
GARDEN COURT
CHAMBERS

PUBLIC INQUIRIES AND INQUESTS: Accountability in the time of COVID

Stephen Simblet QC, Garden Court Chambers

10 May 2021

The legal basis and framework for a public inquiry

Public inquiries

- Cynic would say that traditionally what happens when society expects to see the Government do something.
- Public Inquiries used to be subject to the Tribunals of Inquiry (Evidence) Act 1921.
- Traditionally, they were judicial inquiries, and the judge and Parliament had a role in setting the terms of reference. They sat in public and the inquiry chair had control over what evidence was heard and how the conclusions were published.

Hutton Inquiry

The dry-run for what the Government thought should be the procedure at an inquiry was the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly.

- This was a death in which the coroner would normally have held an inquest. However, there was no evidence on oath (compared to an inquest).
- The witnesses were questioned by counsel to the inquiry.
- There was control of the information available to the inquiry.

Inquiries Act 2005- Finucane Inquiry

A joint British/ Irish inquiry by Justice Peter Cory into the death of the lawyer Pat Finucane recommended in 2004 that there be a full public inquiry set up by the British Government.

The British Government wanted to limit the extent to which secret intelligence and allegations of collusion were scrutinised.

The British Government decided that this Inquiry be set up under the provisions of an Inquiries Bill that was proceeding through Parliament. That Bill (which later became the Inquiries Act 2005) was rushed through Parliament in April 2005.

This meant little Parliamentary scrutiny of the substantial changes made to the 1921 Act.

Finucane Inquiry not public inquiry, and not Article 2- compliant

- The Government did, eventually, get the Finucane Inquiry off the ground, and the late Sir Desmond da Silva QC conducted it. It was not, by then, a public inquiry, and instead was an "independent review", finished in 2011,.

- The adequacy of the Inquiry was challenged and in a judgment earlier in 2019, the Supreme Court held that the Inquiry had not been adequate and did not comply with Article 2 ECHR: see In the Matter of an application by Geraldine Finucane for Judicial Review [2019] UKSC 7. Since the Inquiry no longer purported to be conducted under the Inquiries Act 2005, this is probably not a direct authority on the Act's non-compliance with Article 2 ECHR.

- Nevertheless, it is clear that certain powers under the Inquiries Act 2005, if invoked in the context of an inquiry into a controversial death, would offend the requirements of Article 2.

Inquiries Act 2005 and Inquiry Rules 2006

Section 1 (1) : “A minister”

Section 2: inquiry cannot determine civil or criminal liability, but is not inhibited by likelihood of liability being inferred

Section 5: minister specifies setting up date and (s. 5 (1)(b)) the terms of reference, after consultation with the proposed chairman (s.5 (4)) BUT (section 5 (3) the Minister “may at any time” after setting out terms of reference “amend them if he considers that the public interest so requires).

It is the Minister (and Government) who control this. It is NOT Parliament, nor even the Chairman.

Membership of the panel

Sections 3- 4: membership- “chairman” plus members.

Presence of members important.

Section 8 deals with “suitability” and section 9 with impartiality, subject to having sufficient “expertise” within section 11 .

Evidence, procedure and public access

Inquiry chairman sets procedure.

S/he does not have to take evidence on oath: power to do so, section 17 (2).
There is an obligation to secure public access to the proceedings in section 18, and a “restriction order” procedure prescribed in section 19, which takes account of “harm or damage”, which specifically includes at section 19 (5) “national security or international relations, “ economic interests” of any part of the United Kingdom or “disclosure of commercially sensitive information”.

How will that play out in a Covid Inquiry?- see also section 23, where Crown can apply to prevent information being revealed where there is a “risk of damage to the economy”

Participation in inquiry

Participation in inquiry by being designated a “core participant” within rule 5.

Way into becoming a core participant (other than playing a part or being liable to criticism, is if “person has a significant interest in an important aspect of the matters to which the inquiry relates”.

Long list of potential people: the bereaved; those involved in frontline care; those involved in running businesses subject to restriction, e.g. care homes; people whose livelihoods directly affected.

Lawyers and advocacy during the Inquiry

Core participants can be legally represented, and rule 6 and rule 7 provide for that, including providing a power to the Chair to require particular core participants to be represented by a single representative.

Rule 11: Core Participants or their legal representatives can make opening and closing statements.

Rule 10 (1) the default position is that it is only counsel to the inquiry (and the panel themselves) who can question witnesses, though there is a limited procedure for making an “application” to question a witness, stating why.

In practice, a lot of the lawyer’s work is in formulating proposed questions for counsel to the inquiry to ask.

Public Inquiries and Article 2

Section 15 of the Act permits a Minister to give notice to other inquiries to convert them to inquiries under this Act (subject to that other person's consent).

Hillsborough Inquests were inquests held under the Coroners and Justice Act 2009, and were not a public inquiry.

Grenfell Tower Inquiry is a public inquiry, as are the Manchester Arena deaths.

We are seeing (Leslie and Allison can tell us) the limitations of the procedures for asking questions, setting the agenda and ensuring that those responsible are properly held to account.

Thank you

020 7993 7600 | info@gclaw.co.uk | @gardencourtlaw