Submission to the Leveson Inquiry on the culture, practice and ethics of the press by Sir Louis Blom-Cooper QC that Rule 13(3) of the Inquiry Rules 2006 is *ultra vires* section 2 of the Inquiries Act 2005.

The criteria for testing the powers of statutory instruments

1. The test of invalidity of a statutory instrument is whether Parliament intended, by the generality of the words in section 2 of the Inquiries Act 2005 – namely, not inhibiting the report of the inquiry from criticising any person – to confer on the Lord Chancellor, under section 41(3)(a) of the Inquiries Act 2005, the power to insert a rule requiring the inquiry chairman to serve a letter on a person, warning that he or she may be subject to criticism in the Chairman's report to the Minister under section 24 of the Inquiries Act 2005.

2. It is submitted that, for the following reasons, Rule 13(3) of the Inquiry Rules 2006 is invalid for want of statutory authority. Rule 13 imposes no *duty* on an inquiry to serve a warning letter; indeed, Rule 13(1) makes it clear that the inquiry has a discretion whether to send a warning letter. But Rule 13(3) says that 'the panel may not include criticism in a report to the Minister unless a warning letter has been sent to the person concerned and that person has been given a reasonable opportunity to respond to this warning letter.[1]

Scope of inquiry report

3. The ambit of the inquiry chairman's duty to deliver the report to the Minister is contained primarily in section 24 of the Inquiries Act 2005. The report must set out the facts determined and, where the terms of reference require it, include any recommendations. Additionally, the report may also contain anything else considered to be relevant to the terms of reference. By section 25 it is the Minister's duty to arrange the publication of an inquiry's report. The Minister may delegate to the chairman the arrangement for publication.

4. The limitation on what the report is entitled to contain is provided in section 2 of the Inquiries Act 2005. The inquiry is '*not* [italics supplied] to rule on, and has no power to determine any person's civil or criminal liability'. This proscription on what the inquiry report may contain is specifically circumscribed by the statutory provision, that 'an inquiry is not to be inhibited by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.'

[1] See Beer, *Public Inquiries* (OUP, 2011) paras 9.34-9.37, page 365.

Two consequences flow from section 2. First, the exclusion from the report of any finding of civil or criminal liability renders the public inquiry outwith the purview of Article 6 of the European Convention on Human Rights requiring fair treatment to any person in the determination of any civil or criminal liability. Second, any finding of the Inquiry as to blameworthiness or fault on the part of any person (which might be classified under the rubric of 'criticism') is otherwise absolutely preserved to the Inquiry report. This in turn is a statutory reflection of the attitude of the common law. It finds a classic expression in the judgment of Mr Justice Laws in *R v Advertising Standards Authority Ltd, ex parte Vernon Organisation Ltd*.[2] In that case, the Advertising Standards Authority (ASA) investigated and upheld a complaint that an advertisement was in breach of the British Code of Advertising Practice, which the ASA proposed to publish as its decision. An application by a company, which specialised in promoting a football pools competition, to restrain the ASA from publishing its decision was refused by Mr Justice Laws. In refusing injunctive relief, he said:

> …there is a general principle in our law that the expression of opinion and the conveyance of information will not be restrained by the courts save on pressing grounds. Freedom of expression is as much a sinew of the common law as it is of the European Convention on Human Rights…

5. It is submitted that, unless there are 'pressing grounds' for limiting the scope of the Inquiry's report to the Minister – something akin to prior restraint on freedom of speech – the 'sending of a warning letter' in Rule 13(3) of the Inquiry Rules 2006 is *ultra vires* the Inquiries Act 2005. The essential vice is the effective prohibition on the chairman in exercising his power to criticise. Even if (contrary to this submission) there may be pressing grounds for letters of warning to those who may be criticised in the inquiry report, such a conclusion could be justified only in primary legislation. It could not be provided by way of delegated legislation.

Other submissions as to the scope of the Inquiry's jurisdiction

Fairness

6. Since Article 6 of the European Convention on Human Rights is inapplicable to an inquiry conducted under the Inquiries Act 2005, the reference to 'fairness' in section 17(3) cannot sensibly be referable to an individual person, whether as a 'core participant' or other

[2] [1992] 1 WLR 1289, at 1293A.

interested party. Since the wording of 'fairness' in section 17(3) relates to 'making any decision *as to the procedure or conduct of an inquiry*' [italics supplied] by the chairman, the provision must refer to fair treatment collectively to all witnesses appearing before the inquiry and not to any individual party. It is also submitted that fairness in the procedure or conduct of the proceedings includes consideration of fairness to the public generally.

Prior warning of criticism

7. It is relevant to consider the aim and purpose of Rule 13(3) to ascertain whether it could ever be a safeguard to potential blameworthiness sufficient to contribute 'pressing grounds'. On the face of it, Rule 13(3) appears to be a statutory successor to 'Salmon letters' as widely used by tribunals since the report of the Royal Commission on Tribunals of Inquiry in 1966 (the Salmon report, Cmnd 3121). The Salmon letter procedure, although generally endorsed as a practice in tribunals for alerting parties before giving oral evidence (by way of alleged potential criticism) was never given statutory authority. Moreover, its utility, if not propriety, was severely criticised by Sir Richard Scott in the *Arms to Iraq Inquiry* in 1997. It must be assumed that Parliament, in the Inquiries Act 2005, specifically declined to enact the principle of Salmon letters.[3] Their re-emergence in a different guise in Rule 13, if otherwise valid, in fact goes beyond what Salmon letters required. It was never the practice of tribunals to require public inquiries to give notice of criticism that was contemplated in the reports to the sponsoring authority, although sometimes a party was told of an intended criticism (Sir Richard Scott did alert the Attorney-General and the Minister of State at the Foreign Office of potential criticisms of their conduct); and post-2005 Act inquiries have indicated the procedure to be adopted.[4]

What constitutes 'pressing grounds'?

8. It is interesting to note an observation of Mr Justice Laws in the ASA case. He noted (at p 1293G) that there was no reason why a public body's duty to express an opinion (such as a public inquiry under the Inquiries Act 2005) should be subject to any less rigid rules than a private individual. If anything, Mr Justice Laws added, the case is analogous to one where an administrative body has an adjudicative function and in the course of its public duties

[3] The Salmon Six Principles seem to survive, however, in an alternated form: see the decision of the Judicial Committee of the Privy Council in *The Queen, ex parte Mario Hoffman v The Commissioner of Inquiry and the Governor of the Turks and Caicos* [2012] UKPC 17, para 38.
[4] See Beer, *Public Inquiries*, paras 9.50-9.58.

publishes a ruling criticising some affected person, and the ruling is later disturbed or reversed by an appropriate appellate body. An inquiry under the Inquiries Act 2005 is an 'administrative body'. If those to be criticised should have some safeguard against publication, any warning letter should come from the Minister as publisher. In this connection it is as well to be reminded of the precise status of a public inquiry, best described by Murphy J in *Lawlor v Flood*:[5]

> It must be remembered that the report of the Tribunal, whilst it may be critical and highly critical of the conduct of a person or persons who give evidence before it, is not determinative of their rights. The report is not even a stage in a process by which such rights are determined. The conclusions of the Tribunal will not be evidence either conclusive or *prima facie* of the facts found by the Tribunal.

Furthermore, the findings as recommendations do not bind anybody. The sponsoring authority (whether it is a Minister or Parliament) can decline to accept any recommendation.

9. Finally, it is interesting to note the conclusion of the Ministry of Justice's *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005* in October 2010:

> We have no evidence of any serious suggestion that the Act should be repealed in any substantive way. The overwhelming evidence, however, is that the Inquiries Rules as currently drafted are unduly restrictive and do not always enable the most effective operation of the Act.[6]

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[5] [1999] IR 139 at 143.
[6] Cm 7943, para 70.