subject of an inquest or not, but which gives rise to a detachable duty to re-investigate the case today because of present procedural steps or omissions that have taken place in relation to that death.

16 Attorney-General v HM Coroner for South Yorkshire (West) [2012] EWHC 3783 (Admin) para 7.


18 R v Inner North London Coroner ex p Chambers, (1983) Times 30 April, per Woolf J.
4) The fourth way is where the state’s investigatory duty under the ECHR is engaged, but the death does not fall under the jurisdiction of coronial law. This occurs where the death and the burial took place outside of the physical territory of the UK, but there is an arguable case that British state agents breached ECHR article 2 in the foreign territory.

5) The fifth way is where the state is arguably responsible for a near death, engaging its obligations under ECHR articles 2 and 3, but without an actual death there can be no inquest.

Each of these situations is analysed below.

Conversion of an inquest into a public inquiry

21.9 Since 1999 there has been provision under coronial law to convert an opened inquest into a public inquiry. Prior to the repeal of the CA 1988 it could be found in section 17A of that Act. The extant provision under the CJA 2009 is contained in Sch 1 para 3. It requires a coroner to suspend an inquest when asked by the Lord Chancellor to do so, on the basis that ‘the cause of death is likely to be adequately investigated by an inquiry under the Inquiries Act 2005 that is being or is to be held’.  

21.10 The coroner can elect not to suspend the inquest ‘if there appears to be exceptional reasons not to do so’. This is obviously a high test, but the paradigm example would be a disaster case, where there were grounds to fear that the inquiry would look at the systemic issues surrounding the disaster but would not be properly geared to analyse with sufficient scrutiny the cause and circumstances of individual deaths. Thereafter, an inquest that has been suspended pursuant to paragraph 3 may be resumed by a coroner after the conclusion of the public inquiry, but only if the coroner thinks there are ‘sufficient reasons for resuming it’. This wording has replaced the previous terms of CA 1988 that required an ‘exceptional reason’ to resume an inquest after an inquiry. The new test therefore mirrors the long-standing test for resumption of inquests after they have been suspended for the purpose of criminal investigations.

19 CJA 2009 Sch 1 para 3(1).
20 CJA 2009 Sch 1 para 3(2).
21 CJA 2009 Sch 1 para 9(1).
22 Formerly CA 1988 s16 and now CJA 2009 Sch 1 para 8. See chapter 8.
to article 2 requirements. Where the terms of reference of an inquiry have required the panel to consider the cause and circumstances of a death, the factual threshold for establishing that there is something left to consider after an inquiry has concluded is likely to be exacting.\(^{23}\) The paradigm example of where a challenge would be justified would be compelling fresh evidence.

**Normally the inquest procedure should suffice**

21.11 As discussed in chapter 19, the normal use of this provision to convert an inquest into an inquiry will be in relation to disasters where there have been mass deaths. Rail crash investigations have been the most common cause for conversion. Of note is the decision of Moses LJ in *R (Lin) v Secretary of State for Transport*,\(^ {24}\) where he found that there was no inherent reason why the modern inquest system was incapable of investigating the Potters Bar rail crash. The position can be contrasted with the *Amin* case and the original view of the West London Coroner that the inquest was an ‘unsuitable vehicle’ for publicly investigating the issues raised by the death of Zahid Mubarek.\(^ {25}\) The public inquiry that was eventually ordered in that case and produced a two-volume report did, however, investigate a range of matters especially in relation to the institutional shortcomings of Feltham Young Offender Institution (YOI), which could not have been properly analysed within the confines of a conventional inquest.\(^ {26}\)

21.12 In recent years, a number of very complex investigations into death have been determined in the inquest forum, largely without criticism. They include the inquest into the death of Princess Diana

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23 One high-profile effort to seek an inquest in the aftermath of a public inquiry, albeit under the previous ‘exceptional’ reasons test, was the judicial review brought on behalf of a group of doctors who challenged the finding of the Hutton Inquiry that Dr David Kelly killed himself: *R (Halpin) v Attorney-General* [2011] EWHC 3759 (Admin). After a detailed investigation seeking fresh comment from Lord Hutton, a pathologist, a toxicologist and Thames Valley Police, it was ruled that there was no basis to challenge the Attorney-General’s conclusion to a high degree of certainty that Dr Kelly had deliberately taken his own life without third-party involvement.


and Dodi Fayed,\(^{27}\) as well as the inquest into the 7 July bombings.\(^{28}\) Both were presided over by senior judges, with counsel to the inquest, and at the time unusual efforts were made to facilitate public involvement including via websites.\(^{29}\) The Diana inquest was presided over by a jury as a result of a successful judicial review.\(^{30}\) The resolution of the Hillsborough case by way of the new article 2 compatible inquest is also an indication that, wherever possible, coronial law must be the primary forum for publicly inquiring into controversial death.

Subject to the second category of case set out below, where a properly conducted inquest has not completed the necessary investigation, there are good reasons in the first instance to favour the modern inquest model over other types of inquiry. Despite delays in completing complex inquests, they are still likely to be heard and completed quicker than an Inquiries Act 2005 inquiry. Inquests can be conducted at a local authority scale of funding, whereas an inquiry staff and structure needs to be built and funded from scratch. Inquests are streamlined processes, albeit that the family enjoys a right to ask questions, and in the most serious cases, a jury will hear and determine the key evidential issues. Although public inquiries can be more wide-ranging in their scope and enjoy the chairing of a senior judge, it will be seen below that there is not an absolute right for the family to ask questions. Public inquiries also enjoy a greater flexibility as to whether evidence is considered in closed proceedings than is the case under coronial law. While this may be unavoidable in some cases, it should never be allowed to become common, especially in highly controversial cases.

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29 The website for the pending Hillsborough inquest is already in place: http://hillsboroughinquests.independent.gov.uk/. Websites are now being used more generally for highly controversial inquests, for example see the inquest into the death of Mark Duggan presided over by HHJ Cutler (http://dugganinquest.independent.gov.uk/) and the inquest into the death of Alexander Litvinenko presided over by Sir Robert Owen (https://litvinenkoinquest.org/).

30 R (Paul and others) v Deputy Coroner for the Queen’s Household and Assistant Deputy Coroner for Surrey [2007] EWHC 408 (Admin), [2008] QB 172.
Exceptional cases

21.14 An important example of an exception to what appears to be an emerging public law convention that inquests must always be the first option was the inquiry into the death of Azelle Rodney. While sitting unarmed in a car in April 2005, Rodney was shot eight times at close range by a member of the Metropolitan Police. His inquest was unable to progress primarily because core material said to be relevant to the decision to open fire on the deceased was declared to be incapable of disclosure into the public domain. The working assumption at the time, without any admissions being made in the public domain, was that the firearms officers were privy to a real-time telephone intercept that could not be disclosed by virtue of section 17 of the Regulation of Investigatory Powers Act (RIPA) 2000. In 2007, the coroner made a ruling to the effect that, while he was obliged to hold an article 2 compliant inquest, the Independent Police Complaints Commission (IPCC) could not lawfully disclose to him the redacted or gisted material nor could the jury or the coroner hear this evidence at an inquest. Aside from the grave impact of delay on the family, the case became a cause célèbre because it was relied upon by the government to insert a clause into the original Counter-Terrorism Bill 2008 and later into the Coroners and Justice Bill 2009 that would have allowed for the secretary of state to order closed inquests. The government eventually agreed to remove both the clauses, albeit that the RIPA 2000 was amended to enable disclosure of telephone intercept evidence not only to panels acting under the Inquiries Act 2005, but also to counsel to the inquiry. In the meantime, litigation arising out of the 7 July inquest had determined that a coroner had no common law power to conduct any part of his investigation in the absence of the properly interested persons. That inquest was able to proceed with sufficient summary of the key evidence in the public

31 Presided over by Sir Christopher Holland, see: http://azellerodneyinquiry.independent.gov.uk/.

32 RIPA 2000 s18(7)(c) amended by Counter-Terrorism Act 2008 s74. The purpose of the amendment was to ensure that there could be some form of independent advocacy on behalf of the core participants who could not see the evidence, even though counsel to the inquiry are not instructed by the core participants and would not be in a position to discuss the content of the evidence with them.

33 R (Secretary of State for the Home Department) v Assistant Deputy Coroner for Inner West London [2010] EWHC 3098 (Admin), [2011] 1 WLR 2564. The issue to which the sensitive evidence went in the 7 July inquest was the degree of prior knowledge that the UK security services had of the men who eventually carried out the London terrorist attacks.
domain. The formally opened Rodney inquest, prior to being indefinitely suspended in 2007, never investigated the causes and circumstances of the death in any way.

21.15 In March 2010 the secretary of state invoked the predecessor conversion provision under CA 1988 s17A to replace the Rodney inquest with a public inquiry that in its terms of reference directly mirrored the inquest function. The terms of references were: ‘To ascertain by inquiring how, where and in what circumstances Azelle Rodney came by his death on 30 April 2005 and then to make any such recommendations as may seem appropriate’. Prior to the start of the inquiry, the UK government admitted a breach of the family’s right to a prompt inquiry that had been caused as a result of not having in place a procedure that was capable of enabling the examination of the key evidence pertaining to the death. Although no public admission was ever made, the inescapable conclusion was that the evidence in question was intercept evidence. Despite the great saga of delay in starting a public investigation, a pragmatic solution was reached whereby the very substantial part of the intelligence evidence was put into the public domain, and it was publicly declared by counsel to the inquiry that the chairman had not seen any key material that had not been placed before the core participants. Small parts of the evidence were kept within a confidentiality ring of advocates, but not further disclosed, as provided for under the Inquiries Act 2005 s19 and Inquiry Rules 2006 r12.

21.16 The inquiry eventually found that although the shooting officer opened fire with an honest belief that Rodney posed a threat to himself and fellow officers (by virtue of having access to a gun mistakenly believed to be an automatic weapon in the car), the force used was not reasonable. In making that finding, the chairman adopted

34 The terms of references were: ‘To ascertain by inquiring how, where and in what circumstances Azelle Rodney came by his death on 30 April 2005 and then to make any such recommendations as may seem appropriate’.
35 Alexander v UK App No 23276/09, 29 May 2012.
36 SI No 1838. The core participants cannot know what became of the intercept evidence that all informed observers believed to exist. Had the chairman wished, he could have exercised powers under RIPA 2000 s18(8A) to order disclosure of telephone intercept evidence, not only to himself but also to his counsel team. This can be done ‘in exceptional circumstances’ and where it is ‘essential to enable the inquiry to fulfil its terms of reference’. The so-called ‘pragmatic solution’ would appear therefore to have been that the counsel to the inquiry team did see the intercept material, but the chairman did not. His counsel team was then able to draft ‘intelligence summaries’ for both the chairman and all the other core participants that did not refer to the actual intercepts but made sure that all the relevant data within them was available to the inquiry.
a more flexible approach to determining the reasonableness of the shooting than if the case was an ordinary case presided over by a jury. We return to this issue, which underscores the greater flexibility of a public inquiry over an inquest, below.

21.17 A similar outcome to the Rodney case is currently being frustrated in relation to the death of Alexander Litvinenko. Litvinenko died in November 2006. He had ingested a radioactive isotope called Polonium-210. Arrest warrants were subsequently issued in respect of two Russian nationals, Andrey Lugovoy and Dmitri Koptun. They are in Russia. It has been made clear that they will not come to this country. Any criminal trial is therefore most unlikely. The coroner, Sir Robert Owen, after a public interest immunity hearing, has ruled that evidence highly relevant to identifying Russian state responsibility for the death and whether the death could have been prevented by actions of the British state, cannot be disclosed. He therefore wrote to the Home Secretary recommending that she should convert the inquest into a public inquiry. In refusing the recommendations, the Home Secretary has cited a concern that national security and international relations prohibit HM government being seen to order an inquiry rather than having to co-operate with an ordinary inquest mandated by statute. The answer to this is that if the Home Office is reluctant to be seen to order a public inquiry, and it is not saying that a public inquiry would of itself damage national security, then the remedy to the problem lies in the Administrative Court ordering the state to conduct such an inquiry. There are some features of foreign policy that a court can properly trespass upon, and this is arguably one of them. The decision was in due course quashed by the

38 Azelle Rodney Inquiry Report paras 19.1–19.11.
39 The chairman’s position is summarised in the transcript of the pre-inquest hearing of 12 July 2013: https://litvinenkoinquest.org/wp-content/uploads/2013/07/lit120713.pdf. There was a further successful challenge by the Foreign Secretary on one aspect of the PII ruling, which the coroner had refused to uphold (R (Secretary of State for the Foreign and Commonwealth Office) v Assistant Deputy Coroner for Inner North London [2013] EWHC 3724 (Admin)). It follows that all of the key evidence going to both Russian state responsibility and the preventability of the death cannot be disclosed in an ordinary inquest.
41 Cf R (Corner House Research and another) v Director of the Serious Fraud Office (JUSTICE intervening) [2008] UKHL 60, [2009] 1 AC 756.
42 See the analysis in Secretary of State for Defence and another v Rahmatullah (JUSTICE intervening) [2012] UKSC 48, [2013] 1 AC 614, SC.
Divisional Court on the basis that it had been unreasonable for the secretary of state to conclude that the inquest would be a sufficient mechanism to investigate the death when the coroner had ruled that it was not going to be.\footnote{R (Litvinenko) v Secretary of State for the Home Department [2014] EWHC 194 (Admin).}

**Post-inquest inquiry**

21.18 The second category of cases where inquest practitioners would need to consider a public inquiry would be where an inquest has been properly conducted, but there remains an argument that something further requires investigation that is beyond the ordinary scope of inquest proceedings.

**Stephen Lawrence Inquiry**

21.19 This is what happened in the case of Stephen Lawrence. Stephen was killed in 1993. No one was ever charged. In 1996 there was a private prosecution, which resulted in the acquittal of three of the prime suspects. In 1997 the inquest before the Southwark Coroner, Sir Montague Levine, returned a unanimous verdict that ‘Stephen Lawrence was unlawfully killed in a completely unprovoked racist attack by five white youths’. In July 1997, as a result of one of the early acts of the new Labour Government, Jack Straw made a decision to order an inquiry chaired by Sir William Macpherson and assisted by Tom Cook, the Right Reverend John Sentamu (now the Archbishop of York) and Dr Richard Stone. The inquiry in due course not only considered the evidence in relation to the night of the murder, but the extent to which institutional racism, corruption and police incompetence may have otherwise prevented the killers being brought to justice. The focus of the inquiry on the inadequacies of the inquest process was an important factor in bringing about voluntary pre-inquest disclosure to the families by the police and prison services. The inquiry also queried the justification for an absolute bar on prosecuting previously acquitted persons (the rule against double jeopardy). This resulted in the introduction of a narrow exception to the rule against double jeopardy under Part 3 of the Criminal Justice Act 2003, which requires the Director of Public Prosecutions (DPP) to make an application to the Court of Appeal to quash the acquittal and order a re-trial. The exception was applied in relation to one of
the previously acquitted defendants, Gary Dobson, in May 2011.\textsuperscript{44} This led to the trial and conviction of both Dobson and another man, David Norris, who had not previously been tried.\textsuperscript{45}

**Further inquiry is normally a matter of discretion**

21.20 For those considering that their case would warrant the same procedural attention as the Stephen Lawrence case, there is a major caveat. As important as the case was and is, Jack Straw was never mandated by the courts to order the inquiry. It was the exercise of ministerial discretion. The same discretion is now written into section 1 of the Inquiries Act 2005.\textsuperscript{46} Those arguing for a public inquiry above and beyond an inquest (or a criminal trial where the inquest has not been resumed) will need to show that the properly conducted inquest or prosecution proceedings were incapable of considering the issue. Two recent examples of this were the cases of Scholes\textsuperscript{47} and Gentle.\textsuperscript{48} In Scholes it was accepted that the coroner could not consider sentencing policy or lack of resources to create more secure training unit accommodation as an alternative to YOIs. In Gentle, it was accepted that a coroner investigating a service death that occurred in Iraq was not required to consider the circumstances in which the British government elected to deploy the Armed Services to that country as part of a military invasion.

21.21 While both of those cases clearly identified matters that were important but did not fall within the ambit of an ordinary inquest, neither of the bereaved families were successful in mandating the relevant ministers to hold inquiries as a result of judicial reviews of the decisions not to order inquiries. First and foremost, neither of the claimants were able to point to a legal obligation to hold the wider inquiries. While ECHR article 2 was held to require the authorities to keep the system for preventing future deaths under review, the obligation did not extend to matters of policy such as the decision to go to war or whether the use of custodial sentencing on young people is justified.

21.22 A key lesson of both Scholes and Gentle is that asking ministers to consider whether to hold an inquiry in the above cases was a positive step in its own right. That is because when a minister is asked

\textsuperscript{45} R v Norris [2013] EWCA Crim 712.
\textsuperscript{46} See para 21.43 below.
\textsuperscript{47} R (Scholes) v Secretary of State for the Home Department [2006] EWCA Civ 1343.
\textsuperscript{48} Gentle v Prime Minister [2008] 1 AC 1356.
to exercise discretion he or she is bound to do so in a manner that conforms to basic public law principles of reasonableness and due consideration of relevant matters.\footnote{Secretary of State for Education \emph{v} Tameside Metropolitan BC [1977] AC 1014 at 1065B.} That involves providing the party seeking the inquiry with an informed and reasoned decision, including publicly justifying why an inquiry into an obviously important matter will not take place. Moreover, where the issue relates to the right to life, even the common law requires a minister to have compelling reasons to make decisions that impact adversely upon that right.\footnote{R \emph{v} Lord Saville of Newdigate ex \emph{p} A [2000] 1 WLR 1855 para 37; and \textit{Keyu and others \emph{v} Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence} [2012] EWHC 2445 (Admin) para 136.} Experience suggests that in order to justify a refusal to hold a public inquiry on matters of substantial importance, the government will activate a range of responses that are short of a public inquiry, but nevertheless generate administrative focus on a particular problem. This was certainly the case with the issue of child death in custody highlighted by the inquest into the death of Joseph Scholes and the related inquests into the death of Gareth Myatt and Adam Rickwood. One of the key consequences of that litigation and the wider campaign that prompted it is that the number of children in prison has decreased markedly since those deaths. The Gentle family did not win its article 2 claim before the House of Lords, but the campaign it represented impacted on the ultimate decision to set up the Iraq inquiry, chaired by Sir John Chilcot, which has examined all of the key political, civil service and armed services personnel responsible for decision to go to war.\footnote{See \url{www.iraqinquiry.org.uk/}. When Gordon Brown announced in the House of Commons the setting-up of the inquiry, he said: ‘Its scope is unprecedented.’ See the website of the inquiry for its ongoing disagreement as to what materials should be disclosed into the public domain.} The human rights of soldiers deployed to war without adequate preparation or equipment continues to resonate in evolving case-law.\footnote{Smith \emph{v} Ministry of Defence [2013] UKSC 41, [2013] 3 WLR 69.}

\section*{21.23} When the \textit{Scholes} case went to Strasbourg the family was not successful in arguing that the UK was under an article 2 obligation to hold a broader public inquiry. What the case shows is that an investigatory process that combines a properly conducted inquest with a wide-ranging scope, ombudsman reports, local authority audit, further independent review (in the related cases of \textit{Myatt} and \textit{Rickwood} that were relevant to the \textit{Scholes} case), as well as a multitude of private and public law proceedings may be capable of discharging
the state’s investigatory obligation under article 2.\textsuperscript{53} When that type of response does not occur, especially in relation to vulnerable categories of prisoner such as women and ethnic minorities, then the article 2 argument for a broader inquiry may be stronger in a claimant’s favour.\textsuperscript{54}

21.24 We return to this issue at para 21.61 below in considering what can be done to seek an inquiry through legal action.

\textit{Administrative practices}

21.25 The most compelling case for a public inquiry will arise when evidence emerges from a death or number of deaths of an administrative practice. The articles 2 and 3 case-law on this issue is dealt with at paras 18.45–18.47 and 18.155–18.158. The concept of administrative or state practice has been defined as ‘an accumulation of identical or analogous breaches which are sufficiently numerous and interconnected to amount not merely to isolated incidents or exceptions but to a pattern or a system’ (\textit{Ireland v UK}\textsuperscript{55}). In those circumstances, the court has held it to be ‘inconceivable that the higher authorities of a State should be, or at least should be entitled to be, unaware of the existence of such a practice. Furthermore, under the Convention those authorities are strictly liable for the conduct of their subordinates; they are under a duty to impose their will on subordinates and cannot shelter behind their inability to ensure that it is respected’.

21.26 In those circumstances, the scope of the investigatory obligation must widen in order to ascertain both the extent and the responsibility for the practice. This was a clearly necessary response of the government when it emerged that the circumstances of the death of Baha Mousa in occupied Iraq in September 2003 involved him and his fellow detainees being subjected to a range of techniques, including hooding, sleep deprivation, noise and stress positions, cumulatively described as ‘conditioning’. Baha Mousa died. Another man nearly died and several other detainees experienced a range of physical

\footnotesize{\textsuperscript{53} Bailey v UK App No 39953/07 (admissibility decision) 19 January 2010. See also Banks v UK (2007) 45 EHRR SE2 and Taylor v UK (1994) 18 EHRR CD215.}

\footnotesize{\textsuperscript{54} This was clearly the impetus for establishing the Corston Review referred to in para 21.2 above following the death of six women at HMP Styal within a 13-month period.}

\footnotesize{\textsuperscript{55} (1979) 2 EHRR 25 para 159.}
and psychiatric injuries. While cumulatively these techniques constituted torture under international law, the situation was all the more reprehensible given that similar methods had been the subject matter of the Ireland v UK case and undertakings had been given to the British parliament and the ECTHR that the methods would never be used again under any circumstances. After considerable legal struggle on behalf of the Mousa family, the Secretary of State for Defence did order a public inquiry, the terms of reference which were ‘To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen’s Lancashire Regiment in Iraq in 2003, and to make recommendations.’ Evidence that arose from the subsequent Baha Mousa inquiry, as well as an extensive number of public and private law actions, has caused the Divisional Court in the proceedings known as Ali Zaki Mousa and others to recognise that there were a number of state practices in Iraq with regard to interrogation and prisoner handling that would constitute the broader administrative phenomenon identified in Ireland v UK. The state is under an obligation to carry out public and independent investigations of those practices and the lessons that can be learned from them, although the exact scope of this duty and the manner in which it relates to ongoing criminal investigations is still the subject of litigation.

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56 For further detail, see the Baha Mousa Inquiry Report website (www.bahamousainquiry.org) and also AT Williams, A very British killing: the death of Baha Mousa, Vintage, 2012. For an examination of the continuing use of torture since 1945 despite its prohibition under international and domestic law, see D Friedman, Torture and modernity [2013] 5 EHRLR 494–511.

57 A and others (No 2) v Secretary of State for the Home Department [2005] UKHL 71, [2006] 2 AC 221 paras 53 (per Lord Bingham), 97 (per Lord Hoffmann) and 126 (per Lord Hope). See also Concluding observations of the Committee against Torture: Israel, 09/05/97, A/52/44 paras 253–260. Without reference to international law, similar techniques were held to be unlawful in Public Committee Against Torture in Israel and others v Israel, (1999) 7 BHRC 31, 16 September 1999.


Historic cases

21.27 Where the death is an historic case that was either the subject of an inquest or not, there is an evolving area of international human rights law that would compel the state to re-open the investigation of the death in certain circumstances. For reasons outlined in chapter 18, the procedural duty under article 2 has been recognised to constitute a detachable free-standing obligation. This means that the duty can arise even if death occurred before the date the convention came directly into force in the UK by virtue of the Human Rights Act (HRA) 1998, on 2 October 2000.61 What this means in practice is that there will be pre-HRA deaths that require a new inquest or some other form of inquiry. This obligation arises either because fresh evidence has been discovered or it becomes apparent that the original inquest was inadequate. In those circumstances, a detachable article 2 obligation will arise today in order to conduct an inquiry into the fresh evidence.62 As will already be apparent from the discussion in para 21.11 above about the power to convert an inquest into public inquiry, the default position is that the modern inquest is the principal administrative forum for investigating deaths, including fresh evidence that brings into doubt the findings of a previous inquest. Before cases such as Amin and Middleton were decided and therefore expanded the scope and verdicts of article 2 compatible inquests, there was a ruling of the Administrative Court in the case of Wright ordering the Home Secretary to conduct a public inquiry in circumstances where an original pre-HRA inquest did not comply with the requirements of article 2.63 The same approach has not been adopted for the Hillsborough case, which other than being justified under the common law, would also be justified under the article 2 fresh evi-


62 The previous position of the House of Lords as held in Re McKerr [2004] 1 WLR 807 and R (Hurst) v Commissioner of Police of the Metropolis [2007] 2 AC 189 that the HRA 1998 could have no application to a death that occurred prior 2 October 2000 was expressly overruled in the case of Re McCaughey [2012] 1 AC 725.

63 R (Wright) v Secretary of State for the Home Department [2002] HRLR 1. This was because ‘the claimants were not represented at the inquest’ and ‘although the second claimant spoke up for the family at the inquest and asked some questions, she did not have the requisite advocacy skills and there was no proper exploration of the issues which quite properly concerned the family’ (para 60(4)).
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dence case-law. It would therefore appear that the best route to create a new inquiry into a death based on fresh evidence remains section 13 of the CA 1988, which remains on the statute books and has not been repealed by the CJA 2009.

21.28 The principle that a detachable and contemporary obligation may arise to investigate an historic death is potentially far-reaching, but has proved both difficult and controversial to apply in both Strasbourg and the domestic courts. So far there have been three Supreme Court cases and two Grand Chamber cases on the subject. The question of whether and to what extent to recognise the competence of courts to correct a legacy of human rights abuse that occurred in countries prior to their ratification of a particular human rights treaty has pre-occupied not only the ECtHR, but other international bodies, especially the Inter-American Court of Human Rights and the United Nations Human Rights Committee. The issue goes to the heart of any concept of transformative justice and is relevant to dealing with the crimes of colonialism, war and previous dictatorship.

21.29 It is now clear that if, for whatever reason, an inquest or inquiry is due to be conducted today that concerns an historic death involving state agents, then those proceedings must be conducted in an article 2 compatible manner. That is the situation that has particularly arisen in relation to several Northern Ireland shoot to kill inquests that are still ongoing. It is also the case with the newly ordered Hillsborough inquest.

21.30 However, in many cases there will be no extant inquest and the primary task of the lawyer will be to reactivate a duty to investigate grave injustice that has long since been consigned to the history books. Detailed guidance was provided by the Grand Chamber in Janowiec and others v Russia. The case involves the massacre of several thousand prisoners by Soviet occupying forces in Katyń Forest in Poland in April and May 1940 and the attempt to compel the Russian

64 From the above footnotes, see McKerr, Hurst and McCaughey in the UK and Silih and Janowiec before the ECtHR.
68 Janowiec and others v Russia App Nos 55508/07 and 29520/09, 21 October 2013, GC paras 140–151. The purpose of the judgment was to clarify previous guidance provided in Silih paras 162–163.
state to further investigate the issue and open up the remaining undisclosed files of the Soviet era. The judgment explains how the detachable obligation is not open-ended, but governed by the following principles:

- **First**, where the death occurred before the critical date upon which the convention was ratified by an individual state, the court’s temporal jurisdiction will extend only to the procedural acts or omissions in the period subsequent to that date. ‘Procedural acts’ are to be understood as ‘acts undertaken in the framework of criminal, civil, administrative or disciplinary proceedings which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party’ (para 143). ‘Omissions’ can in their own right constitute a relevant bridge to the pre-ratification event applying to ‘a situation where no investigation or only insignificant procedural steps have been carried out but where it is alleged that an effective investigation ought to have taken place’ (para 144). Ways in which the obligation to investigate can be activated include ‘when a plausible, credible allegation, piece of evidence or item of information comes to light which is relevant to the identification and eventual prosecution or punishment of those responsible’ (para 144).

- **Second**, the procedural obligation will in a normal case only come into effect if there is a ‘genuine connection’ between the death as the triggering event and the entry into force of the convention. The requisite connection is one between the ‘triggering event’ (ie the death) and the entry into force of the convention in respect of the respondent state. The latter date (referred to as the ‘critical date’) is ‘a condition sine qua non for the procedural obligation to come into effect’ (para 145). As regards the relationship between the ‘triggering event’ and the ‘critical date’, the time factor is the first and most crucial indicator of whether the connection was genuine and in this context would normally not exceed ten years (para 146). Together with the time elapsing between the triggering event and ratification being no more than ten years, it also has to be shown that ‘much of the investigation into the death took place or ought to have taken place in the period following the entry into force of the Convention’ (para 147).

- **Third**, a connection which is not ‘genuine’ may nonetheless be sufficient to establish the court’s jurisdiction if it is needed to ensure that the guarantees and the underlying values of the convention are protected in a real and effective way. The position deals with the extent...
to which the potentially arbitrary cut-off point of ten years will not hinder the obligation arising for cases that require investigation for other compelling reasons (paras 149–151). In ‘extraordinary situations’ the underlying values of the convention ‘would constitute a sufficient basis for recognising the existence of a connection’ (para 149). This would arise ‘if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of the very foundations of the Convention’ (para 150). This would be the case ‘with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments’ (para 150). However, the ‘Convention values’ test could not be met if the trigger event occurred prior to the adoption of the convention itself, on 4 November 1950. In that respect, ‘a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predated the Convention’ (para 151).

21.31 Applying the above principles to the facts of Janowiec the Grand Chamber held that there could be no genuine connection between the trigger event and the critical date, because the passage of time between the Katyn massacre in 1940 and Russian ratification of the ECHR in 1998 was 58 years and in the period after the entry into force of the Convention it was impossible to identify any significant procedural steps or omissions (paras 157–159). Given the date of the massacre, 11 years before the convention itself came into being, it was also not possible to activate an investigatory obligation by virtue of the convention values test (para 160). As regards other war crimes and similar gross human rights violations post-dating the existence of the convention, the ‘Convention values’ test will be of considerable significance. It will be relevant to the later colonial period of the British Empire and the ongoing investigation of historic cases in Northern Ireland. The genuine connection test concerns the treaty and not the HRA 1998. It remains to be seen as to whether the UK courts will read the ten year rule across to the applicability of the HRA 1998 so as to rule out all death pre-dating October 1990. Given that the HRA 1998 is designed to mirror the protection afford by Strasbourg, that argument appears to be unsound. Thus, to take a current live example, if the Attorney-General had not himself sought a new inquest in the Hillsborough case dating back to 1987, it is almost inevitable that the families would have been able to mandate some form of further
public inquiry by virtue of ECHR article 2 based on the procedural omissions that occurred in the original inquests and other inquiries, as identified by the Hillsborough Independent Panel. Another case that would appear clearly to fulfil the criteria for re-activation of the investigatory obligation is the 1988 Lockerbie bombing, not least because of the referral of Abdelbasset al-Megrahi’s 2001 conviction back to the Court of Appeal by the Scottish Criminal Cases Review Commission in 2007, but also the permanent stay of the appeal in 2009 after the decision to allow al-Megrahi to return to Libya under a prisoner exchange treaty. In relation to the gravest crime in modern British history, the fresh evidence that justified the referral of the case to the Court of Appeal has never been the subject of judicial investigation.  

21.32 For cases pre-dating the actual existence of the convention, it is important to note that where a genuine connection can be shown between a trigger event and the date on which the treaty came into force in the UK (ie September 1953) it may well be possible to rely on this case-law to re-activate the investigatory obligation. The issue will be decided in the UK by the case of Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence, the appeal of which has been heard in the Court of Appeal and judgment is pending at the time of writing. It concerns the killing of 24 unarmed civilians by the Scots Guards in Malaya in 1948. In 1970, five out of 11 surviving patrol members confessed to the perpetration of the mock executions and murder, and ultimately repeated these confessions under police caution, many in the presence of lawyers. It is noteworthy that in Janowiec the Grand Chamber was asked by the Russian government to rule that the fact that the events occurred before the convention came into existence categorically precluded the court from examining Russia’s compliance with its procedural obligations (para 108). It did not do so, as did the Chamber in the first instance decision in Janowiec and the court in the case of Dorado Ortiz, which concerned the forced disappearance of a man in 1936 during the Spanish Civil War.

However, for all of these historic cases, families and lawyers must act without ‘excessive and unexplained delay’ if it can be said today.

70 [2012] EWHC 2445 (Admin). This case has already been heard by the Court of Appeal and judgment is pending at the time of writing.
71 Janowiec and others v Russia App Nos 55508/07 and 29520/09, 16 April 2012 para 113.
that the principles outlined above apply to a particular case. That is because the state may well be able to argue that a family has lost its victim status for the purposes of both the HRA 1998 and article 35 of the ECHR if it has unreasonably delayed in notifying the authorities of the reasons why the case should qualify for re-activation. As to what delay is ‘excessive and unexplained’ will depend on each case, but this is not an area where victims of a breach of article 2 can indefinitely argue that the authorities are under an obligation to investigate of their own motion without being prompted to do so.

Investigation of deaths caused by the UK abroad

In the previous section we considered the extent to which recent case-law has dramatically extended the temporal reach of the ECHR. As outlined in chapter 18 a separate body of case-law has extended the jurisdictional reach of the convention beyond the physical territory of the UK. This development, like the temporal issue just described, is mirrored in regional and global human rights jurisprudence. It is equally dramatic and among other things stands to radically alter the law of armed conflict from now on. As a consequence there will be circumstances where both the death and the burial have taken

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74 See, for example, the disposal of the complaint in Gutiérrez Dorado and Dorado Ortiz v Spain App No 30141/09, 27 March 2012 para 39 on the ground of that applicants ‘did not display the diligence required to comply with the requisites derived from the Convention and the case-law of the Court concerning disappearances’.
75 See paras 18.68–18.72. See in particular Al Skeini v UK (2011) 53 EHRHR 18. For reasons identified by the Supreme Court in Smith v Ministry of Defence [2013] 3 WLR 69, the Grand Chamber judgment in Al Skeini must now be seen as the principal authority outlining the extra-territorial scope of the ECHR.
77 As to the impact of the recent jurisprudence on the law of occupation, see E Benvenisti, The law of occupation, OUP, 2012. For a more general discussion of how international human rights law is creating a paradigm shift from
place abroad, but there is an arguable basis to conclude that the death was attributable to British state agents acting within the jurisdiction of the ECHR, albeit on foreign territory. For reasons well-rehearsed in chapter 8, the statutory requirement to hold an inquest only arises where the body of the deceased is in the UK. British courts are therefore in the process of working out both the scope of the extra-territorial duty to investigate death and the procedural form to be adopted in complying with that duty.

21.35 Article 1 of the ECHR requires signatory parties to secure to ‘everyone within their jurisdiction’ the rights and freedoms contained within the rest of the convention. There are two principal exceptions to the norm that a state’s jurisdictional competence under article 1 is primarily territorial. They are factual circumstances of ‘State agent authority and control’ and ‘Effective control over an area’. The ‘State agent authority and control’ exception applies to circumstances where the state through its agents exercises control and authority over an individual outside its territory, such as using force to take a person into custody or exerting full physical control over a person through apprehension or detention. It also applies to soldiers of the UK who are subject at all times to a chain of command. The ‘effective control over an area’ exception applies where through military action, lawful or unlawful, the state exerts effective control of an area outside its national territory, even if it does not exercise detailed control over the policies and actions of the subordinate local administration. The paradigm example is an occupied territory, but it would also apply to formal places of detention under UK control, even in an area that was not under UK occupation.

Inquests into the death of service personnel

21.36 This case-law has had a profound impact on two areas of controversial death. The first relates to inquests into armed services person-

state-centred sovereignty to humanity-centered sovereignty, see RG Teitel, *Humanity’s law*, OUP, 2011.

78 See paras 8.20–8.22.
79 See Al Skeini *v* UK (2011) 53 EHRR 18 paras 130–141. The settled position is helpfully summarised in *Chagos Islanders v UK* App No 35622/04, 11 December 2012 para 70.
80 *Al-Skeini v UK* paras 133–137. See also *Issa v Turkey* (2004) 41 EHRR 567.
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nel that die abroad when subject to military command. As a result of the judgment of the Supreme Court case in *Smith v Ministry of Defence*, an inquest into the death of service men and women will need to comply with article 2 requirements, most significantly in terms of disclosure and the requirement to allow the jury to return a verdict in accordance with *Middleton*.83 As detailed in chapter 3, it is a mark of the significance of this area of inquest law that monitoring of inquests into the death of service personnel is a discrete function of the Chief Coroner dealt with in section 17 of the CJA 2009. Also pursuant to his function to issue guidance, the Chief Coroner has already created a specialist cadre of coroners to deal with this area of the law.84

**Inquest-type investigations into the death of Iraqi civilians**

21.37 The second impact from the case-law that is still being resolved is the requirement to investigate the death of foreign civilians who die while under the control of UK armed services. If buried abroad, there will be no inquest. However, under article 2 the families of those deceased are still entitled to a prompt, public, independent and effective investigation, with the additional right of effective participation in the process in order to secure their interests. In *Ali Zaki Mousa (No 2)*, the Divisional Court has forged together the common law and article 2 jurisprudence in order to require an inquest-type procedure to take place in relation to every death in custody case during the British operations in Iraq where it is established that criminal proceedings have not otherwise disposed of the article 2 duty to investigate. It is believed that up to 161 cases could fall within this duty.

21.38 In its main judgment in *Ali Zaki Mousa*,85 the court identified that the coronial model evolved at ‘common law and under ancient statute’ (including a capacity to make recommendations) was capable of effectively meeting ‘the need for expedition, the practicality of what can be done in one inquiry and proportionate costs’ (paras 213–214). Yet cognizant of the costs of ‘extensive deployment of

83 *Smith v Ministry of Defence* [2013] 3 WLR 69 overturning the previous decision of *R (Smith) v Oxfordshire Assistant Deputy Coroner* [2011] 1 AC 1.

84 See paras 3.16–3.21. Issues likely to arise in service inquests include adequate provision of equipment and basic medical attention such as hydration pills. Other issues would include ‘friendly fire’ and provision to prevent it, terrorist attack, unsafe methods of training and inadequate planning and security for operations that put lives at risk.

teams of lawyers at inquiries’, suitable adaption of the coronial model would allow a group of retired judges and experienced practitioners to carry out a public inquisitorial process. The additional model of a DTI inspection was also apposite, albeit that it would need to adjust in order to meet article 2 standards. Thus, there will need to be a video link to Iraq, public hearings in the UK, and website access for evidence and transcripts to be accessed and final reports published. The entire process will also be overseen by a presiding judge of the Queen’s Bench Division who will act as something akin to a chief coroner.

21.39 In a follow-on judgment in Ali Zaki Mousa, the court then ruled on various features of the inquest-procedures, albeit on the basis that each ‘Inspector’ (the name given to the judge or senior lawyer who would preside over the inquiry) would need to develop his or her own procedure depending on the facts of the case. The approach of the court is indicative of a streamlined and potentially cheaper form of public inquiry than would traditionally be the case. The benefit of the model is that it may overcome the impediments of cost, delay and political obstruction, so that more inquiries actually take place. The key features of the pending small inquiries will be as follows:

- While it is for the secretary of state to determine the terms of reference and the detail as to the form of each inquiry in conjunction with the Inspector, the terms of reference must be drafted so as to ensure that the inquiry is compliant with article 2.
- The Inspector must have a power to compel witnesses to attend and to compel the production of documents (with appropriate sanction for failures to comply).
- The inquiries should be public and be given the necessary support to enable the families of the deceased in Iraq to participate in such a way as to safeguard their legitimate interests.
- Discrete attention must be paid to the rehabilitative and cathartic matters that may arise for families and other victims.
- The Inspector should adopt an inquisitorial approach and he or she should generally conduct the examination of witnesses, or, if he or she is provided with assistants, questions can be asked by the assistants on his or her behalf. Given the streamlined nature of the task there should be no separate counsel to the inquiry.
- In terms of fact-finding the Inspector should adopt the approach applicable to inquests as outlined in R (Middleton) v HM Coroner

86 R (Ali Zaki Mousa) v Secretary of State for Defence (No 2) [2013] EWHC 2941 (Admin) paras 10–44.
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for West Somerset\(^8\) ie seeking to establish by what means and in what circumstances the deceased came about his or her death.

- The Inspector may also need to consider making recommendations about lessons learned, where appropriate, but should carefully consider the extent to which it is necessary and proportionate to examine such issues if those issues have already been covered by the Ministry of Defence or other inquiries.
- Disclosure of relevant material must be made to the Inspector.
- It will then be a matter for the Inspector to decide what needs to be disclosed to interested parties to enable them to participate in the inquiry to the extent necessary to protect their legitimate interests.
- The next of kin of those whose deaths are the subject of an inquiry have a right to suggest questions and raise lines of inquiry to the extent considered necessary by the Inspector to enable them to be involved to an appropriate extent. But such persons, or those representing them, have no right to ask questions and it will be a question of discretion for the Inspector whether he or she permits questions to be asked directly by such persons or those representing them.
- Funding will be required for legal assistance to victims and families to the extent necessary to safeguard their legitimate interests. However there is no need for an advocate to be instructed on behalf of the family.

We return to the implication of this model for the Iraq inquiries below.

Investigation of near death

21.40 There is a procedural duty to investigate under ECHR articles 2 and 3 in relation to life-threatening injuries and near-suicides.\(^8\) Where there is no actual death there can be no inquest, but in the non-fatal self-harm and near death cases the courts (as they have had to do in relation to the extra-territorial deaths arising out of UK involvement in overseas armed conflict) have had to fashion appropriate remedies to comply with the investigatory obligation.

\(^8\) [2004] 2 AC 182.
\(^8\) See also paras 18.167–18.169 above.

\(^8\) R (JL) v Secretary of State for Justice [2009] 1 AC 558; R (D) v Secretary of State for the Home Department [2006] 3 All ER 946.
21.41 The result that was finalised by the Supreme Court in the JL case has been the construction of staged process, whereby the death must be investigated independently at the outset, but the investigator has discretion as to whether to order a second stage of the investigation that would contain a more public element. Funding for legal representation for the family of the injured must be available for the first stage for advice and submission purposes; and thereafter (if the investigation progresses to a public stage) the funding can be for more in-depth legal assistance if the investigator deems it necessary. The duty of disclosure traverses both stages. Thus, although the first stage is not public, it remains sufficiently transparent. While there is no right to ask questions, there is a right to suggest questions that should be submitted to the investigator that in turn must be given due consideration. Inspectors might simply choose to allow questioning albeit on notice (see below). For an analysis of the logistics of inquiries of this nature, including the demands of actual and apparent independence and impartiality, as well as the detail of the public funding structure, see SP v Secretary of State for Justice.89

Powers to order inquiries

21.42 There are three mechanisms for creating an inquiry: statutory, non-statutory or Orders in Council.

Statutory inquiries

21.43 Statutory inquiries are now principally carried out under the Inquiries Act 2005 and Inquiry Rules 2006.90 Section 1(1) of the 2005 Act provides:

A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that –
(a) particular events have caused, or are capable of causing, public concern, or
(b) there is a public concern that particular events may have occurred.

90 The previous dedicated legislation was the Tribunal and Inquiries Act 1921. It was actually surprisingly underused, in part because its procedures were not sufficiently flexible. Inquiries of note conducted under the 1921 Act in more recent times were the Shooting at Dunblane Primary School Inquiry, the Shipman Inquiry and the Bloody Sunday Inquiry.
Since 2005 major inquiries conducted under the new Act have included the Baha Mousa Inquiry, the Azelle Rodney Inquiry, the Mid Staffordshire NHS Trust Inquiry and the Leveson Inquiry into the culture, practices and ethics of the press. Other legislation gives ministers particular powers to order inquiries. Before the 2005 regime came into force these powers were used more often, notably for the Marchioness Inquiry under Merchant Shipping Act 1995 s269, the Stephen Lawrence Inquiry under Police Act 1996 s49, the Beverly Allitt Inquiry under National Health Service Act 1977 s2 and the King’s Cross Underground Fire Inquiry under the Regulation of Railways Act 1871 s7. The inquiry of Lord Laming into the death of Victoria Climbie combined three statutory inquiries created jointly by two ministers (Home Secretary and Health Secretary) under three separate pieces of legislation. 

**Non-statutory inquiries**

By virtue of their prerogative powers ministers can set up inquiries on a non-statutory basis. This was often done before the Inquiries Act 2005 and included major landmark investigations such as the Hutton Inquiry into the death of David Kelly and the Zahid Mubarak Inquiry. It is under non-statutory powers that ministers also order investigations that are short of being formal inquiries. In the area of controversial death these often take the form of thematic reviews. Examples include the review of Nicholas Blake QC into the death of soldiers at Deepcut Barracks, and the Corston Review into women with particular vulnerabilities within the criminal justice system. One particular issue with non-statutory inquiries is their potential lack of power to compel witnesses and the production of documents.

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91 The first inquiry was established under the Children Act 1989 s81. It was concerned with the functions of local authority social services committees and the way they relate to children. The second inquiry was established under National Health Service Act 1977 s84 and was concerned with matters arising under that Act. The third inquiry was established under Police Act 1996 s49 and was concerned with policing: see Report on the Victoria Climbié Inquiry, para 2.4, available at: www.official-documents.gov.uk/document/cm57/5730/5730.pdf.


However, where the documents and witnesses all lie within the control of government this may not be an issue.

Privy Council inquiries

Orders in Council are sometimes used to convene inquiries. This was more common before the Inquiries Act 2005, but it remains the mechanism for convening Privy Council investigations, particularly on matters that require unencumbered investigation at the heart of government. Two major Privy Council inquiries of recent times have been the Iraq Inquiry, chaired by Sir John Chilcot, and the so-called Detainee Inquiry, chaired by Sir Peter Gibson.

Finally it should be noted that just as a minister of state has the power to convert an inquest into an inquiry under the Inquiries Act 2005, by virtue of section 15 of that Act, he or she has the power to do the same with regard to any other form of inquiry.

Forms of inquiries

For those who campaign for public inquiries as much as those who have the power to order them, one thing that can get lost is thinking about the form that the inquiry should take.

‘Traditional’ inquiry model

As we considered in the background section of this chapter there are some events that are so integral to the life of the nation, or a critical part of it, that it is necessary for an inquiry to look long and hard, including an extensive range of core participants, and investigating as much as necessary to discover the truth in an open forum for all the world to see. The Stephen Lawrence Inquiry was one such inquiry. Although it was not as critical to the life of the average person on the streets of Britain, in its own way the Baha Mousa Inquiry was also such an inquiry, because it went to the heart of wrongful practices that were apparently tolerated across vast parts of British armed services culture. Before it was completed it had become a conventional wisdom that the Bloody Sunday Inquiry had cost too much (ultimately £192 million) and taken too long to complete (by the time of the report, over 12 years). While lessons may have been learned about how to conduct inquiries of such prominence, it is easy to forget how important Bloody Sunday itself was to the intensification of the Troubles in Northern Ireland and how equally
important the catharsis of inquiry was to the resolution of those problems. However, a review of some of the most important truth and reconciliation events in history tells us that extraordinary processes of inquiry can be accomplished quickly, especially where transitional justice demands that they do:

- In 1983, the Argentine Commission on Disappearances was set up. Within a year it produced the report *Never again*, having considered 9,000 cases.
- In 1987, an investigation in Chile was established to consider 2,279 state killings during the Pinochet era. It reported in 1991.
- In 1995, the South African Truth and Reconciliation Commission was established. It had three committees (Human Rights Violations; Reparation and Rehabilitation; and Amnesty). It reported in 1998 having considered a 45-year period of apartheid combining oral hearings and written statements on a range of modular subjects.
- In 2002, in Ghana, a Truth Commission for human rights violations since 1997 was established. The commission reported in 2004 having considered 4,000 complainant statements, of which half the deponents were invited to give oral testimony.
- From November 2002 to October 2004, the Sierra Leone Truth Commission fulfilled its mandate to ‘create an impartial historical record of violations and abuses of human rights and international humanitarian law’ for the eight years of civil war. It did so in a period that overlapped with the start of the criminal trials, but did not wait for them to end.

Not every inquiry has to last several years and cost millions of pounds. Indeed, a critical feature of convincing governments to invest in inquiries is that the process will not amount to an open-ended commitment in terms of time and money. The lessons learned by the Bloody Sunday Inquiry and 2005 Act inquiries that have followed it is that there are ways of shortening even the traditional public inquiry process by splitting the investigation into different modules, some of which can be paper-based, some of which entitle some core participants, if not all, to ask questions, but others which can be conducted on a seminar basis. In the modern internet age, inquiries can also be public in a number of ways. Sometimes there can be formal hearings and sometimes there can be documents put on to the internet that

94 It is also overlooked just how much work the inquiry did, taking some 2,500 statements, sitting for 427 days and hearing 922 witnesses.
can be commented upon in virtual hearings. In the next section we deal more with how traditional inquiries can be speeded up by modern investigation practices.

21.50 Despite such developments, there are some things that cannot be speeded up or diluted in terms of their full transparency, especially where critical facts are in issue. Our experience of inquiries into controversial deaths is no different to our experience of inquests of a similar nature. Grief, conflict or the parties’ suspicion of each other cannot be magically cleansed from the process as if these things do not exist. An inquiry, like an inquest, is not strait-jacketed by the confines of ordinary litigation, but the quality of some inquiries can be damaged by the pretense that they are purely inquisitorial. As Lord Bingham said of inquests, they are ‘a hybrid procedure, not purely inquisitorial or purely adversarial’ – the same is true of inquiries.95

Migrating the ‘Middleton’ model

21.51 One of the important by-products of inquest juries conducting Middleton type systemic reviews into the circumstances of a death up and down the country each week is that it demonstrates that there is no reason why the model cannot be transferred away from the inquest forum and used to look into discrete events or themes. Some of the most controversial and difficult inquests in recent times suggest a model of inquiry that in some cases will be an appropriate economy of scale in terms of both time and money: ie a public and independent investigation of both individual and systemic responsibility that can be disposed of within a budget analogous to local authority spending and can be completed in days as opposed to weeks. The Fatal Accidents Inquiry in Scotland into the Chinook helicopter disaster took 16 days of hearings, the McCann (Death on Rock) inquest in Gibraltar took 19 days, the inquest into the death of Ian Tomlinson took 1 days and the actual time spent hearing evidence in the Azelle Rodney Inquiry (the procedure created because the inquest could not be held) took just over 20 days.

21.52 It is this modern inquest model, with the benefit of a senior judicial or other legal figure, which enabled the Azelle Rodney investigation finally to complete in a public and effective manner. It is the same model that the courts have chosen in order to carry out the numerous investigations of alleged abuse and unlawfully killing in Iraq.

Thematic reviews

21.53 Thematic reviews are a device that move away from the formality of an ordinary inquiry, for a fraction of the price, but ideally comparatively similar, if not greater, in-depth learning. For example, following the self-inflicted deaths of six women at Styal prison, in 2006 the government commissioned the independent Corston Review of Women with particular vulnerabilities in the criminal justice system. The review was chaired by an experienced independent figure; had a Reference Group of experts in the field; conducted a paper exercise bringing together all relevant information including reviewing and analysing the profiles and characteristics of women who had committed suicides in prison and followed the pathways that led them there; conducted a range of site visits to prisons and alternatives to custody; organised a family listening event to enable relatives to share their experiences directly; held other stakeholder events as part of the process; and produced a comprehensive final report with suggested actions.

21.54 Another example is offered by the Bradley Review of People with mental health problems or learning disabilities in the criminal justice system. The review was chaired by a leading expert and independent figure; had both a Reference Group of experts in the field and a Working Group comprising key government departments and agencies; analysed available data and conducted literature reviews to inform the focus; sought contributions from a wide range of individuals and organisations through individual meetings with heads of agencies, organisations and professional groups and focus groups with service users and carers; conducted site visits across the country to review practice – good or otherwise; issued a national call for evidence to enable all stakeholders to submit their views, culminating in an analytical report; commissioned a cost/benefit analysis of options; and produced a comprehensive final report which has informed subsequent government action plans and investment.

Panel investigations

21.55 As detailed in the earlier part of this chapter, the injustice of the Hillsborough disaster only began to be properly grasped with the setting up of the Hillsborough Independent Panel. According to its website introduction, the Hillsborough Independent Panel was established by the government in January 2010 to oversee the release of documents related to the 1989 Hillsborough football disaster. The
Panel’s role was to ensure that the Hillsborough families and the wider public receive the maximum possible disclosure of all relevant information relating to the context, circumstances and aftermath of the tragedy. It is also the Panel’s role to research and analyse the documents and provide a comprehensive report on what their disclosure adds to public understanding. Throughout its work the Panel consulted with the families of the deceased and its work was informed by their views and priorities. It was part of the approach of the Panel that disclosure took place first to families and then to the public.

21.56 There were thus novel features in the Panel process. Although the Panel interacted dynamically with the bereaved families and had a primary aim of making as much material available to the public as possible, this was by no means a public inquiry. Moreover, although one of the Panel members was the lawyer Raju Bhatt who, among other things, is an inquest law specialist, this was decidedly neither a judicial nor a lawyer led inquiry. The Panel included the Right Reverend James Jones, Bishop of Liverpool, the journalist and broadcaster Peter Sissons and the criminologist Phil Scraton. Its other members were a medical consultant, a retired police officer, two experts on document archiving and a television producer. This was a group that could enjoy both the trust of the families and respect of the wider interested parties.

21.57 More recently, the Home Secretary has opted again for a variant of the panel format in setting up an investigation into the murder of Daniel Morgan. Morgan was a private investigator who was killed in 1987 in circumstances that strongly suggest police involvement. Since then there have been five separate investigations into the death, leading to a failed prosecution of a group including retired police officers in 2011 that was stayed as an abuse of process. One of the features of the failed investigations over the years has been a link between the police suspects and News of the World employees. The issue was disclosed to the Leveson Inquiry but not investigated because it was considered deserving of separate inquiry. The Metropolitan Police accept that the investigations over the decades have been tainted by police corruption. The Hillsborough model appears at present to have been slightly adapted in that the Panel members will have a barrister to assist them in their task. It is also likely to be smaller in number than the Hillsborough Panel, with its present composition containing a criminologist and human rights expert, an academic and a retired police officer. The Panel’s terms of reference are of some importance because they afford the bereaved family a special
status in the process expressly requiring the panel ‘to engage with the family and take their views into account at all stages in relation to the methodology of its work and the results of its work’. As with the Hillsborough Panel, there will also be a ‘family-first’ approach with regard to disclosure prior to the material being disclosed into the wider public domain.

Other investigations

21.58 Aside from the more formal models outlined above, there are numerous other ways in which senior lawyers, academics, civil servants and police officers can be commissioned to conduct investigations into a particular issue or theme. Lord Butler did the first Iraq investigation into the publication of evidence supporting the disarmament case for war. Mark Ellison QC is currently conducting an investigation into the allegations that undercover police sought to collect information on the Lawrence family that would bring their campaign into disrepute.

Hybrid models

21.59 A review of the different models above indicates that there is a range of ways that controversial matters can benefit from independent investigation. Sometimes the mere fact that a case is looked at by an informed independent person who then informs the interested parties and the public of their view can be of benefit. More recently, the work of the Hillsborough Panel has caught the imagination because of its move away from the legalistic format towards a process combining a range of experts and respected personalities to review the evidence and make it as accessible as possible to the public.

21.60 However, for the issues considered in this book, especially the vulnerability of people in conflict with the law that end up taking their own life or being killed, there is much to be said for a hybrid process that combines the Middleton model of hearings with the more flexible model of review. Indeed, there is no reason why the robust Middleton form of public hearing, with time then given to the inquiry to conduct follow on seminars, paper reviews and consultation with wider stakeholders, could not be adapted to create a streamlined inquiry mechanism. Its benefit would lie in it being public and inclusive. Yet it would have the capacity to carry out a number of similar inquiries into related matters (for instance, different categories of
vulnerable prisoners) and potentially repeat the investigations on a cyclical basis to monitor improvements and lessons learned.

**Seeking an inquiry through legal action**

21.61 An article 2 compliant inquest will generally be all the state is required to hold above and beyond criminal proceedings where the evidence suffices. In seeking a further inquiry the practitioner should give careful consideration as to the reason why the inquest has not been sufficient and the model of the inquiry that their client seeks.

21.62 As to sufficiency, it may be that the inquest was never available (see the historical and extra-territorial cases discussed above), or it may be that the inquest alone was not sufficient to analyse the administrative practice or nationwide systemic deficiency that the inquest has learned about without being able to fully investigate.

21.63 The campaign for any form of inquiry into administrative patterns or systemic deficiency involves legal action, lobbying, wider political debate and the need for all sides to think outside the box. Key matters of importance include:

- producing statistics and other evidence of administrative patterns;
- selecting core cases to exemplify the issue, with inquest ‘conclusions’ and recommendations indicating the nature of the pattern;
- showing how previous reviews, coronial recommendations and academic research have not been sufficient to resolve the issue;
- combining ECHR law with other international law on the relevant subject (eg, the case-law and General Comments of the UN Committee on the Rights of the Child) to show that the state is required to do more to remedy a pattern or fault with its systems;
- emphasising the broader functions of inquiries now recognised by parliament and the courts namely:96 (1) establishing the facts; (2) learning from events; (3) catharsis or therapeutic exposure; (4) reassurance and rebuilding public confidence; (5) accountability, blame and retribution; (6) political considerations;

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combining the views (and where possible the stated support) of the major subject matter non-governmental organisations (NGOs) and official independent figures (Ombudsman, HM Inspectorate of Prisons, ICCPR, Chief Coroner, individual coroners) and recognised experts both nationally and internationally;

- raising the issue with the interested committees who act under treaties to ensure their compliance (e.g., UN Committee on the Rights of the Child, the UN Human Rights Committee and the UN Committee against Torture);

- identifying minimum features that should be included in the terms of reference;

- suggesting different models of inquiries that are capable of dealing with concerns about time and cost;

- seeking discussion with government departments on the issue.

A case study of a current campaign: children and young people dying in prison

The appalling statistics of children and young people dying in custody and the legal issues arising for the UK’s obligations under the United Nations Convention on the Rights of the Child are dealt with at paras 19.47-19.50 above. For some years the charity INQUEST has focused on the need for an inquiry into children and young people in conflict with the law. In 2005 INQUEST published the first analysis of these deaths: *In the care of the state* (by Professor Barry Goldson and Deborah Coles). Following the inquest into the 2002 death of 16-year-old Joseph Scholes in Stoke Heath YOI, the coroner took the unusual step of writing to the Home Secretary to recommend a public inquiry into ‘all the circumstances … [including] sentencing policy which is an essential ingredient but outside the scope of this inquest’. INQUEST, the Prison Reform Trust (PRT), NACRO, other penal reform groups, MPs and the Joint Committee on Human Rights supported the call for a public inquiry. However, it was rejected by the government in 2006. In 2012 INQUEST and PRT published *Fatally flawed: has the state learned lessons from the deaths of children and young people in prison*. The evidence-based report drew on INQUEST’s extensive casework on the 143 deaths of children and young people in custody.

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98 The full report is available at: www.inquest.org.uk/publications/books/fatally-flawed.
young people (aged 24 years old or younger) between 2003 and 2010 and included six individual stories outlining the experiences of some of the children and young people who have died.

A key recommendation of *Fatally flawed* was that ‘an Independent Review should be established, with the proper involvement of families, to examine the wider systemic and policy issues underlying the deaths of children and young people in prison’. In support of this proposal, the families who seek such an investigation can point to the continuing figures of children and young people committing suicide in custody, including 43 further deaths between January 2011 and November 2013. A range of internal and discrete case investigations during that time had not stemmed the tide of fatality. As INQUEST puts it in the latest submission to the Ministry of Justice, ‘The government must try something different. For the following reasons, a comprehensive, holistic independent review must now be established to help find a solution’.99

The INQUEST submission goes on to analyse why the prison ombudsman investigations are limited by case-specific focus coupled with the fact that their remit begins and ends at the prison gates. The value of the inquest is then qualified by the extent to which that forum is limited in its evidential scope to the circumstances of the death as opposed to its broader policy context.

The submission identifies a minimum set of issues for the inquiry to consider:

- analysis of deaths of children and young people under 24 since 2003 to date to draw out and identify underlying issues, missed opportunities and failures in procedures and systems both before and in custody;
- examination of the provision and support offered to children and young people beyond the prison walls to include their journey into custody; the roles of social services, health (particularly psychiatric) and youth offending teams; and the availability of alternatives to custody for children and vulnerable young people;
- recommendation making powers and a monitoring function to review the action taken to implement those recommendations that are accepted by the government.

The submission ends by proposing a model of investigation that would include a number of aspects of the above-described Corston and the Bradley Reviews:

99 INQUEST Briefing (November 2013).
• proper guarantee of independence with a suitably robust chair supported by two assessors recognised as experts in the issues raised;
• meaningful involvement of bereaved families;
• a non-adversarial approach albeit that some bereaved families may need access to support and advice from lawyers (because of their vulnerability or personal circumstances);
• input from children and young people in custody about their experiences;
• involvement and ‘buy-in’ from those with experience of working with children and young people in conflict with the law (both in custody and beyond);
• evidence from a broad range of experts;
• transparent and open processes to enable public comment on the core issues by all stakeholders;
• reasonable time frames which achieve a balance between quick learning and effective learning.

21.69 Bearing these matters in mind, what the submission ultimately seeks is something that INQUEST calls a ‘Corston or Bradley-plus’ model. It is similar to what we have called the hybrid model above. For INQUEST this would include:

• focused, public oral evidence and question sessions to enable greater understanding of the core issues;
• parts of the process conducted on the basis of written evidence alone;
• parts of the review conducted as seminar style events with more than one expert giving evidence and discussing possible solutions.

Just as this book was about to go to press in February 2014 the government announced that there will be a review into the deaths of 18–24-year-olds in prison.100 In summary:

• There will be a review into the self-inflicted deaths of 18–24-year-olds in prison custody.
• The Independent Advisory Panel on Deaths in Custody, chaired by Lord Toby Harris, will conduct that review and will report in Spring 2015.101
• The review’s terms of reference will focus on: identifying and managing vulnerable young offenders; information sharing

100 www.justice.gov.uk/about/deaths-in-custody-independent-review.
101 For more about the IAP here: http://iapdeathsincustody.independent.gov.uk/.
Public inquiries and other investigations

including from agencies outside the criminal justice system; safety in custody; staff-prisoner relationships; family contact; and staff training.

- The government’s response to their much-criticised consultation on *Transforming Management of Young Adults in Custody* has been put on hold until they have received the recommendations from the IAP review.
- It will NOT specifically examine the deaths of under-18s as the government asserts their ‘situation’ is distinct and is being considered in other ways (through work by the YJB, the NOMS Young Peoples’ Working Group).
- It will NOT be tasked with considering why the young people who died ended up in custody in the first place.

As to the last two features that the inquiry will not deal with, INQUEST continues to campaign vociferously.

**Conduct of an inquiry**

**Procedure**

21.70 Depending on the form of inquiry adopted the chair will set his or her own protocols of conduct. That said, the Inquiries Act 2005 regime (including the Inquiry Rules 2006) contains a number of procedural features that are likely to influence other investigations, even if the 2005 regime is not being used. The features include:

- a discretion to adapt procedure subject to requirements of fairness and the need to avoid unnecessary costs (Inquiries Act 2005 s17);
- a discretion to appoint counsel to the inquiry or some other form of assistance, with consequential roles in relation to the examination of witnesses and the filtering of questions posed by other representatives (Inquiry Rules rr2, 5(2) and 10);
- compulsion of production of documents and witness attendance (Inquiries Act 2005 s21);
- a recognised role for Core participants (Inquiry Rules 2006 r5);
- a recognised mechanism for designating groups of core participants to be represented by a single legal representative (Inquiry Rules 2006 r7);
- discretion regarding questioning and other procedural matters (Inquiry Rules 2006 r10);
opening and closing statements (Inquiry Rules 2006 r11);
restricted disclosure of sensitive material (Inquiry Rules 2006 r12);
warnings procedure for persons who may be criticised in the final report (Inquiry Rules 2006 r13);
an obligation on the investigator to take such steps as he or she considers reasonable to secure public access both to the hearings and the records of evidence and documentation (Inquiries Act 2005 s18);
anonymity and ‘in camera’ proceedings (Inquiries Act 2005 s19);
a declaratory provision that denies an inquiry the power to rule on any person’s civil or criminal liability, but expressly removes any inhibition on liability being inferred from facts that the inquiry determines or recommendations that it makes (Inquiries Act 2005 s2);
a truncated 14-day time limit for judicial review of a decision made (a) by a minister in relation to an inquiry, or (b) by a member of the inquiry panel (Inquiries Act 2005 s38(1));
reporting (including interim reporting) and record keeping (Inquiry Rules 2006 rr17 and 18 and Inquiries Act 2005 s24);
means for awarding funding and subjecting claims to assessment (Inquiry Rules 2006 rr20–34).

Public

21.71 We have looked above at the extent to which different forms of inquiry may moderate their public element. The default position under both ECHR article 2 and the common law is that a public inquiry should be conducted in public, but that does not preclude written-only stages based on disclosed material.¹⁰² The Inquiries Act 2005 does contain mechanisms for either considering evidence in camera (albeit in the presence of core participants) or with the exclusion of core participants.¹⁰³ The recent pragmatic approach of the Azelle Rodney Inquiry as outlined in para 21.15 shows how counsel to the inquiry can view and summarise sensitive evidence so that both the chair and the core participants ended up seeing entirely the same evidence.

¹⁰³ Inquiries Act 2005 s19.
Disclosure

21.72 Although not all parts of the inquiry are literally conducted in public, it is important that the relevant evidence is made public first to the core participants and then (as far as possible) made available in the public domain. An inquiry that does not secure sufficient pre-hearing disclosure will not be compatible with article 2.104 That principle which applies to inquests has been carried over to public inquiries.105 As to the process that decides what is relevant disclosure, Inquiry Rules 2006 r12 provides for ‘restricted evidence’ that can be disclosed to the parties prior to being made fully disclosable evidence. However, it will ordinarily be for the chair to decide on disclosure by reference to the terms of reference of the inquiry.106

Questioning

21.73 We have seen above that different inquiries will demand different degrees of involvement of lawyers and of the right to ask questions of witnesses that appear before the inquiries. The starting position is that of Silber J in R (Stanley) v HM Coroner for Inner North London,107 citing Lord Woolf’s judgment in Amin in the Court of Appeal, ‘the use of fatal force by agents of the state’ requires the most careful scrutiny as ‘a credible accusation of murder or manslaughter by state agents will call for an investigation of the utmost rigour conducted independently for all to see’. Since then domestic human rights law has confirmed that any form of custodial death [in the broadest sense of custody] is no less demanding of investigation and of the widest exposure possible.108 The position is to be contrasted with cases involving ‘simple negligence’ in hospitals109 and near-death self-harm in custody.110

106 For a consideration of the disclosure of helicopter film evidence in the Azelle Rodney Inquiry that was also said to be sensitive, see R (Metropolitan Police Service) v Chairman of the Inquiry into the death of Azelle Rodney [2012] EWHC 2783 (Admin).
108 See the House of Lords decision in Amin paras 16, 30, 41, 50 and 62.
Although cross-examination is not therefore an entitlement across the spectrum, a right to ask questions in a disciplined fashion under the control of the investigator was recognised to be part of the remedy in the *Amin* case when an ethnic minority prisoner died as a result of being placed in a cell with a known racist and otherwise disturbed fellow prisoner. It would follow that there is strong case that the same must apply in relation to a fatal shooting and in relation to the death of a prisoner who otherwise enters custody in good health. In upholding the first instance decision of Hooper J in *Amin*, which Lord Bingham described para 32 as ‘loyally’ applying convention standards, the House of Lords effectively endorsed the finding of the High Court\footnote{[2001] EWHC 19 (Admin).} that is recorded at para 26 of its judgment: ‘On the facts of this case the obligation to hold an effective and thorough investigation can, in my judgment, only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation’.\footnote{See also the High Court order cited at para 15 of the House of Lords judgment, which each of their Lordships expressly ruled should be restored: paras 38, 49, 53, 54 and 66.} Having made that finding Lord Bingham (at para 39) went on to emphasise the ‘professional duty’ of legal representatives to ensure – under the ‘firm grip’ of the investigator – that the process combined a focus only on ‘cross-examination justifying further exploration … in a focused and disciplined way’ and ‘so far as may be properly done at a hearing required to be held in public’ reliance should be placed on written statements and submissions.

The way the issue of questioning has been dealt with since *Amin* has varied. It is one of the key differences between an inquest and a public inquiry that there is a statutory right of interested persons to ask questions at an inquest, albeit with the continuing filter of the coroner’s view as to whether the question is relevant.\footnote{Coroners (Inquests) Rules 2013 SI No 1616 r19.} The position has always been the same in Scotland with regard to Fatal Accident Inquiries.\footnote{See Fatal Accident and Sudden Death Inquiries (Scotland) Act 1965, and Fatal Accident and Sudden Deaths Inquiries (Scotland) Act 1976 and the 1977 Procedure Rules issued under section 7 of the Act. See the observations of Lord Hope in *R v Secretary of State for the Home Department ex p Amin* [2003] UKHL 51 in relation to this aspect of the Scottish system at paras 58–59 and 63.} By contrast, there is no absolute right for core participants to ask questions at an inquiry, but they may be permitted to...
do so. Indeed the default position under the Inquiry Rules 2006 is that counsel to the inquiry asks the questions. The granting and scope of any permission to ask questions by an inquiry will therefore depend on the nature of the inquiry and a number of logistical matters such as whether there is a chair or a counsel to the inquiry that has asked the questions sufficiently in any event, whether the core participants have been able to suggest appropriate questioning in writing by virtue of adequate disclosure, and the nature of the controversy and issues that arise in relation to a given witness’s evidence.

21.76 Thus far when the courts have considered the abstract question of whether there should be exclusive examination of witnesses by the inquiry, it has been held that article 2 does not compel the state to grant a right of interested parties to question witnesses in all situations. The stated caveats have been that this is provided the investigation remains procedurally fair given the issues at stake, that proper consideration is given to suggested questions, and that the default stance is kept under review. Arguably the issue does not therefore give rise to a single abstract answer and is likely to depend on the disputes that arise in the course of the inquiry.

21.77 Some article 2 inquiries in Northern Ireland have been carried out with counsel to the inquiry being fed questions from core participants, whereas some have not. The default position at the forthcoming Iraq inquest type procedures is that questions will be passed to the investigator. Other inquiries in England, such as the Baha Mousa Inquiry, have allowed questions to be asked on notice to the Chair, but with strict time limits. The Azelle Rodney Inquiry, which by and large reproduced the inquest format, required notice of general question topics, but largely did not insist on any time limits. Equally, the Al Sweady Inquiry, which involves a considerable conflict between some Iraqi and UK witnesses, has not insisted on time limits. A number of points should be borne in mind:

117 This was the situation in the Rosemary Nelson Inquiry, which was considered in Chief Constable of PSNI, Re Judicial Review [2008] NIQB 145.
118 Counsel for the core participants were allowed to ask questions in the Robert Hammil Inquiry.
It is not surprising that the case-law of the ECtHR does not deal with the right to ask questions in detail, given that many of the European civil law systems would not include a tradition of advocates asking questions.

There are some Strasbourg decisions that have focused on the positive fact that lawyers for the families were allowed to ask questions.\(^{120}\)

Anecdotally – and the authors would include their own anecdotes to this effect – it is often a pertinent question as to whether the time and resources used to submit questions to an inquiry would not be better used by allowing strictly time limited questioning.\(^{121}\)

By contrast, it is clear that assistance given to the inquiry in writing can be an effective means of involvement provided that (1) the inquiry is sufficiently public; (2) sufficient disclosure is provided; and (3) sufficient time and funding to families’ representatives is also provided in order to meaningfully make submissions about the disclosure and evidence.\(^{122}\) These caveats are critical.

In a long inquiry a flexible approach that varies the right to question orally in relation to different parts of the inquiry may be preferable.

Different models of inquiries, such as reviews and panels, would generally not need oral questioning other than perhaps for limited hearing days, if at all.

In all situations it is incumbent on the inquiry to consider asking any suggested questions submitted by the families.

Likewise, an inquiry must consider oral submissions on behalf of the family.

**Funding**

Once it is established that an article 2 inquiry is necessary, then domestic law requires funding victim representation, both for the purposes of preparation and, where necessary, advocacy. The governing principle can be found in the discrete value that it is for the next of kin to safeguard their own interests, rather than be beholden


121 See the observations in Jason Beer QC, Public inquiries paras 5.177–5.190.

to others to do so. An additional basis to justify public funding in inquiries is the vulnerability of the next of kin in the forthcoming Iraq inquest type procedures, the courts have ruled that sufficient funding must be available to represent the interests of the families, analyse disclosure and ensure that questions can be suggested to the tribunal.

21.79 Each inquiry will normally manage its own funding budget, although in some inquiries the government sets up a funding tariff at the outset. There are presently standard rates for representation under the Inquiries Act 2005. Even if the default position of any inquiry is that the investigator alone asks the questions, funding must enable lawyers to advise on witness statements, read pre-inquest disclosure, query that disclosure (where necessary), identify opening issues to the investigator, suggest questions to be asked of witnesses, ask questions where permitted, observe proceedings, make closing submissions, and respond to warning letters. There are, however, potential further ways in which funding can be managed. As in the Leveson Inquiry (and subject to any unassailable conflicts) a finite group of lawyers could act for victims/complainants. This is specifically catered for by rule 7 of the Inquiry Rules 2006.

Effective participation of families

21.80 The decisions that are made in relation to the form of inquiry, the extent of disclosure, the questioning of witnesses and funding all need to take into account the governing article 2 entitlement of the next of kin ‘in all cases ... to be involved in the procedure to the extent necessary to safeguard his or her legitimate interests’. Beyond this core feature of the ECHR jurisprudence, it is important that any inquiry must acknowledge the independent values of public scrutiny and effective involvement of next of kin. Being involved in the inquiry
process is particularly important for the experience of restorative justice. It may also have a care and rehabilitation dimension. These matters are now acknowledged in domestic public law. Where delay or any other adverse consequence to next-of-kin has taken place because of the deficiencies of previous inquiries, it is important that this is publicly acknowledged.

21.81 These common law principles chime with the increasing recognition in international human rights law of a ‘right to the truth’. Although the right to the truth extends to society as a whole, it is first and foremost ‘subsumed in the right of the victim or the next of kin to obtain clarification of the facts’.

21.82 Aside from their right to participate, families and victims contribute in various important ways. They monitor the process because of their interest in it; and the process responds to that interested scrutiny. They catalyse attention to matters that have not been considered. Objectively their involvement gives the process added legitimacy, just as the process loses legitimacy if they are not involved.

21.83 The statements of domestic and international courts about the care and catharsis aspect of these inquiries need discrete emphasis. The lesson of coronial law in the last 30 years is that the process is equally important to the outcome and that any process that treats victims or the bereaved badly can victimise them in a secondary way. There is a customary international law position that strongly emphasises the role that inquiries themselves fulfill as a means of rehabilitation and justice. Article 14 of the UN Convention Against

129 See Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence [2012] EWHC 2445 (Admin) para 157 (referring to ‘catharsis and therapeutic exposure’); and R (Khan) v Secretary of State for Health [2004] 1 WLR 971 paras 40–43 (referring to ‘learning, discipline, catharsis and reassurance’, but also to how compromising participation leads to ‘break down in trust ... and frequently a breakdown or deterioration in health’). Both these authorities are cited in R (Ali Zaki Mousa) (No 2) v Secretary of State for Defence [2013] EWHC 2941 (Admin) para 22. See also R (Amin) v Secretary of State for the Home Department [2004] 1 AC 653 para 16; R (Lin) v Secretary of State for Transport [2006] EWHC 2575 (Admin) para 51; and R v Secretary of State for Health ex p Wagstaff [2001] 1 WLR 292 at 312.

130 Attorney-General v HM Coroner for South Yorkshire (West) [2012] EWHC 3783 (Admin) para 7.


132 Bámaca Velásquez v Guatemala, IACtHR, (Ser C) No 91 (2002), 22 February 2002 paras 75 and 77.
Torture (UNCAT) not only refers to the right of victims of torture to seek compensation, but also to be accorded ‘the means for as full rehabilitation as possible’. General Comment No 3 (2012) of the UNCAT Committee, 12 December 2012, characterises victims as persons who have suffered human rights abuse and their immediate family and dependents (para 3). The Committee ‘emphasises the importance of victim participation in the redress process, and that the restoration of the dignity of the victim is the ultimate objective in the provision of redress’ (para 4). It provides advice on rehabilitation (paras 11–15), broader concepts of non-pecuniary satisfaction and the ‘right to the truth’ (paras 16–17) and (where relevant) the need for judicial personnel to receive specific training on the various impacts of torture and ill-treatment (para 34). The UNCAT Committee Report on the UK (May 2013) expressly calls upon this country to comply with the requirements of the General Comment No 3.133

The stance of the UNCAT Committee reflects the broader consensus reflected in UN General Assembly Res 60/147 of 16 December 2005, Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law. Principle (10) provides that:

Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.

Fact finding and the standard of proof

Like an inquest, a public inquiry does not make findings that determine civil or criminal liability. The Inquiries Act 2005 provides in express terms that which was understood at common law, namely that the findings of an inquiry do not and can not amount to a determination of liability. At the same time, it frees the inquiry unequivocally

133 UNCAT, for which see the Concluding Observations of the United Nations Committee Against Torture on the fifth periodic report of the United Kingdom, 31 May 2013, para 16.
to express itself in terms upon which criminal or civil liability might be inferred:

2 No determination of liability

(1) An inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.

(2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.

21.85 Unlike an inquest, an inquiry is not required to find facts to a certain standard of proof, be it the balance of probabilities for general matters, or the high criminal standard of beyond reasonable doubt for unlawful killing and suicide. These are discrete features of inquest law and the high standard of proof for unlawful killing and suicide are essentially historical relics of the days when an inquest acted as a committal hearing for criminal matters and, with regard to suicide, there were consequences in terms of the criminal law and wider moral opprobrium. All the major public inquiries conducted in recent times have not required similar set standards of proof. The reason for this is that section 24 (1) of the Act mandates the chairman of the inquiry to deliver a report to the minister setting out: ‘the facts determined by the inquiry panel’ and (b) ‘the recommendations of the panel’. The subsection continues, ‘The report may also contain anything else that the panel considers relevant to the terms of reference’. The 2005 Act does not therefore contain any express requirements as to what standard or degree of certainty is required before an inquiry is able to express determinations of fact or make recommendations. The terms of section 24(1) appear to leave the matter entirely open.

21.86 Thus, the Bloody Sunday Inquiry Panel recognised that: ‘Unlike the courts it cannot decide the guilt (or innocence) of any individual or make any order in its report. Our task is to investigate the events of Bloody Sunday, to do our best to discover what happened on that day and to report the results of our investigations.’ As Sir William Gage explained in the Baha Mousa Inquiry, he would ‘record the level of satisfaction which I find established in relation to any finding

134 R (Lewis) v Mid and North Shropshire Coroner [2010] 1 WLR 1836.
of fact’. The Azelle Rodney inquiry adopted the same approach. Most recently, the Hillsborough Independent Panel sought to report on ‘how the information disclosed adds to public understanding of the tragedy and its aftermath’. All of these notable examples are helpfully cited in the report of the Mid Staffordshire NHS Inquiry by Robert Francis QC, who for similar reasons adopted the same approach.

The approach of Sir Christopher Holland in the Azelle Rodney Inquiry is also of significance because as a judge presiding over an inquiry, as opposed to a coroner or inquest jury, he did not regard himself as encumbered by the constraints of the criminal law definition of the lawful use of force. Rather he adopted a broader analysis considering (1) the honesty and reasonableness of the belief of the firearms officers that it was necessary to open fire to protect themselves or others and (2) the reasonableness of the force used. Similarly, in the Baha Mousa Inquiry, Sir William Gage did not regard it as necessary to apply the inflexible rules of criminal joint enterprise in deciding whether Baha Mousa was killed as a result of unreasonable force.

Recommendations

Inquiries like inquests not only must report but are bound to make recommendations, especially in the realm of matters that the inquiry regards as capable of preventing future fatality. Unlike the reformed inquest system (under CJA 2009 Sch 5 para 7(1) and Coroners (Investigations) Regulations 2013142 regs 28 and 29) there is no obligation to respond to an inquiry recommendation, let alone implement it. This is unusual with regard to the common law world. That said, the reports of inquiries are generally the subject of ongoing attention from parliament and more recently the courts. Indeed, although the

141 Azelle Rodney Inquiry Report paras 19.1–19.11.
143 See Jason Beer QC, Public inquiries paras 10.63–10.70.
issue of standing (at time of writing) has become controversial, it is likely that sufficiently interested persons or NGOs would be in a position to bring judicial review claims in the face of an unreasonable or otherwise unlawful refusal of government to implement an inquiry recommendation. Indeed merely writing a pre-action protocol letter would bear the benefit of obliging the interested government department to provide a justification for not implementing the recommendation.