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New Law Journal Article: Public Inquiries

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Public inquiries are fast becoming the universal panacea for public and political controversy. While the Inquiries Act 2005 sought to put these sorts of public inquiries on a consistent statutory footing, questions remain as to how inquiries should operate and how they interact with other on-going legal proceedings. With the frequency and scope of inquiries growing, these questions are becoming increasingly important.

Recently, amidst much public, political and press noise about the use of phone hacking by newspapers, David Cameron announced a total of three inquiries, notwithstanding that a number of criminal and civil proceedings were already on foot, as well as internal inquiries, Parliamentary Select Committee hearings, parliamentary debates, and even an FBI investigation.

While the 2005 Act was intended to consolidate provisions and ensure greater consistency and clarity on the legal function of public inquiries, uncertainties remain. Not all inquiries are governed by the Act, of note being the current Chilcot inquiry and the Archer inquiry into the supply of contaminated blood products. Even where the Act is applicable, it does not provide a complete or clear answer to some of the most important questions.

THE 2005 ACT

Until 2005, the principal statutory basis for a "public inquiry" was the Tribunals of Inquiry (Evidence) Act 1921, but many inquiries were conducted on a non-statutory basis or under other subject-specific legislation, with varying terms of reference. Indeed, only 24 inquiries were ever established under the 1921 Act during its 84-year existence. The 2005 Act was intended to concentrate the source of powers necessary to establish public inquiries into a single piece of legislation and provide a clearer and more consistent basis for such inquiries

Among other things, the 2005 Act:

- provides for Ministers to establish independent inquiries into matters of public concern (s. 1(1)), set the terms of reference (s. 5(1)(b)(ii)) and appoint a chairman and inquiry panel members (s. 4);
- gives the inquiry chairman powers to determine procedures and compel evidence and witnesses (s. 17 and s. 21);
- allows for public access to the inquiry to be restricted where appropriate (s. 19); and
- gives the chairman and panel members immunity from civil suit (s. 37).

CONCERNS ABOUT THE INTERPLAY WITH OTHER PROCEEDINGS

What the Act does not do, however, is to grapple with the difficult interplay between such inquiries - which, by virtue of the Act, can have many of the features of legal proceedings - and other civil and criminal proceedings that are contemplated or already on foot.

While concerns about this issue have, some may say, been overplayed for political purposes (for example, when the previous Labour Government consistently refused to launch a public inquiry into the extraordinary rendition of terrorist subjects), it is an important issue for those involved, including lawyers engaged in any legal proceedings that may be affected.

There is no statutory provision that precludes a Minister from establishing a public inquiry when there are ongoing legal proceedings concerning the same subject matter. Indeed, the 2005 Act gives the Minister a wide discretion to establish an inquiry and (in s. 13, which empowers, but does not require, the Minister to suspend an inquiry in light of such proceedings) implicitly confirms that he may do so notwithstanding the existence of other proceedings.

What is more there are numerous examples of public inquiries (both statutory and non-statutory) being conducted either in parallel with legal proceedings or when such proceedings were contemplated, from the Ladbroke Grove Rail Crash inquiry to the Bloody Sunday inquiry, since the conclusion of which there has been considerable discussion of possible criminal prosecutions.

While there appears to be no caselaw directly on point, there is substantial caselaw concerning the analogous situation where civil proceedings are brought in parallel with criminal proceedings concerning the same matter. In such circumstances, criminal defendants often argue that the civil proceedings should be adjourned to avoid prejudice to the criminal trial. However, the caselaw is clear that it is a matter of discretion for the trial judge in the civil proceedings to decide whether to adjourn (*Jefferson v Betcha* [1979] 1 WLR 898) and one to be exercised "with great care" only where there is "a real risk of serious prejudice" (*R v Panel on Takeovers and Mergers, ex parte Fayed* [1992] BCC 524). In exercising that discretion, the Judge must balance that risk with the public interest in the civil proceedings (*Secretary of State for Trade and Industry v Crane* [2004] B.C.C. 825). It is also clear that, while a judge in civil proceedings will seek to prevent a manifest risk of injustice, ensuring a fair trial is ultimately a matter for the criminal court, which has extensive powers to remedy any prejudice.

Similarly, Ministers have a discretion as to whether to establish (and not suspend) a public inquiry in parallel with existing legal proceedings. They must exercise that discretion fairly and reasonably, balancing various competing interests, of which the public interest in the inquiry itself will be a very substantial part, but the Minister is not precluded by statute or common law from concluding that the inquiry should proceed.

Establishing an inquiry in such circumstances clearly raises the risk that the inquiry could prejudice the fairness of other

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proceedings. In particular, as regards the impact on related criminal proceedings, the protections afforded to criminal defendants are not available to witnesses in a public inquiry, who may be compelled to give evidence or disclose documents that may breach the privilege against self-incrimination that would be available to them in the criminal proceedings themselves. Such evidence or documents might then be used against the witness in a subsequent criminal trial. There is also the risk that a widely-publicised inquiry could taint any jury in subsequent criminal proceedings, preventing a fair trial.

It is less obvious that an inquiry could have a serious impact on civil proceedings. Any evidence that is not disclosable in a civil trial would not be compellable in a public inquiry (s. 22 of the 2005 Act) either and there is no privilege against self-incrimination in relation to civil claims.

There are, however, also concerns for the conduct of the public inquiry itself, as witnesses may be more reluctant to give frank and open evidence if they feel exposed to the risk of a criminal prosecution as a result, and they may refuse to give evidence or disclose documents on the basis of the privilege against self-incrimination.

ADDRESSING THOSE CONCERNS

As noted above, the 2005 Act anticipates the possibility of, and issues associated with, parallel or subsequent legal proceedings. In addition to the Ministerial power to suspend an inquiry, the 2005 Act (s. 2(1)) also expressly provides that an inquiry panel must not rule on, and has no power to determine, any person's civil or criminal liability, but (s. 2(2)) 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. These provisions clearly recognise the problem, but fail to resolve it.

There are, however, steps that can be taken to manage the risk of prejudice to other legal proceedings. Such measures could include one or more of the following.

- The Attorney General may give an undertaking not to use evidence given in the course of the inquiry in any subsequent criminal prosecutions against the witnesses. Such undertakings were given in the Scott Inquiry into the Export of Arms to Iraq, the Bloody Sunday inquiry, the Dunblane inquiry, and the Ladbroke Grove Rail Crash inquiry. Although not amounting to immunity from prosecution, this would mean that witnesses could give evidence or disclose documents to the inquiry without risk that the evidence will be used against them.
- The chairman of the inquiry could, under s.19 of the 2005 Act, order that any evidence that might prejudice any legal proceedings should be heard in private and not published pending the outcome of those proceedings.
- Publication of the inquiry report could be stayed pending the outcome of legal proceedings if it was felt that the findings of the report could cause undue prejudice.

CHALLENGING DECISIONS

In deciding whether to establish and/or to suspend an inquiry, the Minister would need to have regard to these and other options for mitigating any risk of prejudice. So too would the chairman in exercising his procedural powers. A failure to do so could open up the Minister and/or the inquiry itself to challenge by way of judicial review.

Although s. 37 of the 2005 Act provides immunity from civil claims for inquiry panel members, s. 38 implicitly confirms that that immunity does not serve to preclude judicial review claims in respect of decisions made by a member or members of the inquiry panel. Under s. 38, any judicial review claim, against the Minister or a member of the inquiry panel, must be brought within 14 days of the day on which the applicant became aware of the decision. Whilst that is a very severe curtailment of the usual time limit for judicial review, it is noteworthy that it starts to run from the date of the applicant's becoming aware of the decision and not from the date of the decision itself. It should also be noted that that time limit does not apply to a decision "as to the contents of the report of the inquiry" or of which the applicant could not have become aware until the publication of the report. It would appear therefore that a decision as to the substantive contents of the report could be challenged within the usual time limits under the Civil Procedure Rules (CPR 54.5), namely "promptly and in any event within three months."

There have been a number of judicial review claims in relation to inquiries under the 2005 Act. Many of those have been challenges to a Ministerial refusal to establish a public inquiry or to the adequacy of the proposed inquiry or investigation. None, it would appear, has focused on the balancing of the public interest in holding an inquiry and the competing interests of ensuring the fairness of other proceedings, and none has been a direct challenge to the decision to establish or to continue a public inquiry in circumstances where it was said that so to do would prejudice other proceedings. Such challenges are, in principle, possible and it is quite conceivable that a claim could be brought on the basis that the decision is irrational or unreasonable or indeed *ultra vires* in light of the right to a fair trial. While such cases are likely to raise human rights issues, and thus to import into the judicial consideration questions of proportionality and a relatively intensive scrutiny of the decision, it remains the case that, given the wide discretion afforded to the Minister under the 2005 Act and the nature of the competing interests, the Courts are likely to be wary to intervene other than in the clearest of breaches. Nevertheless, the importance of the issues at stake, and the burgeoning public inquiry industry, mean that it is surely likely that such claims will arise in the coming years.

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