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# THE CONVERSATION

## Waiting for Chilcot: are threats from families and politicians really the answer?

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Will we ever know what he knows? EPA/Andy Rain

David Cameron recently spoke of his immense frustration at the continued delay in

publication of the Chilcot inquiry report – a document supposed to reveal why the UK went to war in Iraq and what lessons have been learned from the conflict.

The inquiry was convened in 2009 and has still not produced its findings. Families of British servicemen killed in Iraq are now threatening to take **legal action** over the delay. It has even become a feature of the Labour leadership election, with candidate Yvette Cooper **pledging** to work with Cameron to pass a House of Commons motion demanding publication of the Chilcot report by the end of the year.

Unfortunately, neither may produce the desired result in this case. But the mounting frustration over Chilcot could prompt change to the way public inquiries are carried out.

## Waiting game

Public inquiries serve many purposes. They establish facts and make recommendations to prevent incidents from recurring. But one of their key roles is to hold those in authority to account. It is therefore vital that public inquiries remain independent from the government and the wider political system.

The Chilcot Inquiry has faced widespread public criticism from the outset in 2009. Many hearings were taking place in secret and there were **protracted disputes** with the government over the publication of sensitive papers. Among these were Cabinet Office minutes and memos between Tony Blair and George W Bush.

The inquiry was already significantly behind its anticipated timetable by the time it reached the stage of Maxwellisation. This is the process of sending everyone who the inquiry intends to criticise the relevant section of the draft final report. They are then given the opportunity to respond ahead of publication.

By that time the patience of the families of the servicemen, government and public was already wearing very thin. Further damage was caused when the 2015 election rolled around and still no report had been published. This gave rise to allegations of cynical political interference and deliberate delaying tactics.



Blair gives evidence in 2011. EPA/Facundo Arrizabalaga

However, direct political interference by parliament, as proposed by Cooper, risks yet further damage to the perceived independence of the process. The Chilcot Inquiry's integrity could be further undermined, which would cast even more of a shadow over its findings.

It also risks, at its most extreme, derailing the inquiry itself. As Sir John Chilcot stated when giving evidence to parliament in February 2015 "We are an independent inquiry and we should hold to our independence. We could not be forced, frankly, to put our signatures to a report which we regarded as incomplete or unfinished."

The families' approach to addressing the delay is to threaten to seek a court order. They want a formal ruling that the delays are unlawful and that those involved in the inquiry have misinterpreted the extent to which the Maxwellisation process needs to be carried out.

They argue the inquiry "is unfairly prioritising the interests of senior politicians, senior civil servants and senior members of the armed forces who may be the subjects of criticism over the interests of family members – as well as the general public – to know why, who and for what, their loved ones died."

But the families face an uphill struggle. Judicial review challenges can be made against public inquiries but the courts in general will not interfere with the exercise of discretion. They generally take the view that members of the inquiry are likely to have a much greater understanding of the inquiry's tasks than the courts.

## The trouble with Maxwellisation

One of the challenges faced by the families is that the Chilcot Inquiry set up the Maxwellisation process with strict duties of confidentiality. That means the full extent of the discussions and correspondence that have taken place during its course will not be known.

Added to that, public inquiries have considerable discretion over the procedure they may choose to adopt. The Chilcot Inquiry is not unusual in opting for Maxwellisation, as part of discharging its obligation to meet requirements of fairness.

Maxwellisation was used in the inquiry into the collapse of **Bank of Credit and Commerce International** in the 1990s and **Scott** inquiry into the sale of arms to Iraq.

Maxwellisation has also been incorporated into the rules governing statutory inquiries (over half of public inquiries currently convened) as the warning letter process. This requires warning letters to be sent out, prior to publication of the report, to any person who may be subject to criticism, providing details and the opportunity to respond.

This procedure is not without its own severe critics. Many see it as too onerous, inflexible, time consuming and costly. The inquiry into the failings of hospital care in Mid Staffordshire is a good example of this. The inquiry has been singled out for its speed and efficiency, having delivered its final report two years after its first hearing. But even then, at least six months was spent on warning letters. Literally thousands of hours of work went into producing the generic warning letter for the **Leveson** inquiry.

It is frequently argued that, in the vast majority of cases, those facing criticism have been present at the hearings, have heard the evidence and are fully aware of the issues and therefore warning letters are unnecessary, except in exceptional circumstances where, if they were not sent, there would be injustice to a particular witness.

The government has been severely criticised for standing by the prescriptive warning letter procedure instead of bringing in a more flexible alternative. These latest complaints about Chilcot could force its hand. Parliament may now reconsider making changes to the warning letter process and Maxwellisation in order to prevent such huge delays in future public inquiries.

That, however, will come as little comfort to the families that have lost loved ones in Iraq and

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are still waiting to be told why.



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