



**JUSTICE**

**Department for Constitutional Affairs**

**Effective Enquiries (CP12/04)**

**Submission by JUSTICE**

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**For further information contact  
Roger Smith**

**Email: [rsmith@justice.org.uk](mailto:rsmith@justice.org.uk) Tel: 020 7762 6412**

1. JUSTICE is a British-based human rights and law reform organisation with 1600 members. Its mission is to advance justice, human rights and the rule of law. JUSTICE is also the British section of the International Commission of Jurists.
2. JUSTICE welcomes this consultation by the Department of Constitutional Affairs. In particular, the conduct of the Butler and Hutton inquiries has been controversial and it is our view that the time has come for a statutory framework for such inquiries that incorporates the provisions set out below. These are designed to enhance the independence of the inquiry and to avoid unnecessary controversy. Particularly if senior members of the judiciary are to continue to be used to chair inquiries on contentious subjects, then reforms of the kind that we propose are required to protect them from being used in so political a role that it might affect the public perception of their impartiality. It might, for example, have been difficult for Lord Hutton to return to being a sitting judge without being affected in some degree by the criticism that was probably unavoidable, whatever the nature of his final report.
3. This response addresses the following as specific issues (referenced to the questions asked in the consultation paper) of major concern:
  - (i) Terms of reference (q 3(c))
  - (ii) Appointment of inquiry chairmen and members (q 3(d))
  - (iii) Membership (q 5)
  - (iv) Value in having a trained Panel (q 7)
  - (v) Adequacy of current legislation (qs 8 and 9)
  - (vi) Holding of inquiries in private (q 12 )
  - (vii) Relationship between public inquiries and Parliament (qs 13 – 18)
  - (viii) Publication of the final report (q 19)

### **The general approach**

4. JUSTICE accepts that Inquiries can serve important functions in the public interest, in particular the following:
  - (i) Investigation of matters of public importance/the exposure of wrong-doing  
The central function of public inquiries is the investigation of past events in order to learn for the future, in cases where the public and/or relevant

decision makers do not have sufficient information to understand what has taken place or to act appropriately. It is their ability to act inquisitorially to investigate past events in order to provide detailed and reasoned factual analysis of such events that provides the primary justification for their existence and the context in which their other functions must be considered.

(ii) The making of recommendations

The role of inquiries should be focussed on the making of technical/procedural recommendations aimed at dealing with the problem(s) under investigation and attempting to ensure that they do not arise again in the future.

(iii) Open government / access to information

The holding of an Inquiry can also provide public access to information that would not otherwise have become available (e.g. in proceedings in court) about the way in which government or other public institutions are run. Where such information is made publicly available, except perhaps where it is highly technical, it will be open to the public to judge for themselves as to what has happened and whether there has been wrongdoing.

5. It is important to recognise, however, that there are important limits to the role of public inquiries. For example, they should not be asked or expected to decide broad questions of political controversy in ways that can be exploited by the government or the opposition or are properly within the realm of party politics. These should be a matter for the political process. So far as possible, public inquiries should confine themselves to the investigation of particular factual circumstances and the making of recommendations closely based on those circumstances. The results of inquiries should then inform the political process

**Q 3 (c) Who should take the decisions on ... c) [the inquiry's] terms of reference?**

6. The terms of reference ('the terms') are a matter of central importance to the effective outcome of an Inquiry. It is of particular importance that the terms are clearly drafted. Failure to do so will lead to ineffectiveness, public disappointment and waste of resources.

7. The Consultation Paper accepts that poor terms of reference cause ‘unnecessary cost and delay, and may introduce questions which merely confuse the essential issues’<sup>i</sup>. The broader the terms of reference, the greater the likelihood of a lack of focus to the Inquiry. This may result in the Chair having too much freedom to decide which matters to investigate. In particular cases, this can lead to a blurring of the lines between the political decision to hold an inquiry and the impartial role of the investigator (see also below). Terms of reference so imprecise that they leave the scope of the inquiry significantly within the discretion of the Chair will almost inevitably attract criticism. Precise terms both serve to provide some protection for the Chair and ensure that broadly political questions remain within their proper sphere. Appropriate terms should also ensure that the Inquiry does not delve into issues that are not strictly relevant to the subject of the Inquiry.
8. We are concerned about the involvement of the Chair in setting the Terms. There are obvious benefits from this. The Chair, especially if an expert in the relevant field, may be well placed to advise as to what is/are the most important question/s to address. Such expertise could however be obtained elsewhere.
9. The terms may sometimes be a (politically or otherwise) controversial issue. They identify the parameters within which the Chair conducts the Inquiry in much the same way as the rule of law for judges. The involvement of Chairs in drawing up the terms brings a danger that they are involved, or are perceived to be involved, in the business of deciding on terms of the purpose of the inquiry, thereby blurring the line between political decision maker and impartial investigator.
10. Particularly in the case of an Inquiry with politically sensitive subject matter, the report may lead to criticisms of the inquiry for bias and partiality. The likelihood of such accusations may be greater where a Chair is involved not only in producing the Report but in drawing up the terms of reference, particularly in cases where the terms are argued by some to fail to identify the central issue<sup>ii</sup>.
11. For these reasons, the role of the Chair in setting the terms should be limited. There may be cases in which the Chair becomes aware of issues that would or could not have been apparent at the time that the Inquiry is established. In such cases, it would be appropriate to allow the Chair to make a reference back, publicly, and giving others the opportunity to make representations, to the person

responsible for setting the terms. Otherwise, the Chair should not be directly involved in this preliminary phase of establishing the Inquiry.

12. We support, therefore, the idea of a 'cooling off' period, which would allow representations to be made to the decision maker in response to draft Terms. Clearly, the benefits of such a period must be weighed against the need, or desire, for swift investigation. This need not, however, weigh too heavily in the vast majority of cases. In the context of even the swiftest of inquiries, a period of a couple of weeks - even a month - will be of relatively little importance. Much of the practical planning of the work of the Inquiry can proceed without delay, even while final decisions on the Terms are awaited.

13. In this respect, it might be noted that many felt that the Hutton Inquiry had failed to address the essential issues. Its terms were particularly broadly drawn, in part as a result of the pressure for the Inquiry to report quickly. That led to widespread dissatisfaction (as Lord Hutton himself has conceded<sup>iii</sup>) because the terms he had been given allowed for widely differing interpretations and hence widely differing expectations of the issues he would think it right to address. That in turn contributed to the political case for yet a further inquiry, that chaired by Lord Butler.

14. Further, the Butler Inquiry was controversial because the terms were announced without consultation. That led to the refusal of the Liberal Democrats to participate, and the partial and unwilling involvement of the Conservatives. This reflected on its impartiality and might have been addressed by allowing for consultation as to its Terms.

15. Accordingly, there should generally be public consultation on the terms. The slight delay that this may occasion is unlikely to outweigh the benefits of such a process.

**Q 3 (c) Who should take the decisions on ... d) the appointment of chairmen<sup>iv</sup> and members?**

16. There are clearly practical constraints on the manner in which members are appointed, notably the need for expedition and the need to find people with the

appropriate expertise and experience. In those circumstances, we accept that it would be inappropriate to have a lengthy process of open application.

17. Nevertheless, JUSTICE has serious concerns about appointment being within the discretion of the Minister, or indeed the Government as a whole. Given the potential of Inquiries to serve the interests of open government, it is unsatisfactory that the appointment of Chairs should be within the exclusive discretion of Ministers. While not every inquiry will have the potential to impact directly upon the interests of the government of the day, it is clear that some do. The Hutton, Butler and Scott Inquiries provide good examples. In the first, Lord Hutton was chosen directly by Lord Falconer, the Secretary of State for Constitutional Affairs. The Prime Minister himself appointed the members of the Butler Inquiry despite the fact that it was in a position to make significant criticisms of his administration and indeed of his personal conduct. Where an inquiry is into the conduct of government, it is inappropriate that a minister of the government should make the decision to appoint the Chair. There is a danger of both actual and perceived bias. Even the perception of bias may damage the ability of the Inquiry to carry out its functions and limit the extent to which its conclusions command wide acceptance.

18. As a matter of general principle, JUSTICE strongly supports the 'option' considered at paragraph 32, namely the appointment of a permanent panel for the selection of Inquiry Chairs. This is the most effective way of distancing the selection of the Chair from the Minister calling the inquiry. It will also allow for prior consideration of issues such as diversity.

19. There are several possibilities as to how such a Panel could be constituted. A simple method, which would avoid altogether any problems over costs, would be for the Panel to be made up of an appointee from each of the three major political parties. An alternative might be for the leader of each political party to be able to nominate a person to be on the Panel. There are other models. The end result should be a panel which meets the requirements of independence for appointment to a high public office.

20. The objections to such a Panel considered in the Consultation Paper (at para 32) have little merit, for the following reasons:

- (i) The ‘same questions would arise about independence of the panel...’  
Even if that were the case, as it might be if the panel were directly appointed by a single Minister, the fact that the Minister was one stage removed from the selection of the Chair would be beneficial, especially if it had to choose from a limited pool of chairmen selected before the particular issue under investigation arose. Further, provided that proper consideration is given to how the Panel is appointed, as above, it should be possible to ensure that the Panel is constituted in such a way as to preclude doubts about its independence from government.
- (ii) There is a danger of a ‘potential to deter prospective chairmen’  
That could conceivably be the case if the Panel were to conduct extensive public hearings for the appointment of a Chair. Such hearings would be undesirable for a number of reasons. Whether or not such hearings are conducted is entirely separate from whether appointment of Inquiry Chairs should be made by the Minister who may be most affected by its deliberations, or by an independent Panel with no direct interest in the outcome of the Inquiry. Far from deterring potential Chairmen, the fact that they would be appointed by an independent panel would, we think, be likely to shield them from accusations of bias or ‘whitewash’, and thus be likely to make the role of Chair more, rather than less, attractive to many candidates.
- (iii) ‘If the Government were to select the panel, it could still be argued that Ministers were influencing the selection of the chairman’  
That is why the Government should not select the Panel.
- (iv) ‘the civil service would need to advise on potential candidates .... , so it might be difficult to demonstrate that the process was independent from Government’  
Civil servants would not have the final say; and provided that Panel members are seen as independent, the fact that civil servants advise them is unlikely to lead to problems in terms of impartiality. Further, in general civil servants themselves have obligations of impartiality, and the mere fact of a civil service involvement would not undermine the impartiality of the process. We note the suggestion at para 56 that there may be a value in maintaining a small, dedicated Inquiries Unit. Presumably, the civil servants who would advise an appointments Panel would be from that Unit. Such a unit would be independent of other

branches of the civil service and that would further serve to reduce fears about impartiality arising out of civil service involvement.

(v) Cost

Unless the number of inquiries were to increase substantially, any such Panel would presumably be constituted on an *ad hoc* basis. If there are few inquiries, then the Panel would not sit to deliberate very often and its costs would be low. If Panel members were themselves MP's they obviously would not require payment. Even if this were not the case, and public figures could not be found who would sit without remuneration, the costs are likely to be low. The cost of civil service support and advice need not be any greater than if it were provided to a Minister. Indeed, if the Panel were to develop expertise it may in due course be considerably reduced. Indeed, JUSTICE considers that the remarks on the costs of maintaining a Panel being unjustified is inconsistent with the recognition at para 56 that there may be a value in having dedicated Inquiries Unit. It is difficult to see how such a unit could be justified in costs terms if one cannot justify a Panel.

**Q5: Is it appropriate for judges to chair inquiries? If not should the subject of the inquiry determine the characteristics of the chair? What qualities should they have?**

21. There are significant benefits in having judges chair inquiries. Judges will be familiar with

- (i) dealing with large volumes of oral and written evidence , and with making findings based on the evidence;
- (ii) ensuring fair procedure;
- (iii) dealing with arguments/submissions made on behalf of individuals affected by the proceedings.

There are others who also have those skills, in particular experienced lawyers. While it is certainly the case that others can have, or develop, those skills, it is perhaps relatively rare to find non-legally qualified people who have all of those skills fully developed. However, decisions as to the identity of the chair may well depend on the subject matter of the inquiry; in some cases, a person with experience of the issues under investigation may be appropriate; in others, this will not be the case. Judges also bring high public prestige. That is why they are attractive to government: it is also why that prestige must be protected.

22. We have some concerns about the use of judges as chairs of public inquiries. The matters investigated by public inquiries can in their very nature be politically controversial. There is a danger that a judge who has chaired a politically controversial inquiry will be perceived differently by sections of the public when he returns to his judicial role. In particular, where an inquiry has a highly sensitive political content, it becomes essential (a) that the Government should not select the judge to chair the inquiry; and (b) that the judge should not sit alone, in order that responsibility for the report should be borne by a panel of persons, not by the judge alone. The authority of a judge in a trial at first instance comes in part from the fact that there is a right of appeal against his or her decision. That possibility does not exist in the case of an inquiry report.
23. Many of the submissions made in this paper are aimed at ensuring that public inquiries are genuinely independent of the executive. To the extent that that is successful, JUSTICE believes that it will greatly reduce objections to having judges serve as Inquiry Chairs. A judge who has been directly appointed by a Minister for a particular inquiry, or who has of necessity to interpret vague terms in order to define his role, will be far more vulnerable to public criticism than one who has been selected by an independent panel and whose role is strictly delineated by the Terms. While it would certainly be impossible to protect judges from all criticism, we would however have far greater concerns about the continued use of judicial chairmen in the absence of such greater safeguards.
24. Thus, judicial Chairs should not be directly selected by a Minister – without prejudice to the argument that no chair at all should be so appointed. In the absence of a panel being set up for the selection of inquiry chairs, the selection should be made by the Lord Chief Justice (or possibly the senior Law Lord) on request by a Minister (rather than by the Minister in consultation with the Lord Chief Justice as suggested in the Consultation Paper).
25. For the reasons already given, the preferable solution is the establishment of an independent panel for the appointment of inquiry chairs.

### **Holding inquiries in private**

26. JUSTICE believes that inquiries serve a strong public interest precisely because they provide a means by which matters of grave public concern can be investigated in a public forum. The value of an inquiry lies not only in the final report but also in the fact that members of the public may thereby gain access to information, in a relatively structured way, which will allow them to make up their own minds, thereby serving the aims of open government / freedom of information. The process of the public inquiry may in some cases be as important, or more important, than the particular conclusions it reaches.
27. For this reason JUSTICE has strong reservations about inquiries being held partly, or wholly, in private. We believe that any legislation should contain a presumption that inquiries should be held in public. Any decision to hold an inquiry either wholly or partly in private, and whether made by the Minister establishing the inquiry or by the Chair of the Inquiry, should require compelling reasons, which should be made public.
28. Even where there is some compelling reason why some part of an inquiry should be held in private, JUSTICE believes that such exceptions should in most cases only lead to that part of the evidence to be in private as is absolutely necessary. Similarly, not all of the matters which may justify the giving of evidence in private will necessarily prevent the evidence from being set out in the Report (as is illustrated by the Butler Inquiry Report).
29. Nevertheless, JUSTICE does accept that there may be reasons in particular cases that require the giving of all, or part, of the evidence in private. In relation to the particular reasons for holding inquiries in public considered in the Consultation Paper, JUSTICE would comment as follows:
- (i) National Security JUSTICE accepts that this may be a reason why an inquiry may need to be held partially, or wholly, in private. As is illustrated by both the Hutton and Butler inquiries, however, there should be no absolute rule that intelligence material can never be made public.
  - (ii) Legal and Commercial confidentiality This can justify that some hearings be in private, or that published reports be redacted, but it will only be in the most exceptional case, if ever, that this could lead to more than a very small part of an inquiry needing to be in private.
  - (iii) Personal privacy JUSTICE agrees with the approach in para 127.

- (iv) Simpler/speedier procedures JUSTICE is concerned that this exception could be used as something of a catch-all, in particular because it does not relate to any particular subject matter. Some of the concerns addressed under this head in the Consultation Paper can more appropriately be dealt with under the heading of personal privacy. Private hearings on this ground would only be justified where the inquiry is to investigate matters of concern to a very limited group of persons, who should not themselves be excluded from the hearings. In such cases however there is less likely to be wide public interest and the effect of wider participation on speed is likely to be limited.

**Q7: Is there a value in having a trained panel from which members of an inquiry can be drawn when necessary?**

30. There may be problems in maintaining panels suitable for all areas. In respect of judicial Chairmen it may also be unnecessary, since the necessary expertise is largely obtained by experience of sitting as a judge. We agree that there is a value in maintaining a list of non-judicial individuals with the relevant expertise to conduct inquiries in particular areas. An expert with no background in conducting procedural / evidential hearings is likely to benefit from such skills training, whatever their level of expertise in the subject matter of the inquiry. There is an additional advantage in that, where a Chair is chosen from an existing list of possible chairs.

31. Inquiries Unit This would be a valuable step. The relevance of this to whether there be an appointments Panel has already been noted.

**Q 8; Should the Tribunals of Inquiry (Evidence) Act 1921 (or other specific legislation) invariably form the basis for Ministers calling such inquiries or is there a continuing need for non-statutory, *ad hoc* inquiries?**

32. We recognise that the existing legislation lacks flexibility in certain respects. In those circumstances we accept that, in the absence of any comprehensive reform of the legislation governing the holding of (non-subject specific) inquiries, it may at times be acceptable for inquiries to be held outside the terms of that legislation.

33. Nevertheless, the holding of *ad hoc* inquiries may allow circumvention of important safeguards as to how Inquiries are run or Chairs appointed. For example there is little point in putting in place safeguards as to how Chairs are appointed, or for a consultation period for Terms of Reference, if those safeguards do not apply to *ad hoc* inquiries, because such inquiries can then be held in precisely the circumstances that would make such safeguards inconvenient to the government.
34. For that reason, we welcome the idea of a new legislative framework within which the sorts of inquiry that are currently established on an *ad hoc* basis could be set up. One particular advantage is that the running of these inquiries could then be brought within the scope of the work of the Council on Tribunals.
35. We consider that, in the absence of general reforming legislation, there is a need for a general Code of Practice, or equivalent document, governing the issues now being consulted upon. That Code should be applied equally to *ad hoc* inquiries as to statutory inquiries.
36. In the event that new legislation is drafted, it should seek to be as comprehensive and flexible as possible so as to obviate the need for *ad hoc* inquiries falling wholly outside the proposed statutory framework. While it need not necessarily prohibit the establishment of *ad hoc* inquiries (indeed, legally that may be difficult to achieve, since they do not require enabling legislation and are resistant to legal classification) the presumption should be that all Inquiries be conducted pursuant to that legislation (or possibly under subject specific legislation). In so far as there are inflexibilities in the current legislation, obviously the new legislation should be drafted in such a way as to avoid such difficulties.
37. We have no detailed comments to make about the need for retention of the various powers available to inquiry chairs under the 1921 Act. In general, such powers are desirable and agree with the approach set out in the Consultation Paper.
38. However, there may be occasions where, although the full range of power under the 1921 Act may not be appropriate, some lesser powers may be needed to assist in the tribunal being run in a fully effective way. We note the recommendations recently made by the Law Commission in relation to local

authority inquiries,<sup>v</sup> in particular the recommendation of a new power to establish a 'special inquiry'. This should be considered more generally in the context of any proposals for the reform of the legal basis on which inquiries are to be established in future.

#### **Relationship with Parliament: Questions 13 - 18**

39. We do not believe that public inquiries set up by Ministers undermine Ministerial accountability to Parliament. To the contrary, by providing Parliament with access to information that it is not currently able to obtain using its own powers, public inquiries may enhance the ability of Parliament properly to hold the executive to account.

40. That will only be the case, however, if Inquiries are kept within a properly focussed remit. In so far as Inquiries are asked to investigate matters of general principle which are properly the subject of political debate, or the government has too much control over the selection of Chairmen or the Terms, the findings of an inquiry may become a smokescreen behind which governments may hide. For that reason, we repeat our concerns above as to these matters.

41. We also consider that public inquiries do not obviate the need for alternative Parliamentary procedures to investigate matters of public concern. The fact that the calling of an inquiry lies within the discretion of Ministers inevitably limits the extent to which they can be relied upon by Parliament in ensuring executive accountability to Parliament, and the ability of Parliament to institute its own methods of inquiry should be protected and strengthened.

42. For this reason JUSTICE believes that, independently of this consultation, there is a continuing need for reform of Parliamentary procedures in order to make Parliamentary inquiries more effective. Such reforms may include, for example, the grant of powers to compel witnesses and require disclosure of information, and the use of counsel to a Committee to improve the quality of questioning.

#### **Question 19 – publication of inquiry reports**

43. It is essential that proper rules for the publication of inquiry reports should be laid down and observed. In particular, we consider that the manner in which the Government controlled the publication of the Scott report in such a way that it had

eight days in which to produce its own selective version of the report was an abuse of the inquiry process. If a government wishes to gain the benefit of an inquiry being conducted by a judge, the government must accept that it cannot control the manner of publication of the report. We of course accept that there may be inquiries into matters affecting national security etc in which certain evidence cannot be published and for the reason of preserving the secrecy of such matters, and for no other, should there be consultation between the inquiry and concerned government departments.

### **Additional points**

44. We make three further submissions not directly raised in the Consultation Paper but which should be addressed in any review of inquiries.
45. The first relates to the following up of inquiry recommendations. The publication of an inquiry report is often seen as the end rather than the beginning of a process. For example, there have been numerous inquiries into aspects of child care and social work which have offered lessons for future action, but whose impact – when the next tragedy occurs – seems limited. One of the objectives of the administrative justice system as a whole – of which ad hoc inquiries form part – is that administrators learn from criticism. We hope that this point will be borne in mind as policy on public inquiries develops. The role of the Parliamentary Select Committee on Public Administration may be of particular importance in this context.
46. The second relates to the analogous issues, mentioned in passing above, of ad hoc inquiries established by local authorities. If there is to be a review of the law on public inquiries, we believe that a serious opportunity will be missed if the closely related issues that arise in the context of local authority inquiries are not tackled as well: the work of the Law Commission should be seen as an aspect of the current consultation on *Effective Inquiries*.
47. The third point is that the use of inquiry procedure ought now to be accepted as an important resource by which techniques long associated with the machinery of justice can be harnessed for public benefit in the analysis of complex events. But an inquiry room is not a courtroom, and the inquiry process is not litigation. The full implications of the differences between the two forms of proceedings, and of

the opportunities opened up by the inquiry process, are not yet fully understood by government, politicians, public opinion or the legal profession. We welcome the present consultation as a step in the right direction, but much more remains to be done.

JUSTICE is grateful to Tim Buley of Landmark Chambers for assistance in the drafting of this submission. It is submitted without prejudice to the right of individual members or council members of JUSTICE to hold or express different opinions.

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<sup>i</sup> Quoted from the advice from the Council on Tribunals to the Lord Chancellor in 1996, referred to at para 20.

<sup>ii</sup> In this regard JUSTICE notes with some concern the comments of Lord Hutton as to his ability to ask Lord Falconer to alter his terms of reference if he considered that appropriate (see the oral evidence of Lord Hutton to the Public Administration Committee, Minutes of Evidence 13 May 2004, qs 46 – 53).

<sup>iii</sup> *Ibid.* esp. q 32.

<sup>iv</sup> We adopt the convention used in the Consultation Paper, that where the male version of a noun or pronoun is used that should be taken to include members of both sexes unless the context indicates otherwise.

<sup>v</sup> *In the Public Interest: Publication of Local Authority Reports* (2004)