For the Treasury Committee

A REVIEW OF 'MAXWELLISATION'

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A. EXECUTIVE SUMMARY AND GUIDELINES

(1) 'Maxwellisation'

1. 'Maxwellisation' is a procedural practice which derives its name from litigation in the early 1970s involving Robert Maxwell. It is the practice whereby a person who faces criticism in a public report is given an opportunity to respond to such criticism prior to publication of the report. This is done either by providing the person with the passages of the draft report containing the proposed criticism or by providing a summary or the gist of the proposed criticism.[1]

2. For the purpose of this review, we have adopted the term '*Representations Process*' rather than '*Maxwellisation Process*'. We have done so because our chosen term more accurately describes the essential nature of the process, and also because it avoids the use of a phrase which, perhaps in part because of its association with Mr Maxwell, elicits strong and often hostile views.

(2) Purpose of the Review

3. It is self-evident that the procedures to be adopted by an inquiry which produces a public report must ensure fairness to those who may be criticised in that report. However, it is also essential, if a public report is to serve a useful purpose, that it is produced with as much expedition as reasonably possible. It should also be produced at a cost to the public purse which is reasonable in all the circumstances. There is a potential tension between the need for fairness, on the one hand, and the need for expedition and cost containment on the other hand.

4. In recent years, questions have been raised (for example, in press reports and in Parliament) as to whether certain inquiries have failed adequately to balance these competing needs. There has, in particular, been a widely publicised concern that recent inquiries have been too slow in producing their reports, and that the Representations Process has caused or contributed to this perceived delay. In the last 12 months, such concern has been directed at the HBOS Review (a non-statutory inquiry whose report, the HBOS Report, was published by the Financial Conduct Authority ('*FCA*') and the Prudential Regulation Authority ('*PRA*') in November 2015) and the Iraq Inquiry (a non-statutory inquiry whose report, the Report of the Iraq Inquiry, was published in June 2016).

[1] A public report might be produced following an inquiry, investigation or review. As we are not here concerned with any differences between these various processes, we use the word '*inquiry*' to cover each such process unless the context requires otherwise. Where we refer to an inquiry '*Chair*', that is a reference to the person with primary responsibility for the conduct of the inquiry (as here defined) and for the production of the report.

5. As a result of that concern, the Treasury Committee has commissioned this review of the Representations Process, with particular focus on public inquiries of a financial nature.[2] The Terms of Reference for this review are at Appendix 1. We are asked to set out (1) what the law requires in terms of a Representations Process, (2) the "*typical problems*" that arise where a Representations Process is conducted (including addressing public concern around the additional time and financial costs incurred), and (3) recommendations or a set of principles to identify ways to ensure the use of this process is fair and proportionate.

(3) What the law requires

6. Our legal analysis is set out in Section B below. As we explain there, it is an irony of the Maxwell litigation that the Court of Appeal rejected, twice, the proposition advanced by Mr Maxwell that he was legally entitled to be shown proposed criticism contained in a draft report, so as to enable him to make representations prior to publication of the report. Rather, the Court of Appeal held that a person should not be criticised in a public report without first having a fair opportunity to respond to that criticism. Providing that such an opportunity has been given, however, there is no requirement for the circulation of proposed criticism contained in a draft report.

7. It follows from this central legal principle that if a person has already been given a fair opportunity to respond to the substance of proposed criticism contained in a draft report (such opportunity being given at the evidence-gathering stage of an inquiry), there is no need to give that person a further opportunity to make any representations prior to publication of the report. Fairness requires that a person is given an opportunity to make representations prior to being criticised in a public report, but it does not require multiple opportunities.[3]

8. Notwithstanding the limited nature of the central legal principle stated in the Maxwell litigation (and approved by Lord Diplock in the House of Lords shortly afterwards[4]), since around 1991 (probably starting with the BCCI Inquiry) the Representations Process has become a standard feature where an inquiry produces a public report. This is the case whether the inquiry is statutory or non-statutory.[5] Indeed, the Inquiry Rules 2006, in effect, impose a mandatory requirement that every inquiry conducted under

[2] The letter dated 31 March 2016, from the Chairman of the Treasury Committee to the Chancellor of the Exchequer notifying him of this review, referred to the fact that the HBOS Report was published some 7 years after the failure of HBOS and that "*one of the reasons the report took so long to be published was the process of Maxwellisation, which eventually lasted for 14 months*".

[3] As Buckley LJ stated *In re Pergamon Press* (the first of the two Maxwell cases), fairness only requires that a person is afforded an opportunity to respond to proposed criticism after the hearing of evidence "*if he has not already had it*"; [1970] 1 WLR 388, 407C-F.

[4] *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 368D-E and 369D-F.

[5] A statutory inquiry is one which is provided for by a particular statute. A non-statutory inquiry is one which is set up without any statutory underpinning.

the Inquiries Act 2005 must include a Representations Process (and one of a particularly prescriptive and potentially onerous nature) if its report is to make an explicit or significant criticism of anyone.[6]

9. The result is that a person conducting an inquiry is now generally expected, and is frequently required by the body commissioning the inquiry, to conduct a Representations Process; it has become "*standard practice*".[7] This means that every person who faces criticism in a public report is given an opportunity to respond to such criticism prior to publication, even if that person has already had an opportunity to respond to the substance of that proposed criticism (i.e. during the evidence-gathering stage of the inquiry). This goes beyond what the law requires.

10. The adoption of this practice is probably the result of caution on the part of those conducting, or commissioning, public inquiries so as to avoid similar legal challenges to those mounted, unsuccessfully, by Mr Maxwell.

(4) The Representations Process in practice

11. For the purpose of conducting this review, we have obtained evidence from a variety of sources. We sought a broad range of views as to the utility of the Representations Process, including evidence as to the "*typical problems*" that arise where such a process is conducted. We have received valuable assistance from a wide category of individuals (particularly from authors of reports) and organisations. Appendix 2 is a list of those who have both provided evidence to us and have consented to the publication of that evidence.[8]

12. There is, in Section C below, a summary of the evidence we received by reference to certain key themes that emerged. The most notable features of the evidence are the following:

    a. The view of 10 out of the 12 report authors who had direct experience of the Representations Process was generally a positive one, with each concluding that its use had improved the quality of their reports. The exceptions were Lord

[6] The Inquiries Act 2005 seeks "*to provide a comprehensive statutory framework for inquiries*" (see Explanatory Notes to the Act). While Rule 13(1) of the Inquiry Rules 2006 provides only that a chairman "*may*" send a warning letter, Rule 13(3) provides that the inquiry report "*must not*" include explicit or significant criticism unless such a letter has been sent and a reasonable opportunity for response provided. Thus, as a matter of substance if not form, the Inquiry Rules 2006 create a legal requirement to conduct a Representations Process.

[7] The '*Inquiries Guidance*' (which is issued by the Cabinet Office for the purpose of setting out "*best practice guidance for all types of inquiry commissioned by Government – whether statutory or non-statutory, public or private*") refers (page 48) to a Representations Process as being "*now standard practice*"; see Cabinet Office *Inquiries Guidance: Guidance for Inquiry Chairs and Secretaries, and Sponsor Departments* (http://www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf).

[8] The list does not include those individuals who were the subject of a Representations Process, for the reason explained in paragraph 90 below.

Penrose (Report of the Equitable Life Inquiry) and Sir Robert Francis QC (Report of the Inquiry into the Mid Staffordshire NHS Foundation Trust). Lord Penrose considered that, while some form of Representations Process "*is essential in most, if not all, inquiries*", in his particular inquiry the representations received "*were generally of no use whatsoever*" (paragraph 101 below). Sir Robert Francis QC, while he said that the process resulted in "*a small number of factual errors being corrected*", expressed the view that the effort involved in conducting the Representations Process was disproportionate to the benefit obtained from it (paragraph 100 below).[9]

b. The time taken up by a Representations Process is capable of disproportionately slowing down the publication of a report. This appears to have been the case with the HBOS Report, where the Representations Process accounted for some 14 months out of a total of 38 months taken to produce the report (paragraph 121 below).

c. However, a carefully managed Representations Process need not lead to undue delay. The evidence we received suggests that the level of delay experienced with the HBOS Report is the exception rather than the rule, certainly for inquiries in the financial services sector. As regards the Report of the Iraq Inquiry, it appears that the Representations Process did not cause any material delay to the publication of the report (paragraph 117 below).

d. There was widespread recognition of the dangers of a Representations Process taking up unreasonable amounts of time and expense, and equally broad agreement that practical steps can be taken to manage the process in a proportionate way. These include certain steps aimed at controlling the length and format of representations. While our task is not to audit the specific reasons for the time taken to produce the HBOS Report, it appears that the delay might have been reduced if such steps had been applied more rigorously.

(5) Principal Conclusions

13. In the light of the legal analysis in Section B below and the evidence summarised in Section C below, our principal conclusions are as follows:

[9] This view may be explained at least in part by the fact that the Representations Process adopted was in accordance with Rules 13 to 15 of the Inquiry Rules which, as stated above, is particularly prescriptive and potentially onerous. In his evidence to the House of Lords Select Committee on the Inquiries Act 2005, entitled *The Inquiries Act 2005: Post-Legislative Scrutiny* (11 March 2014, HL Paper 143 of session 2013–14), (referred to herein as the 'House of Lords Select Committee Report'), Sir Robert Francis QC stated (quoted at paragraph 246): "*…I think my inquiry was extended by at least six months by having to undertake a rule 13 process*". It is also worth noting that, in his evidence to us, counsel to the inquiry took a slightly different view from Sir Robert Francis QC as to the value of the Representations Process in the case of that inquiry and report (paragraph 100 below).

a. The common law imposes no rigid requirement that a Representations Process must always be conducted. What is required is that a person be given a fair opportunity to respond to criticism prior to its publication in a report.

b. It follows that, if a person has already been given a fair opportunity to respond to the substance of a proposed criticism contained in a draft report (such opportunity being given at the evidence-gathering stage of an inquiry), there is no need to give that person a further opportunity to make any representations prior to publication of the report.

c. It is important that those conducting inquiries have flexibility to determine the procedures (including any procedures relating to the Representations Process) to be adopted for the purpose of fulfilling the terms of reference of the particular inquiry in a way that is fair, while recognising the importance of expedition and cost efficiency.

d. It is an error of approach (unless required to do so by Rules 13 to 15 of the Inquiry Rules 2006) to adopt a procedure, at the start of an inquiry, which includes a commitment to conduct a Representations Process applicable to every person who is to be criticised in the final report. Such an approach (in addition to going beyond what is required by the common law) inhibits flexibility by committing the author to conduct a Representations Process even in the case of persons who, by the time a draft report has been produced, have already received a fair opportunity to respond to proposed criticism.[10]

e. It follows that the procedures to be adopted for an inquiry should enable a decision to be made, once a draft report has been produced, as to whether or not to conduct a Representations Process and, if so, which persons should be invited to make representations and in respect of which proposed criticism.

f. The Inquiry Rules 2006 (Rules 13 to 15), in effect, impose a statutory obligation to conduct a Representations Process whenever an inquiry is conducted under the Inquiry Act 2005. Furthermore, the process required by these Rules is particularly prescriptive and potentially onerous. We endorse the recommendation of the House of Lords Select Committee on the Inquiries Act 2005 that Rules 13 to 15 should be revoked. The Government initially rejected this recommendation, but then agreed (in July 2015) to reconsider the position. It does not appear yet to have done so. It should now do so, and it should revoke Rules 13 to 15.[11]

[10] Frequently, the written procedural protocols drafted at the start of an inquiry will commit the Chair to conducting a Representations Process applicable to every person who is to be criticised in the final report. We consider this to be an error of approach.

[11] Such revocation is unlikely to require primary legislation, but would instead involve the exercise of the Lord Chancellor's rule-making power under section 41 of the Inquiries Act 2005.

g. It is generally appropriate to use the Representations Process as a 'sweeping-up' exercise so as to ensure fairness to those specific people who, by the time a draft report has been produced, have not already had a fair opportunity to respond to proposed criticism.

h. So, for example, if a particular person has already had a fair opportunity to respond to the substance of a proposed criticism contained in a draft report, it is neither legally necessary nor generally appropriate to conduct a Representations Process in respect of that person. And, if a person has already had the opportunity to respond to the substance of (say) 3 out of 4 proposed criticisms contained in a draft report, a Representations Process should generally only be conducted for that person in respect of the one proposed criticism for which a fair opportunity has not yet been given.

i. Thus, the Representations Process can (as a matter of law) and should (for reasons of expedition and cost efficiency) generally be used considerably more sparingly than is the case at present.

14. On the basis of these conclusions, we have drafted Guidelines to assist both those responsible for commissioning inquiries and those responsible for conducting inquiries and producing public reports. They are designed (1) to make clear that a Representations Process should not automatically be conducted in relation to every person and every proposed criticism in a draft report; (2) to identify ways of conducting a Representations Process efficiently (to the extent it is required at all); and (3) to reduce the need for a Representations Process, by ensuring that witnesses have as great an opportunity as possible to respond to the substance of potential criticism during the evidence-gathering stage of an inquiry.

15. As a matter of both principle and efficiency, it is preferable for witnesses to be given an opportunity to respond to the substance of potential criticism when giving evidence, rather than through a separate and subsequent Representations Process. As well as avoiding or minimising the delay caused by a Representations Process, presenting witnesses with potential criticism prior to the stage at which the report is drafted allows them to make their case before conclusions are formulated even on a draft and provisional basis.

16. In this way, the Guidelines seek to balance the need for ensuring fairness to those who may be criticised in a public report with the public interest in producing public reports as expeditiously and cost efficiently as reasonably possible. The Guidelines are only appropriate for those inquiries to which the Inquiry Rules 2006 (incorporating Rules 13-15 in their current form) do not apply.

(6) Guidelines

A. There is no common law requirement that a Representations Process should always be conducted as part of a public inquiry.

B. The central legal principle is that a person should not be criticised in a public report without first having a fair opportunity to respond to that criticism.

C. A criticism of a person is sufficiently serious to engage this legal principle if it may adversely affect their interests (including their career or reputation).

D. A fair opportunity to respond to such criticism does not require that the person is presented with the precise formulation of the criticism that might ultimately appear in a report; but rather requires that the person has been made aware of the substance of the proposed criticism and any further information necessary to enable them to address it.

E. If, by the time a draft report has been produced, a person has already had a fair opportunity to respond to the substance of proposed criticism contained in it (i.e. at the evidence-gathering stage of the inquiry), there is no need to give that person a further opportunity to make representations prior to publication of the report.

F. The Chair of an inquiry should have flexibility to determine the procedures to be adopted for the purpose of fulfilling the terms of reference of the particular inquiry, including flexibility to determine how best to ensure fairness to those who may be criticised in the published report. It follows that the Chair should not be required (whether by the body commissioning the inquiry or otherwise) to conduct a Representations Process.

G. The written procedural protocols drafted for the purpose of a particular inquiry ('*Procedural Protocols*') should generally enable the Chair to decide, once a draft report has been produced, whether it is necessary to conduct a Representations Process. This decision should be based on an assessment of whether those persons criticised in the draft report have already had a fair opportunity to respond to the substance of such proposed criticism.

   i. A Representations Process should generally only be conducted in respect of those persons whom the Chair considers have not already had a fair opportunity to respond to proposed criticism contained in a draft report.

   ii. Where the Chair considers that a particular person has not already had a fair opportunity to respond to some of the proposed criticisms contained in a draft report, a Representations Process should generally only be conducted for that person in respect of those criticisms for which no fair opportunity has yet been provided.

H. If the Chair decides to conduct a Representations Process, the mechanics of that process should seek to meet the needs not only of fairness but also of expedition and cost efficiency. In particular, careful consideration should be given to:

i. The time limits to be given to each person for responding. The Chair should, in general, adopt the shortest time limits consistent with providing the person with a fair opportunity to respond to the proposed criticism. The circumstances and extent of the criticism may justify longer or shorter periods being adopted for different persons. The time given should, in all but the most exceptional cases, be measured in weeks rather than months, and in appropriate cases may be a matter of days.

ii. Whether the Representations Process is to be conducted by providing the person with a copy of the parts of the draft report containing the proposed criticism; with a draft of the entire report; with a summary of the proposed criticism; or by any other method. In some cases (for example, where there is particular concern about leaks) it may be appropriate to allow relevant persons and their advisers to view a draft text at a particular location without being given a copy of the text.

iii. The circumstances (if any) in which a person will be permitted to make further representations i.e. after a first response to the Representations Process. A Representations Process involving more than one round of representations from any person should be exceptional.

iv. Whether a person who has been subject to a Representations Process (1) will be informed as to whether the responses have resulted in changes being made to the draft report, and (2) will be provided with a subsequent draft report in whole or in part. Generally, such information and material should not be provided.

I. When a Representations Process is conducted, the Chair may impose appropriate requirements for representations, and make clear that responses that fail to respect them may not be considered. For example, those making representations may be required to use a template, or to make representations directly by reference to specific paragraphs of a draft report, or to stay within a reasonable word limit.

J. Whenever a Representations Process is conducted, the Chair should resist any attempt by persons who are invited to participate in that process, or their advisers, to seek to 'negotiate' the conclusions of the report, or the terms in which those conclusions are expressed. While the Chair may properly ask follow-up questions or request evidence in relation to points raised during the Representations Process, a back-and-forth dialogue about the conclusions or their drafting should be avoided.

K. In order to reduce the need for a Representations Process, the Chair should consider incorporating the following procedures into any Procedural Protocols:

i. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with advance notice of the matters which are of interest to the inquiry. This need not take the form of a list of each question to be put to a person, but should identify the areas about which questions will be asked (with as much detail as the Chair considers appropriate in all the circumstances).

ii. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, where reasonably practicable, be provided with the main documents about which questions will be asked orally or which written evidence will be expected to address. This material should be provided to the person a reasonable time prior to the giving of evidence.

iii. Before a person gives evidence to the inquiry (whether orally or in writing), that person should, unless there is some compelling reason to the contrary, be provided with a summary of any adverse material which has been obtained and/or damaging evidence which has been given against them during the course of the inquiry. This summary should be provided to the person a reasonable time prior to that person giving evidence.

iv. Where the inquiry receives adverse material and/or damaging evidence against a person after that person has given evidence, consideration should be given to whether that person should be invited to give supplementary evidence (whether orally or in writing).

L. The Cabinet Office should maintain an online resource containing Procedural Protocols adopted by public inquiries (statutory and non-statutory) so that, when future inquiries are set up, Chairs can see what processes have been adopted in previous inquiries. This online resource should comprise: (1) the Procedural Protocols for those inquiries which, at the date of this review, have been conducted under the Inquiries Act 2005; (2) the Procedural Protocols for the reports identified in Appendix 3 to this review; and (3) the Procedural Protocols for inquiries set up after the date of this review which the Cabinet Office considers to be of significant public importance.[12] The Cabinet Office has agreed to provide this resource.

[12] It is not necessary that the online resource contain a comprehensive list of Procedural Protocols of public inquiries. The essential purpose is to enable Chairs and their advisers to have access to a broad selection of protocols, thereby informing their decision as to what procedures will best suit the needs of their particular inquiry (not just in relation to the Representations Process, but more generally).

B. WHAT THE LAW REQUIRES

(1) Historical development of the Representations Process

(i) Salmon letters

17. In 1963, Lord Denning produced the report of his non-statutory inquiry into the Profumo affair. In that report, he described his role as "*detective, inquisitor, advocate and judge*".[13] The process was conducted in private; and witnesses did not hear the evidence given against them or have any opportunity to challenge that evidence.

18. In 1966, the Royal Commission on Tribunals of Inquiry (chaired by Lord Justice Salmon) was set up to review the statutory framework for inquiries.[14] The Royal Commission's Report[15] commented that Lord Denning's Report into the Profumo affair had been "*generally accepted*" but that "*this was only because of Lord Denning's rare qualities and high reputation.*"[16] The Royal Commission concluded that "*no Government in the future should ever in any circumstances whatsoever set up a Tribunal of the type adopted in the Profumo case to investigate any matter causing nation-wide public concern.*"[17]

19. In particular, the Royal Commission considered that:[18]

> *When a person against whom allegations are made is not even allowed to hear the evidence brought against him, let alone to check it by cross-examination, when he has "never had the chance to rebut" the case against him, how can any judicially-minded Tribunal be satisfied, save in the most exceptional circumstances, that the allegations have been made out? In these most exceptional cases, if they ever occur, in which such a Tribunal felt justified in making an adverse finding against anyone, that person would feel and the public might also feel that he had a real grievance in that he had had no chance of defending himself. It follows that the odds against any such Tribunal being able to establish the truth, if the truth is black, are very heavy indeed, and accordingly the truth may remain hidden from the light of day.*

20. The Royal Commission was concerned to ensure that, in future, people should be given an opportunity to defend themselves before adverse findings were made against them. It considered this necessary not only in the interests of fairness to individuals but also as a means of reaching more reliable factual conclusions. Accordingly, the Royal Commission formulated six cardinal principles for the conduct of public inquiries. The second principle was that: [19]

> *Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations that are made against him and the substance of the evidence in support of them.*

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[13] *Lord Denning's Report* (Cmnd 2152, 1963), pages 2-3.
[14] Tribunals of Inquiry (Evidence) Act 1921, now superseded by the Inquiries Act 2005.
[15] *Report of the Royal Commission on Tribunals of Inquiry* (Cmnd 3121, 1966).
[16] *Ibid.,* paragraph 21.
[17] *Ibid.,* paragraph 42.
[18] *Ibid.,* paragraph 38.
[19] *Ibid.,* paragraph 32.

21. The six principles came to be known as the 'Salmon Principles', and the document sent when giving effect to the second principle came to be known as a 'Salmon letter'. Although the Salmon Principles were "*generally accepted and followed*" by inquiries for some years, they were later criticised as encouraging an overly legalistic approach.[20] In particular, in the 1996 report of his inquiry into the arms-to-Iraq affair, Lord Justice Scott (as he then was) observed disapprovingly that the Salmon Principles "*carry strong overtones of ordinary adversarial litigation*".[21] He considered that:[22]

> *[C]are should be taken lest by an indiscriminate adoption and application of the six 'cardinal principles' the inquiry's inquisitorial procedures become hampered by an unnecessary involvement of adversarial techniques and of lawyers acting for witnesses and others whose interests may lie in delay and obfuscation.*

22. The 'Salmon letter' process[23] is distinct from the Representations Process. The former concerns the notice given to a witness, before giving evidence, of the allegations against the witness and the supporting evidence. The latter concerns the opportunity given to comment after the evidence-gathering stage of the inquiry, and once provisional criticisms have been formulated.

(ii) The Representations Process

23. The term 'Maxwellisation' derives its name from litigation involving Robert Maxwell in the early 1970s. In June 1969, an American corporation (Leasco) made a takeover bid for Pergamon Press Ltd ('Pergamon'). Leasco bought many of the shares in Pergamon, made an offer to buy the rest, but in August withdrew the offer. Pergamon's share price fell. In September, in light of the controversy around the takeover and at the request of the City Takeover Panel, the Board of Trade appointed inspectors to investigate and report on Pergamon's affairs under section 165 of the Companies Act 1948. The inspectors sought to question a number of Pergamon's directors, including Mr Maxwell.

24. In October 1969, Leasco used its shareholding in Pergamon to remove and replace Mr Maxwell and certain other directors. Several of the replacements were Leasco personnel. In November, Leasco brought a claim in New York against Mr Maxwell and certain of his companies, alleging fraud and deceit in connection with the Pergamon share sale. Thus, the inspectors' questioning of Mr Maxwell and the other Pergamon directors took place against the backdrop of US litigation. The directors, however, refused to answer the inspectors' questions absent certain procedural assurances.

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[20] The House of Lords Select Committee Report (citation at footnote 9 above), paragraph 31.

[21] Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (Session 1995-96, HC Paper 115) Volume IV, section K4.

[22] *Ibid.*, paragraph K1.5. See also Richard Scott, 'Procedures at inquiries - the duty to be fair' (1995) 111 *Law Quarterly Review* 596.

[23] Now superseded by 'warning letters' within the framework of the Inquiries Act 2005 and Inquiry Rules 2006.

25. The inspectors gave an assurance that they would not "*criticis[e] anyone in either an interim report or a final report without first giving the person concerned an opportunity of giving us his explanation*". But they declined to give the more detailed and prescriptive assurances sought, including an undertaking to provide the subject of criticism with provisional conclusions. In response, the directors refused to answer anything other than the inspectors' introductory questions.

26. This impasse led to two Court of Appeal decisions: *In re Pergamon Press* and *Maxwell v Department of Trade and Industry*. As discussed below (paragraphs 30 to 43), both decisions rejected the proposition that, on the facts of the case, fairness required Mr Maxwell to be given an opportunity to make representations in response to the inspectors' provisional conclusions. Remarkably, therefore, the term 'Maxwellisation' derives its name from litigation which held that the process was <u>not</u> required.

27. Nevertheless, the prospect of similar legal challenges appears to have caused inspectors in subsequent company investigations to adopt a Representations Process.[24] And the Representations Process also came to be adopted by those conducting public inquiries. It appears that the first public inquiry to adopt the Representations Process was conducted by Lord Justice Bingham (as he then was) into the collapse of the Bank of Credit and Commerce International (the '*BCCI Inquiry*'). In 1991, Lord Bingham set out in his statement of proposed procedure that:[25]

> *Provisional findings of fact will be disclosed to the subjects of them, who will be given the opportunity to suggest corrections or modifications. In particular, any individual or department which may be criticised, or upon whom the findings might be thought to reflect unfavourably, will be given a full opportunity to challenge criticisms and rebut adverse findings of fact before any final conclusion is reached.*

28. Since the BCCI Inquiry, the Representations Process has become a familiar feature of public inquiries. Indeed, the '*Inquiries Guidance*' prepared by the Cabinet Office[26] refers to the Representations Process as "*now standard practice*" (in the case of statutory and non-statutory inquiries commissioned by Government). And the Iraq Inquiry, set up in June 2009 under the chairmanship of Sir John Chilcot, informed witnesses that (emphasis added):[27]

> *If the Inquiry expects to criticise an individual in the final report, that individual will, <u>in accordance with normal practice</u>, be provided with relevant sections of the draft report in order to make any representations on the proposed criticism prior to publication of the final report.*

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[24] As noted by Robert Walker J in *Re Atlantic Computers plc* [1998] BCC 200 at 206C.

[25] Paragraph 6 of Lord Bingham's statement of "*the important procedural steps which the [BCCI] Inquiry proposes to follow*", 1 August 1991.

[26] Full citation at footnote 7 above.

[27] *Protocol for witnesses giving evidence to the Iraq Inquiry*, paragraph 10 (www.iraqinquiry.org.uk/the-inquiry/protocols/witnesses-giving-evidence/).

(2) The central legal principle

29. The Court of Appeal twice rejected arguments that the Representations Process was legally required in relation to the investigation by the company inspectors into the Pergamon affair. Instead, the court set out the general principle that, while a person should not be criticised in a report without having had a fair opportunity to respond to that criticism, there is no requirement for that opportunity to involve the circulation of provisional findings or conclusions contained in a draft report.

(i) The Pergamon case[28]

30. The issue in the *Pergamon* case was whether witnesses were entitled to refuse to answer questions in the absence of an assurance that they would be shown, and allowed to comment on, any provisional conclusions subsequently reached by the inspectors. Notably, the inspectors explained in one of their certificates to the court that providing an opportunity to respond to every provisional conclusion "*would involve our trying right out every matter of criticism and would make our task impossible. It would lengthen our inquiry to such an extent as to make our report useless.*"[29]

31. Lord Denning M.R., giving the leading judgment in the Court of Appeal, set out the following statement of principle (emphasis added):[30]

> *The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.*

32. The consequence of this central legal principle is that, if a fair opportunity to make representations has already been provided by the time a draft report has been produced (i.e. during the evidence-gathering stage of an inquiry), no further opportunity to make representations is required. As Lord Denning M.R. stated (emphasis added):[31]

> *It was suggested before us that whenever the inspectors thought of deciding a conflict of evidence or of making adverse criticism of someone, they should draft the proposed passage of their report and put it before the party for his comments before including it. But I think this also is going too far. This sort of thing should be left to the discretion of the inspectors. They must be masters of their own procedure. They should be subject to no rules save this: they must be fair. This being done, they should make their report with courage and frankness, keeping nothing back. The public interest demands it.*

[28] *In re Pergamon Press* [1970] 1 WLR 1075.
[29] *Ibid.*, 1084C.
[30] *Ibid.*, 399H-400A.
[31] *Ibid.*, 400F-G.

33. In his concurring judgment, Sachs LJ emphasised the importance of an appropriately flexible approach to procedural fairness:[32]

> *In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand…It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen and, indeed, perhaps even frustrate the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective …*
>
> *So many are the permutations and combinations which may arise in an investigation that it seems to me quite plain that it is impracticable and, indeed, ill-advised to attempt to lay down a set of rules applicable to all witnesses at all times.*

34. Buckley LJ, also agreeing with the dismissal of the directors' case, adopted a substantially similar approach. In particular, he stated that fairness only requires that a person is afforded an opportunity to respond to proposed criticisms after the hearing of evidence "*if he has not already had it*".[33]

(ii) The Maxwell case[34]

35. On 2 June 1971, the inspectors appointed to investigate Pergamon's affairs signed their first interim report. It was highly critical of Mr Maxwell. He then issued proceedings against the inspectors and the Department of Trade seeking declarations that the inspectors had not acted in accordance with the rules of natural justice and injunctions to restrain the inspectors from proceeding further.

36. At first instance, Forbes J heard the interim application and refused to grant an injunction. He did, however, make certain remarks which were broadly favourable to Mr Maxwell's case. In particular, he considered that a proper inquiry before the inspectors had three stages:[35]

> *First, the hearing of evidence (including Mr. Maxwell's) and the study of documents; secondly, the inspectors coming to a conclusion (necessarily tentative in the circumstances); and thirdly, putting the substance of that conclusion to the witness.*

37. Forbes J therefore expressed the view that:[36]

> *At no time did [the inspectors] formulate their tentative criticisms and give Mr. Maxwell an opportunity of dealing with them. It follows that, in my judgment, the probability is that the trial judge would find a failure by the inspectors to direct themselves properly as to the rules of natural justice which should govern their investigations.*

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[32] *Ibid.*, 403F-G and 404G.
[33] *Ibid.*, 407C-F.
[34] *Maxwell v Department of Trade and Industry* [1974] QB 523.
[35] Quoted in the judgment of Lord Denning M.R. at 533C.
[36] *Ibid.*, 532F.

38. That interim view proved to be incorrect. When the actions against the inspectors and the Department of Trade came on for a consolidated trial in December 1972, the trial judge, Wien J, dismissed Mr Maxwell's claim. Wien J stated:[37]

> *I am quite satisfied that in every instance the inspectors gave proper and sufficient notice to Mr. Maxwell of what was said against him or what it was that he had to meet....I consider that they succeeded in being eminently fair and that the plaintiff has no just cause for complaint.*

39. Mr Maxwell appealed. As in *Pergamon*, Lord Denning M.R. gave the leading judgment in the Court of Appeal. Again, he rejected the argument that fairness required that tentative conclusions be put to the witnesses after the hearing of evidence had concluded (i.e. the third stage identified by Forbes J). He stressed the unacceptable implications of such an approach (emphasis added):[38]

> *Just think what it means. After hearing all the evidence, the inspectors have to sit down and come to tentative conclusions. If these are such as to be critical of any of the witnesses, they have to reopen the inquiry, recall those witnesses, and put to them the criticisms which they are disposed to make. What will be the response of those witnesses? They will at once want to refute the tentative conclusions by calling other witnesses, or by asking for further investigations. In short, the inquiry will develop into a series of minor trials in which a witness will be accused of misconduct and seek to answer it. <u>That would hold up the inquiry indefinitely. I do not think it is necessary. It is sufficient for the inspectors to put the points to the witnesses as and when they come in the first place</u>. After hearing the evidence, the inspectors have to come to their conclusions. These need not be tentative in the least. They can be final and definite, ready for their report.*

40. It was argued on behalf of Mr Maxwell that not all of the criticisms contained in the interim report had in fact been put to him when he was giving his evidence. In an effort to support this argument, counsel for Mr Maxwell carried out a "*detailed analysis of the voluminous documents*".[39] This approach was rejected by Lord Denning (emphasis added):[40]

> *I am not going further into all the details to which we have been subjected, for this reason: <u>I think this line of attack is entirely misconceived</u>. It must be remembered that the inspectors are doing a public duty in the public interest. They must do what is fair to the best of their ability. They will, of course, put to a witness the points of substance which occur to them - so as to give him the chance to explain or correct any relevant statement which is prejudicial to him. They may even recall him to do so. But they are not to be criticised because they may on occasion overlook something or other. Even the most skilled advocate, expert in cross-examination, forgets now and again to put this or that point to a witness and we all excuse him, knowing how difficult it is to remember everything. The inspector is entitled to at least as much consideration as the advocate. To borrow from Shakespeare, he is not to have "all his faults observed, set in a notebook, learn'd, and conn'd by rote," to make a lawyer's*

[37] *Ibid.*, 533A.
[38] *Ibid.*, 534B-D.
[39] *Ibid.*, 534F.
[40] *Ibid.*, 536B-D.

> *holiday. His task is burdensome and thankless enough as it is. It would be intolerable if he were liable to be pilloried afterwards for doing it. No one of standing would ever be found to undertake it. The public interest demands that, so long as he acts honestly and does what is fair to the best of his ability, his report is not to be impugned in the courts of law.*

41. Orr LJ gave a brief judgment agreeing with Lord Denning M.R. Quoting *Pergamon* with approval, he concluded that:[41]

> *… a clear distinction exists for the present purpose between an inquiry based on a charge or accusation and an investigation such as the present in which the inspectors are required in the public interest to find out what has happened, and in the course of so doing form certain views or conclusions. In the former case it is essential that the person against whom the accusation or charge is made should know its terms. In the latter, on the authority to which I have referred, the only requirement is, in my judgment, as stated by Lord Denning M.R. …*

42. Lawton LJ, who also dismissed the appeal, stated that (emphasis added):[42]

> *The researches of counsel have not produced any other case which has suggested that at the end of an inquiry those likely to be criticised in a report should be given an opportunity of refuting the tentative conclusions of whoever is making it. Those who conduct inquiries have to base their decisions, findings, conclusions or opinions (whichever is the appropriate word to describe what they have a duty to do) on the evidence. In my judgment they are no more bound to tell a witness likely to be criticised in their report what they have in mind to say about him than has a judge sitting alone who has to decide which of two conflicting witnesses is telling the truth. The judge must ensure that the witness whose credibility is suspected has a fair opportunity of correcting or contradicting the substance of what other witnesses have said or are expected to say which is in conflict with his testimony. Inspectors should do the same but I can see no reason why they should do any more.*

43. As Lawton LJ made clear, fairness may require that a person be given an opportunity to address not only criticisms of their conduct but also negative findings about the credibility of their evidence. That is because a rejection of a person's evidence may in itself amount to an adverse finding.[43]

(3) Subsequent authorities

44. Less than seven months after the Court of Appeal's decision in *Maxwell*, the central legal principle set out in *Pergamon* and *Maxwell* was approved by Lord Diplock in a decision of the House of Lords.[44] He stated:

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[41] *Ibid.*, 538E.

[42] *Ibid.*, 541B-C.

[43] The position will, however, depend on all the circumstances. For example, a rejection of evidence as being dishonest or disingenuous will risk serious reputational harm for the relevant witness. That will not necessarily be the case where the evidence is rejected on the basis that memories have faded with time. Accordingly, fairness will impose greater procedural demands in the former situation than in the latter.

[44] *F Hoffmann La Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295, 368D-E and 369D-F.

> *…I would accept that it is the duty of the commissioners to observe the rules of natural justice in the course of their investigation – which means no more than that they must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may adversely affect him*."

45. Subsequent authorities have illustrated the practical implications of that principle. We set out below the key themes which have emerged.

(i) To which inquiries, investigations and reviews does the principle apply?

46. The *Pergamon* and *Maxwell* decisions were made in relation to an investigation under section 165 of the Companies Act 1948. However, the Court of Appeal restated the same "*fundamental rule*" in a challenge to an investigation by the Race Relations Board, and noted that it applied to "*many bodies who are required to make an investigation and form an opinion*".[45]

47. More recently, in a carefully reasoned decision refusing permission to bring a judicial review claim against investigators appointed by the Treasury under section 43A of the Insurance Companies Act 1982, Collins J adopted the *Pergamon* approach and stated that "*it seems to me that the principles apply really across the board*".[46] We agree, subject to the proviso that where a public report is prepared under a statutory framework (such as the framework set out by the Inquiries Act 2005 and Inquiry Rules 2006) the statute may impose different requirements regarding an opportunity to make representations before criticisms are made. The two principal relevant statutory frameworks for our purposes are considered in paragraphs 61 to 78 below.[47]

(ii) Who is a 'person' capable of being criticised?

48. Although Lord Denning M.R. in *Pergamon* referred to criticism of a "*man*", it is clear that fairness can require that any natural or legal person be afforded an opportunity to make representations[48], even if the person is a public body.[49] The reputation and commercial success of legal persons can plainly be adversely affected by criticisms in public reports.[50] Accordingly, those preparing public reports should ensure that a fair

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[45] *R. v Race Relations Board Ex p. Selvarajan* [1975] 1 WLR 1686, 1693H-1694D.
[46] *Re R* [2001] EWHC Admin 571, paragraph 24.
[47] The duty to be fair is a public law duty. The financial regulators are clearly under a public law duty to act fairly. Those who prepare public reports on their behalf are likely also to be subject to this duty. By contrast, skilled persons appointed by firms pursuant to a requirement under section 166 of the Financial Services and Markets Act 2000 are likely (absent special circumstances beyond the bare fact of their appointment) to fall on the other side of the line: see *R(Holmcroft Properties Limited) v KPMG LLP & Ors* [2016] EWHC 323 (Admin), paragraphs 23-48.
[48] *R v Commission for Racial Equality ex p Westminster City Council* [1985] ICR 827, 841B-C.
[49] *R. v Secretary of State for the Environment Ex p. Hammersmith and Fulham LBC* [1991] 1 AC 521, 598F.
[50] As noted in Leveson LJ's ruling, on 1 May 2012, on the application of Rule 13 of the Inquiry Rules 2006 (the 'Leveson 1 May 2012 ruling'), paragraph 26 (http://webarchive.nationalarchives.gov.uk/20140122145147/http://www.levesoninquiry.org.uk/wp-content/uploads/2011/11/Application-of-Rule-13-of-the-Inquiry-Rules-2006.pdf).

opportunity is given both to natural and legal persons before making criticisms of them.

49. Practical difficulties may arise in separating out legal persons from the individuals through whom they act. First and foremost, it is the subjects of the proposed criticism who must be provided with a fair opportunity to make representations before the criticism is made. The key task is therefore to identify the subject or subjects of the criticism (who may be legal persons, unincorporated associations or natural persons).[51] That task will require close consideration of the particular language of the particular proposed criticism.

(iii) What amounts to a sufficient 'criticism'?

50. The question is whether a person's "*interests (including in that term career or reputation) may be adversely affected*" by the proposed criticism.[52] Identifying what amounts to a sufficient 'criticism' is a task of significant practical importance. However, any attempt to elaborate on the legal test in the abstract would be liable to lapse into unhelpful paraphrase. Instead, we provide practical suggestions on how to approach the legal test in Section C(6) below (paragraphs 129 to 134).

51. As apparent from above (paragraph 43), it is a matter of common sense as to whether a refusal to accept a witness's evidence can be seen as amounting to a 'criticism' that adversely affects their interests. This is unlikely to be the case where evidence is treated as an honest attempt to give an accurate account but such evidence is rejected due to the degradation of memory over time or other similarly blameless factors.[53]

(iv) What amounts to a fair opportunity to rebut?

52. Lord Denning M.R stated in *Pergamon* that a person must be given a *"fair opportunity for correcting or contradicting what is said against him"* and "*[the inspectors] need not quote chapter and verse. An outline of the charge will usually suffice*."[54]

53. Later courts have offered a variety of glosses on those propositions. It has been said, for example, that it is the "*gist*" of the criticism that must be provided.[55] What amounts

[51] Leveson 1 May 2012 ruling (footnote 50 above), paragraphs 27-28.
[52] *Mahon v Air New Zealand Ltd* [1984] AC 808, 820H. See also *R. v Race Relations Board Ex p. Selvarajan* (footnote 45 above), 1693H-1694D.
[53] See *Public Disclosure Commission v Isaacs* [1988] 1 WLR 1043 (PC), 1050B-E. Further, in relation to Rule 5 of the Inquiry into Historical Institutional Abuse Rules (NI) 2013, see *Re BP's Application for Judicial Review* [2015] NICA 20, [43]. Leveson LJ appeared to adopt a more generous approach to witnesses in this regard under Rules 13 to 15 of the Inquiry Rules 2006: see Leveson 1 May 2012 ruling, paragraph 55.
[54] *In re Pergamon Press* [1971] Ch 388, 399H-400A.
[55] *Meadowvale Stud Farm v Stratford County Council* [1979] 1 NZLR 342, 346. See also the classic English authority of *R. v Secretary of State for the Home Department ex parte Doody* [1994] 1 AC 531, 560G.

to a sufficient "*gist*", however, will depend on the context.[56] A helpful formulation is that of Collins J (emphasis added):[57]

> *Fairness does not require that a person to be criticised knows from whom or from what source or why those criticisms have been made. What he needs to know is that the criticism has been made and what that criticism is and to be given sufficient information about it to enable him to deal with it and to make the necessary investigations on his own side and to come up with any explanations or to set right any errors of fact which may lie behind it…*

54. There will be cases in which the nature of the inquiry is such that the possibility of the proposed criticism has been readily apparent from the outset. In those cases, provided the subject of the criticism is able to give evidence, a fair opportunity to make representations will come naturally.[58] But such obvious cases are not the only ones in which a fair opportunity to meet proposed criticisms can be provided at the evidence-gathering stage. Where a potential criticism emerges in the course of an inquiry, the relevant person may still be able to respond to it by being notified of the substance of the criticism before giving evidence. Even where a potential criticism only emerges after the relevant person has given evidence, consideration can be given to recalling that person to give supplementary evidence (again, after having been notified of the substance of the criticism).

55. We refer to 'the substance of the criticism' because, as made clear by the cases cited above, it is not necessary for a person to be presented with the precise formulation of a criticism in the form that might ultimately appear in a report. It is enough if the person is made aware of the substance of the criticism and sufficient information about it to enable him to address it. The question is one of substance rather than form: there is no requirement for the equivalent of a formal criminal indictment or civil law statement of case.

56. In some cases, a significant amount of detail may be required in order for the proposed criticism to be properly understood and addressed. In other cases, a very short description will suffice. Chairs should in each case exercise their discretion in the particular circumstances of their inquiry.

(v) What considerations are relevant once it is decided that a Representations Process should be used?

57. The courts have emphasised the following factors:

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[56] See, by way of analogy, *Groupe Eurotunnel SA v Competition Commission* [2013] CAT 30; [2014] Comp. AR 77, paragraphs 224-225.

[57] *Re R* (footnote 46 above), paragraph 21. See also *Furnell v Whangerei High Schools Board* [1973] AC 660 (PC), 685A.

[58] *House of Lords Select Committee Report* (footnote 9 above), paragraph 244. See also *Stewart v Secretary of State for Scotland* 1996 SC 271, 284, 286 and 288 (concerning an investigation into fitness for office under section 12(1) of the Sheriff Courts (Scotland) Act 1971, now repealed).

a. First, where there is a public interest in the efficient and expeditious conclusion of the inquiry, this can and should be taken into account when determining how to carry out any necessary Representations Process exercise.[59]

b. Secondly, the so-called process of 'Re-Maxwellisation' (whereby a person is given notice of amended provisional criticisms, following a first round of a Representations Process, in order to allow for a further round of comments) is not required unless the amended proposal include new criticisms that the person has not previously had a fair opportunity to address.[60]

c. Thirdly, those preparing public reports must be suitably flexible in creating an appropriate procedure for any required Representations Process so as to ensure that the object of the inquiry is not frustrated. For example, it may be appropriate for a person to be given an opportunity to respond orally rather than in writing.[61]

(vi) Does Article 6 of the European Convention on Human Rights require a Representations Process?

58. Article 6(1) of the European Convention on Human Rights ('ECHR') provides that: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*"

59. It is unlikely that Article 6 ECHR will be engaged in relation to public reports covering financial matters. Such reports are typically not based on a charge or allegation of any kind, but rather are concerned with making findings and recommendations on matters of public concern. Accordingly, such reports are unlikely to involve any "*determination*" of "*civil rights and obligations or of any criminal charge*".[62]

60. It has, however, been argued that damage to reputation by a finding in a public report may be sufficient to engage Article 6 ECHR.[63] Whatever the merits of that argument, the key point for present purposes is that the common law duty to act fairly already requires that the subject of proposed criticism be given a fair opportunity to contradict or correct it. Accordingly, even on the assumption that Article 6 ECHR is engaged, it

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[59] *Wiseman v. Borneman* [1971] AC 297, 308G. See also, more recently, *Re BP's Application for Judicial Review* (above), paragraphs 23-29.

[60] *R(Clegg) v Secretary of State for Trade and Industry* [2001] EWHC Admin 394, paragraph 51 (affirmed on appeal, where the point was not addressed: [2002] EWCA Civ 519; [2003] BCC 128).

[61] *Ibid*., paragraph 50.

[62] See, by way of analogy, *IJL v United Kingdom* (29522/95) [2002] BCC 380, paragraph 100; *Al-Fayed v United Kingdom* (17101/90) (1994) 18 EHRR 393, paragraph 61. See also the earlier admissibility decisions by the European Commission of Human Rights in *Goodman International v Ireland* (19538/92, 12 January 1993), and *McKenzie v UK* (22301/93, 1 December 1993).

[63] Helen Quane, 'Challenging the report of an independent inquiry under the Human Rights Act' [2007] *Public Law* 529, 535-539. This argument, based on damage to reputation, faces particular difficulty in relation to inquiries under the Inquiries Act 2005 in light of the immunity provisions in section 37 of the Act: see Jason Beer QC, *Public Inquiries* (2011), paragraphs 11.11-11.12.

does not in our view require any greater opportunity to make representations than the common law principle already ensures. The High Court in Northern Ireland has so held.[64]

(4) Specific statutory regimes

61. An inquiry or investigation which leads to the production of a public report may be statutory (i.e. conducted under a specific statutory framework) or non-statutory. It is apparent from the list of reports at Appendix 3 that all bar 2 of the 10 public reports in financial services-related matters have been non-statutory.

62. There are, however, a number of possible statutory bases for the conduct of inquiries or investigations. Two require particular consideration:

a. First, Part 5 of the Financial Services Act 2012 ('*the 2012 Act*'). This contains a bespoke regime for certain inquiries and investigations in the financial services sphere, which confers a discretion on those conducting inquiries and investigations to determine their procedure. That discretion must be exercised in accordance with the general common law duty to act fairly. Inquiries and investigations under Part 5 of the 2012 Act are, therefore, subject to the central legal principle emerging from the *Pergamon* and *Maxwell* decisions.

b. Secondly, the Inquiries Act 2005 ('*the 2005 Act*') and Inquiry Rules 2006 ('*the 2006 Rules*'). This regime is not specifically focused on inquiries into financial matters. The 2006 Rules prescribe a detailed 'warning letter' process which is analogous to a Representations Process and has recently been analysed by the House of Lords Select Committee on the Inquiries Act 2005.

(i) Part 5 of the Financial Services Act 2012

63. In broad summary, Part 5 of the Financial Services Act 2012 imposes a duty on the financial regulators (the FCA, the PRA and the Payment Systems Regulator ('*PSR*')) to investigate and report to the Treasury in three main circumstances:

a. Where it appears to the regulator that a serious regulatory failure has occurred.[65]

b. Where it appears to the Treasury that a serious regulatory failure has occurred.[66]

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[64] *Re Tiernan's Application for Judicial Review* [2003] NIQB 60, paragraph 12. Further, the English High Court has rejected the argument that common law fairness and Article 6 ECHR required an opportunity to make representations before a critical report was made by the election court to the High Court under section 145(4) of the Representation of the People Act 1983: *R (Khan) v The Election Commissioner for the Aston Ward of Birmingham City Council* [2009] EWHC 1757 (Admin), paragraphs 15-23.

[65] See sections 73, 74 and 76A of the 2012 Act in relation to the FCA, PRA and PSR respectively (effectively defining regulatory failure differently in relation to each regulator in light of their distinctive regulatory remits and objectives).

[66] *Ibid.*, sections 73(2), 74(3) and 76A(2).

c. Where it appears to the Treasury that it is in the public interest that the regulator should undertake an investigation into relevant events.[67]

64. Where a regulator is required to carry out an investigation in any of these three circumstances, "*it is for the regulator to decide how it is to be carried out*",[68] subject to any directions given to the regulator by the Treasury on matters including the "*conduct of the investigation*" and "*the making of reports*".[69] The regulator in determining how to carry out the investigation, and the Treasury in exercising its power to give directions, "*must have regard to the desirability of minimising any adverse effect that the carrying out of the investigation may have on the exercise by the regulator of any of its other functions*".[70] Further, each regulator is required to issue a statement of policy on its conduct and conclusion of investigations under Part 5 including, in particular, "*how it will carry out investigations under the relevant sections*".[71]

65. Part 5 confers substantial discretion on the regulators to decide how they will conduct investigations, and to define the policy to which they will have regard.[72] The FCA and PRA have each issued a statement of policy; and, as regards the Representations Process, the relevant policies are substantially similar. The FCA's policy states: "*Should it be necessary, those subject to potential criticism will be given an opportunity to make representations in response before the report is finalised and sent to the Treasury*". That policy statement does not require the FCA to conduct a Representations Process more extensive than that required at common law.

66. Part 5 also empowers the Treasury to arrange independent inquiries by appointing such person as it considers appropriate to hold the inquiry.[73] This power can be exercised in three specified situations (essentially those in which there appears to the Treasury to have been a serious regulatory failure).[74] The appointed person "*may… determine the procedure to be followed in connection with the inquiry*",[75] subject again to the

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[67] *Ibid.*, section 77. As defined in section 77(3)-(4), "*relevant events*" are those that have occurred on or after 1 December 2001 in relation to "*(a) a collective investment scheme, (b) a person who is, or was at the time of the events, carrying on a regulated activity (whether or not as an authorised person), (c) listed securities or an issuer of listed securities, or (d) a regulated payment system.*"

[68] *Ibid.*, section 78(1).

[69] *Ibid.*, section 78(5).

[70] *Ibid.*, section 78(2) and (7).

[71] *Ibid.*, section 80.

[72] FCA, *How the Financial Conduct Authority will investigate and report on regulatory failure* (April 2013), paragraph 7.13 (https://www.fca.org.uk/static/fca/documents/how-fca-will-investigate-and-report-regulatory-failure.pdf). See PRA, *Policy Statement: Conducting statutory investigations* (April 2013), paragraph 32 (http://www.bankofengland.co.uk/publications/Documents/other/pra/conductstatinvestigations.pdf). It appears that the PSR is yet to issue a statement of policy under section 80 of the 2012 Act.

[73] Section 69 of the 2012 Act.

[74] *Ibid.*, section 68.

[75] *Ibid.*, section 70(1)(c).

power of the Treasury to give directions.[76] Here also, the central legal principle of fairness, as set out above, will apply.

(ii) Inquiries Act 2005 and Inquiry Rules 2006

67. The 2005 Act repealed a large number of statutory provisions which had previously provided statutory bases for inquiries to be set up by Ministers.[77] With the exception of specialist regimes (such as Part 5 of the Financial Services Act 2012), the 2005 Act is now the sole basis on which Ministers can establish statutory inquiries. As set out in section 1(1) of the 2005 Act:

> *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 public concern that particular events may have occurred.*

68. An inquiry under the 2005 Act is to be undertaken by a Chair (alone or with one or more other members).[78] Section 17 makes the following provision regarding the Chair's approach to evidence and procedure:[79]

> *(1) Subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.*
>
> *(2) In particular, the chairman may take evidence on oath, and for that purpose may administer oaths.*
>
> *(3) In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others).*

69. Section 41 of the 2005 Act allows for rules to be made concerning "*matters of evidence and procedure in relation to inquiries*". The Lord Chancellor made the 2006 Rules in exercise of this power.[80] Rules 13 to 15 set out a detailed and prescriptive 'warning letter' procedure that is analogous to, but potentially more onerous than, the Representations Process that has become "*standard practice*" in non-statutory inquiries.

70. Rule 13 provides that the inquiry chairman "*may*" send a warning letter to specified people including "*any person…who may be subject to criticism in the report, or any interim*

[76] *Ibid.,* section 69(2)-(3).
[77] Sections 48 and 49 and Schedules 2 and 3 of the 2005 Act.
[78] *Ibid.,* section 3.
[79] *Ibid.,* section 17 (emphasis added).
[80] Analogous Scottish rules are contained in the Inquiries (Scotland) Rules 2007. No similar rules have been made by the National Assembly for Wales. Northern Ireland Ministers have not made rules under the 2005 Act, but have used their powers under section 21 of the Inquiry into Historical Institutional Abuse (Northern Ireland) Act 2013 to make rules governing the ongoing Inquiry into Historical Institutional Abuse.

report."[81] This is a power and not an obligation. However, the final sub-paragraph of Rule 13 provides that:[82]

> *(3) The inquiry panel must not include any explicit or significant criticism of a person in the report, or in any interim report, unless –*
>
> *(a) the chairman has sent that person a warning letter; and*
>
> *(b) the person has been given a reasonable opportunity to respond to the warning letter.*

71. Thus, in order for the panel to include an "*explicit or significant criticism*" in a report, it must first send a warning letter to the person it proposes to criticise. This plainly goes beyond what is required by the common law (by requiring such a letter even when a fair opportunity to meet the criticism has already been given). Rule 15 sets out the required content of the warning letter, which must "*(a) state what the criticism or proposed criticism is; (b) contain a statement of the facts that the chairman considers substantiate the criticism or proposed criticism; and (c) refer to any evidence which supports those facts*". Again, this plainly goes beyond the common law, which more flexibly requires only that the subject of the criticism be provided with its substance and any further information necessary to address it.

72. In May 2013, the House of Lords Select Committee on the Inquiries Act 2005 was set up "*to consider the law and practice relating to inquiries into matters of public concern, in particular the [2005 Act]*".[83] The House of Lords Select Committee Report was published early in 2014. It concluded that the rules on the warning letter process "*are highly detailed and go far beyond what is necessary*".[84] It stated that "*We believe that circumstances are so varied that fixed rules are unnecessary and unhelpful.*"[85]

73. The Report, based on the evidence that the Select Committee heard, referred to the "*great difficulty*" caused by the interpretation of the 2006 Rules and their practical implementation.[86] In particular, the Report recorded the following evidence provided to the Select Committee:

    a. By Leveson LJ (Leveson Inquiry): "*…if I had obeyed [Rule 13] to the letter, [it] would have killed any prospect of doing the report in time*"; and, as regards Rule 15: "*I think it is rule 15 that required me to set out the potential criticism, the facts forming the basis of the criticism, and all the evidence. Had I done that in terms, I need never have finished because they were all very specific.*"

    b. By Robert Jay Q.C. (now Mr Justice Jay) (counsel to the Leveson Inquiry): "*Rule 15 caused us huge grief and a huge amount of work and incurring of public expense. I think literally thousands of hours of work went into the generic letter.*"

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[81] Rule 13(1)(c) of the 2006 Rules.
[82] *Ibid.,* rule 13(3).
[83] *House of Lords Select Committee Report* (footnote 9 above), Terms of Reference.
[84] *Ibid.,* paragraph 245.
[85] *Ibid.,* paragraph 244.
[86] *Ibid.,* paragraphs 247-251.

c. By Sir Robert Francis (Report of the Inquiry into the Mid Staffordshire NHS Foundation Trust): "*…in practice I think my inquiry was extended by at least six months by having to undertake a rule 13 process.*"

74. Recommendation 25 of the Report was as follows:[87]

> *We recommend that rules 13–15 of the Inquiry Rules 2006 should be revoked and a rule to the following effect substituted: "If the chairman is considering including in the report significant criticism of a person, and he believes that that person should have an opportunity to make a submission or further submission, he should send that person a warning letter and give him a reasonable opportunity to respond."*

75. The Government initially rejected Recommendation 25 in its response of June 2014.[88] The reason for the rejection was stated as follows:

> *The Government rejects this recommendation because rule 13 encapsulates what was the practice of most pre-2005 Act inquiries (and is still the practice of many non-statutory investigations) in (i) sending a 'Salmon latter' giving notice of potential criticism of a person before he or she is called to give evidence, and (ii) giving a participant who is to be criticised in an interim or final report the opportunity to comment on a proposed criticism before publication. The power to send a warning latter contained in rule 13(1) is discretionary, although in the Treasury Solicitor's Department's experience is almost universally adopted by inquiry chairs; only the requirement to give an opportunity to respond to criticism contained in rule 13(3) is mandatory. The Treasury Solicitor's Department has advised that the drafting of rule 13 is not defective.*

76. Following this statement by the Government, a number of speeches were given in the House of Lords in support of Recommendation 25[89]. As a result of those speeches, in July 2015, Caroline Dinenage MP stated, on behalf of the Ministry of Justice, that:[90]

> *In the light of the strength of argument in the debate…we accept that the process of Maxwellisation and the related rules should be reconsidered to see whether greater clarity can be given to both chairmen and those who may be criticised in inquiry reports. Rules 13 to 15 will therefore be reviewed as we take forward work to amend the Inquiry Rules 2006 which [the Select Committee] recommended.*

77. The results of that review are still awaited.

78. In the light of the legal analysis set out above, it is clear that Rules 13 to 15 of the Inquiry Rules 2006 go beyond the requirements of the common law (i.e. by, in effect, imposing an obligation to conduct a Representations Process even where the person to be criticised has already had a fair opportunity to respond to the proposed criticism

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[87] *Ibid.*, paragraph 42 on page 94, and also paragraph 251.

[88] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (June 2014, Cm 8903), paragraphs 79-80.

[89] See, in particular, the speeches of Lords Woolf, Cullen, Morris and Pannick, Baroness Buscombe and Lord Brown: HL Deb, 19 March 2015 at columns 1141-2, 1146-7, 1149, 1152-3, 1153-6 and 1157-9 respectively.

[90] Letter from Caroline Dinenage MP to Lord Sewel CBE dated 21 July 2015 (http://www.parliament.uk/documents/lords-committees/liaison/Inquiries-Act-2005-Committee-follow-up.pdf).

contained in the draft report). They also impose requirements as to the content of the 'warning letter' which are prescriptive and potentially onerous (as, among others, Leveson LJ has made clear). We, therefore, endorse the recommendation that Rules 13 to 15 should be revoked.

(5) Remedies for breach of the duty to act fairly

79. A person who seeks to challenge a Chair for unfairness will issue a claim for judicial review. Where a claim for judicial review is successful, the court has discretion over what remedy (if any) to grant. Possible remedies include orders quashing a challenged decision, and the making of declarations of (for example) the existence of unfairness or legal error. Sir Clive Lewis (writing extra-judicially) has said, in relation to public reports amenable to judicial review: "*if a quashing order were considered an inappropriate remedy, as the report produced no legal consequences which needed to be removed, other remedies may now be claimed under the judicial review procedure. In particular, declarations that the body making the report has exceeded its jurisdiction or erred in law will be available.*"[91] We agree.

80. When exercising their discretion, the courts have indicated that they will be reluctant to grant declarations of procedural unfairness in the preparation of public reports. In *Maxwell*, the Court of Appeal stated that such declarations should only be granted in the most exceptional circumstances.[92] The policy rationale for this restrictive approach was explained by Chadwick LJ in *Clegg* (although in that case the issue did not in fact arise, because there had been no unfairness).[93] Chadwick LJ noted the force of the argument that a general declaration of unfairness could undermine an entire report, which would be undesirable if the unfairness in question was only minor, or only affected part of the report. Equally, a more specific declaration could involve the court in acting, inappropriately, as a forum for appeals against the conclusions of report authors. At the same time, Chadwick LJ acknowledged that there might be cases where declaratory relief could be appropriate: in particular, where "*procedural unfairness has denied a party the opportunity of putting before inspectors matters which might have made a real difference to their conclusions*".[94] Further, in appropriate cases it is possible that the Courts could grant interim relief during the course of an inquiry: for example, an urgent declaration regarding a procedure proposed to be followed, or even an injunction preventing publication until a challenge has been heard.

(6) The approach in other common law jurisdictions

81. The essentially flexible, context-specific nature of the central legal principle considered above is reflected in the jurisprudence of other common law jurisdictions. We are not

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[91] Clive Lewis, *Judicial Remedies in Public Law* (5th ed., 2014) at paragraph 4-035.
[92] *Maxwell* (footnote 34 above) [1974] QB 523, *per* Lord Denning MR at 536G, Orr LJ at 539B and Lawton LJ at 542H-543A.
[93] *Clegg* (footnote 60 above) [2002] EWCA Civ 519; [2003] BCC 128, paragraph 37 (quoting and finding "*much force*" in the reasoning of Stanley Burnton J at first instance).
[94] *Ibid.*

aware of any common law jurisdiction in which there is a standard legal requirement for a Representations Process.

82. In Australia, the courts have held that the key principle is that an inquiry "*cannot lawfully make any finding adverse to the interests of [a person] without first giving [that person] the opportunity to make submissions against the making of such a finding*".[95] This may be done in a number of ways, and there is no standard requirement for draft findings or recommendations to be provided for comment in advance of publication. As expressed in one case: *"Within the bounds of rationality, a decision-maker is generally not obliged to invite comment on the evaluation of the subject's case"*.[96] While a Representations Process is sometimes adopted by public inquiries, there is no legal requirement for such a process in every case. [97] In its 2009 report on a potential new statutory framework for inquiries in Australia, the Australia Law Reform Commission recommended codifying a requirement for those conducting inquiries to take *"all reasonable steps to give notice of proposed adverse findings or the risk or likelihood of adverse findings"* to a person before making adverse findings against him. The language of *"proposed adverse findings or the risk or likelihood of adverse findings"* was adopted by the Commission expressly because it recognised that there might be cases in which a full and fair evidence-gathering process might obviate the need for *"an additional requirement that the inquiry circulate the contents of findings"*.[98]

83. In New Zealand, similarly, the courts have emphasised both the basic "*right to be heard*" and the fact that this can be accomplished in different ways in different contexts. It has been held that no fixed formula can be laid down, since "*so much depends upon the nature of the inquiry, its subject-matter and the circumstances of the particular case*".[99] In common with the Australia Law Commission, as referred to above, the New Zealand Law Commission has proposed a statutory requirement for "*prior notice of allegations, proposed adverse findings or the risk or likelihood of adverse findings*" to be given to persons who stand to be criticised in public reports.[100] Such a recommendation reflects the position that a Representations Process is an option, but only one option, to achieve procedural fairness.

84. In Canada, section 13 of the Inquiries Act 1985 provides that statutory commissions of inquiry established by the federal government may not make any findings of misconduct against a person "*until reasonable notice has been given to the person of the charge of misconduct alleged against him and the person has been allowed full opportunity to be heard in person or by counsel*". Such notice, however, need not take the form of the circulation of provisional findings. On the contrary: notice should be given "*as soon as*

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[95] *Annetts v McCann* (1990) 170 CLR 596, 600-601.
[96] *Commissioner of ACT Revenue v Alphaone Pty Ltd* (1994) 127 A.L.R. 699, 714.
[97] See, generally, the summary of the law in paragraphs 15.26-15.31 of the report by the Australia Law Reform Commission, *Making Inquiries: A New Statutory Framework* (October 2009).
[98] *Ibid.*, paragraphs 15.47-15.48.
[99] *In re the Royal Commission to Inquire into and Report upon State Services in New Zealand* [1962] NZLR 96, 116 (CA).
[100] New Zealand Law Commission, Report 102, *A New Enquiries Act* (2008). Neither Australia nor New Zealand have in fact enacted legislation as proposed by their respective law commissions.

it is feasible" to do so.[101] More generally, the Canadian courts have broadly reflected the approach of those in England, by stressing that the duty of procedural fairness is flexible and context-sensitive. A Representations Process does not appear to be a standard feature of Canadian public inquiries. Instead, the emphasis is on the provision of sufficient information to witnesses during the evidence-gathering stage of an inquiry (ideally prior to them giving evidence, but potentially after all witnesses have been heard) to allow them to respond to allegations against them.[102] There is no suggestion of a separate, standard requirement for provisional findings to be circulated towards the end of the decision-making stage of an inquiry.

85. In Ireland, as in Canada, judicial decisions regarding fairness in public inquiries have focussed on the rights of witnesses at the evidence-gathering rather than the decision-making stage.[103] In *Re Haughey* [1971] IR 217, the Irish Supreme Court held (by reference to rights under Article 40, section 3 of the Irish Constitution[104]) that a person whose conduct is being examined should be shown relevant evidence and allowed to cross-examine witnesses. More recently, the Irish courts have held that there is a need for flexibility in meeting the demands of justice in any given case, taking into account the seriousness of the position in which a particular individual is placed. Hence, the procedural requirements set out in *Haughey* should not be treated as *"a ritual or a formula requiring a slavish adherence"* in relation to all witnesses before all inquiries.[105] In any event, there is no standard legal requirement for draft findings to be circulated towards the conclusion of the decision-making process.

(7) Conclusion

86. Apart from those inquiries governed by the Inquiry Rules 2006, there is no legal requirement for a Representations Process to be a standard part of every public inquiry.

87. Far from mandating a Representations Process, the courts have repeatedly emphasised the need for procedural flexibility, in the sense of the adoption of procedures that best address the particular context of each inquiry. They have warned against the adoption of fixed procedural formulae. The legal requirement is that a person should not be criticised in a public report without having been given the opportunity to challenge that criticism. That broad requirement may be satisfied in different ways.

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[101] *Canada (Attorney General) v Canada (Commission of Inquiry on the Blood System in Canada)* [1997] 3 SCR 440.

[102] See, for example, the Canadian Supreme Court in *Consortium Developments (Clearwater) Ltd v City of Sarnia* [1998] 3 SCR 3.

[103] See generally the summary of the law in chapter 5 of the Irish Law Reform Commission's *Report on Public Inquiries including Tribunals of Inquiry* (LRC 73-2005, 2005).

[104] Which provided at the relevant time that: "*(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. (2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.*"

[105] *Lawlord v Flood* [1999] 3 IR 107. See similarly, in relation to the need for flexibility, *O'Callaghan v Mahon* [2005] IESC 9.

C. THE REPRESENTATIONS PROCESS IN PRACTICE

(1) The sources of evidence

88. We have obtained evidence from a variety of sources, as set out below.

89. First, we obtained evidence from the authors of 13 reports. Those reports are listed in Appendix 3. The authors were invited to answer an '*Author Questionnaire*' in the form set out in Appendix 4. Of those reports, 10 were selected on the basis that they were among the most significant reports relating to the financial services sector published since 2000; and 3 non-financial services reports were selected on the basis that they were high-profile reports from which lessons about the Representations Process might be learned (for example, the Report of the Iraq Inquiry and the Report of the Bloody Sunday Inquiry). All but one of these reports (Bloody Sunday) involved a Representations Process. The responses to the Author Questionnaire appear at Appendix 5.[106]

90. Secondly, we sought evidence from various individuals and organisations who had been invited to participate in a Representations Process, including in relation to the 10 financial services reports identified in Appendix 3. As we did not generally know the identities of those individuals and organisations, we sought to contact them through the public bodies that had commissioned the particular report (for example, the FCA, the PRA and the Bank of England). Given that in every case their participation in the relevant Representations Process was confidential, we have decided not to identify those who responded and have not published their evidence. Their responses were nevertheless helpful in informing our conclusions.

91. Thirdly, we published a '*Call for Evidence*' in the form set out in Appendix 6. This was sent by us to various individuals and organisations whom we identified as being particularly likely to have relevant evidence to provide (for example, those with personal experience of conducting public inquiries, and industry representative bodies and regulators). The Call for Evidence was also published on the Treasury Committee's website. The responses of those who consented to publication appear at Appendix 7.

[106] The Author Questionnaire was sent to the authors of more than 13 reports. However, certain authors did not provide any substantive response and one author responded but did not consent to the publication of that response. Further, although one of the co-authors of this review, Andrew Green QC, was the author of the *Report into the FSA's enforcement actions following the failure of HBOS* (published November 2015), he did not provide a response to the Author Questionnaire as, following the publication of his report, the FCA commenced further enforcement investigations; and he took the view that, while those investigations were ongoing, it was not appropriate to answer the Author Questionnaire.

(2) The themes emerging from the evidence

92. We set out below a summary of the evidence we received by reference to certain key themes that emerged, namely:

a. To what extent is a Representations Process useful and desirable in practice?

b. What are the implications in terms of delay and cost?

c. Does a Representations Process give a potentially unfair advantage to participants and their advisers?

d. What should be considered when deciding whether to conduct a Representations Process in a particular case?

e. How should a Representations Process be conducted?

f. Are there steps that can be taken earlier in the inquiry process that might avoid or minimise the need for a Representations Process?

93. In the sections below, we quote from some of the evidence received, such evidence being attached at Appendices 5 and 7. This is simply by way of illustration of points that we consider important. We have considered carefully all evidence received, whether or not we quote it. Insofar as the evidence we received made reference to the '*Maxwellisation Process*', the quotations below retain use of that phrase. We use the word '*representees*' below to refer to those people who are invited to make representations in response to a Representations Process.

94. After the summary of evidence in respect of each theme, we set out our brief conclusions. These conclusions and the legal analysis in Section B above have formed the basis for the Principal Conclusions and the Guidelines set out in Section A above.

(3) The utility of a Representations Process

95. 10 of the 12 report authors who had actually carried out a Representations Process were generally positive about the process, and considered that it had improved the quality of their reports. The exceptions were Lord Penrose and Sir Robert Francis QC, whose responses we discuss below. While there was a range of responses in terms of precisely how useful the process had been, a significant majority reported that it had made a material and positive difference.

96. The PRA (joint author of the HBOS Report)[107] stated that its "*experience is that the process… acts to improve the quality and robustness of the final report…The PRA's experience in the HBOS Report was that, even though the Maxwellisation process was complicated and time consuming, Maxwellisation responses did lead to amendments being made which, in the PRA's opinion, made the final report a more robust account of the failure of that firm and the*

[107] Appendix 3, item 1.

FSA's actions as a regulator".[108] The PRA also said that a Representations Process "*is important in terms of attracting, retaining and motivating high quality staff*", on the basis that when their "*decisions are subject to review, [they] can have confidence that they will be supported and their interests taken into account in an appropriate manner*."[109]

97. The FCA's overall view was that "*Maxwellisation is likely to reduce the risk of the report containing material factual errors. In this way the credibility of the report is protected.*"[110] In particular, it referred to the report by its predecessor body, the FSA, (the RBS Report, published in December 2011).[111] It said that the Representations Process in that case "*resulted in a large number of changes being made to the report, which improved its accuracy, comprehensiveness and overall readability*".[112]

98. As well as the PRA and FCA, individual report authors were positive about the utility of a Representations Process. The Lord Chief Justice (the Mirror Group Report)[113] stated that the Representations Process had improved his report, and "*is essential*".[114] Clifford Chance (Report of the inquiry into the press briefing of information in the FCA's 2014/15 Business Plan)[115] stated that "*the Maxwellisation process was useful in ensuring that the wording of the Report matched the underlying facts and that its account of the facts and the knowledge of the various individuals at the time was accurate*".[116] It also said that, in its view: "*the problem with Maxwellisation is likely to be poor process rather than the process of Maxwellisation itself.*"[117] Lord Grabiner QC (Report on Bank of England Foreign Exchange Market Investigation)[118] considered that the Representations Process enabled him to "*amend and improve*" certain provisional conclusions.[119]

99. Similar views were expressed by report authors who are not lawyers. Ann Abraham (Report on Equitable Life: A decade of regulatory failure)[120] said that her experience was that the Representations Process "*provides an opportunity to test one's understanding and interpretation of the evidence and ultimately makes for a more robust and authoritative report*".[121] Sir John Chilcot (Report of Iraq Inquiry)[122] stated that "*the Maxwellisation process provided constructive input to the Inquiry's Report*".[123]

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[108] Appendix 5, page 85.
[109] Appendix 7, page 122. We do not understand this to be a suggestion that the staff of regulators should have any special protection. Nor do we consider that such special protection would be appropriate. The adoption of fair processes will protect all those who are the subject of criticism in a public report.
[110] Appendix 7, page 110.
[111] Appendix 3, item 5.
[112] Appendix 5, pages 70-71.
[113] Appendix 3, item 10.
[114] Appendix 5, page 91.
[115] Appendix 3, item 2.
[116] Appendix 5, page 66.
[117] *Ibid.*
[118] Appendix 3, item 3.
[119] Appendix 5, page 78.
[120] Appendix 3, item 6.
[121] Appendix 5, page 59.

100. In respect of the Report of the Inquiry into the Mid Staffordshire NHS Foundation Trust,[124] we received evidence from both the Chair (Sir Robert Francis QC) and counsel to the inquiry (Tom Kark QC). Sir Robert considered that "*a small number of factual errors were corrected as a result*" of the Representations Process, but that "*few, if any, potential criticisms were changed or withdrawn as a result of the process*".[125] His view was that "*the process was disproportionate to the value it brought to the inquiry*".[126] Mr Kark's analysis of the value of the Representations Process, however, was significantly more positive. He considered that "*the process was critical to the success of the report*", leading to factual errors being corrected and certain criticisms "*mitigated*".[127] He also said that: "*In oral evidence it is easy to make an error or to 'mis-speak' and the process gave people a chance to reflect and provide an explanation*".[128]

101. Lord Penrose, who conducted a Representations Process when producing his Report of the Equitable Life Inquiry[129], said that the responses received were "*generally of no use whatsoever*".[130] He attributed this to the fact that there was civil litigation in progress during the course of his inquiry, so that many relevant parties "*had already adopted firm positions in written pleadings, affidavits and other statements of position prepared for the purposes of litigation*".[131] Accordingly, the representations received during the Representations Process merely "*repeated positions already well known*".[132] At the same time, Lord Penrose expressed the view that "*some form*" of Representations Process "*is essential in most, if not all, inquiries*".[133] In particular, he stated that "*when significant parts of the procedure may have involved extensive examination of documents or of publications ... the inferences that might be drawn by the panel can remain obscure until they are reduced to writing*".[134]

102. There was support for the Representations Process from lawyers who advise representees, and from those who represent participants in the financial services sector more generally. For example, the submission from the Financial Services Lawyers Association ('FSLA') stated that the Representations Process is not only important because of considerations of "*natural justice*", but can also "*improve the quality of a report by giving the authors the opportunity to correct factual inaccuracies and reconsider their interpretation of documents*".[135] Edward Sparrow of Ashursts stated that the Representations Process is "*necessary, appropriate and practical*" and that "*much of the*

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[122] Appendix 3, item 11.
[123] Appendix 5, page 62.
[124] Appendix 3, item 12.
[125] Appendix 5, page 74.
[126] *Ibid.*
[127] Appendix 5, page 80.
[128] *Ibid.*
[129] Appendix 3, item 8.
[130] Appendix 5, page 81.
[131] *Ibid.*
[132] *Ibid.*
[133] Appendix 5, page 82.
[134] *Ibid.*
[135] Appendix 7, page 114.

criticism of the Maxwellisation process seems to be ill-informed and to be driven by press and Parliamentary demand for quick answers".[136] The British Bankers' Association ('BBA') considered the Representations Process to be "*a fundamental process and one which should not be dispensed with*".[137]

103. The evidence that we received from representees was generally to the effect that they had found it at least a partially useful process as applied directly to them. There was no discernible difference in attitudes between those who had or had not used lawyers to advise them.

104. By contrast with the above, the evidence from Lord Saville (Report of the Bloody Sunday Inquiry)[138] set out a case against the Representations Process in principle. Lord Saville regarded "*the Maxwellisation process as undesirable, given the circumstances are such that the people concerned can be given a fair and reasonable opportunity, during the course of the inquiry, to consider and reply to criticisms made of them. In such circumstances I see no legal or other basis for providing them with any further opportunity…In our inquiry, the criticisms were advanced during the course of the inquiry, giving both those criticized and those advancing criticisms a fair and reasonable opportunity to put their respective cases*".[139] Thus, his view was that criticisms could and should be put during the evidence-gathering stage of an inquiry, such that a Representations Process is unnecessary.

Our conclusions

105. We were struck by the level of consensus, among report authors who had direct experience of the Representations Process, that its use had improved the quality of their reports – sometimes materially so. It might be expected that, to some extent, authors who pursued the process would not be inclined to say that doing so was a mistake. But we note that similar sentiments were expressed both by authors who opted to adopt a Representations Process and by those who were required to do so by their terms of reference or the Inquiry Rules 2006.

106. We note that Sir Robert Francis QC, while considering that the effort involved in the Representations Process in his inquiry was disproportionate, did not consider it to have been wholly without merit - and that Mr Kark QC, as counsel to that inquiry, was significantly more positive in his view. We also note that Lord Penrose's negative experience of the utility of his Representations Process arose in the particular circumstances of his inquiry (in which parallel litigation was on foot) and did not alter his view that some form of Representations Process is often "*essential*".

107. We note the force of Lord Saville's observations to the effect that people can be given a fair and reasonable opportunity to respond to criticisms during the evidence-gathering stage of an inquiry (i.e. before a draft report is produced). In the Bloody Sunday

[136] Appendix 7, pages 138-139.
[137] Appendix 7, page 104.
[138] Appendix 3, item 13.
[139] Appendix 5, page 89.

Inquiry, criticisms/allegations were generally initiated by legally represented "*interested parties*", and may have been more apparent from the early stages of the inquiry than is sometimes the case with inquiries. It was, therefore, perhaps possible to identify and address such criticisms/allegations during the evidence-gathering stage, which took the form of a lengthy series of public hearings at which witnesses were represented and cross-examined by lawyers. Following that type of procedure – which has many similarities to court proceedings - we agree with Lord Saville that a Representations Process may not be required, and may well be inappropriate.

108. However, other public inquiries will legitimately follow different evidence-gathering procedures. Their format will often be less adversarial and more inquisitorial. Specific criticisms/allegations will often emerge only as the evidence unfolds, and after a relevant individual has already given evidence. Indeed, it is often the case (through no fault of those conducting the inquiry) that important evidence emerges at a late stage, sometimes even during the process of drafting the report. This inevitably means that important evidence may be produced to the inquiry after witnesses have already given their evidence to the inquiry. Also, it is fairly common that, after a particular witness has given evidence, another witness gives evidence which is relevant, and perhaps contradictory, to the evidence of the earlier witness.

109. Accordingly, individuals will not necessarily always have been given a fair opportunity, prior to the drafting of the report, to consider and respond to all of the proposed criticisms to be directed at them. In such situations, a sensible alternative to re-opening the evidence-gathering stage of the inquiry and perhaps recalling witnesses, is to conduct a properly focussed and tightly controlled Representations Process directed at those specific people who, because of the way the evidence has emerged, have not had a fair opportunity to respond to criticism. The Representations Process thus becomes a 'sweeping-up' exercise, ensuring fairness to those specific people who have not yet had a fair opportunity to respond to proposed criticism. In that situation, it would only be necessary to put to the particular person the substance of the particular criticism which they have not yet had a fair opportunity to address. Our view is that this is how the Representations Process should, generally, be used.

(4) Delay and cost

110. There was general consensus among those who responded to the Author Questionnaire and the Call for Evidence that the Representations Process has the potential to cause disproportionate and undesirable delay. Even those who strongly supported the use of the process were mindful of the public interest in avoiding the publication of reports being unduly held up. For example, the FCA noted that there is "*a strong public interest in the report of an inquiry being published on a timely basis, as lengthy delays risk any findings and recommendations in the report becoming out-of-date and also to public criticism of the delays and scepticism of the reasons for them*".[140] Others emphasised the importance of tightly controlling the time taken by the process. For

[140] Appendix 7, page 110.

example, Tom Kark QC said that "*it is critical that firm control is kept over the timing of Maxwellisation and that the onus is put upon the participants to ensure they respond very promptly*".[141]

111. In fact, the evidence suggests that in many cases a Representations Process does not add unduly to the total time taken to produce a report. The following table indicates how long we were told the Representations Process took in the context of the overall timing of the following 6 financial services-related reports[142]:

Report	**Total time between report being commissioned and produced (approx.)**	**Total time taken up with Representations Process (approx.)**	**Deadline for Representations Process responses**
Report of FSA on the Review of the Regulation of Equitable Life[143]	9 months	6 weeks	2 weeks
Report on supervision of Northern Rock: a lessons learned review[144]	5 months	4 weeks	Precise figure unclear, but only a few weeks
The RBS Report[145]	12 months	4 weeks	1 week
Report on the extent of awareness within the FSA of inappropriate LIBOR submissions[146]	8 months	4 weeks	2 weeks
Report on Bank of England Foreign Exchange Market Investigation[147]	8 months	3 weeks	1 week
Report of the Inquiry into the press briefing of information in the FCA's 2014/15 Business Plan[148]	7.5 months	7 weeks	3 weeks

[141] Appendix 5, page 80.
[142] The other 2 financial services-related reports where the authors were able to identify how long was taken up with the Representations Process are dealt with separately below (paragraphs 113 to 115). In the case of the reports listed at items 8 and 10 of Appendix 3, the authors were unable to identify how long was taken up by the process.
[143] Appendix 3, item 9; Appendix 5, pages 67-71.
[144] Appendix 3, item 7; Appendix 5, pages 67-71.
[145] Appendix 3, item 5; Appendix 5, pages 67-71.
[146] Appendix 3, item 4; Appendix 5, pages 67-71.
[147] Appendix 3, item 3; Appendix 5, pages 76-78.
[148] Appendix 3, item 2; Appendix 5, pages 64-66.

112. The time taken by the Representations Process in those inquiries does not seem to us disproportionate. We note that in each case the representees were given a relatively short deadline to submit their responses after being notified of proposed criticisms. We also bear in mind the point that, as expressed by FSLA, time spent on an appropriate Representations Process should not fairly be termed "*delay*" at all.[149]

113. In 2 other financial services-related inquiries, however, the time taken up by the Representations Process was considerably longer: both in absolute terms and as a proportion of the total time from report commissioning to delivery.

114. Ann Abraham, who as Parliamentary Ombudsman produced the Report on Equitable Life: A decade of regulatory failure,[150] said that her report (published in July 2008) took 4 years from start to finish, with around 18 months of that time being taken up with a Representations Process. Ms Abraham explained, however, that the period of 18 months included not only the actual conduct of the Representations Process, but also reviewing a "*considerable amount of further evidence*", provided during that process, which "*had not previously been provided by the bodies under investigation*".[151] She did not consider that the process could reasonably have been conducted any more quickly.

115. The HBOS Report[152] took 3 years and 2 months to deliver. Of that total time, 14 months was taken up by the Representations Process, in the sense of representees being invited to review criticisms, submitting their representations, and those representations being considered by the FCA and PRA. The delay caused by the Representations Process in that case has been the subject of widespread criticism. As we set out in paragraph 121 below, that delay appears to us to be disproportionate.

116. In terms of inquiries outside the financial services field, Sir Robert Francis QC has stated that the Representations Process added at least 6 months to the production of his Report of the Inquiry into the Mid Staffordshire NHS Foundation Trust[153] (paragraph 73c above).

117. As regards the Report of the Iraq Inquiry[154], Sir John Chilcot's response to us was unclear as to how much time was taken up by the Representations Process. When we sought further clarification, we were referred to his evidence before the Parliamentary Liaison Committee on 2 November 2016.[155] During that session, Sir John told the Committee that the Representations Process in the Iraq Inquiry *"did not hold up the rest of the work. While we had draft text out for comment from criticised witnesses, we were doing*

[149] Appendix 7, page 115.
[150] Appendix 3, item 6.
[151] Appendix 5, page 59.
[152] Appendix 3, item 1; Appendix 5, pages 83-86.
[153] Appendix 3, item 12; Appendix 5, pages 72-75.
[154] Appendix 3, item 11; Appendix 5, pages 61-63.
[155] House of Commons Liaison Committee, *Oral evidence: Follow up to the Chilcot Report,* HC 689 (2 November 2016) (https://www.parliament.uk/documents/commons-committees/liaison/John-Chilcot-oral-evidence.pdf).

all sorts of other work to finalise the report".[156] Sir John also suggested that the Representations Process was particularly important in the context of the Iraq Inquiry, because many sensitive documents had not been put to witnesses during public evidence-taking sessions, which were held before the Inquiry had reached agreement with the Government about the publication of those documents.

118. In terms of cost, the responses we received were, for the most part, unable to provide specific figures for the cost incurred by the inquiries in conducting a Representations Process. Those who expressed a view generally suggested that the costs of the Representations Process were only a small part of the total costs of their reports. In the light of this, our focus can only be on delay.

Our conclusions

119. Press reports in recent years have sometimes given the impression that the Representations Process inevitably causes long delay. On the basis of the evidence presented to us, this appears to be an inaccurate generalisation. We have seen examples of the Representations Process being deployed without leading to excessive delay.

120. We also bear in mind that the issue of delay is a complex one. The Representations Process is undertaken in order to ensure that affected persons have a fair opportunity to respond to proposed criticisms. Where the Representations Process has been pursued, it would not have been an option simply to decide not to put proposed criticisms to affected persons. Instead, some other method would have had to be found: for example, an evidence-gathering process such as that conducted by Lord Saville in the Bloody Sunday Inquiry and/or a process of recalling witnesses who had previously given evidence in order that supplementary questions could be asked. Such processes would themselves take time. In this regard, we note that the Bloody Sunday Inquiry did not involve a Representations Process, but did involve years of evidential hearings, at substantial expense.

121. Nevertheless, it is clear that the Representations Process, if not handled effectively, is capable of disproportionately slowing down the production of a report. The HBOS Report is perhaps the most striking example of this. Our remit does not extend to determining the specific reasons for the time taken to conduct the Representations Process in that instance: we have not sought to carry out an audit of the work of the PRA and FCA in producing that report. However, it does not appear to us to be proportionate for the Representations Process to account for 14 months out of a total of 38 months taken for the report to be produced. In sub-section (7) below, we have paid particular attention to the problems that we were told arose in producing the HBOS Report. These have assisted us in formulating our Guidelines in the hope of avoiding similar issues in the future.

[156] Ibid., Q79.

(5) Potential unfair advantage to representees and their advisers

122. As part of his argument against the Representations Process in principle, Lord Saville said that he considered that the Representations Process can be "*one sided and can be said to be unfair, since those advancing criticisms are given no opportunity to reply to answers provided during the process.*"[157]

123. More generally, several respondents raised the concern that the Representations Process can provide parties, and their lawyers, with an inappropriate opportunity to "*dilute*" proposed criticisms through a process of "*negotiation*" with report authors. This danger was recognised even by those who advise representees: for example, the BBA, while defending the Representations Process, noted that it "*should not be viewed as a repeated comment and review process*".[158]

Our conclusions

124. We recognise the strength of Lord Saville's argument in the context of an inquiry such as the Bloody Sunday Inquiry. In such cases, where "*interested parties*" themselves make allegations/criticisms and these are addressed in the course of public hearings, it may well be inappropriate to allow the subjects of proposed criticism a further opportunity to comment through a confidential Representations Process. But, as we have explained above, this is not the model adopted by many (indeed, most) public inquiries, at least in the financial services sector. Where potential criticisms emerge in the course of an inquiry, and have not been put to witnesses during the evidence-gathering stage, we consider that it is appropriate to afford affected persons an opportunity to comment through a Representations Process.

125. As to the general concern about "*negotiation*" of draft findings, we note that we have not been provided with any specific examples of this occurring and while there were occasional criticisms of the length of representations, there was no suggestion of representees or their lawyers misusing the process. Instead, various report authors told us that they were assisted by representations made by lawyers acting for representees. It appears to us that the danger may have greater prominence in the public mind than is justified in practice. But we agree that it is a possible danger, and one that report authors should carefully guard against. This is a point we refer to expressly in the Guidelines.

(6) When to conduct a Representations Process

126. Several responses expressed concerns as to a lack of clarity in relation to the circumstances in which a Representations Process is necessary. The Financial Reporting Council, for example, said that it "*would welcome the introduction of clear guidelines that can be consistently applied… and that set out clear expectations and parameters in respect of: (i) the process for identifying when individuals should be provided with an*

[157] Appendix 5, page 89.
[158] Appendix 7, page 104.

opportunity to make representations in response to comment made about them…".[159] Similarly, the PRA raised concern at the lack of clarity as to "*the threshold at which mere comment becomes criticism and engages the need for Maxwellisation*".[160] It also identified uncertainty where there is "*criticism of a body of persons who may be difficult to identify*", and invited "*some guidance on the question as to when a collective reference to a group should lead to Maxwellisation for the individuals within that group, and some criteria for determining which side of the line a particular group might fall*".[161] Similar concerns were expressed by the FCA.

127. Specific criticisms in this regard were made of Rules 13 to 15 of the Inquiry Rules 2006, which require (in the context of statutory inquiries) the sending of a "*warning letter*" before a report makes *"any explicit or significant criticism of a person"*. The PRA invited us to clarify the meaning of this "trigger-point" for the Representations Process,[162] while Sir Robert Francis QC argued that the terms of Rule 13 "*are very broad and do not allow for proportionality*".[163]

128. More generally, several experienced sources expressed concern that the Representations Process has in practice moved from being a flexible, context-specific exercise in procedural fairness, to become (in the words of Lord Woolf in his response to our Call for Evidence) "*ossified so that currently it is regularly applied in a rigid and disproportionate manner so that in any case today in which a witness has given evidence and the witness is to be criticised it is almost routine*".[164]

Our conclusions

129. We start from the basic legal proposition that every person who stands to be criticised in a public report must be given a fair opportunity to respond to such proposed criticism. But, as set in Section B above, the law (save where the Inquiry Rules are applied in their current form) does not require that this be done by means of a separate Representations Process.

130. In some inquiries, criticisms will be sufficiently crystallised at an early stage, enabling the Chair to have confidence that they can be put to witnesses during the evidence-gathering stage. In these cases (the Bloody Sunday Inquiry is perhaps the paradigm example), a separate Representations Process may not be required and may well be inappropriate. In many other cases, however, a Chair will want to reserve the right to conduct a Representations Process, depending on how the evidence unfolds.

131. We have already said (paragraphs 105 to 109 above) that our view is that, generally, the correct use of the Representations Process is as 'sweeping-up' exercise, so as to

[159] Appendix 7, page 111.
[160] Appendix 7, page 123.
[161] Appendix 7, page 124.
[162] Appendix 7, page 124.
[163] Appendix 5, page 74.
[164] Appendix 7, page 140.

ensure fairness to those specific people who, by the time a draft report has been produced, have not had a fair opportunity to respond to particular proposed criticisms. It should not be a process which is automatically used for every person who faces criticism in a final report.

132. Accordingly, as already set out in paragraph 78 above, we do not consider that Rules 13 to 15 of the Inquiry Rules provide those conducting inquiries with sufficient flexibility. The Chair of a statutory inquiry should not be required to conduct a Representations Process in respect of every person to be criticised in a report. The Chair should be able, in appropriate cases, to take the view that the subject of a proposed criticism has already had a fair opportunity to make their case. The Rules should be revoked, as recommended by the House of Lords Select Committee Report.

133. As to the specific 'trigger-point' for conducting a Representations Process, we consider that (even aside from the overall criticism made above, about lack of flexibility) the wording of Rule 13(3) is unhelpful. The threshold of *"any explicit or significant criticism of a person"* lacks clarity. It appears to require a Representations Process in relation to criticisms which are "*explicit*" even if they are not "*significant*", which we consider is lacking in principle. Moreover, it provides no guidance as to when a proposed criticism will be "*significant*". For example, it does not indicate whether the significance of a criticism is to be assessed (for example) by reference to its importance to the report's reasoning, or to its potential impact on a person's reputation, or both. Nor does it indicate whether "*significant*" should be read as "*material*", or "*substantial*" or as having some other meaning.

134. In our view, an inquiry Chair should be given maximum flexibility in deciding whether, in any given case, fairness demands that a person who stands to be criticised in a report should be given an opportunity to comment by means of a Representations Process. Chairs should ask themselves two questions. Firstly, will the report contain a criticism of a person (whether express or implied) which is capable of adversely affecting that person's interests including their career or reputation? In answering this question, they should err on the side of over-inclusivity. Secondly, has the relevant person already had a fair opportunity to present their side of the story, and to respond to the proposed criticism? In answering this question, Chairs should take a robust view of the opportunities already presented to the person in question. To find that a fair opportunity has already been extended to them, it is not necessary for a specific conclusion or formulation to have been expressly put to them. Instead, they must have had a fair opportunity to address the inquiry (in writing or orally) with regard to the substance of the criticism and sufficient information to address it. If they have not had that opportunity by the time a draft report has been produced, then a Representations Process will be appropriate.

(7) How to conduct a Representations Process

135. Several respondents requested clarification over how a Representations Process should be conducted. The PRA, for example, observed that: "*uncertainty around the parameters of Maxwellisation is likely to lead to report-writers adopting a cautious approach*".[165]

136. The need for clear – and firmly enforced - procedures is highlighted by the experience of the FCA and PRA in producing the HBOS Report. As set out above, that inquiry featured a prolonged and widely-criticised Representations Process. The PRA informed us that there were two rounds of the Representations Process.[166] 82 affected parties and/or their legal representatives were invited to participate in the first round, leading to 1,425 representations being received from a total of 35 different individuals and their legal representatives. Following the first round, a second round of a Representations Process was conducted. We were told that this was primarily due to responses in the first round resulting in either: (1) more significant criticisms being made of individuals involved in the first round; or (2) new criticisms being made of individuals who were not involved in the first round. In the second round of the Representations Process, 34 parties and/or their legal representatives were invited to participate, and 227 representations were received from 30 different individuals and their legal representatives.

137. The PRA told us[167] that representees were "*provided with a template for submissions of representations which was intended to allow the HBOS Review Team to see clearly which representations related to which specific paragraphs of the HBOS Review*". Notably, however, "*certain responses received…were, in the PRA's view, unduly long and, on occasion, unnecessarily repetitive. Many of the representations were not submitted on the supplied template, but were of a more narrative character*". Further, "*some representations were not tied to specific paragraphs. This led to additional work for the HBOS Review Team in determining to which parts of the HBOS Review the representations related, and how they should be dealt with*". The PRA stated that "*these issues complicated, and therefore may have lengthened, the Maxwellisation process*".

138. Various respondents offered practical guidance based on their own experience of conducting inquiries. The theme of this guidance was that there should be appropriate control over how representees are notified of potential criticisms, and how long they should be given to make representations in response. For example, Clifford Chance commented that the process can become "*unwieldy*" if there is "*an overly prescriptive approach to those extracts which an individual can see*".[168] The Lord Chief Justice stated that notification letters "*must be clear and concise*"; short time limits must be imposed; and, if time limits are not met and there is no reasonable excuse for a delayed response, the report must be published without waiting.[169]

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[165] Appendix 7, page 123.
[166] Appendix 5, pages 83-84.
[167] *Ibid.*
[168] Appendix 5, page 66.
[169] Appendix 5, page 91.

139. Experience differed as to precisely how affected persons should be notified of provisional criticisms. Sir Robert Francis QC considered the provision of drafts of a report "*an unnecessary practice*", preferring instead "*a fair summary of the point being made and some signposting to the evidence*".[170] By contrast, Lord Grabiner saw advantages of the "*draft extract*" approach, namely: (1) "*where those criticisms are not materially changed following representations by the relevant person, there can be no dispute that the criticisms have been properly put to that person*"; and (2) "*providing the provisional criticisms in writing gives the person the opportunity to consider the precise criticisms proposed to be made*".[171]

140. There were also different views on the merits of limiting affected persons and their legal advisers to inspecting a draft report (or sections of it), as opposed to being provided with copies to review at their convenience. Clifford Chance stated that the former approach can avoid delay,[172] while one representee said that its use (at the first stage of a Representations Process) caused additional work and inefficiencies.

141. Finally, some respondents noted a frequent desire on the part of representees to be told the outcome of their representations, while noting that it is not common practice to provide such 'feedback'.

Our conclusions

142. There is a clear need for any Representations Process to be carefully controlled.

143. In general, representees should be given a relatively short period to make representations after receiving notification of potential criticisms. The Chair will need to have flexibility, but rarely would considerations of fairness justify a period exceeding 21 days (subject of course to the possibility of granting justified requests for extensions of time in particular cases). Where it is apparent that some representees have much more material to respond to than others, the Chair should consider imposing shorter deadlines for some and longer deadlines for others. This may help stagger the workload of reviewing responses.

144. It may also be appropriate to exert control over the format in which representations will be accepted. As set out above, the FCA and PRA in producing the HBOS Report sought to impose discipline by providing a template for representees and their advisers. But it appears that this was disregarded by some representees, and that responses were often unduly long and unfocussed. In appropriate cases, we see no reason why inquiry teams should not make clear that they will refuse to consider representations which (for example) do not use a template provided, or which are not tied specifically to paragraphs of a draft report, or which exceed a reasonable word limit. Such restrictions will not always be necessary, and there should always be scope

[170] Appendix 5, pages 74-75.
[171] Appendix 5, page 78.
[172] Appendix 5, page 66.

for justified exceptions. But Chairs should not hesitate to impose discipline where it appears that a Representations Process is becoming unwieldy. Indeed, clear guidance as to the format of representations may actually be welcomed by representees and their advisers. In this regard, FSLA noted that "*mystery surrounding the process can cause consultees to feel obliged to provide responses which are in fact unhelpfully long and unfocussed*".[173]

145. The evidence shows that a number of different approaches can be taken in terms of how proposed criticisms are notified. We see no need to recommend a prescriptive, one-size-fits-all approach. We can see advantages in providing representees with the actual text of the relevant passages in a draft report, in particular because this can avoid any subsequent suggestion that a summary or 'gist' was incomplete or misleading. But there will be other cases where a summary or gist may be more appropriate – for example, where a report author intends to refer to a proposed criticism made in various different parts of a draft report. Inquiry Chairs should be given discretion to adopt the approach that seems best suited to the particular circumstances. This applies also to questions of the mechanics of notification, in terms of provision of copies, or limitation to inspection (whether of a physical copy or through an online 'dataroom'). In this regard, considerations of confidentiality and the danger of leaks may be important (although few of the authors who gave evidence to us suggested that leakage was a material problem).

146. The evidence we received did not reveal any clear and consistent practice regarding when and how to conduct a second round of a Representations Process, following the consideration of responses. Such a step has sometimes been referred to as 're-Maxwellisation'. It is clear that there may be cases where a new proposed criticism emerges, or an existing criticism is strengthened, only after consideration of responses received in the course of a Representations Process. In the case of a new proposed criticism, it will be appropriate to seek the response of the subject of the proposed criticism if that person has not previously had a fair opportunity to respond to it (either at the evidence-gathering stage or during the Representations Process). In the case of an existing criticism which has been strengthened as a result of the Representations Process, it will only be appropriate to revert to the person criticised if the strengthening of the criticism has materially changed the nature of the criticism such that it is, in effect, a new criticism (for example a criticism of incompetence has become one of recklessness). However, we emphasise that the conducing of any such further limited Representations Process will be an exceptional situation. There is no need to re-run a Representations Process simply because it has resulted in changes to proposed criticisms. The test is whether new and different criticisms emerge that require to be responded to.

147. Whatever course is adopted, inquiry Chairs should consider the extent to which affected persons should be provided not only with proposed criticisms, but also any

[173] Appendix 7, page 115.

relevant underlying evidence. In many cases the evidence relied on will be apparent from the nature or drafting of the proposed criticism. But in other cases it may be (for example) that the report author proposes to rely on a document obtained by the inquiry only after evidence was given by the person provisionally criticised. In such a case, fairness might require that the person be shown the document as part of the Representations Process. This approach should, however, be deployed sparingly. There is no requirement for representees to be provided with every document relied on in reaching proposed criticisms. An appropriate test will be to ask whether the representee can fairly engage with the proposed criticism without seeing the underlying evidence.

148. Finally, we do not consider that there is any obligation on inquiry Chairs to give feedback to representees about how their representations have been taken into account. We would advise, generally, against any such practice, which is only likely to increase delay and costs.

(8) Steps that might reduce the need for a Representations Process

149. Given that a Representations Process is not necessary where those who are the subject of proposed criticisms have already been given a fair opportunity to make representations in response to such criticisms, such an opportunity can most obviously be provided during the evidence-gathering stage of an inquiry.

150. In this regard, we received useful evidence in the form of a joint submission by Lord Scott and Christopher Muttukumaru CB.[174] They explained that, particularly in an inquisitorial inquiry: "*Effective and fair evidence gathering and analysis will be the cornerstone of a credible report*".[175] They then set out an outline of principles based on their experience in the Scott Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions.

Our conclusions

151. We consider that it is desirable for inquiry Chairs to consider, at the stage when they are designing the procedural protocols applicable to their particular inquiry, how they might adopt procedures which will reduce the need for a Representations Process (while complying with the principle of fairness). We have, therefore, identified in our Guidelines (at item K) various procedures which might be adopted with a view to creating a more comprehensive evidence-gathering process. These include a procedure whereby a person who is to give evidence to an inquiry should, unless there is a compelling reason to the contrary, be provided, in advance of giving evidence, with a summary of any adverse material which has been obtained and/or damaging evidence which has been given against that person during the course of the inquiry.

[174] Appendix 7, pages 127-137.
[175] *Ibid.*, page 128.

152. Finally, one difficulty frequently faced by those conducting inquiries is the selection of procedural protocols most appropriate for the particular inquiry – not just in relation to the Representations Process, but in relation to the entire inquiry process from start to finish. We have, therefore, obtained the agreement of the Cabinet Office to its creation and maintenance of an online resource containing procedural protocols from a selection of inquiries (past and future). This online resource will provide those people conducting inquiries in future with access to a broad selection of procedural protocols, thereby enabling them to create protocols best suited to the needs of their particular inquiry. It is hoped that this resource will provide valuable assistance to those conducting inquiries in the future.