



HOUSE OF LORDS

Select Committee on the Constitution

1st Report of Session 2004-05

Inquiries Bill

Report with Evidence

Ordered to be printed 15 December 2004 and published 12 January 2005

Published by the Authority of the House of Lords

London : The Stationery Office Limited
£price

HL Paper 21

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Inquiries Bill

1. On 24 February 2004, the House of Commons Select Committee on Public Administration (PASC) announced that it would be examining the subject of “Government by Inquiry”. It published a list of questions about the value of inquiries established by Ministers into particular, controversial events that had given rise to public concern. The Committee took oral evidence from the Lord Chancellor on 25 May 2004. Other witnesses included the Lord Chief Justice, (Lord Woolf) who gave evidence on 14 December 2004.
2. The Government’s response to the PASC call for evidence took the form of a consultation paper, “Effective Inquiries”, published on 6 May 2004 by the Department of Constitutional Affairs, which drew extensively on the Select Committee’s questionnaire. The consultation period closed on 29 July 2004. In September 2004, the Department published its paper “Summary of Responses to the Effective Inquiries Consultation Paper”. This paper contained a summary of responses, and also, on some but not all of the questions, a brief statement of the Government’s position.
3. In the Queen’s Speech on 23 November 2004, it was stated that “Legislation will be brought forward to provide a modern and comprehensive framework for statutory inquiries into matters of public concern.” The Inquiries Bill was introduced into the House of Lords and given its first reading two days later. It was given a second reading on 9 December and remitted to a Grand Committee.
4. The Bill proposes the repeal of the Tribunals of Inquiry (Evidence) Act 1921 and provisions in over twenty other Acts (ranging chronologically from the Regulation of Railways Act 1871 to the Fire and Rescue Services Act 2004) which authorize the holding of inquiries into specific subjects, for example railway accidents, child abuse, health, education, police. In the place of these provisions, the Bill (clause 1(1)) gives “a Minister” power to cause an inquiry to be held “in relation to a case where it appears to him that:
 - (a) particular events have caused, or are capable of causing, public concern, or
 - (b) there is public concern that particular events may have occurred”.

By clause 1(2), “a Minister” is defined as meaning a United Kingdom Minister, the Scottish Ministers, a Northern Ireland Minister and the National Assembly for Wales.

5. Our general concerns about the constitutional significance of the Bill were expressed in a letter sent to the Lord Chancellor on 8 December, before the second reading debate, reproduced at Appendix 1. The Government did not respond during the debate, but replied in writing on 17 December (Appendix 2). The reply contained several questions, to which the Chairman responded on 20 December (Appendix 3). We make this report and publish the correspondence for the information of the House in order to draw attention to matters of principle affecting principal parts of the constitution.

APPENDIX 1: LETTER FROM THE CLERK OF THE CONSTITUTION COMMITTEE TO THE RT HON THE LORD FALCONER OF THOROTON, LORD CHANCELLOR AND SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS

I have been asked by Lord Holme of Cheltenham, the Chairman of the Constitution Committee, who is abroad, to write expressing his concern at the far-reaching implications, form and timing of the Inquiries Bill, which receives its second reading tomorrow. He very much regrets that, because of his absence abroad, he is unable to take part in the debate on second reading.

The Queen's Speech states that the Bill will provide "a modern and comprehensive framework for statutory inquiries into matters of public concern". In seeking to do so, the Bill raises many detailed questions concerning matters of constitutional principle as well as proposing the repeal of legislation that has been in place for over 80 years. It was not however preceded by a white paper or other full statement of the Government's proposals, but only by a paper outlining the response to the Department of Constitutional Affairs' consultation, carried out while the Public Administration Select Committee's inquiry into the same subject is still in progress.

In its recent report, *Parliament and the Legislative Process*,¹ the Constitution Committee welcomed the recent extent of pre-legislative scrutiny, paying special tribute to the work done on the Draft Civil Contingencies Bill by the Joint Committee appointed for the purpose. The Committee pointed out that pre-legislative scrutiny should lead to better legislation and, potentially, save time during the later legislative stages of a bill. The Committee stated that it wished to see the practice of pre-legislative scrutiny improved and extended. In an earlier report, *Changing the Constitution: the Process of Constitutional Change*,² the Committee examined the procedure that should be followed in regard to bills of constitutional significance, stating that such bills would benefit in the same way as all other measures from changes designed to strengthen parliamentary scrutiny.³

Lord Holme is of the view that it would be wholly consistent with these sentiments for the Inquiries Bill, as a measure of constitutional significance, to have been the subject of pre-legislative scrutiny. Since that is not now a realistic option, he hopes that appropriate means can be found to ensure that it is fully scrutinised during its passage through Parliament, including taking into account the findings of the Public Administration Select Committee's inquiry into the subject.

At Lord Holme's request, I am sending copies of this letter to the leaders of the principal parties in the House, to the Convenor of the Cross Bench peers and to the Chairman of the Public Administration Select Committee, as well as to members of the Select Committee on the Constitution.

8 December 2004

¹ 14th Report, 2003-04, HL Paper 173-I.

² 4th Report, 2001-02, HL Paper 69.

³ Ibid, para 65.

**APPENDIX 2: LETTER FROM BARONESS ASHTON OF UPHOLLAND,
PARLIAMENTARY UNDER-SECRETARY OF STATE FOR CONSTITUTIONAL
AFFAIRS, IN RESPONSE TO LETTER FROM THE CLERK OF THE
COMMITTEE TO THE LORD CHANCELLOR**

I am writing as Bill Minister for the Inquiries Bill in response to Ian Mackley's letter of 8 December to the Lord Chancellor. I am very sorry that you were not able to take part in the Second Reading debate to discuss the issues that you asked Mr Mackley to write about. As you will be aware, we had an interesting debate and I look forward to your participation in later debates.

Our decision to introduce the Bill now reflects the growing feeling in recent years that inquiries legislation needed to be re-examined and the concerns that have been raised about the cost and duration of some inquiries. The Public Administration Select Committee's inquiry, "Government by Inquiry" was very timely since it seemed from their "Issues and Questions Paper" published 24 February, that many areas which PASC wished to examine overlapped with the work Government was already doing. It therefore seemed appropriate to respond to the PASC paper with a detailed Memorandum and (with the permission of the Committee) to use that as a basis of a paper for public consultation. We published this paper on 6 May.

The consultation set out Government's broad thinking in a number of areas and invited comment. During the three-month consultation period we held three discussion group seminars in order to learn from those with direct experience of carrying out inquiries. About thirty people, including former inquiry chairmen, counsel, solicitors and secretaries, took part, and the views expressed in these groups were reflected in the response to the Consultation Paper.

The responses to the Consultation Paper confirmed the Government's view that new legislation on inquiries, to replace the Tribunals of Inquiry (Evidence) Act 1921 and many of the provisions on inquiries in subject specific legislation (for example, section 49 of the Police Act 1996 and section 84 of the NHS Act 1977), could improve the conduct and effectiveness of inquiries. Responses also showed general support for the Government's detailed thinking about what new legislation should contain as set out in the Consultation Paper. A summary of responses was published on 28 September.

The drafting of the Bill reflects the very clear views that came out of the Consultation and were set out in the Summary of Responses. The only significant exception is that the provisions on inquiries by devolved administrations were not covered in the consultation. Those provisions were the subject of detailed discussion with the devolved administrations. I was pleased that Lord Fraser, who has recent experience of conducting a major inquiry for a devolved administration, was supportive of the Bill at its Second Reading.

Thus we considered we have a well thought out policy which has been the subject of consultation with a wide range of people who have had involvement or interest in inquiries. The Bill was ready, and the Government felt it was time to bring it forward.

I agree it would have been helpful to have had the views of the Public Administration Select Committee prior to introduction. We understood originally that the Committee was aiming to report last July. This proved not to be the case

and I understand that the report is now expected by early February, so its conclusions will be to hand for Commons consideration, and any subsequent Lords consideration necessary. We certainly intend to consider PASC's conclusions very carefully. I wrote to the Chairman of the Committee on the day of the Queen's speech to let him know that the Bill was included in it and was likely to be introduced in the Lords soon afterwards, and I am meeting him to discuss it.

I confess I had not seen this Bill as one of substantial constitutional significance. It is very much a consolidation measure. It does not introduce any new constitutional ideas, but is designed to provide a single, UK wide framework that would be suitable for any future statutory inquiry into events that have caused public concern. It draws together and simplifies the complex collection of current legislation on inquiries, filling in some gaps in areas where no suitable legislation currently exists. It reflects both the direction the case law relating to inquiries has taken and a lot of good practice that has grown up over the years in the conduct of both statutory and non-statutory inquiries. The Bill is concerned with the tools needed by inquiries to do a successful job.

I wonder if you could elaborate on which aspects of the Bill particularly concern you, so that I can address your concerns more fully. I suspect that one of the issues of concern to you is the repeal of the 1921 Act, which requires resolutions of both Houses to give an inquiry which has been set up by a Minister or the monarch statutory powers. The 1921 Act is unusual in that it is the only legislation on inquiries to require such resolutions. This requirement was originally included in the Act because the Parliament of the day was concerned that the Government might try to set up too many inquiries under the 1921 Act and thought that a Parliamentary veto was needed. In practice, this has not been the case. Since 1990, there have been over 30 notable inquiries set up but only four of those were established under the 1921 Act. In three of those cases, the resolutions were passed as a formality, without debate, the exception was the Shipman Inquiry which was set up under the 1921 Act, rather than the NHS Act following a successful judicial review of an earlier decision to set it up in a different manner.

The Bill could be used for a wide range of different inquiries. While the subject matter of some might raise national concern, others may be concerned with more localised issues. The Government does not feel it would be appropriate to require the sanction of Parliament for every inquiry set up by a Minister, as this is not required currently for most cases. The need for resolutions in all cases could delay the process of setting up an inquiry, particularly when Parliament was not sitting.

It has been the practice of Ministers in the present Government, as well as its predecessors, to explain to Parliament the reason for setting up a major inquiry, whether a 1921 Act inquiry or not. I would expect this practice to continue. I gave an undertaking at Second Reading that I would be happy to consider whether the practice needs to be strengthened in any way during the deliberations on the Bill when it goes to Grand Committee in January.

I would be very happy to meet to explore your concerns further, if that would be helpful.

I am copying this letter to the leaders of the principal parties in the House, the Convenor of the Cross Bench peers, the Chairman of the Public Administration Select Committee, the Chairman of the Constitutional Affairs Select Committee and members of the Select Committee on the Constitution.

17 December 2004

APPENDIX 3: LETTER FROM LORD HOLME OF CHELTENHAM, CHAIRMAN OF THE CONSTITUTION COMMITTEE TO BARONESS ASHTON OF UPHOLLAND, PARLIAMENTARY UNDER-SECRETARY OF STATE FOR CONSTITUTIONAL AFFAIRS

1. Thank you for your letter of 17 December 2004, which helpfully explains the position of the Government in several respects. I should first make clear that we accept that there is a case for legislation in relation to the holding of public inquiries on matters that are or may be of public concern, although the urgency which surrounds this particular measure is less easy to understand. We are concerned that the subject has constitutional implications that appear not to have been appreciated by the Government, and are anxious to ensure that these implications are taken into account during the progress of the Bill through Parliament. Our preference, indeed, would have been for the Bill to be published in draft and subjected to pre-legislative scrutiny, in a similar manner to the procedure applied to the Bill which, after consideration over two sessions, has been enacted as the Civil Contingencies Act 2004.
2. Before dealing with other concerns about which you have asked for more information, I have to confess to some surprise that you do not see the Inquiries Bill as being one of substantial constitutional significance. That might possibly be the case if it were indeed a “consolidation measure” as you state, but in our view this is simply not a tenable description of the Bill. It is the case that the Bill seeks to repeal both the Tribunals of Inquiry (Evidence) Act 1921 Act and over twenty subject-specific powers for the holding of inquiries. Yet the general scheme of powers that it proposes does not so much amount to consolidation of existing statute-law as to be wholly new legislation. To give one example: before the powers of the 1921 Act can be exercised, a resolution of each House of Parliament is required declaring that it is expedient for a tribunal of inquiry to be appointed to inquire into a matter of urgent public importance. This is very different from the power that the Bill confers on a newly defined, but very wide, group of Ministers—including the devolved authorities—to cause an inquiry to be held when it appears that particular events have caused, or are capable of causing public concern, or that there is a public concern that particular events may have occurred. A further point among many that could be made to show that the Bill is not a “consolidation measure” is that under the Bill any reference to the specific subject-matter of particular inquiries (police, health, railway accidents and so on) disappears from the new generalised grounds.
3. It is to be hoped that the Bill builds on successful practice in relation to public inquiries as it has evolved in recent years, but there is a vital distinction to be drawn between allowing administrative practice to continue to evolve, and drawing from the recent record of inquiries the need to confer wide and far-reaching statutory powers on Ministers in relation to the conduct of inquiries. Indeed, that process of conferring powers upon Ministers may need to be accompanied by a statement of the essential principles that must be observed if the integrity of the inquiry process is to be maintained.
4. I might add, briefly, three other reasons why the Bill seems to us to be of constitutional significance. First, the Bill concerns the framework for the

procedure of impartial and independent inquiry, a mechanism that in its various forms is an important means of helping to secure the democratic accountability of the Executive: in this matter, both Parliament and the public at large have a substantial interest. Secondly, many but not all inquiries have involved the use of full-time judges for purposes that are not ordinarily regarded as being part of their duties in administering civil and criminal justice. The experience of several western legal systems is that the use of judges in this way is likely to raise questions of principle as to the relationship between the judiciary and the Executive. Thirdly, I would draw attention to the evidence already given to the Select Committee on Public Administration which both shows that the subject is of constitutional significance and raises questions to which a wide range of possible answers may be given.

5. Against this background, I will attempt to identify the principal concerns of the Committee on the Constitution. As noted above, the principal constitutional significance of the Bill is that it repeals the Tribunals of Inquiry (Evidence) Act 1921. This requires that a resolution of each House of Parliament, declaring that it is expedient that a tribunal of inquiry be appointed to inquire into a matter of urgent public importance, is necessary before the Government (that is, Her Majesty or a Secretary of State) can appoint a tribunal of inquiry with the same powers to compel witnesses to give evidence as are exercised by the High Court. Under the terms of the new Bill, similar powers are exercisable by “Ministers” (as defined) alone, who may initiate inquiries with the statutory authority to compel witnesses to give evidence, without reference to the two Houses of Parliament. The subject-matter of the inquiries need not (as under the 1921 Act) be of “urgent public importance”, but must relate to events that have caused or are capable of causing “public concern”.
6. There are five further reasons why the Bill is of constitutional significance:
 - (a) It contemplates that Ministers may appoint judges to conduct inquiries initiated under the new powers. The only express safeguard affecting the use of this power is (by clause 9(1)) that before the Minister appoints a full-time serving judge to be a member of an inquiry, he must first consult the relevant presiding or senior judge (in England and Wales, this will be the senior Lord of Appeal in Ordinary, so far as the Lords of Appeal in Ordinary are concerned, or the Lord Chief Justice, in respect of judges of the Supreme Court or circuit judges; in Scotland, the judge to be consulted will be the Lord President of the Court of Session and, in Northern Ireland, the Lord Chief Justice of Northern Ireland). It is a matter for consideration whether this is a sufficient provision to govern the situation in which a Minister seeks to appoint a judge to exercise functions lying outside the judge’s regular duties in the administration of justice. A related issue is whether the Bill should draw a distinction, as it does not at present, between inquiries conducted by judges and inquiries conducted by other persons.
 - (b) The holding of inquiries into events of public concern is an important mechanism within a democracy for enabling authoritative and impartial investigations to be made into events which may in many ways involve the political responsibility of governments. The Bill addresses only one, executive-led, means of helping to secure

such democratic accountability. If such inquiries are to achieve the purpose of responding to public concern, it is essential that the public should have confidence in the integrity of the whole process, including the decision to appoint an inquiry, the conduct of the inquiry hearings, and publication of the inquiry report.

- (c) A well-conducted and thorough inquiry can have a strong impact on the rights and interests of individuals connected with the events being inquired into. Clause 2 of the Bill reads: “(1) An inquiry panel is not to rule on, and has no power to determine, any person’s civil or criminal liability.” It then goes on to state “(2) But an inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.” Certainly, no inquiry panel has the power to determine questions of criminal liability or to make an award of damages, but it may be questioned whether the reference in this clause to civil liability aptly delimits the proper scope of an inquiry that is appointed, for instance, to examine and report upon the causes of a serious railway accident or industrial disaster.
- (d) Many inquiries appointed by Ministers in recent years (including the “arms for Iraq” inquiry, the Hutton inquiry, the Bichard inquiry into the circumstances of the Soham murders, and the Budd inquiry) have been appointed and held without the benefit of statutory powers. The Bill includes provision enabling Ministers to convert an inquiry begun without statutory powers into an inquiry held under the new legislation (clauses 14-15), but questions arise as to the future intentions of the Government in regard to non-statutory inquiries, including questions as to the appointment of judges to conduct such inquiries.
- (e) The Bill is concerned not only with the decision to hold an inquiry and appoint the inquiry panel, but also grants functions to the relevant Minister in respect of the conduct of an inquiry—for instance, in regard to the termination of a panel member’s appointment, suspending an inquiry, power to end an inquiry before it has reported, power to impose restrictions on reporting and public access, and a qualified duty to publish the report of an inquiry. It would however run counter to the reasons for establishing the inquiry if, having set it up, a Minister continued to exercise an active oversight of the proceedings. It may in particular be asked whether such powers should be exercised by a Minister where an inquiry is being conducted by a serving judge. A further question is whether the Council on Tribunals (a body that acts independently of Ministers) is to be entirely excluded from oversight of such inquiries, as is the effect of the Bill as it stands.⁴

7. As for the general case for legislation in this area, for many years, since at least the report of the Royal Commission on Tribunals of Inquiry chaired by Lord Justice Salmon in 1966⁵ and a departmental committee on the

⁴ Inquiries Bill, Schedule 2, para 14 (which amends the Tribunals and Inquiries Act 1992, s 16, to bring about this result). And see the comment on this point by the Minister, Baroness Ashton of Upholland, HL Hansard, 9 December 2004, col 1014.

⁵ Cmnd 3121, 1966

application of the law of contempt to tribunals of inquiry, also chaired by Lord Justice Salmon⁶, it has often been said that the Tribunals of Inquiry (Evidence) Act 1921 is in need of reform. Although successive governments have often appointed non-statutory inquiries, or inquiries under subject-specific legislation, rather than proceeding under the 1921 Act, practical difficulties have arisen from the lack of a statutory framework, and from the variety of statutory frameworks that exist in the case of subject-specific inquiries. Nonetheless, we are concerned for the broad reasons summarized above at the full extent of the constitutional changes proposed by the present Inquiries Bill.

8. In view of the Bill's constitutional significance, we are also concerned at the manner in which it has been presented to Parliament. We believe that the issues involved merit the widest public debate, whether through the publication of a white paper or by pre-legislative scrutiny of a draft bill. As you have acknowledged, a full inquiry into the subject of public inquiries is currently being conducted by the PASC, and I understand that the PASC will issue its report at an early date. It is a matter of concern to my Committee that the present Bill, that seeks (among other things) to repeal legislation that has been in place for more than 80 years, is based upon the Government's response to a consultation process that was undertaken while the PASC inquiry was in progress and that has been given little prominence. The Constitution Committee, for example, was not sent the consultation document. If I might say so, it is no great comfort to be reassured that PASC's comments will be taken into account after the Bill has left this House.
9. Finally, I would emphasise that in the time available the Committee have not been able to scrutinise all the detailed provisions of the Inquiries Bill, and this letter is not a substitute for such scrutiny. Our terms of reference require us to concentrate our attention on questions of principle, not matters of detail. We therefore propose to bring this correspondence to the attention of the House, in the belief that it may assist the Bill to receive the detailed scrutiny in Parliament that it deserves.

20 December 2004

⁶ Cmnd 4078, 1969