

# **Inquiries Bill**

## **House of Lords Committee Stage**

**January 2005**

The Committee on the Administration of Justice (CAJ) prepared a preliminary commentary on the Inquiries Bill dated December 2004 previously circulated to all Members of the House of Lords. We have subsequently had two exchanges of correspondence with Baroness Ashton and these exchanges are available on request.

### **General**

CAJ feels that this Bill is unhelpful and that it would be better to withdraw and re-formulate its provisions so as to address the concerns it gives rise to.

Baroness Ashton's response to our preliminary commentary does little to assure us that there is an urgent need to proceed with this Bill, especially in this draft form. While our main concerns relate to the impact of this legislation, once passed, on developments in Northern Ireland (relevant to investigations into the deaths of Pat Finucane, Robert Hamill, Rosemary Nelson and Billy Wright), this legislation is likely to have very wide application.

If government is unwilling to withdraw this legislation, we believe that the House of Lords should seek to secure a series of major amendments which would fundamentally change the focus of the legislation. Indeed, the debates at Second Reading highlighted that some members supported, in principle, the introduction of new legislation governing public inquiries but argued that this draft required extensive amendment.

CAJ proposes a series of amendments to this end. The amendments and deletions proposed all have the objective of:

- a. retaining a power for parliament to direct a public inquiry when parliament so chooses
- b. placing some limits on those inquiries which will in future be called by the minister, to ensure some restrictions are placed on what would otherwise be untrammelled ministerial powers
- c. making explicit government's stated willingness (see correspondence from Baroness Ashton) to consult with those directly affected by an inquiry
- d. ensuring greater public confidence in the accountability to be provided by public inquiries.

Specifically, CAJ proposes:

## **Clause 1: power to establish an inquiry**

CAJ believes that the current power to establish an inquiry that rests with both Houses of Parliament (via the Tribunals of Inquiry (Evidence) Act 1921) should be retained for particular circumstances.

There are two options for maintaining this mechanism. The first option is that the House of Lords seeks outright deletion of section 46.1, which would retain on the statute book the opportunity for parliament to establish inquiries (Tribunals of Inquiry Act (Evidence) 1921), alongside whatever mechanisms are agreed as a result of the proposals in this Inquiries Bill. The second option would be to place onto the face of this Inquiries Bill an opportunity for parliament to establish an inquiry.

CAJ has drafted amendments below that assume that the Lords may choose to merge the provisions of the 1921 Act in this consolidated new draft legislation.

***Oppose the Question that Clause 1 stand part of the Bill and amend as follows***

- ❖ *Page 1 line 2 insert a new clause 1.  
(1). A Minister shall cause an inquiry to be held under this Act where both Houses of Parliament so resolve and direct.*
- ❖ *Page 1 line 3 amend numbering, delete 1 and renumber as 2  
(2 )A Minister may .....*

## **Clause 4: Appointment of Inquiry Panel**

***Oppose the Question that Clause 4 stand part of the Bill and amend as follows -***

- ❖ *Page 2 Clause 4(1),line 7 after “in writing” insert “The Minister shall make these appointments after consultation with parties having a sufficient interest in the matter subject to inquiry and shall have regard to any representations made about the composition of the inquiry panel” .*

## **Clause 5: Setting up date and terms of reference**

***Oppose the Question that Clause 5 stand part of the Bill and amend as follows -***

- ❖ *Page 2 line 11 insert a new Clause 5(1) “The terms of reference of any inquiry established under section 1 of this Act shall be such as set out in the resolution approved by parliament.”*
- ❖ *Page 2 line 11 amend numbering of clause 5.1 so that it is clause 5.2*
- ❖ *Page 2 line 11 amend new clause 5.2, insert “Where an inquiry is established under section 2 of this Act” before “In the instrument”.*
- ❖ *Page 2 line 15 amend new clause 5(2)(b). After “before that date”, insert “,after consulting with and having given regard to representations made by the chair and parties having a sufficient interest in the matter subject to inquiry”*
- ❖ *Page 2 line 18 new clause 5.1(b)(ii), after “inquiry panel”, delete “and if so how many”*
- ❖ *Page 2 line 18 new clause 5(2)(b)(ii), after “inquiry panel”, insert “and, if so, the identities of the inquiry panel members.”*
- ❖ *Page 2 line 29 insert new clause 5.5(e) “At the request and with the agreement of the chair, the Minister may, in the course of an inquiry, make amendments to the terms of reference.”*

## **Clause 6: further appointments to the inquiry panel**

### **Oppose the Question that Clause 6 stand part of the Bill and amend -**

- ❖ *Page 2 line 33 and line 34, clause 6.1.a, delete “(including a vacancy in the position of the chairman)”*
- ❖ *Page 2 line 36 delete clause 6(2)(a) and re-number*
- ❖ *Page 2 line 39 insert in clause 6.3 a sentence before “The power”- “Where the vacancy occurs in the position of chair, the Minister should give regard to any representations made by interested parties in filling this vacancy.”*

## **Clause 7: suitability of inquiry panel**

### **Oppose the Question that Clause 7 stand part of the Bill and amend -**

- ❖ *Page 3 line 2 clause 7.1, delete “In appointing a member of the inquiry panel the Minister must have regard”*
- ❖ *Page 3 line 2 insert new clause 7.1 “In appointing a member of the inquiry panel the Minister shall consider representations on the*

*appointment of the chair and any members of the inquiry panel, and in so doing have due regard”*

## **Clause 8: requirement of impartiality**

***Oppose the Question that Clause 8 stand part of the Bill and amend -***

- ❖ *Page 3 line 17 clause 8.1, after “influence his decisions as a member of the panel.” Insert additional sentence “In forming his or her opinion the Minister shall consider any representations made by parties with a sufficient interest in the matter subject to inquiry”.*

## **Clause 10: appointment of assessors**

CAJ believes assessors should be appointed by the chair/inquiry panel and not by the Minister.

***Oppose the Question that Clause 10 stand part of the Bill and amend -***

- ❖ *Page 4 line 10 insert in clause 10.2 after “exercisable”, “by the chair”*
- ❖ *Page 4 lines 10-13, delete clauses 10.2.a and 10.2.b*
- ❖ *Page 4 line 14 clause 10.3, delete “the Minister or”*
- ❖ *Page 4 line 15 clause 10.3, delete “(as the case requires)”*
- ❖ *Page 4 line 20 and line 21, clause 10.5, delete “but only with the consent of the Minister in the case of an assessor appointed by the Minister”*

## **Clause 11: duration of appointment**

***Oppose the Question that Clause 11 stand part of the Bill and amend -***

- ❖ *Page 4 line 29, clause 11.3, after “may” insert “at the request of the chair,”*
- ❖ *Page 4 line 39, clause 11.3.c., delete “Minister’s” and replace with “chair’s”*
- ❖ *Page 5 line 10 delete clause 11(6)*
- ❖ *Page 5 line 18 clause 11.7.b, delete “(to the extent that no obligation to consult them arises under subsection (6))”*

These proposed amendments from CAJ do not address the problem created if there is a need to replace the chair. We would propose that the procedure which is followed to name the chair (see clause 4) is followed for any replacement chair.

## **Clause 12: power to suspend inquiry**

CAJ believes the power to suspend an inquiry (which would obviously only be exercised in exceptional circumstances) should lie with the chair rather than with the Minister.

### **Oppose the Question that Clause 12 stand part of the Bill and amend -**

- ❖ *Page 5 Line 21, clause 12.1, delete “The Minister may, at any time, by notice to the chairman”*
- ❖ *Page 5 line 21, clause 12.1 insert “The chair may at any time, after consultation with the inquiry panel, and by notice to the Minister,”*
- ❖ *Page 5 line 31, clause 12.3, delete “Minister of a further notice to the chairman”*
- ❖ *Page 5 line 31 clause 12.3, insert “chair of a further notice to the Minister”*
- ❖ *Page 5 line 37, clause 12.5, delete “chairman”, insert “Minister”*
- ❖ *Page 5 line 41 clause 12.5.c delete “chairman”, insert “Minister”*
- ❖ *Page 5 line 42 insert new clause 12.6, “In determining the necessity for, and length of, any suspension, the chair shall have due regard to the avoidance of unnecessary delay for ensuring public confidence in the inquiry.”*

## **Clause 13: end of the inquiry**

CAJ proposes giving the authority for ending an inquiry to the chair rather than to the Minister.

### **Oppose the Question that Clause 13 stand part of the Bill and amend -**

- ❖ *Page 6 line 4, clause 13.1.b, delete “chairman by the Minister”*
- ❖ *Page 6 line 5, clause 13.1.b, insert “Minister by the chair. Any such notice shall give reasons for the failure to deliver a report or fulfil the inquiry’s terms of reference where applicable”*

## **Clauses 14 and 15: Conversion**

**Oppose the Question that Clause 14 stand part of the Bill**

**Oppose the Question that Clause 15 stand part of the Bill**

CAJ is somewhat reassured by Baroness Ashton's statement that the intention of this provision is to enable, where thought necessary, current non-statutory inquiries to be given better compulsion powers and improved sanctions. We are particularly pleased to learn that the government has "no plans to convert any statutory inquiry currently underway". To avoid later ambiguity, we would however urge the Lords to seek explicit confirmation in the course of the parliamentary debate that government will not convert the proposed inquiries into alleged collusion in the cases of Robert Hamill, Rosemary Nelson, and Billy Wright.

The Lords may want to submit amendments that bring converted inquiries more in line with the proposed suggestions elsewhere in this document to ensure that powers currently given to the Minister are given instead to the chair.

## **Clause 16: Evidence and procedure**

CAJ has not had sight of the rules referred to in 16.1, although we understand from Baroness Ashton's letter that they were to be issued during the recess. No comments are therefore being made at this stage in relation to article 16.

## **Clause 17: restrictions on public access etc.**

CAJ believes that this section needs radical change if the nature of "public" inquiries is not to be totally changed. Inquiries are often required when all other remedies have proved ineffective in establishing the truth, securing accountability, and effecting change. This section's title and following text appears to make a presumption in favour of denying public access. With no parliamentary or other external scrutiny, it may well be that the Minister conflates the governmental interest with an interest in not being embarrassed. This whole section needs to be re-formulated.

Clearly there will be instances where parts of an inquiry – or indeed all of an inquiry – will need to be held *in camera*, but this should not be treated as the norm. The draft legislation currently gives extensive powers to the Minister to determine what should and should not be made public. This is unacceptable. CAJ furthermore believes that there is no need to have an extensive listing of exceptional situations where privacy will be required, and suggests that these decisions should be guided by the principles of "necessity" and "proportionality". These principles will ensure consideration of "harm and damage" to individuals, "potential damage to national security", threats to "economic interests", or disclosure of "commercially sensitive information".

The European and domestic case-law in relation to privacy and conflicting rights is well established, and the inquiry's compliance with this case-law will ensure that competing interests are correctly balanced and effectively protected. We propose the following changes:

**Oppose the Question that Clause 17 stand part of the Bill and amend -**

- ❖ *Page 7 line 22, clause 17, delete "Restrictions on public access etc."*
- ❖ *Page 7 line 23, clauses 17.1-17.5, delete in their entirety.*
- ❖ *Page 7 line 22, clause 17, insert new title "Public access"*
- ❖ *Page 7 line 23, insert the following –*

*17.1 Inquiries held under this Act should be held in public unless otherwise determined by the chair.*

*17.2 The chair may, after consultation with parties having a sufficient interest in the matter subject to inquiry, and with the inquiry panel, determine the circumstances in which the inquiry may place restrictions on public access, and where he or she so decides shall issue a 'restriction order'.*

*17.3 Such restrictions as are agreed in 17.2 shall be specified in an order made by the chair and shall be imposed on:*  
*(a) attendance at an inquiry, or any particular part of an inquiry;*  
*(b) disclosure or publication of any evidence or documents given, produced or provided to an inquiry.*

*17.4 A restriction order must specify only such restrictions*  
*(a) as are required by any statutory provision, enforceable Community obligation or rule of law, and*  
*(b) are necessary and proportionate*

- ❖ *Page 8 line15, clause 17.6, delete "restriction notice or"*

**Clause 18: Further provisions about restriction notices and orders**

***Oppose the Question that Clause 18 stand part of Bill and amend -***

CAJ is not sure why this clause is necessary here, rather than in the detailed procedural rules. If any of this text is retained in the legislation, authority about decisions on restricting public access should be placed with the chair rather than the Minister, and specific reference should be inserted on the face of the Bill to the provisions of the Freedom of Information Act.

## **Clause 20: Privileged Information etc.**

If the chair is to exercise his/her functions effectively, he or she must have access to all information. This pre-requisite is not respected in the current text. If the chair, and the inquiry, is to be and be seen to be independent, they cannot be second-guessed by Ministers seeking Public Interest Immunity Certificates. This whole section needs re-formulation.

### ***Oppose the question that Clause 20 stand part of the Bill***

❖ *Pages 9-10, delete clause 20*

## **Clause 21: risk of damage to the economy**

CAJ believe these matters have been covered by earlier proposed amendments and this clause should therefore be deleted.

### **Oppose the Question that Clause 21 stand part of the Bill**

❖ *Page 10 line 10-28, delete clause 21*

## **Clause 22: Inquiry Reports**

CAJ makes a distinction in this clause between inquiries established by parliament (our proposed new clause 1) and ministerial inquiries. Clearly, where parliament established the inquiry, the final report must be submitted to parliament to allow for debate. Parliament may of course wish to legislate to ensure that all statutory inquiries, even when established by a Minister, are placed before them?

### **Oppose the Question that Clause 22 stand part of the Bill and amend -**

❖ *Page 10 line 31, clause 22, insert after "Minister", "or, where the inquiry was established under section 1, to parliament,"*

## **Clause 23: publication of reports**

Without a change to section 23.1, the Minister has sole responsibility for determining whether and if so how a report is to be placed in the public domain. Given that the purpose of public inquiries is to hold decision makers to account and to restore public confidence, reposing authority for publishing reports in the hands of the Minister would be unacceptable. See further earlier discussion of this issue in relation to clause 17.

### **Oppose the Question that Clause 23 stand part of the Bill and amend -**

- ❖ *Page 11 line 5, clause 231, delete “It is the duty of the Minister, or the chairman if subsection (2) applies,” and insert “It is the duty of the chair to arrange for reports”*
- ❖ *Page 11 lines 8-12, clause 23.2, delete.*
- ❖ *Page 11 line 18-32, delete clauses 23.4, 23.5 and 23.6*
- ❖ *Page 11, line 14, insert new clause 23(4) “The person whose duty it is to arrange for a report to be published may withhold material in the report from publication to such extent (a) as is required by any statutory provision, enforceable Community obligation or rule of law, or (b) as the person considers necessary and proportionate”.*

### **Clause 27: Northern Ireland inquiries**

It is not clear to CAJ why in this clause Northern Ireland is apparently being treated differently to Scotland and Wales in that it will not be open to devolved Ministers in Northern Ireland to inquire into matters that occurred prior to devolution. No similar restriction seems to apply to other jurisdictions.

**Oppose the Question that Clause 27 stand part of the Bill without amendment.**

### **Clause 32: Offences**

It has been the experience in the past that, in advance of the formal announcement of public inquiries, information and evidence has been destroyed. Accordingly, CAJ believes that individuals who knowingly act to subvert the inquiry, even in advance of its formal constitution, should face the risk of sanctions.

**Oppose the Question that Clause 32 stand part of the Bill and amend -**

- ❖ *Page 16 line 27, clause 32.2, delete “during the course of an inquiry”*
- ❖ *Page 16 line 34, clause 32.3, delete “during the course of an inquiry”*
- ❖ *Page 16 line 40 delete “the” before inquiry*
- ❖ *Page 16 line 40 insert “an” before inquiry*

### **Clause 36: Inquiry Expenses**

While accepting that it is important to control excessive public expenditure, it is equally vital that important matters of grave public concern can be

adequately inquired into without undue financial restrictions. It is not clear from the text how government is proposing to cover the legal expenses of the various parties to the inquiry and this presumably will be clarified once the detailed regulations are issued. CAJ can comment more knowledgeably at that time

## **Clause 46: Repeals and Revocations**

Clause 46.1 proposes repeal of the Tribunals of Inquiry (Evidence) Act 1921. CAJ has earlier argued that there would be a value in retaining the distinct legislation allowing parliament to establish inquiries. However, the House of Lords may want to accept government's proposal to consolidate all inquiry legislation. If they do so, and accept the amendments proposed earlier, it would be logical to accept clause 46 and repeal the 1921 Act.

In relation to clause 46.2, CAJ is very concerned that the new legislation will bring to an end inquiry provisions across a very wide range of legislation, touching on issues as diverse as policing, child protection, mental health, planning etc. We are unconvinced that all of the implications of the proposed revocations have been properly considered.

### ***Gender-neutral language***

CAJ consistently argues that legislation should use gender-neutral language and its proposed amendments reflect this stance. We accept that there are some limitations in how much this principle can be embedded in legislative texts, but we see no reason why subsequent Codes, guidance, and commentaries cannot use gender-neutral language. We urge parliament to make this recommendation to government.