

**Briefings delivered to John Swinney or any Scottish Government ministers on the inquiries act 2005 from January to July 2016.**

**Note sent to Cabinet Secretary for Education and Lifelong Learning in January 2016 and then the attachment was sent to the Deputy First Minister in July 2016**

**From:** [redacted]  
**Sent:** 26 January 2016 14:11  
**To:** Cabinet Secretary for Education and Lifelong Learning  
**Cc:** Higgins K (Kate); Henderson D (Donald); [redacted]  
**Subject:** FW: Letter from Ms Susan O'Brien - proposed reply  
**Importance:** High

David

As per Kate's email below I now attach a short brief providing information on Ministers' powers and duties in relation to an Inquiry.

If you need anything else please let me know.

Regards

[redacted]

[redacted]  
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## **MINISTERIAL ROLES/DUTIES WITHIN AN INQUIRY**

The Inquiry is established under the Inquiries Act 2005. As such, it must be undertaken in accordance with that Act and, where applicable, with the Inquiries (Scotland) Rules 2007. The Act and Rules set out things that the Inquiry (including the Chair) must do or that it may have power to do. There are also provisions within the Act relating to Ministers' duties and powers.

### **What powers does the Minister have under the 2005 Act?**

The Minister has power to:

- establish the Inquiry
- amend the Terms of Reference
- appoint further Inquiry panel members
- terminate the appointment of panel members (including Chair) at any time by notice on the grounds that the member –
  - by reason of physical or mental illness or any other reason, is unable to carry out the duties
  - failed to comply with any duty imposed on them by the Act
  - has a direct interest in the matters to which the inquiry relates or a close association with an interested party and could be regarded as affecting impartiality
  - has, since their appointment, been guilty of any misconduct that makes them unsuited to membership of an inquiry panel
- suspend the Inquiry at any time (by notice to the Chair) for such a period as appears to be necessary to allow for –
  - completion of any other investigation relating to any of the matters which the Inquiry relates
  - the determination of any civil or criminal proceedings arising out of those matters
- end the Inquiry on the date, after the delivery of the report of the Inquiry, on which the Chair notifies the Minister that the Inquiry has fulfilled its terms of reference or on a date earlier specified in a notice given to the Chair by the Minister setting out in the notice the reasons for bringing the Inquiry to an end
- restrict public access to the Inquiry/disclosure of evidence in certain circumstances
- make determinations about amounts to be payable to the panel members, assessors, counsel and solicitors to the Inquiry, and other persons assisting the Inquiry

### **What duties does the Minister have under the 2005 Act?**

The Minister has a duty to:

- appoint the Inquiry panel members
- specify the setting-up date of the Inquiry and set out the Terms of Reference
- inform Parliament of the appointed Chair and Terms of Reference or any amendment to them
- refrain from appointing panel members who are not impartial
- publish the Inquiry report, unless it has already been agreed that the Chair will be responsible for this
- lay the Inquiry report before Parliament
- pay witness expenses awarded by the Chair
- meet any other expenses incurred in holding the Inquiry, unless it is acting outwith its terms of reference
- publish the total amount of what the Minister requires to pay in respect of the Inquiry within a reasonable time after it has ended.

In exercising many of these powers and duties, there is a requirement for the Minister to consult with or notify the Inquiry Chair: for example, if the Terms of Reference are to be amended; if further Inquiry panel members are to be appointed; or if the Inquiry is to be suspended/ended.

### **Financial Duties and Accountability**

- As noted above, the Minister generally has a requirement to pay expenses incurred by the Inquiry insofar as these are incurred in carrying out the Terms of Reference. The Minister must pay witness expenses as are awarded by the Chair – however, the Chair’s power to make such an award may be subject to such conditions or qualifications as the Minister may determine.
- As also noted above, the Minister has power to make determinations about the expenses payable to the Inquiry Panel, assessors, counsel, solicitors and others providing assistance to the Inquiry.
- Section 39(6) of the 2005 Act requires the Minister to publish the total amount paid (or which is still to be paid) per the paragraph above within a reasonable time after the Inquiry has ended. At any time during the Inquiry proceedings, the Scottish Government is accountable to Parliament for the expenditure of the Inquiry – in terms of section 14 of the Public Finance and Accountability (Sc) Act 2000, the Permanent Secretary is the principal accountable officer to Parliament for the Scottish Government’s expenditure generally. Paul Johnston, Director General, Learning and Justice has been delegated as the accountable officer for this Inquiry.

### **What duties does the Chair have under the 2005 Act?**

The Chair has a duty to:

- direct the procedure and conduct of an inquiry subject to any provision of the Act and the Chair must act with fairness and with regard to the need to avoid any unnecessary cost (whether to public fund or to witnesses or others)
- take steps as she considers reasonable to secure members of the public are able to attend the inquiry and obtain or view a record of evidence and documents (subject to some restrictions as laid out in the Act)
- require production of evidence including compel a person to attend or give evidence by other form (subject to restrictions as laid out in the Act)
- deliver a report to Ministers at the end of the Inquiry but may also deliver an interim report at any time containing anything that may be returned in the final report
- award reasonable expenses of witnesses (subject to conditions or qualifications determined by the Minister)

The Inquiry Panel (including the Chair) is not to rule on, and has no power to determine, any person’s civil or criminal liability. But is not inhibited in the discharge of its functions by any likelihood of liability being inferred from fact that it determines or recommendations that it makes.