

## Protocol for the Detainee Inquiry

1. This Protocol sets out the arrangements that the Detainee Inquiry will establish to ensure that it is able to carry out its remit and fulfil the Terms of Reference agreed with Her Majesty's Government (HMG). It is designed to ensure that the Inquiry gets the evidence that it needs to establish a reliable account of what happened, to identify the lessons that can be learned and to make recommendations to the Prime Minister whilst ensuring that national security and international relations are protected. This Protocol has been agreed with HMG.
2. In establishing the Detainee Inquiry, the Prime Minister said, in his statement of 6 July 2010 to the House of Commons:

*“an independent Inquiry, led by a judge, will be held. It will look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11.*

*Some information must be kept secret – information about sources, capabilities and partnerships. So any intelligence material provided to the Inquiry panel will not be made public...*

*The Inquiry will be able to look at all the information relevant to its work, including secret information; it will have access to all relevant Government papers, including those held by the intelligence services.”*

3. Following this statement, the Prime Minister wrote to Sir Peter Gibson on 6 July 2010 appointing him as Chair of a Panel which comprises Dame Janet Paraskeva and Peter Riddell. The letter also set out the parameters for the Inquiry and its conduct [www.detaineeinquiry.org.uk/key-documents/letters](http://www.detaineeinquiry.org.uk/key-documents/letters). The Terms of Reference set out the scope of what will be examined [www.detaineeinquiry.org.uk/key-documents/terms-of-reference](http://www.detaineeinquiry.org.uk/key-documents/terms-of-reference)
4. The Detainee Inquiry will have the full support of, and cooperation from, HMG and its security and intelligence agencies. This includes access to all relevant government papers, and an expectation that serving government officials will attend as witnesses if the Inquiry so requests. This will mean that some evidence, both written and oral, will need to be considered in private in order to protect national security and international relations and/or to ensure that international intelligence sharing understandings are not undermined during the course of the Inquiry. However the Inquiry will, wherever possible, ensure that its proceedings are public, so far as is consistent with the criteria set out in Paragraph 1 of Annex A.

5. This Protocol addresses:

- the production, handling and protection of information supplied to the Inquiry by HMG;
- the procedure for release into the public domain of, or making public reference to, such information; and
- how the Inquiry will balance the need for public and private evidence sessions.

**1. The production, handling and protection of information supplied to the Inquiry by HMG.**

6. This part of the Protocol is designed to ensure that:

- (a) the public know how information will be provided to the Inquiry by HMG and are aware of the procedure for the publication of, or making public reference to, this information by the Inquiry;
- (b) the Inquiry can have confidence in the completeness of information it receives from HMG;
- (c) HMG can have confidence that the information it provides to the Inquiry is handled and protected appropriately and in accordance with the law.

Provision of Information

7. In line with the Prime Minister's letter and to meet the Inquiry's commitments (paragraph 9 below), HMG has committed to undertake as thorough and rigorous searches as could reasonably be expected, to identify any relevant information it holds which the Inquiry requests, consistent with its terms of reference. Permanent Secretaries of the relevant departments and Heads of the security and intelligence agencies will be asked to confirm, in writing, to the Inquiry that these searches have taken place.

8. All relevant information identified during the searches will be supplied to the Inquiry as soon as possible: no such information will be withheld from the Inquiry except where the Inquiry accepts that HMG is bound by an existing legal duty of confidentiality (for example, the terms of the mediated settlement of the Guantanamo Bay civil damages cases).

9. In response to this commitment by HMG, the Inquiry commits:

- (a) that the Panel, Inquiry Secretariat and Counsel to the Inquiry will follow the relevant Government security rules and procedures set out in the Security Policy Framework for the transmission, handling, storage, removal from secure offices and overall security of information. It will also adhere to any specific procedures relating to the handling of individual documents which

HMG identifies at the time the information is passed to the Inquiry or as soon after this as practicable;

- (b) to respect the understandings and commitments made or given by HMG, including through its intelligence and security agencies, to the authorities and/or agencies of any foreign government concerning the confidentiality, security and protection against public disclosure of any information to which those understandings and commitments relate;
- (c) that all those who will have access to any HMG information held by the Inquiry (namely the Secretariat staff, Counsel instructed by the Inquiry, and any expert assessors or witnesses the Inquiry engages) will be appropriately security cleared, in line with government rules and procedures for security clearance;
- (d) that it will follow the procedures set out in paragraphs 11-18 below regarding the publication of information; and,
- (e) that it will file, record, store and retain both information passed to it, and any material it generates, in a manner consistent with Cabinet Office standards on filing, record keeping, storage and retention of official material in order for a complete record of the Inquiry to be returned to the Cabinet Office, where it will be treated in accordance with the usual statutory requirements affecting public records, on the Inquiry's closure.

## **2. The procedure for release in to the public domain of, or public reference to, information supplied by HMG.**

10. The Inquiry may only release into the public domain, or make public reference to, information provided to it by HMG where the Inquiry and HMG have followed the procedures set out in paragraphs 11-18 below having regard to the criteria in Paragraph 1 of Annex A.

### Agreeing Publication of Information

11. If the Inquiry considers that any publicly undisclosed information provided to it by HMG (or reference to such information) should be made public, whether by inclusion in its final report or at any earlier stage in its proceedings, it shall follow the procedure set out below.
12. The Inquiry will notify the Cabinet Office, as the sponsoring department, what information it wishes to release into the public domain, including by making public reference to it prior to or in the published final report. The Cabinet Office will then liaise with the originating, or recipient, department or agency of the information.
13. The Cabinet Office, following consultation with the originating or recipient department or agency, will respond to the Inquiry, in writing, as soon as possible

and within 10 working days, subject nevertheless to the fact that it may take longer for HMG to consult with third parties where necessary, either:

- (a) confirming that the information can be published as proposed by the Inquiry;  
or,
- (b) informing the Inquiry why it considers that any or all of the information proposed for publication engages the criteria in Paragraph 1 of Annex A.

14. In the event of paragraph 13 (b) above, the Cabinet Office will also inform the Inquiry, within the same timeframe or as soon as practicable thereafter, whether:

- (a) redactions, or another form of words, suggested by the originating, or recipient, department or agency would render the information outside the scope of Paragraph 1 of Annex A; or
- (b) withholding the information in its entirety would be the only way to prevent any of the harms or breaches cited.

15. Where, having received information from the Cabinet Office as set out in paragraphs 13 (b) and 14 above, the Inquiry is content to make any proposed redactions in full, or an alternative means of inclusion or release is agreed with the originating or recipient department or agency via Cabinet Office, it shall write to the Cabinet Office confirming this. The Inquiry will then be free to publish the information in the agreed form.

16. Where on the other hand, the Inquiry considers that the information it proposes to release:

- (a) does not meet the criteria set out in Paragraph 1 of Annex A; and/or
- (b) that although the information *could* meet the criteria set out in Paragraph 1 of Annex A, it is unnecessary or disproportionate to withhold it from the public; and/or
- (c) that some or all of the redactions or usage of an alternative form of words is unnecessary or disproportionate,

it may refer the matter, in the first instance, to the Cabinet Secretariat in the Cabinet Office, in its role as the sponsoring department of the Inquiry. The Cabinet Secretariat will assist in seeking an agreement between the originating, or recipient, department or agency of that information and the Inquiry as to the form in which the information could be published. The expectation is that the majority of disclosure issues should be capable of resolution in this manner.

17. In exceptional cases where agreement cannot be reached with the Cabinet Office:

- (1) The Inquiry Chairman will write to the Cabinet Secretary indicating the Inquiry's view that the information in question can and should be released,

and inviting the Cabinet Secretary to reconsider or for HMG to make formal submissions to the Inquiry either in writing and/or orally, as to why it still believes the particular information should not be released;

(2) On receipt of those submissions, if the Inquiry still disagrees with HMG, the Inquiry Panel will set out in writing its reasons for concluding that the balance of competing interests lies in favour of disclosure, which it will send to the Cabinet Secretary;

(3) On receipt of the Panel's written reasons the Cabinet Secretary may determine and inform the Panel that notwithstanding those reasons the material must not be disclosed. In such cases, the Inquiry shall not release that information into the public domain or make public reference to the details of it. In such circumstances, it will remain open to the Inquiry to make public the fact that material it would have wished to publish has been withheld.

18. Where this process is successful and agreement is reached, the Inquiry will write to the Cabinet Office, recording the agreed form in which the information may be published. The Inquiry will then be free to publish the information in the agreed form.

### **3. Public and private evidence sessions.**

19. The aim of the Inquiry is to receive full and frank evidence from all who give evidence to it. The Inquiry will not establish legal liability, or order or recommend any financial settlement. The Attorney General will provide an undertaking that evidence given by witnesses may not be used against them in criminal proceedings, whether their evidence is given in public, private or both. The Cabinet Secretary, Head of the Diplomatic Service and Heads of the security and intelligence agencies will set out analogous undertakings to staff in respect of disciplinary proceedings based on their evidence, whether in public or private.

20. The Inquiry invites everyone who has relevant evidence to produce that evidence to the Inquiry. In the case of current or former Crown or Civil Servants this will usually be at the request of the Inquiry; however this should not preclude any other current or former Crown or Civil Servant approaching the Inquiry if they have evidence they would like to share. The Inquiry may also make some specific requests for witness statements from other individuals, including some detainees.

21. Such evidence should be given initially in the form of a written statement (see paragraph 23 below) but the Inquiry may request that the witness providing such a statement should also give oral evidence to the Inquiry. If the witness refuses that request, the Inquiry will decide what weight, if any, will be given to that witness's written evidence. The Inquiry may also request further persons to give written and/or oral evidence. The Inquiry does not undertake to hear evidence from every person who puts his/her name forward

22. As the remit of the Inquiry is to examine the actions of the UK, it will not request evidence from the authorities of other countries or their personnel.

### Before the Evidence Session

23. The Inquiry will write a minimum of seven weeks in advance to any person whom the Inquiry requests to give oral evidence, inviting them to provide a witness statement to the Inquiry. For serving and former ministers, civil servants and Crown servants, the letters will be copied to relevant departments/agencies. The Inquiry Secretariat will give in the letter an indication of the matters which the Inquiry wishes the witness to address, and as much supporting detail as is available.
24. Witness statements are to be provided within four weeks of the request being made. The witness statement should be in the standard format, which can be found on the Inquiry website, should include the confirmation as to the accuracy of the statement, and should refer to any documents which are relevant to that witness's evidence and to which that witness is likely to wish to refer. As set out in paragraph 1 of Annex B, any request for protective measures or that the witness give some or all of his/her evidence in a private session should be submitted as soon as practicable after the individual has been identified as a witness but in any event no later than the date when the witness statement is provided. An explanation of the basis for the request must be provided.
25. Written statements should be sent to the Inquiry Secretariat at 35 Great Smith Street, London, SW1P 3BQ, or by e-mail to [statements@detaineeinquiry.org.uk](mailto:statements@detaineeinquiry.org.uk)
26. Following receipt of a witness statement, if it is decided to call the individual to give oral evidence, the Inquiry Secretariat will provide each witness and his/her department where relevant, with details of the evidence session as set out in Paragraph 3 of Annex B of this Protocol. This will include an indication of whether or not it considers the witness's evidence should be heard in public or private.
27. The Inquiry is not a court of law and nobody will be on trial. The Inquiry will make criticisms however, if warranted. In the event that a particular witness may be the subject of criticism by the Inquiry, the Inquiry Secretariat will notify that witness separately, in writing, at least 14 days in advance of the evidence session, of the nature of the potential criticism and the evidence that supports it.

### Public Evidence Sessions

28. The Inquiry wishes to be as open and transparent as the subject matter under consideration allows. Wherever possible, evidence on policy issues, guidance and training will be held in public. The Heads and former Heads of the security and intelligence agencies will be invited to give evidence on these issues, as far

as possible, in public. Ministers, members of the Senior Civil Service and their equivalents, and former holders of those posts, should expect to give evidence in public unless the criteria in Paragraph 1 of Annex A require otherwise. The potential for embarrassment to these witnesses will not justify secrecy.

29. Subject to paragraph 34 below, even if there are good reasons why a witness should give some of his/her evidence in private, the Inquiry will still hear evidence from that witness in public as far as practicable and appropriate. It cannot be assumed that any witness will be heard wholly in private simply because some of his/her evidence justifies being heard in private. In general, a private evidence session will address only the evidence which must be heard in private.
30. The Inquiry recognises that particular questions may lead unexpectedly into sensitive matters that cannot be discussed in public. Witnesses should feel free to draw the Inquiry's attention to this. If the Inquiry judges that a matter should not be discussed in public, any further questioning on that matter will be deferred to a private evidence session.
31. Witness statements that relate to a public evidence session, will be treated as publishable once the witness has given evidence unless reasons are given why it should not be published – for example, a statement contains information which meets any of the criteria set out in Paragraph 1 of Annex A. In case of disagreement the procedure at paragraphs 11-18 above will be followed.
32. Public evidence sessions will be open to the media and members of the public to attend, via arrangements made by the Inquiry Secretariat.

### Private Evidence Sessions

33. The Inquiry recognises that the operational details of the security and intelligence agencies will need to be considered in private due to national and personal security concerns. All evidence from current or former members of the security and intelligence agencies, below the level of Head, will be heard in private. The private evidence sessions of current or former crown servants, civil servants or Ministers may be attended by authorised representatives of the relevant departments, unless the witness has requested otherwise and the Inquiry accedes to that request.
34. Other individuals wanting to give evidence in private will have their requests considered on a case by case basis by the Inquiry with reference to the following points:
  - (a) would the matters on which the witness will give evidence, if revealed in public, meet the criteria in Paragraph 1 of Annex A
  - (b) is there any genuine or sufficient reason (such as health or personal security concerns) why a witness would have difficulty appearing or being entirely frank in public? The Inquiry will consider sympathetically any

request to give evidence in private from a witness who believes that he/she has suffered trauma in the course of his/her detention, or otherwise as a result of the matters about which he or she is to give evidence.

- (c) would giving evidence in private ensure the witness's welfare, security or freedom to speak frankly, for example in the case of junior staff who may wish to give evidence that runs counter to that of others?
- (d) the extent to which a witness's concerns could be addressed by other protective measures short of hearing the evidence in a private session.

### Conducting Evidence Sessions (both Public and Private)

- 35. Evidence sessions will be conducted by the Inquiry. Questions will be asked of witnesses by Counsel to the Inquiry in the first instance. Members of the Panel may also ask questions. Questions from others present will not be permitted. Witnesses should ask for an explanation if they are not sure what they are being asked or what the Inquiry wants from them.
- 36. Any person may suggest to the Inquiry questions which should be asked of a particular witness who is due or expected to appear before the Panel. Where witnesses have been asked to give evidence in public, their names will be listed on the Inquiry's website. In that event, proposed questions should be submitted to the Inquiry at least two weeks before that witness is due to give evidence to the Inquiry. The Inquiry does not undertake to ask every question that is put forward to it.
- 37. Witnesses may wish to be accompanied at hearings, for example by a friend, colleague, counsellor, trade union representative or legal adviser. If a witness wishes, for any reason, to be accompanied when giving evidence, he/she should so request, when first invited to give evidence. Witnesses will be allowed one person to accompany them, who may sit close to them during hearings. In evidence sessions which are private because of the criteria set out in Paragraph 1 of Annex A of this Protocol, this will be subject to the person having appropriate security clearance. In public sessions, other friends and colleagues may attend as members of the public.
- 38. Departments will, if appropriate, provide legal and welfare support for current and former ministers, civil servants and Crown servants to help them prepare any statements and to provide assistance in advance of and/or at hearings. Other categories of witnesses may wish to seek support. The Inquiry can recommend that reasonable costs be met by the public purse. The Inquiry will look sympathetically at requests for funding from individuals that relate to the preparation of witness statements and assistance in advance of and/or at the hearings. In most cases, recommendations for funding for individuals will not extend beyond that level of assistance. However, recommendations for any further funding would be considered on a case-by-case basis.

39. During a hearing, communication between the witness and the person accompanying him/her is not forbidden, but the Inquiry would expect that to be the exception; and that it should not disrupt the hearing or hinder the conduct of its business. The accompanying person will not be entitled to ask any question of that witness or any other witness.

#### Publication of evidence

40. Draft transcripts of evidence given in public will be provided to witnesses on the day of their evidence session or the working day following. Witnesses will be invited to identify transcription errors, within a deadline of 24 hours of their receipt of the transcript.
41. In respect of public hearings, a draft transcript – marked as ‘uncorrected’ – will be placed on the Inquiry’s website at the time the text is sent to the witness for checking. This will be replaced by the final transcript once the witness has signed the statement confirming that the evidence, as transcribed and if necessary corrected or clarified, is accurate.
42. In the case of hearings held in private as a result of the criteria set out in Paragraph 1 of Annex A, the transcripts will be made available to the witness at a secure location. To reflect the need for the witness to attend a secure location, witnesses will be invited to identify transcription errors within one working week.
43. Suggestions for “improving” evidence which go beyond mere correction or clarification will not be accepted. If witnesses wish to correct or clarify their evidence, they may submit an addendum for consideration by the Inquiry. Witnesses will be asked to sign a statement confirming that their evidence as transcribed and corrected or clarified is accurate.
44. During the Inquiry, transcripts of a private hearing will be accessible only by the Inquiry, the witness and, where appropriate, the authorised representative of the relevant department(s). Witnesses will not routinely be provided with transcripts of the evidence given in private hearings by other witnesses where they cover similar subject matter. However, in the interests of fairness, where a witness gives evidence which is potentially adverse to, or critical of, another witness, the Inquiry will consider whether to disclose relevant extracts of that evidence to the other witness in order to permit him or her to respond to it. Where necessary and appropriate, the identity of the maker of the adverse comment may be disclosed. Disclosure will normally be effected by the witness viewing the relevant part of the transcript at the Inquiry’s offices. Disclosures to other witnesses detailing evidence given in private relating to, or containing, HMG information will be subject to the procedure set out at paragraphs 11 to 18 above.
45. The Inquiry will give careful consideration to how best to draw on and explain in public what was covered in a private evidence session, either in its final report or at an earlier stage – for example, in the general interests of transparency or to pursue a point with a future witness in public session. To the extent that such disclosure engages any of the criteria set out in Paragraph 1 of Annex A of this

Protocol, it will be subject to the procedures set out at paragraphs 11 to 18 above. If evidence is given during a private hearing which neither relates to classified documents nor engages any of the criteria set out in Paragraph 1 of Annex A of this Protocol, it is anticipated that that evidence will be published.

46. In cases where the Inquiry wishes to publish a summary of the nature of evidence taken rather than a full transcript, it will seek confirmation from the witness that the proposed text is an accurate reflection of the relevant part(s) of their evidence. If such confirmation cannot be obtained, the Inquiry will decide on the contents of the summary and make clear in publishing it that the witness does not endorse the summary and their reasons why. Prior to publication of the summary, the relevant department or agency will also be asked to confirm that the intended summary will not engage the criteria set out in Paragraph 1 of Annex A. If it does, the procedures set out at paragraphs 11-18 above will apply. In cases where the Inquiry has granted anonymity to a witness, it will confirm with the witness that the text proposed for publication does not contain any information that would reveal their identity.

#### Expenses

47. Witnesses who are serving or former Ministers, civil servants or Crown servants should contact their departments for payment of expenses. In other cases the Inquiry will pay reasonable travel and accommodation expenses of witnesses.

## Annex A

### Disclosure of Information

1. Where, in the opinion of the originating or receiving department or Agency, the release of any information would, or would be likely to cause harm or damage to the public interest, the purpose of the procedures set out in paragraphs 11-18 in the Protocol is to ensure the proper protection of the public interest. Such harm or damage may include:
  - (a) harm or damage to national security, economic, defence interests or international relations. This includes respecting the understandings and commitments between HMG and its security and intelligence agencies and the authorities and the agencies of any foreign government concerning the confidentiality, security and protection against disclosure outside the Inquiry of any information to which those understandings and commitments relate;
  - (b) endangering the life of an individual or otherwise risk serious harm to an individual;
  - (c) breaching the principle of legal professional privilege (LPP);
  - (d) prejudicing, in the case of information covered by legal professional privilege (LPP) (following any voluntary limited waiver of LPP) rather than material facts, the position of HMG in relation to contemplated or ongoing legal proceedings;
  - (e) breaching the rules of law which would apply in proceedings in England and Wales under the provisions of Section 17 of the Regulation of Investigatory Powers Act 2000;
  - (f) breaching the rules of law applicable to the disclosure of information by the Security Service, SIS or GCHQ, the third party rule, referred to by the Courts in recent litigation as the control principle governing non-disclosure of intelligence material, or other commitments or understandings governing the release of sensitive information;
  - (g) breaching the Data Protection Act 1998; or
  - (h) prejudicing the course or outcome of any ongoing statutory inquiry or criminal investigation.

### Freedom of Information

2. The Inquiry is not a public authority as defined by schedule 1 of the Freedom of Information Act 2000. The Inquiry is not therefore obliged to respond to any requests for information it receives under this Act.

3. UK Government Departments are however public authorities and may receive requests for information, under the Freedom of Information Act (FOIA), relating to the Inquiry (the Security and Intelligence Agencies are not public authorities for the purposes of the FOIA). Any requests received by public authorities will be considered on a case by case basis. In considering each request departments will however have regard to the following two points:
  - (1) Departments will consult the Inquiry, as an interested third party, on their proposed handling of the request. This will include, but is not limited to, the proposed response to the request and any information proposed for release. Departments will give due regard to any comments made by the Inquiry. The final decision is a matter for the relevant Department; and
  - (2) Any information sent to the Inquiry by Departments, and vice versa, is, as a general rule, sent in confidence on the understanding that it be treated as such by both parties.

## **Annex B**

### Process for Witnesses Giving Evidence to the Inquiry

1. Within four weeks of receipt of the request to provide a witness statement, the witness (and his/her department where relevant) should, alongside provision of a statement:
  - (a) identify dates when he/she would be unable to attend to give oral evidence if the Inquiry so requests;
  - (b) if necessary, give reasons why some or all of the witness's evidence should be heard in private, in accordance with paragraph 34 of the Protocol;
  - (c) where either the witness has requested a private hearing or the Inquiry has decided to invite the witness to give evidence in private, indicate whether or not the witness is content for authorised representatives of the relevant government department or Agency to be present during the hearing;
  - (d) if necessary, give reasons why the witness's identity should not be revealed in public;
  - (e) indicate whether he/she would wish to be accompanied in giving oral evidence; and
  - (f) make any other requests he/she wishes the Inquiry to consider.
2. Upon receipt of a witness statement from a potential witness, the Inquiry will consider whether there are areas in that statement which require clarification or further information. On the few occasions where this is necessary, the Inquiry will write to the witness requesting that the statement is updated accordingly. The Inquiry may then invite the witness to attend and finalise their statement with the Inquiry secretariat, accompanied by a legal representative if they so wish.
3. Either upon receipt of the items and information at paragraph 1 above, or immediately following any necessary clarification of the witness statement, the Inquiry Secretariat will provide each witness and his/her department or agency where relevant, with:
  - (a) the date, time and place of the evidence session, and its expected duration;
  - (b) whether it will be in public or in private (or both);
  - (c) if public, the extent to which it is proposed to broadcast the session;
  - (d) if a private evidence session was requested but the Inquiry has decided to hear all or part of the evidence in public, in accordance with paragraph 34 of the Protocol, the reasons behind that decision will be explained in writing;
  - (e) if a witness has requested that his/her identity should be protected but the Inquiry disagrees, the reasons behind that decision will be explained in writing;

- (f) any further questions or additional matters which it wishes the witness to address;
- (g) an indication of the matters covered in the witness statement which the Inquiry wishes to cover during the oral evidence session;
- (h) documents the Inquiry wishes to refer to in the session (which will normally be limited to documents which the witness would have had access to at the time about which the witness will be asked to give evidence); and
- (i) notification if that particular witness may be the subject of criticism by the Inquiry.

This will be done at least 14 days in advance of the evidence session.

4. If further questions or requests that additional matters be covered gives rise to issues in respect of the witness' ability to give evidence in public or agreed timescales, the Inquiry must be notified as soon as practicable.