

NOTE FOR MADDEN AND FINUCANE MEETING

At the last meeting we discussed potential models of inquiry if one were to be held. This note sets out an overview of three current examples to aid discussion and to assist the family in making representations to the Secretary of State.

Northern Ireland Office

January 2011

NON-STATUTORY INQUIRY EXAMPLE – GIBSON INQUIRY

- Non-statutory inquiry established by the Prime Minister in July 2010.
- Guarantees given by the PM in Parliament on state co-operation in relation to documents and potential witnesses.
- Independent judicial Chair. Two other non-judicial members of the panel.
- Chair invited to consider the balance between public and private sessions, though the Prime Minister's letter of appointment to the Chair makes clear that "almost all of the operational intelligence detail will need to be reviewed in closed session."
- Chair asked to agree a public protocol with the Government on the disclosure of information. If the protocol follows that used in the Iraq Inquiry, that would mean a detailed consultative process between the Government and Inquiry on disclosure. If agreement cannot be reached then the Inquiry can refer to this in its final report but cannot disclose the information.
- PM's letter to the Chair establishes that the Inquiry is free to question people and groups from outside Government in open session.
- Asked to report within 12 months.
- Budget TBC. Based on the example of the non-statutory Iraq Inquiry, a similar year long inquiry could cost around £3 million.

INFORMATION RECOVERY EXAMPLE – HILLSBOROUGH PANEL

- Non-statutory panel established by the previous Government in January 2009.
- Eight independent panel members drawn from a range of backgrounds.
- Panel asked to oversee the disclosure of documents and to produce a report on "how the information disclosed adds to public understanding of the tragedy and its aftermath."
- Obligation in the terms of reference to consult with the Hillsborough families to ensure their views are taken into account.
- Disclosure protocol based on the "fundamental aim....to provide full disclosure of documentation to the panel and, subsequently, to the Hillsborough families and then the wider public, taking into account legal and other considerations". Exceptions to the disclosure principle based on legal professional privilege, legal constraints on disclosure and material prejudicing Cabinet collective responsibility.
- Estimated duration of 3 years.
- Budget of £4 million.

2005 ACT EXAMPLE - BAHA MOUSA INQUIRY

- Statutory 2005 Act public inquiry established by the previous Government.
- Independent judicial Chair.
- Team of three independent legal Counsel to the Inquiry.
- Terms of reference to investigate and report on the circumstances of the death taking into account the investigations that have already taken place.
- Detailed protocol in place governing the practical operation of the restriction order process under section 19(2)(b) of the 2005 Act. Protocol states the expectation that these procedures will be used to apply for a restriction order from the Chair rather than consideration of a restriction notice from the Minister.
- Duration 2 ½ years (estimate).
- Cost £11.4 million (to end October 2010). Final cost likely to be under £13 million.

SUBMISSIONS ON BEHALF OF THE FAMILY OF PAT FINUCANE

1. As a result of discussions between representatives of Pat Finucane's family and NIO officials the family have been asked to submit representations to the Secretary of State on the type of inquiry that should be established into Pat Finucane's murder.
2. The Finucane family have already submitted a note outlining the basic principles to which any such inquiry should conform. The NIO have provided examples of three current "Inquiries" for comparison purposes: the Baha Mousa Inquiry; the Gibson Inquiry; and the Hillsborough Truth Recovery Mechanism.
3. As discussed, the Finucane family do not believe that a non-statutory inquiry would provide an appropriate mechanism for an inquiry into Pat Finucane's murder. Such an inquiry would not provide the powers that will be needed to carry out the task.
4. The family therefore believe that a statutory inquiry is the only realistic option for the Pat Finucane case.
5. At present the only possible statutory basis for an inquiry is the Inquiries Act 2005. The Finucane family have made their position on this Act clear on many occasions, whether in submissions to the Committee of Ministers of the Council of Europe, in public statements or in the recent meetings with NIO officials.
6. The NIO have provided the family's legal team with a copy of the *Protocol for the Production of Documents and Other Evidence to the Inquiry by the Ministry of Defence* produced by counsel to the Baha Mousa Inquiry. This appears to be a procedure agreed between the Inquiry and the Ministry of Defence for the production and onward disclosure of material, including redaction and applications for non-disclosure. It is also stated to apply to other government departments to the extent that they will be involved with the inquiry.
7. Paragraph 29 of that document states:

“Where public interest issues or other s19(3) issues arise, the Inquiry expects the above procedures to be used for seeking a restriction order from the Chairman rather than a restriction notice being issued under s.19(2)(a) by the relevant minister.” (emphasis added)

8. There is no reason why the Minister(s) could not make a similar agreement in respect of an inquiry into the murder of Pat Finucane. Of the three examples provided the Baha Mousa inquiry would be the most appropriate mechanism for an inquiry into the murder of Patrick Finucane.

ISSUES FOR DISCUSSION PAPER

Following the last meeting the Finucane family have given some thought to the principles they consider are required as a minimum to ensure the proper investigation of the circumstances surrounding the murder of Pat Finucane.

The Finucane family have always said that any inquiry should comply with Article 2 ECHR. They maintain this submission. What that means in practice is that the inquiry should be:

Effective

The inquiry should be capable of examining all circumstances relevant to the murder, including the involvement of any and all state agents. This is relevant both to the terms of reference and the inquiry's powers for securing evidence and the attendance of witnesses. Will the family be involved in discussions designed to agree mutually acceptable terms of reference?

Independent

This clearly requires both actual and perceived independence and impartiality. It is here that the issues of (i) the members of the inquiry (ii) the inquiry team and (iii) the restriction notice arise.

Does the government still intend to make use of the restriction notice procedure? Will the government agree not to use the restriction notice procedure?

Will the family be involved in discussions around the identification and appointment of the inquiry members? What process will be used to identify and appoint the inquiry members?

Public

Again, the restriction notice procedure is relevant here. Attendance at the inquiry should be a matter for the inquiry to decide according to the law.

Accessible to the family

The family will require legal representation, to be able to raise issues for the inquiry's consideration and to sufficient access to the material being examined, as determined by the inquiry.

Where will the inquiry be held?

Prompt

The European Court of Human Rights has already found a breach of the Article 2 promptness requirement. Action taken henceforth to establish, commence and conclude an inquiry should be taken expeditiously.