

Note on application of Rule 10 of the Inquiry Rules 2006

Introduction

1. Rule 10 of the Inquiry Rules 2006 states:

10. (1) *Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only counsel to the inquiry (or, if counsel has not been appointed, the solicitor to the inquiry) and the inquiry panel may ask questions of that witness.*
- (2) *Where a witness, whether a core participant or otherwise, has been questioned orally in the course of an inquiry hearing pursuant to paragraph (1), the chairman may direct that the recognised legal representative of that witness may ask the witness questions.*
- (3) *Where—*
 - (a) *a witness other than a core participant has been questioned orally in the course of an inquiry hearing by counsel to the inquiry, or by the inquiry panel; and*
 - (b) *that witness's evidence directly relates to the evidence of another witness, the recognised legal representative of the witness to whom the evidence relates may apply to the chairman for permission to question the witness who has given oral evidence.*
- (4) *The recognised legal representative of a core participant may apply to the chairman for permission to ask questions of a witness giving oral evidence.*
- (5) *When making an application under paragraphs (3) or (4), the recognised legal representative must state—*
 - (a) *the issues in respect of which a witness is to be questioned; and*
 - (b) *whether the questioning will raise new issues or, if not, why the questioning should be permitted.*

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2. The purpose of this Note is to set out how the Chairman of the Undercover Policing Inquiry intends to apply Rule 10 at the evidential hearings due to commence on 2 November 2020. It should be read further to:
 - (i) the Chairman's statement dated 30 October 2019 about the conduct of evidence hearings, in particular at paragraphs 16-17:
 16. *Save as set out below, the questioning of witnesses will be conducted by counsel to the Inquiry or by me. Recognised legal representatives of core participants and, where they are not represented, core participants themselves will have the opportunity to propose questions or areas of questioning for consideration by counsel to the Inquiry and me before a witness gives evidence. Such requests must be made at least one week before the day on which the witness is scheduled to give evidence. (The Inquiry will publish a list of witnesses to core participants directly affected by the undercover policing in a given tranche at least four weeks in advance of the start of each hearing.) With good reason, late requests will be entertained and considered on a case specific basis.*
 17. *There will be circumstances in which the questioning of a witness by a recognised legal representative will be both permitted and encouraged after counsel to the Inquiry has questioned the witness. They will arise when there is a significant dispute of fact between the individual or individuals represented by the recognised legal representative and the witness. This is likely to occur three circumstances: when it is alleged that an undercover officer has encouraged, incited or participated in a serious crime alleged to have been committed by a core participant; when a deceitful sexual relationship is alleged, but disputed by the undercover officer; when there are significant disputes of fact between a manager and an undercover officer who is a core participant about what each did or knew. In each case, the individuals concerned are likely to know or assert the existence of facts which support their account against that of the other. Such requests, with details as to the questions or areas of questioning, must be made at least one week before the day on which the witness is scheduled to give evidence. In each case in which direct questioning is permitted, the person on whose behalf the questions are asked will be expected to be willing to give*

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evidence themselves. If they are not, direct questioning on their behalf will not be permitted.

And

- (ii) the Chairman's statement dated 18 December 2019 accompanying the Hearings Protocol, in which the Chairman said in relation to the questioning of witnesses that:

Recognised legal representatives of category M core participants will be permitted to question managers (and vice versa) when there is a significant dispute of fact between the core participant and the manager. The category of circumstances in which direct questioning will be permitted is not closed, save that it will be limited to those in which there is a significant dispute of fact between the core participant on whose behalf the question is asked and the witness... Because the purpose of permitting direct questioning of witnesses is to elucidate disputed issues of fact, it will only be permitted when the witness on whose behalf direct questioning is to occur is willing to be questioned in the same manner. It will not be necessary for that witness already to have given evidence: all that is required is an indication of willingness to do so... issues which arise unexpectedly or otherwise during the course of evidence given by a witness... will be dealt with on a case by-case basis as and when they arise.

And

- (iii) the Hearings Protocol, "Questioning of Witnesses" section.
3. Unless otherwise stated, references in this note to a Core Participant in the context of Rule 10 should also be taken to include reference to a witness as defined r10(2) or (3) – that is, a person giving oral evidence to the Inquiry whom the Chairman directs can be asked questions by their own legal representative, or whose recognised legal representative may apply for permission to question another witness on their behalf.

Principles

4. Rule 10 envisages as a starting point that all questioning of witnesses before a public inquiry will be conducted by Counsel to the Inquiry, with an opportunity for the recognised legal representatives of Core Participants, and of witnesses who give oral evidence (whether or not they are also Core Participants), to apply also to ask questions.

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5. This Inquiry intends to proceed within the spirit of Rule 10, so that the majority of all questioning of witnesses will ordinarily be conducted by Counsel to the Inquiry. Such an approach tends to support the efficient and fair running of evidential hearings.
6. The Inquiry recognises, however, that the effective participation of its Core Participants may require that some questioning of witnesses be conducted by the recognised legal representatives of those Core Participants, and that in any event all Core Participants (whether represented or not) should have an opportunity of indicating, in advance of questioning by Counsel to the Inquiry, which issues or lines of questioning they consider to be relevant to a particular witness.
7. To that end, this note sets out a proposed procedure for those eligible to do so to submit in advance of a witness being called proposed lines of questioning for the witness, and to receive a response from Counsel to the Inquiry.
8. The Inquiry observes that Rule 10 of the Inquiry Rules 2006 provides for the Chairman to permit *the recognised legal representative* of a Core Participant to ask questions, but does not permit the asking of questions by unrepresented Core Participants or witnesses.

Eligibility and timetable

9. Any Core Participant, or witness who meets the criteria set out in r10(2) or r10(3), and who is in receipt of the hearing bundle for the tranche of the Inquiry in which the witness to be questioned is being called, will be eligible to submit proposals for the questioning of that witness.
10. In respect of Core Participants not in receipt of the hearing bundle for the tranche in question, Counsel to the Inquiry will consider any relevant issues raised in their opening statement to the Inquiry when framing their questions to the witness.
11. Further to r10(2) the Chairman will allow 10 minutes for the recognised legal representative of the witness giving evidence to ask questions of that witness, arising from his or her evidence, without the need to seek permission in advance. Any such questioning will usually take place after Counsel to the Inquiry and any other legal representative who has been given permission to do so have asked questions of the witness.

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12. It is proposed that ***no later than 7 days*** before a witness is scheduled to give evidence the recognised legal representative of any Core Participant or witness who wishes to propose lines of questioning and/or seek permission to ask questions in accordance with r10(3) or r10(4) should submit a written request using the template set out in Annex A to this Note.
13. The template requires the recognised legal representative to indicate, further to r10(5):
 - (i) The issues about which it is proposed the witness should be questioned;
 - (ii) A short explanation of why the issue/line of questioning is, having regard in particular to the Inquiry's Terms of Reference and any relevant list of issues
 - a. Relevant;
 - b. Appropriate; and
 - c. Justified.
 - (iii) The documentary evidence relevant to the issue(s)/line(s) of questioning proposed, which should be identified by reference to the unique reference number, date and tab on Opus.
14. The template does not require - nor does the Inquiry invite – lists of questions for each witness. Rather, its purpose is to ensure that Counsel to the Inquiry is provided in an efficient manner with sufficient information to make a decision as to the appropriateness and justification for proposed issues to be addressed or lines of questioning to be pursued, and where Counsel to the Inquiry will ask the questions, to understand the Core Participant's intended purpose and rationale for seeking to pursue the issue or line of questioning so that that may be borne in mind when the witness is being questioned. Core Participants and witnesses should assume that witness statements will stand as a witness's primary evidence to the Inquiry, and so there will be no need to list as issues for questioning evidence that is wholly contained within the written statement(s). Further, regard should be had to the opening statement made by Counsel to the Inquiry which will set out some of the issues which Counsel to the Inquiry consider to be of significance, in relation to each witness, and it can be assumed that Counsel to the Inquiry will explore those issues without the need for notification using this process.

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15. A copy of the completed template will not ordinarily be circulated outside of the Inquiry team.
16. **No later than 1 day** before the witness is due to give oral evidence, Counsel to the Inquiry will return the written request to the recognised legal representative who submitted it indicating in relation to each issue or line of questioning proposed, that
 - (i) Counsel to the Inquiry will address the issue as part of their questioning of the witness; or
 - (ii) Counsel to the Inquiry consider it is an issue best addressed by questioning from the Core Participant's recognised legal representative – for example, further to the Chairman's statements of 30 October and 18 December 2019, where there is a significant dispute of fact; or
 - (iii) It is a line of questioning that Counsel to the Inquiry do not consider relevant or appropriate having regard to, in particular, section 17(3) of the Inquiries Act 2005 (duty to act with fairness and with regard to the need to avoid an unnecessary cost), the Terms of Reference, and any relevant List of Issues - in which case an application may be made to the Chairman at the conclusion of Counsel to the Inquiry's questioning for permission to pursue the matter, should it remain unaddressed by the oral evidence given.
17. An indication by Counsel to the Inquiry that they will address an issue/line of questioning should not be understood as meaning that they will refer to every document to which reference is made in the completed template, rather that the issue will be addressed in the way considered most appropriate by Counsel to the Inquiry at the time oral evidence is given. Core Participants should understand, however, that documents not flagged when submitting the questioning template may not be available to be shown to a witness during the hearing, and so they should take care to include reference to any significant document(s) that may have a direct bearing on the witness's evidence.
18. It is recognised that it may be necessary, on occasion, for the deadlines within this note to be amended or shortened. In particular, the Chairman may permit oral applications to be made seeking permission to question witnesses where it is necessary and appropriate to do so, for example where a new issue arises unexpectedly during oral evidence. However, all those who wish to question witnesses should assume that adherence to the process and timetable set out

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above will be a necessary precursor to making an oral application for permission to question a witness, absent good reason to support a different approach.