CAJ preliminary commentary on proposals in the Inquiries Bill

December 2004

a. Constitution of Inquiry

The Minister will –

- decide "where it appears to him" that it is necessary to cause an inquiry to be held;
- appoint the inquiry chair and panel(where the inquiry is to be carried out by more than one person) and may appoint assessors;
- decide the setting up date;
- determine the terms of reference, before the setting up date;
- decide whether there will be more than one member on the inquiry and if so decide how many members, all of whom are appointed by the Minister.

The Minister decides on the composition of the panel and the terms of reference of the inquiry without the need for consultation with the chair or any other persons or bodies who might have a legitimate interest in the inquiry. It is obviously not always in the Minister's interest to ensure a wide remit for an inquiry into alleged wrongdoings on his/her part, or the part of his/her department. Neither is there any provision for consultation with the victims or their next of kin on the terms of reference or composition of the inquiries.

The only proposed 'limitation' to the Minister's powers in this domain is the far from onerous responsibility to *"have regard"* to the need to ensure that the inquiry panel has the necessary expertise and to the need for balance.

b. In the course of the operation of the Inquiry

The Minister has extensive powers to restrict the inquiry when underway: He/She:

- may impose restrictions on attendance at the inquiry, and disclosure or publication of any evidence or documents given, produced or provided to an inquiry.
- may issue a restriction notice to the chair at any time before the ending of the inquiry;
- may vary or revoke a restriction order before the end of the inquiry (restrictions can continue indefinitely),
- may, when issuing a restriction order, have regard in particular to certain matters – how the restriction might inhibit the allaying of public concern, the risk of harm or damage that could be avoided or reduced by a restriction, whether conditions of confidentiality apply, the extent to which if a restriction is not imposed delay,

impaired efficiency or effectiveness of the inquiry or additional costs to public purse or witnesses will result.

Under this draft legislation the Minister clearly has greater powers to classify information as restricted. The matters to which the Minister and the chair have to have regard in determining the restrictions to be imposed suggest a presumption in favour of issuing restriction notices:

> (4) (b) for example says "any risk or damage that could be avoided or reduced by any such restriction" What about any risk that will be created by such restriction?
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> 4(d) the person considering issuing a restriction is to have regard to the extent to which not imposing a restriction will result in delay, impaired efficiency or effectiveness of the inquiry or additional costs to public purse or witnesses. What about consideration of the extent to which imposing a restriction will result in delay, impaired efficiency or effectiveness of the inquiry or additional costs to public purse or witnesses? It seems likely that imposing a restriction in controversial circumstances will lead to legal challenges and have the effect of increasing costs.

Also the grounds on which the Minister can choose to restrict disclosure of information are extremely broad. It is obviously appropriate to limit an inquiry's public disclosure of information which might lead to death or injury but it is far from clear how one can effectively determine the threat posed to "national security", " international relations," or "the economic interests of the UK". As we understand the draft legislation, the Minister alone will determine the interpretation to be placed on these crucial terms. With no parliamentary or other external scrutiny, it may well be that the Minister conflates the governmental interest in not being embarrassed with "national security".

More generally, the Minister will

- have the power to increase the number of panel members (with the consent of the chair) or to appoint members where a vacancy has arisen (in consultation with the chair).
- be informed by a panel member of any possible conflict of interest.
- have to approve of the chair's proposal to terminate
- be empowered to terminate the appointment of any member of the inquiry panel
- be empowered to determine if any inquiry panel member has failed to comply with "any duty imposed on him by" the Act and if so, in consultation with the chair, to terminate his or her membership of the inquiry.
- determine (in consultation with the chair) if a panel member has any conflict of interest and whether this requires the member being removed from the inquiry.

c. Amendment to terms of reference:

The terms of reference are set in advance by the Minister and the draft legislation makes no provision for any amendment to the terms of reference to be made in the course of the inquiry. If the inquiry finds facts which suggest that there are important matters likely to be of public concern that are not included in the terms of reference does this mean that a new inquiry has to be set up?

d. Suspension of the Inquiry:

The Minister has the power to suspend the inquiry and he/she may end the inquiry before it has completed its investigations merely by giving notice to the chair (the legislation makes no reference to this being an exceptional recourse or to the circumstances in which this power might be invoked).

e. Inquiry Report

The Minister decides whether the chair or the Minister is to have responsibility for publishing any report and whether this will be in full or edited form. As these inquiries are set up to address matters of public concern, surely it is only in extremely exceptional circumstances and for narrow reasons that an inquiry's findings should not be published or information withheld from the public.

f. Conversion of Inquiries

This is a very disturbing provision (Clause 14) which allows inquiries to be retrospectively covered by this legislation once passed. Inquiries which were originally designated under other legislation can be converted into inquiries under this legislation, subject only to the consent of the person who originally caused the inquiry to be held. It allows the Minister to change the terms of reference and to change the terms on which the members of that inquiry were appointed. The Minister can overturn the scope and remit of any inquiry converted and change the agreed procedures and conditions of inquiries commenced before the passing of this legislation.

Any converted inquiry, regardless of what was agreed in its setting up, will be held under the terms of the new Act. This has the effect of making this proposed legislation retrospective, which is unfair and breaches the legitimate expectations of all parties to current inquiries.

CAJ Commentary

1. This legislation is intended to dramatically increase the power of the executive. The Tribunal of Inquiries (Evidence) Act 1921, which is being rescinded by this new legislation allowed parliament to make a resolution of both houses and to take responsibility for instigating an inquiry where there was a matter of "grave public importance". Given that inquiries are, by their very nature, often established to look at alleged wrongdoing or problems inherent in ministerial use of power, or the role of a specific department under ministerial responsibility, this legislation is clearly an attempt to reduce the public nature of parliamentary and public scrutiny, and is extremely worrying.

2. CAJ does not understand why this legislation is being rushed through:

   - The government has published this Inquiries Bill when the parliamentary Select Committee on Public Administration has not concluded its investigation into public inquiries. CAJ understands that the committee is not due to report until the New Year. There was very limited circulation of the early government consultation paper and groups like CAJ were not on the initial mailing list, only receiving a copy of the document on request. Other groups in Northern Ireland (and presumably elsewhere) will have been entirely unaware of the consultation..

   - The legislation could also have important consequences for the devolved executives and legislatures in Scotland, Wales and Northern Ireland with limitations on their powers to hold inquiries into, or make recommendations on, issues that are not solely related to their own jurisdiction.

   - This Bill impacts on a very wide range of constituencies and interests – mental health; agriculture; transport, travel and traffic; the environment; children; the elderly and vulnerable adults and those in care; higher and further education; the Regulatory Powers Act 2000, health and safety etc.. It is not clear to us how extensively this legislation was discussed with the many groups who have found public inquiries under this disparate legislation to be helpful and their reactions to the loss 'overnight' of key inquiry powers. Schedule 2 rescinds a whole raft of legislation and the implications of this are as yet unclear. In the Northern Ireland context, we are unaware of any equality impact assessment being carried out on this legislation as far as it pertains to this jurisdiction.

3. This draft legislation has been designated compliant with the Human Rights Act 1998. CAJ is however unclear how, in cases where an inquiry is to be held into alleged governmental breaches of fundamental rights under the ECHR (most particularly the right to life and the right not to be tortured), this draft legislation can be said to comply with the European Court requirements for independent investigation. For further information on the procedural requirements in such cases, see the European Court judgments in *Jordan , McKerr, Shanaghan and Kelly*).