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The Inquiries Act 2005 - fit for purpose?



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This month saw the publication of a Lords select committee report on the law and practice relating to public inquiries into matters of public concern and, in particular, the Inquiries Act 2005. Emma Ireton looks at the findings and recommendations.

Public inquiries 'into matters of public concern', by their very nature, concern us all. The sheer range of matters covered is illustrated by examples of public inquiries over recent years: from the most recent announcement of a public inquiry into undercover policing following the findings of the Stephen Lawrence Independent Review, to the Leveson Inquiry into the culture practices and ethics of the press, the Mid Staffordshire Inquiry into the monitoring of the NHS Trust and the Bloody Sunday Inquiry into events in 1972 surrounding the death and

injury of civilians in Londonderry by members of the British Army, to name but a few.

Background to the Act

It was the Bloody Sunday Inquiry, the longest running and most costly inquiry ever, costing £192m and taking 12 years to complete, that was a significant driver behind the desire to update legislation governing public inquiries, and which led to the introduction of Inquiries Act 2005. A key focus of the Act and Rules is the desire to control the length of public inquiries and the cost, both to the public purse and to others. The Act gives a minister the power to establish a public inquiry into matters of public concern and gives those inquiries the power to require the attendance of witnesses, the production of documents, and the taking of evidence on oath.

Prior to the Act coming into force, there was significant concern about the powers given to the minister, including the power to restrict attendance at the inquiry, the disclosure or publication of evidence, and the power to determine whether any evidence in the report should be withheld in the public interest. There was also a substantial body of criticism over the apparent rush to introduce the legislation, and the lack of pre-legislation scrutiny. [1]

Statutory or non-statutory?

Although the 2005 Act was intended to consolidate numerous pieces of existing subject-specific legislation, and provide the primary framework for establishing public inquiries, surprisingly it has been rarely used. [2] There have been only 14 public inquiries set up under the 2005 Act, and only two, Leveson and Mid Staffordshire, set up under the current Government. Non-2005 Act public inquiries and investigations continue to be set up by the Government under the two remaining statutory provisions [3] and so do, more significantly, many inquiries without any statutory basis.

There has been concern over the lack of transparency and consistency in ministerial decisions to set up, or refuse to convene, a 2005 Act inquiry; reasons are not always given. The only significant differences between a 2005 Act inquiry and a non-statutory inquiry are the powers of compulsion and the presumption that hearings will be held in public [4]. The 2005 Act is generally recognised to be good. It has been suggested that ministers may choose alternative forms of inquiry and investigation because they feel the Act somehow ties their hands, is too complicated, or is 'too public'. [5]

An underlying reason for not using it is often concern over cost. There are also many occasions where a 2005 Act inquiry is not convened because security and other sensitive issues are involved, and a decision is made that the evidence should be heard in secret. Reasons given include protecting matters of national importance and national security, or where the release of material might jeopardise economic measures concerning Britain's economy. [6] However, the lack of transparency in the decision-making process can give rise to concern over the motives behind the decision reached and can seriously damage the public's trust in the process. Further, the lack of both the power of compulsion and the power to take evidence on oath diminishes the effectiveness of any non-statutory inquiry.

The Inquiry Rules and Warning Letters

The Ministry of Justice published a preliminary assessment of the 2005 Act in October 2010, concluding that, overall, it had been successful but that the Inquiry Rules 2006, as currently drafted, were "unduly restrictive and do not always enable the most effective operation of the Act".

The rules prevent the inquiry panel or chairman from including any explicit or significant criticism of a person in a report without first sending that person a warning letter and giving them a reasonable opportunity to respond. Ostensibly, this appears to be a good provision. Where, at a late stage in the inquiry, evidence comes to light criticising an individual who has not previously been involved in the inquiry, clearly it would be unfair if the report were to criticise them without first allowing them to put their case. Usually it is clear from the outset that an inquiry is concerned with serious allegations against individuals, for example staff at Stafford Hospital or the News of the World, and those individuals have the opportunity to argue their case during the inquiry. [7]

In practice, the current requirement to send warning letters to any person facing significant criticism in the report, then dealing with each response and the associated complications arising from obligations of confidentiality set out in the rules, is extremely onerous. This provision is frequently singled out for criticism by chairmen, counsel and solicitors to the inquiry. It has been estimated that the Mid Staffordshire Inquiry was extended by at least six months by the warning letter process, [8] and thousands of hours of work were added to the Leveson Inquiry, [9] significantly delaying the reports and creating a huge amount of work at public expense.

The recommendations

The Select Committee was convened on 16 May 2013 and received written and oral evidence from chairmen, counsel and solicitors to inquiries, core participants, academics, interest groups and others. Its report, published 11 March 2014, produced 32 recommendations; the key ones are:

- Inquiries into matters of public concern should normally be held under the Act and Ministers should give reasons for any decision to hold an inquiry otherwise than under the Act;
- There should be stronger controls on the powers of ministers, for example seeking the 'consent', rather than 'consulting' with the chairman of an inquiry before setting or amending terms of reference, adding another member to the inquiry panel or terminating the appointment of a panel member; where the minister wishes to terminate the appointment of the chairman of an inquiry, a notice of his intention, with reasons, should be laid before Parliament. Further, except in matters of public security, on publication of the report, only the chairman should have the power to withhold material from publication;

- Interested parties, in particular, victims and victims' families should be given an opportunity to make representations about the final terms of reference;
- A central inquiries unit should be set up to provide assistance with the practical details of setting up an inquiry, such as premises, infrastructure, IT, procurement and staffing, the costs of which, it is anticipated, would be more than compensated by the consequent savings;
- The rules relating to warning letters [10] should be revoked and new rules introduced giving the chairman discretion as to when a warning letter should be sent. The expectation is that this recommendation alone should cut months off the length of an inquiry, and reduce the cost proportionately;
- Parliament should do more to hold ministers to account following publication of the inquiry report, on responding to recommendations and implementation.

It remains to be seen which of the recommendations Government will adopt. Many are not new. There has been criticism of the Rules for a number of years, but amendments have yet to be made as it has not been considered a high priority, [11] despite the key role played by public inquiries in addressing major crises, and their relevance to the public as a whole. It may be some time yet before we see changes to the current system.

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[1] See the [comments of Lord Howe of Aberavon](#): HL Deb, vol 667, col 991.

[2] See the [comments of Lord Solely](#) *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 11 December 2013 Q319 available [here](#).

[3] Health and Safety at Work etc Act 1974, s14 and Financial Services Act 2012, ss68-72

[4] Select Committee on the Inquiries Act 2005 *Inquiries Act: post-legislative scrutiny* (HL) 11 March 2014 Paragraph 66 available [here](#).

[5] See Lord Richard *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 11 December 2013 Q323

[6] Shailesh Vara Parliamentary Under-Secretary of State for the Ministry of Justice *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 11 December 2013 Q321

[7] Select Committee on the Inquiries Act 2005 *Inquiries Act post-legislative scrutiny* (HL) 11 March 2014 Paragraph paragraph 244

[8] Robert Francis QC *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 30 October 2013 Q216

[9] Sir Robert Jay *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 16 October 2013 Q125

[10] Inquiry Rules 2006, r13-15

[11] See the [comments of Shailesh Vara MP](#) *Inquiries Act: post-legislative scrutiny – Evidence* (HL) 11 December 2013 Q339

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