

SEWEL MEMORANDUM

INQUIRIES BILL

MOTION

1. The Motion to be put to the Parliament is:

Inquiries Bill: That the Parliament recognises the benefits of a modern statutory framework for the holding of inquiries into matters of public concern and agrees that the provisions in the Inquiries Bill, so far as they relate to matters within the legislative competence of the Parliament or to the executive competence of the Scottish Ministers, should be considered by the UK Parliament.

PURPOSE OF THE INQUIRIES BILL

2. The Inquiries Bill is intended to provide a comprehensive statutory framework for inquiries set up by Ministers to look into matters of public concern.

BACKGROUND

3. From time to time events occur of such serious public concern that it is in the public interest to establish an inquiry to examine what happened and make recommendations, with a view to ensuring that lessons are learned to prevent recurrence and to restore public confidence. Many inquiries have been effective in restoring public confidence by undertaking thorough investigations into matters of public concern, and making valuable recommendations.
4. An inquiry can be set up in a number of ways, and there are recent examples of inquiries with a variety of legal bases. Some, such as the inquiry by Lord Cullen into the Dunblane tragedy, the Harold Shipman inquiry, and the Bloody Sunday Inquiry have been set up under the Tribunals of Inquiry (Evidence) Act 1921. That Act confers on the inquiry the same powers as the Court of Session as regards compelling witnesses and production of documents. There are also a number of other provisions in legislation which give Ministers powers to set up inquiries into specific matters, for example clause 67 of the Education (Scotland) Act 1980, or clause 76 of the National Health Service (Scotland) Act 1978. The BSE and the Foot and Mouth inquiries, the Hutton inquiry, and Lord Fraser's inquiry into the building of the Scottish Parliament, on the other hand, were all set up on an "ad hoc" basis, with no specific statutory footing.
5. The Tribunals of Inquiry (Evidence) Act 1921 can be used to provide an inquiry with formal powers to compel witnesses and the production of evidence, but the scope for its use in post-devolution Scotland is limited since it requires a resolution of both Houses of the UK Parliament in order for an inquiry to be set up under it. Nor is it well suited to the modern inquiry or legal environment. It does not allow very much flexibility in relation to questions such as whether any part of the inquiry should be held in private, or provide any guidance as to rules of procedure or rights of audience. It does not deal with issues such as the publication of reports, or payment of inquiry expenses. There is accordingly a strong case for new legislation to create a modern statutory mechanism

enabling Ministers to order an inquiry to be held on a matter of public concern, with the form and procedures of the inquiry being tailored to the particular circumstances at hand. Such legislation could confer on Ministers clear statutory powers to decide whether all or any part of an inquiry should be in private, power to make rules, and provide for the granting of appropriate powers to an inquiry to compel attendance of witnesses and disclosure of documents in appropriate cases.

CONSULTATION

6. On 6 May 2004 the Department of Constitutional Affairs (DCA) of the UK Government published a consultation paper entitled “Effective Inquiries”. The paper had its origins in a Memorandum provided by DCA to the Public Administration Select Committee (PASC) of the House of Commons, responding to the Committee’s “Issues and Questions Paper”, issued on 24 February 2004 as part of its inquiry into “Government by Inquiry”. The Committee asked a number of questions about inquiries established by Government Ministers to investigate particular, controversial events giving rise to public concern. The UK government felt that the discussion merited wider comment through a public consultation, and by agreement with PASC, it published the Memorandum as part of a paper for public consultation. The DCA paper responded to the questions asked by the PASC paper, set out a number of ideas on how the inquiries system could be improved, and sought views on the issues discussed. The paper was sent to a range of people and organisations throughout the UK.
7. The consultation period for the “Effective Inquiries” paper ended on 29 July 2004. The paper acknowledged that it is for Scottish Ministers to consider whether to bring forward legislation to establish a framework for inquiries in devolved areas, and stated that the UK Government was working with each of the devolved administrations to develop sensible arrangements for dealing with inquiries which may need to cover both devolved and reserved areas. A report on the responses to the consultation paper was published on 28 September 2004. Work with DCA has continued over the period since the consultation ended, and has developed to include consideration of the appropriate mechanism for creating a new statutory framework for inquiries in Scotland into matters within the remit of Scottish Ministers. Scottish Ministers concluded that the Bill planned for introduction at Westminster offered advantages in terms of timing and coherence.

WHY A UK APPROACH?

8. It would be competent for the Scottish Parliament to legislate to create new powers and procedures in respect of inquiries in relation to any devolved subject matter (and, of course, will remain so). The Tribunals of Inquiry (Evidence) Act 1921 is not reserved in terms of the Scotland Act, and could be repealed or amended as regards devolved matters by the Scottish Parliament. As already mentioned, there are a number of specific provisions in other legislation conferring on Scottish Ministers the power to set up inquiries into particular matters. Scottish Ministers might also wish to set up an inquiry on a non-statutory basis, and the extent of their power to set the remit of such an inquiry would be determined by an application of the purpose test in section 29(3) of the Scotland Act.
9. In many instances however, where events occur of sufficient seriousness to merit a formal inquiry being held, it is likely that the issues raised will involve a mixture of devolved

and reserved matters. The Dunblane inquiry is a good example of this. It examined security in schools, which would now be a devolved matter, but it also made recommendations regarding firearms legislation, a reserved matter. Should a similar situation arise, there is a question as to whether it would be within the power of Scottish Ministers to set up an inquiry with a sufficiently broad remit as to enable it to examine all the relevant issues. However, it would seem unsatisfactory for Scottish Ministers to have to leave the responsibility for such an inquiry to UK Ministers. Nor would it make sense for each administration to set up its own inquiry for their respective interests, in relation to basically the same facts, resulting in the duplication of work and a waste of public money. What would be needed in that kind of situation is agreement between the administrations as to the need for an inquiry, and consultation and co-operation as to its remit and organisation. In short, a partnership approach.

10. Both the Scottish Ministers and the UK Government – and indeed the devolved administrations of Wales and Northern Ireland – have recognised the need for a new framework for inquiries to provide for such a partnership approach. Legislation in the Scottish Parliament could not directly create a structure which facilitates that, since it could not make any provision for inquiries into reserved matters. It can be achieved only through legislation at Westminster.
11. The Scottish Parliament could of course legislate to create a new framework for inquiries into devolved matters. There is, however, a full programme of legislation already before the Parliament, and other planned legislation to take forward the priorities of the Executive’s Partnership Agreement. A decision to legislate for devolved inquiries in the Scottish Parliament would mean either that such a Bill would have to be given priority over other distinctive Scottish priorities, or be delayed until time could be found. Including provisions for devolved inquiries in the UK bill means that a new framework for devolved inquiries can be put in place at an early date, without disrupting the current Scottish Parliament legislative programme.
12. Furthermore, any Scottish legislation would be strictly limited in its scope and would be unable to confer powers on Scottish Ministers which related to reserved matters or conferred functions exercisable otherwise than in or as regards Scotland. The text of the bill that has been agreed with the UK Government allows a degree of leeway in terms of the remit of an inquiry established by the Scottish Ministers. The test for the terms of reference of such an inquiry are that it must not require the inquiry to determine any fact or make any recommendation that is not wholly or primarily concerned with a Scottish matter (i.e. a matter that relates to Scotland and is not a reserved matter as defined by the Scotland Act). Powers to compel evidence are similarly restricted. The inclusion of the words “or primarily” allows a degree of flexibility in relation to the remit of a Scottish Ministers’ inquiry extending into reserved matters, providing that the overall purpose relates to devolved matters.

SUMMARY OF PROVISIONS OF THE BILL

13. The Bill extends to the whole of the UK. As well as the main provisions applying to all inquiries under the Bill, there are provisions applying specifically to UK, Scottish, Welsh and Northern Ireland inquiries.

Constitution of Inquiry.

14. The Bill will empower a Minister (which is defined so as to include Scottish Ministers) to cause an inquiry to be held 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 (clause 1).
15. The inquiry can be undertaken by a chairman alone, or a chairman with one or more other members (clauses 3 and 6), and the Minister or the chairman may also appoint expert assessors to assist the inquiry panel (clause 10).
16. The chairman and members must be appointed in writing by the Minister (clause 4), and the Minister must have regard to the suitability, in terms of expertise and balance (where there is more than one member of the panel) of the persons to be appointed before making the appointments (clause 7). The Lord President must be consulted first if the Minister is proposing to appoint a judge of the Court of Session, a sheriff principal or a sheriff (clause 9). Ministers must not appoint anyone who is not impartial and members of the inquiry panel have a continuing duty of impartiality (clause 8). There is provision for the Minister to terminate the appointment of any member of the inquiry panel on the grounds of inability, failure to comply with a statutory duty, conflict of interest or misconduct (clause 11). The Minister can suspend the inquiry to allow for the completion of any other investigation or any civil or criminal proceedings, and can also terminate the inquiry at any time, by notice to the chairman (clause 12).
17. The inquiry must be set up as from a date specified by the Minister, and before the inquiry begins receiving evidence, the Minister must set out in writing its terms of reference, i.e. the matters to which the inquiry relates; any particular matters as to which the inquiry panel is to determine the facts; whether the inquiry is to make recommendations; and any other matters relating to the scope of the inquiry that the Minister may specify. The functions conferred on an inquiry are exercisable only within the inquiry's terms of reference (clause 5).
18. An inquiry is not to rule on any person's civil or criminal liability, but is not to be inhibited in the discharge of its functions by the likelihood of liability being inferred from its determinations or recommendations (clause 2).
19. An inquiry which has been set up otherwise than under the bill can be converted into an inquiry under the bill by the Minister giving notice to that effect to the persons holding the original inquiry (clauses 14 and 15).

Inquiry Proceedings

20. Ministers will have power to make rules dealing with evidence and procedure for inquiries, and with awards of expenses for witnesses or participants, including the costs of legal representation. Scottish Ministers will be able to make rules for inquiries in Scotland (by SSI) (clause 38). The Minister responsible for an inquiry must specify what is the "relevant part of the UK" for the purpose of the inquiry (clause 28), so that the law of that part will, where necessary, apply to the inquiry even if it also sits in other parts of the UK. Where an inquiry has been set up jointly by Ministers from more than one part of

the UK, they will have to agree at the outset which set of rules, or combination of rules, to use, and what is to be the relevant part of the UK in relation to the inquiry.

21. Subject to the provisions of the bill and to the rules being used, the procedure of the inquiry is set by the chairman (clause 16).
22. Ministers may impose restrictions on public access to the inquiry or disclosure of evidence, either before it starts or at any time thereafter. The chairman may also impose restrictions. Restrictions can only be specified if they are required by law, or if the Minister/chairman considers they are conducive to the inquiry fulfilling its terms of reference, or necessary in the public interest. In determining the public interest, the Minister/chairman must take into account a range of factors including the need to allay public concern, and the risk of any harm or damage which the restriction might avoid or reduce (clauses 17 and 18).
23. Subject to any restrictions in operation, the inquiry must take place in public. The permission of the chairman is required for any recording or broadcasting of the proceedings (clause 17).
24. The chairman of an inquiry can by notice in writing require a person to attend to give evidence at an inquiry or to produce any documents or things in his possession or control (clause 19). There is an exemption if the requirement would be incompatible with Community law, and the same exemptions as would apply in civil proceedings in the relevant part of the United Kingdom (clause 20). There is also a provision restricting the revealing of information if to do so would create a risk of damage to the economy (clause 21).
25. There are provisions creating offences in relation to failure to attend as a witness or to produce evidence (clause 32). Non-compliance with a notice or order relating to access, attendance or evidence can be referred to the Court of Session (clause 33).

Inquiry Reports

26. The chairman must deliver a report to the Minister setting out:-
 - (a) the facts the panel has determined
 - (b) the recommendations of the panel (where the terms of reference require recommendations to be made or the panel sees fit to make them) (clause 22).
27. The Minister or chairman must publish the report. Material may be withheld from the published report on grounds similar to those allowing the inquiry to be held in private (clause 23).

UK and Scottish Inquiries.

28. The remit of an inquiry set up by a UK Minister may not include in it anything that would require the inquiry to determine any fact or make any recommendation that is wholly or primarily concerned with a Scottish matter, unless the Minister has first consulted the Scottish Ministers. Nor can a UK Minister's inquiry use its powers of compulsion in respect of evidence or things wholly or primarily concerned with a Scottish matter, or so as to require anything to be produced or provided by or on behalf of the Scottish

Ministers, without permission from the UK Minister, who must consult the Scottish Ministers before granting permission (clause 24).

29. A “Scottish matter” is defined as a matter that relates to Scotland and is not a reserved matter within the meaning of the Scotland Act.
30. The remit of an inquiry set up by the Scottish Ministers must not require the inquiry to determine any fact or make any recommendation that is not wholly or primarily concerned with a Scottish matter. The compulsion powers of a Scottish Ministers’ inquiry are exercisable only in respect of evidence or things wholly or primarily concerned with a Scottish matter, or for the purpose of inquiring into something that is wholly or primarily a Scottish matter, and cannot be used so as to require anything to be provided by a UK Minister or by either of the other devolved administrations (clause 25).
31. There are broadly similar provisions in respect of Wales (clause 26) and Northern Ireland (clause 27).

Joint inquiries

32. An inquiry can be set up by two or more Ministers acting jointly. In such inquiries all powers are exercisable jointly and all duties apply jointly, subject to any other arrangements that may be agreed (clause 29). Where joint inquiries are set up by Ministers who are not all UK Ministers, the remit of the inquiry can cover matters that any one of the relevant Ministers would be able to establish an inquiry into (clause 30). Ministers can, by agreement, transfer responsibility for inquiries between themselves (clause 31).

General

33. The members of the inquiry panel, assessors, counsel and solicitors to the inquiry all have immunity from legal action in respect of any act or omission made in good faith in the course of their duty. The proceedings of the inquiry are privileged for the purposes of the law of defamation to the same effect as if they were proceedings before a court in the relevant part of the UK (clause 34).
34. The Minister has power to pay remuneration and expenses to the inquiry members and staff, and must meet the costs of the inquiry (except in so far as it has exceeded its remit) and publish the total amount of the costs (clause 36). The chairman can award expenses to witnesses if the Minister has given permission to do so (clause 37).

Repeals and Consequential amendments

35. The Bill repeals the Tribunals of Inquiry (Evidence) Act 1921 and makes a number of other minor and consequential amendments. A number of Departments of the UK Government have decided to repeal provisions in other legislation conferring powers on Ministers to hold inquiries into particular matters, and rely instead on the new provisions in the Bill should they wish to set up an inquiry into such matters. Some of these pieces of legislation have Scottish equivalents and consideration has been given to whether the inquiry provisions in the Scottish legislation should also be repealed. Scottish Ministers have decided to retain their subject-specific powers to set up inquiries for the time being.

They will consider in due course whether to repeal such provisions, in the context of any review of the specific legislation concerned and in the light of any experience of the operation of the new legislation.

Financial Consequences

36. A Regulatory Impact Assessment has been published with the Bill. This sets out the costs and benefits of the Bill across the UK. The Bill does not necessitate any additional public expenditure or changes to public service manpower. Under the Bill, as is the case at present, the Government Department responsible for sponsoring the inquiry will meet its running costs. There will be no immediate cost implications associated with the Bill; any implications would only take effect when an inquiry is established under the legislation. The Bill includes specific provisions designed to reduce the potential for excessive cost and delay.
37. The Regulatory Impact Assessment concluded that the legislation would not directly impact upon business, charities or the voluntary sector.

Scottish Executive
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