Effective Inquiries

Response to Consultation
[CP ( R ) 12/04]
28/09/2004
Effective Inquiries

Response to consultation carried out by the Department for Constitutional Affairs. This information is also available on the DCA website at www.dca.gov.uk
## Contents

- Introduction .......................................................... 2
- Background ............................................................ 3
- Summary of responses ............................................... 4
- Responses to Specific Questions ............................... 5
- Conclusions ............................................................ 52
- Consultation Co-ordinator contact details .................. 53
- The Consultation Criteria ....................................... 54
- Annex A – List of Respondents .................................. 55

---

1
Introduction

This document is the post-consultation report for the consultation paper, *Effective Inquiries*.

It will cover:

- the background to the report
- a summary of the responses to the consultation paper
- a detailed response to the specific questions raised in the paper
- conclusions

Further copies of this report and the consultation paper can be obtained by contacting Shahi Rahman at the address given below:

**Inquiries Policy Division**  
**Department for Constitutional Affairs**  
**5th Floor, Selborne House**  
**54-60 Victoria Street**  
**London**  
**SW1E 6QW**

**Telephone:** 0207 210 8288  
**Email:** inquiriesconsultation@dca.gsi.gov.uk

This report is also available on the Department’s website at: www.dca.gov.uk
Effective Inquiries  Summary of responses

Background

On 24 February 2004, the Public Administration Select Committee announced that it would be conducting an inquiry into Government by Inquiry. It published a list of questions about the value of inquiries established by Government Ministers into particular, controversial events that had given rise to public concern.

The consultation paper Effective Inquiries was published on 6 May 2004. It set out its response to these questions and invited wider comment on a range of ideas for improving the effectiveness of inquiries.

The Consultation period closed on 29 July 2004. This report summarises the responses to each question asked by the Select Committee, and to some particular ideas suggested by the Government in Effective Inquiries. The paper also states, where appropriate, the conclusions that the Government has reached following the consultation on some key points.

A list of respondents is at Annex A
Summary of responses

A total of 57 written responses to the consultation paper were received. Most took the form of detailed discussion papers. Some consultees covered all the questions asked by the Public Administration Select Committee, while others only addressed particular points. 16 of the responses came from individuals, including academics, former inquiry chairmen and others with experience of past inquiries. 12 came from public bodies, such as the Council on Tribunals and the Health and Safety Commission. Nine came from organisations in the healthcare field. Seven came from firms of solicitors or from legal chambers, and a further five came from other legal organisations. Two came from groups representing the interests of former participants in inquiries. The remaining six came from other organisations.

In addition to the written consultation, the Government held three consultation seminars (referred to in this paper as the discussion groups) in order to learn from those with experience of conducting past inquiries. About thirty former inquiry chairmen, counsel, solicitors and secretaries participated in the groups, discussing a wide range of issues covered in the consultation paper. The views expressed during these discussions are reflected in the summary of responses below.

We are grateful to all those who responded and participated in the discussion groups.

Individual responses have not been published with this consultation paper, but copies of the responses1 and the minutes of discussion group meetings can be obtained in electronic or paper form from:

Mr Shahi Rahman
Tel: 0207 210 8288
Email: inquiriesconsultation@dca.gsi.gov.uk

1 We will not release the responses from those consultees who asked for their response to be kept confidential.
Responses to Specific Questions

1. Have the largely ad hoc inquiries into matters of public concern functioned adequately over recent years or is a reconsideration of their use now necessary?

21 consultees commented on this question.

20 responses believed that such reconsideration was now necessary and one consultee felt that ad hoc inquiries had functioned adequately.

“We very much welcome the opportunity to reform and modernise the whole inquiries process so that it is more transparent, coherent and comprehensible.”

Royal College of General Practitioners

A commonly cited drawback with ad hoc, non-statutory inquiries was that without formal powers they could not guarantee the co-operation of potential witnesses. This was considered a problem both for the inquiry itself, and for those participating. One response pointed out that it was unreasonable for an individual who co-operated with a non-statutory inquiry to lack any form of statutory protection simply because he or she had participated voluntarily. A further response felt that although a non-statutory inquiry was able to operate less formally than a statutory inquiry, the potential for misrepresentation was far greater, going on to say:

“There should be a statutory framework or code of practice for such inquiries – certainly for their proceedings and status of findings.”

C P Vellenoweth

A number of consultees believed that some form of framework or overarching statute that could apply to all inquiries would be of great benefit. It was suggested that it would be helpful to consolidate the areas in which existing statutory legislation was similar. There was a view that a single framework would not only help to better promote an understanding of the inquiry process, but also help manage expectations of what it could realistically achieve. One consultee also
Effective Inquiries  Summary of responses

talked of the advantage to having an agreed set of principles that could be readily understood by the public, as well as by politicians and lawyers.

“A general statutory power for Ministers to set up inquiries into matters that have caused or have potential to cause public concern would represent a useful modernisation, rationalisation and clarification of the present position. The Council believes that all such inquiries should be brought within its remit.”

Council on Tribunals

2. In what circumstances should an inquiry be called?

16 consultees responded to this question.

The most common reason given for holding an inquiry was that an investigation would be in the wider public interest. A few responses set out certain circumstances in which an inquiry might need to be called and listed seriousness, systemic failure, public interest and the need for transparency as the key elements.

“We consider that it would be helpful for specific criteria, whether statutory or otherwise, to be produced which would indicate the circumstances in which an inquiry may be initiated. This would avoid some criticism that the setting up of an inquiry is a knee jerk political reaction to a given set of circumstances. There would be increased legitimacy if clear criteria were set out.”

Herbert Smith

Two responses felt inquiries should be held to provide greater accountability and transparency where the normal investigation would be conducted by the organisation or system being criticised. It was also noted that inquiries should not take the place of normal investigation procedures.

“Particularly in medical practice, a single clinical incident can lead to a wide range of inquiries and despite the pressure applied by individuals and groups in these circumstances, MPS does not believe it to be in the public interest to hold an inquiry where the current accountability processes to which doctors
and dentists are subject are comprehensive and an additional inquiry will not provide further value.”

Medical Protection Society

- The Government believes that in each case Ministers must decide whether or not an inquiry is in the public interest, bearing in mind a range of factors, which are discussed in detail in paragraphs 3 to 9 of Effective Inquiries. Ministers face an increasingly large number of calls for inquiries, from Members of Parliament, the press, representative groups and private individuals. Inquiries can require a great deal of time and resources, and can place a considerable strain on those involved. It is important that inquiries are called only in exceptional situations, in which no other investigatory mechanism would be sufficient to establish the facts or restore public confidence.

3. Who should take the decisions on:

   (a) calling an inquiry

   (b) the form it should take

   (c) its terms of reference, and

   (d) the appointment of chairmen and members?

(a) Calling an inquiry

21 consultees commented on this question.

18 responses believed that the power to commission inquiries should rest with Government Ministers, one response did not think the decision should rest with Ministers and two did not express an opinion either way.

“It is difficult to see who else could be involved in calling an inquiry rather than government ministers. It may be considered disingenuous to suggest that anyone can call an inquiry.”

Royal College of General Practitioners
Some consultees went on to suggest how a Ministerial power to commission inquiries should best be covered in statute, with several calling for it to be set out in new overarching legislation on inquiries.

“We view this power as a good thing, for reasons of accountability and public confidence. It appears to work well at present on the basis of subject-specific statutory provisions combined with a general prerogative power. Current arrangements might be helpfully codified in any new legislation by a catch-all power to call an inquiry, provided that the wording of the legislation is sufficiently wide to retain the current flexibility of ad hoc inquiries.”

Clifford Chance LLP

- The Government agrees that Ministers should be able to commission inquiries, when they are necessary, and that any legislation should contain a power to that effect.

It was pointed out that the power to commission inquiries should not be over-used.

“Ministers should have power to call inquiries, though this must not lead to a series of unwanted and costly investigations.”

British Medical Association

However, a few consultees were concerned that there should be some mechanism to deal with the situation where there were calls for an inquiry but the Government chose not to hold one. Two called for the creation of a new, independent body such as an Inquiries Council to advise the Government on whether an inquiry should be established, suggesting that the Government should justify any decision not to take its advice. Two saw a role for Parliament in initiating inquiries.

“There have been several examples where the government have refused public and parliamentary demands to hold an inquiry. While it is clear that inquiries should be used sparingly, a process that facilitates the creation of an official (i.e. publicly funded) inquiry without necessarily being reliant on the support of the government of the day would help to foster public confidence. This process might take the form of a parliamentary public inquiry that reported back to a select committee or the House of Commons as a whole.
The creation of an inquiry could be based on a vote in the House being supported by a certain percentage of members."

Dr Matthew Flinders

- The Government believes that it is right that Ministers should explain publicly any decision to establish, or not to establish, an inquiry. Ministers can be, and often are, called to justify such decisions to Parliament, and this practice will undoubtedly continue. This is Ministers’ basic constitutional accountability.

- It is for Parliament to consider the question of whether it might establish its own inquiries. Many questions would arise regarding the mechanisms for appointing and funding such inquiries.

(b) The Form of the Inquiry

Six consultees offered comments on the form that an inquiry should take. It was generally agreed that the form would vary depending on the circumstances.

“We fully support the view that flexibility of form is important to enable an inquiry to meet the needs of the particular circumstances.”

Rail Safety & Standards Board

(c) Terms of Reference

11 consultees commented on this question.

Nine responses supported the Minister consulting to some extent on the terms and one response was not in favour of consultation. Two responses suggested that only the chairman should be consulted. Seven responses felt there could be wider consultation. One response raised concerns about the chairman’s involvement in establishing the terms of reference, fearing it could lead to accusations of bias on publication of the report.

Most consultees who commented on terms of reference focussed on the importance of drafting them correctly. Some responses noted that wide ranging
terms of reference can lead to a lack of focus and higher inquiry costs; however, a similar number expressed concerns that narrow terms could prevent a full examination of events.

Some consultees commented on who should set the terms of reference, and views were mixed on this question. One discussion group agreed that the drafting of the terms of reference should be the responsibility of the commissioning Minister. Another group felt that it was important that the Minister setting the terms of reference was not an interested party. One response suggested that the Secretary of State for Constitutional Affairs should be responsible for setting the terms.

Among the responses that supported interested parties having the opportunity to make representations before the terms are finalised, there was a suggestion that consultation would improve confidence and transparency in the process, particularly where the issue of trust in the Government was in question.

“On occasion, an inquiry is set up precisely because of a lack of trust, or a need for closer scrutiny, of the exercise of ministerial functions. In such instances, it seems unlikely that an inquiry composed by appointees of the Minister and working to terms of reference established by the Minister, could ensure the necessary legitimacy and credibility…Given this, we would concur with any move to consult on the terms of reference before finalising them.”

Committee on the Administration of Justice

It was suggested that delays at the outset would be offset by greater co-operation throughout the inquiry.

“The main advantage would be to promote a shared understanding by everyone involved, from the outset, of the purpose and direction of the inquiry, including the issues to be explored and their connection with the purpose for which the inquiry was established.”

General Medical Council

The main argument against wider consultation was that it does not fit with the idea of setting up an inquiry to urgently investigate matters of serious concern. It was felt there was a danger that any consultation period could become too formal, and that allowing representations would cause too much delay.
“While a cooling off period has been suggested to allow for discussion and preliminary investigation, the time this would take must be balanced by the need to proceed with the inquiry with all possible expedition. A cooling off period could lead to expectations being raised that the terms of reference would be changed, which may cause a problem at a later stage. To avoid this risk the terms of reference should be agreed at the outset.”

Steeles (Law) LLP

On the question of altering the terms of reference during the inquiry, three responses expressed the view that this could only be done in exceptional circumstances with careful consideration of the effect on evidence already submitted. One response was less cautious, asserting that it was sensible for the chairman to be able to amend the terms of reference.

- The Government agrees carefully considered terms of reference are key to a successful inquiry. The Government considers that the need for consultation on terms with the chairman or interested parties will vary between inquiries, but that the final decision rests with the Minister.

(d) Appointment of Chairman and Members

13 consultees commented on this question.

Six responses felt that the Minister was best placed to select the chairman\(^2\), five did not and two offered no opinion either way.

“The proposal that Chairmen of inquiries should be selected by Ministers must be correct. Any other selection process would be extremely costly in terms of time and would deter many people from becoming involved.”

Solicitor/Secretary to the Shipman Inquiry

\(^2\) Two consultees expressed concern at the use of a gender-specific term for the person chairing an inquiry. We have used the term “chairman” in the belief that it is now common usage for it to apply to both men and women. We would like to stress that there is absolutely no presumption that the chairman of an inquiry will be a man.
Some consultees put forward ideas for the creation of a new independent commission to appoint inquiry panel members. One respondent also saw a role for Parliament.

“We consider that an independent Parliamentary Committee should be responsible for selecting a Chairman for inquiries or, alternatively, that the Committee should appoint members of a Commission and that the Commission in turn should appoint the Chairman and members of an inquiry.”

Herbert Smith

However, others felt that, in the majority of inquiries, there would be no objection to selection by Ministers, and that special arrangements could be made to ensure the independence of the selection process in controversial cases.

“In the past, the form of inquiry chosen and the identity of the Chairman have not, in general, proved to be controversial.”

Sir Roy Beldam

Ideas to ensure independence in controversial cases included a suggestion that the Minister should consult some external body as to the suitability of the chairman. It was also suggested that it would be better for the chairman to be selected by a different Minister to the one whose department had responsibility for the issues under investigation. In particular, it was felt that the role of DCA in identifying judicial chairmen helped to enhance public confidence in the independence of judicially-chaired inquiries.

- The Government agrees with the majority view that the commissioning Minister should retain responsibility for appointing the chairman and other panel members.

- However, the Government accepts that there may be controversial cases, for example, if a Government Department has a direct interest in the inquiry. The Government is not persuaded of the need to establish and maintain a new commission to make selections for these relatively few controversial cases. It should be possible for the Minister to take steps to ensure that the appointment is, and is seen as, impartial.
A few candidates also offered views on the nature of the selection process. Several suggested that all posts should be advertised and inquiry chairmen selected through open competition.

“Ultimately, the decision to appoint the Chair and any additional Panel members to a particular Inquiry would be made by the Minister. However, the fact that the Minister was constrained to choose from amongst a pool of prospective candidates that have been appointed on the principles of open and independent competition, would go some way to addressing any questions of perceived bias.”

Royal Pharmaceutical Society

- The Government believes that the selection process should be as transparent as possible. However, it must be borne in mind that chairing an inquiry is a difficult and time-consuming task. It may be that very few people would be willing to put themselves forward in response to a general advertisement unless they had a specific interest in the outcome.

Statutory Requirements for Independence and Suitability of the Panel

13 consultees commented on this question.

Seven responses supported the idea of some sort of requirement for independence, four did not and two did not offer an opinion either way.

“Although practical considerations mean lack of independence is unlikely to be an issue in reality, there can be no disadvantage to making this a statutory requirement, as it would reinforce public confidence in the independence of the chairman and panel.”

Clifford Chance LLP

Some consultees were concerned that a requirement for independence would be difficult to define and could lead to an increased number of challenges at the beginning of an inquiry. In particular, some members of the discussion groups commented that if the subject of the inquiry were particularly narrow, it could be
It was pointed out that any requirements for impartiality on the part of the chairman should apply also to the other panel members and people working for the inquiry.

Members of the discussion groups commented that there would be benefit in describing, perhaps in guidance, the functions of the solicitor, secretary and counsel to the inquiry. Guidance should make clear that the inquiry support team is responsible to the chairman. Often, the inquiry support team is composed mainly of civil servants. Although no one questioned the suitability of civil servants to fulfil those roles, there were concerns that they could be put in a difficult position if they felt that they were answerable to two different employers.

- The Government envisages that any new legislation on inquiries should include a statutory requirement for the Minister to have regard to the need for impartiality when appointing inquiry panel members.

- The Government believes that the inquiry team, and any assessors appointed to assist the inquiry, should also be impartial; it may not be necessary to set out the impartiality of those other than the panel in statute, but their roles and obligations should be clearly defined.

Seven consultees commented on the question of a statutory requirement for suitability. Four supported a statutory requirement, three were opposed. Those against the idea raised concerns that a statutory requirement for “suitability” would be:
“…an open invitation for court applications which would hamper the operations of the inquiry in its crucial early stages.”

Team of Counsel to the BSE Inquiry

Some consultees in the discussion groups felt very strongly that the competence of the chairman was essential to the success of the inquiry. Some attributes, such as analytical skills and judgement, were cited as being essential for a competent chairman. It was also suggested that the focus should be placed on whether the chairman displayed the competence and specific skills necessary for the inquiry.

- The Government considers that ‘suitability’ may be too broad a concept to define in statute. However, the competence of the chairman was clearly a very important consideration to consultees. The Government believes that any new legislation could emphasise this through a more specific requirement for the Minister to ensure that the panel had the necessary expertise to conduct the inquiry.

It was also pointed out that any duties placed on the Minister to ensure the suitability and impartiality of the panel should continue throughout the course of the inquiry.

“The responsibility to ensure competent chairmanship and conduct of an inquiry does not leave the minister after commencement. A chair or panel member may die or may need to withdraw suddenly, and decisions about whether to replace, and with whom, need just as much care as the original appointment. There could conceivably be cases where a chairperson’s capacity diminishes over the course of an inquiry (bearing in mind recent appeals in cases heard by a very ill judge); there may also be cases where the chair loses the confidence of key interests, for example by an arbitrary or unduly restrictive interpretation of terms of reference. The appointing minister has a continuing responsibility to ensure efficiency, probity, public accountability and confidence in the process. Thus the minister should take enough interest in the progress of the inquiry to be satisfied that it is running efficiently and within its remit, but to preserve the independence of the process
it should be rare in the extreme for this to require active intervention once the process has commenced: the removal of an inquiry member, or an unsolicited clarification of terms of reference, would be very serious steps.”

Northern Ireland Human Rights Commission

4. Should there always be a single, all encompassing inquiry into an issue or is it inevitable that other “side” issues will need to be conducted on certain specific aspects e.g. into professional conduct?

19 consultees responded to this question. 10 consultees expressed a view on when inquiries should be held in relation to other proceedings. Nine consultees gave general comments on this topic.

Seven of the 10 consultees who commented on the issue of whether criminal prosecutions or disciplinary proceedings should be completed before an inquiry is held were firmly of the view that the inquiry should be set up only after the conclusion of any other proceedings.

“Inquiries should be at the end of the line in terms of other proceedings (for example court cases) – so not to ‘contaminate’ any legal proceedings, or inquiries into professional conduct. Hearings into someone’s performance, or into legal matters can be undertaken to ascertain levels of guilt, or to ensure that similar occurrences, by an individual or by organisation does not happen again.”

General Medical Council

Others expressed the view that there may be circumstances where an inquiry should take precedence over criminal or other proceedings. For them, the main concern was that in some cases finding out what went wrong, and making recommendations to prevent recurrence, may be of more importance than prosecution; and delaying an inquiry will delay lessons being learned.

“The complexity of the multiple investigations and inquiries into the event is considered, but para.36 [of Effective Inquiries] states that it is sensible for criminal investigations to take place before an inquiry. From our experience,
this approach leads to an unacceptable delay – that can stretch into years – in learning the safety lessons from an accident. We believe that the safety lessons should be considered more important than achieving prosecutions.”

Rail Safety and Standards Board

The example was given of the BSE Inquiry where most of the disciplinary investigations were held following the issuing of the Inquiry’s report. It was also suggested that the broad findings of an inquiry could help inform subsequent disciplinary proceedings.

5. 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?

25 consultees commented on this question.

19 consultees expressed the view that in the correct circumstances a non-judicial chairman was as appropriate as a member of the judiciary in this role and six consultees did not offer an opinion either way.

Four responses thought that a judicial chairman was always necessary for inquiries that involved a significant degree of legal consideration or representation. There were however suggestions that by making legal advice available to the chairman, from the solicitor to the inquiry or an independent lawyer, some of these issues might be overcome. This view was also echoed during the discussion groups.

“Not every inquiry needs to be chaired by a judge, but every tribunal should be served by senior counsel who has knowledge of subpoena and disclosure.”

British Irish Rights Watch

A further point raised during the groups, and also within a written response, regarded the implications of the Human Rights Act on the selection of the chairman. Where necessary, it was believed that a High Court judge or senior lawyer would ensure that decisions were taken within the framework of the Act.
Several responses believed that a judge was often better suited to chair an inquiry that involved a high level of factual evidence and analysis.

“If the inquiry is primarily concerned with the finding of fact, then a senior judge with the necessary forensic skills is probably most appropriate.”

General Medical Council

One of the disadvantages cited about judges as inquiry chairmen was their inherent association with justice that could adversely lead to a false expectation of an inquiry determining innocence or guilt. Three responses expressed concern over the impact that participation might have on the perception of judicial independence.

“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.”

JUSTICE

6. Is the use of expert assessors necessary for every inquiry? Should inquiries always ensure lay participation? If so what form should it take?

Expert Assessors

22 consultees commented on this question.

13 responses believed that the use of expert assessors should depend on the circumstances of the inquiry, three responses felt that assessors were always necessary for subject-specific inquiries, two responses that they were required for all inquiries and four responses offered no opinion either way.

“As regards use of experts and/or lay members I consider that Panel membership should be tailored to meet the demands of each particular Inquiry. I am sure that flexibility is the key to getting the right Inquiry for the particular job.”

Jean Ritchie QC
It was thought that where a tribunal incorporated the necessary expertise, assessors might not be necessary, but that their participation should always be an available option.

Consultees felt that assessors should either be chosen by the Chairman, or in consultation with the Chairman. It was generally considered that their participation promoted a balanced view within an inquiry. However, one response suggested that expert members would encourage applications from interested parties for other experts to provide evidence.

Two responses suggested that it should be possible for assessors to become full members of the inquiry panel if it became appropriate to do so. Another stated that it would be inappropriate for a panel member to act as an assessor at the same time. Three responses commented that expert assessors were always necessary in subject specific inquiries such as those related to mental health or clinical issues.

“Certainly disaster inquiries involving failure of equipment should always involve assessors who have the appropriate technical knowledge.”

MV Derbyshire Family Association

Two responses commented that assessors should always assist an inquiry.

“We would therefore like to see inquiries supported by a small panel of (perhaps three/five) trained inquiry assessors. They would not be technical assessors but would help to ensure that all evidence and arguments are fully considered.”

Consumers’ Association

**Lay Participation**

Five consultees discussed this topic.

Three responses believed that it should not be a pre-requisite to an inquiry. Others felt that although they would provide balance, their use should be dependent on the needs of inquiry rather than compulsory. Those in favour believed that default inclusion could bring an element of “common sense” to the inquiry and ensure that all key matters were considered in relation to the facts.
• The Government believes that the need for assessors or lay participation will depend on the circumstances of the inquiry, and that any new legislation on inquiries should be sufficiently flexible to cover all appropriate forms.

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

18 consultees commented on this question.

None of the responses felt that such a panel would be justified.

“Due to the unique nature of each individual inquiry – reflected in the differing terms of reference – the composition of the panel would need to be so wide and diverse as to be unworkable.”

Association for Personal Injury Lawyers

A trained panel was felt to be an impractical proposition given the uncertain nature of when inquiries might be established and the expansive range of topics they could feasibly cover. Alternative suggestions included creating a database of suitable candidates or establishing some form of panel or society to provide a forum for the exchange of views and pooling of information. A proposition from both the responses and discussion groups was that it might be more helpful to provide appointed panel members with some form of training where appropriate.

Would there be benefit in maintaining a small, dedicated Inquiries Unit?

30 consultees commented on this possibility.

27 consultees saw considerable benefits in establishing some form of Inquires Unit and there was also strong support for a unit from participants in the discussion groups. Two consultees did not believe there would be benefit to such a unit and one response offered no opinion either way.
“The Council considers that a dedicated central inquiries unit would be a great asset. It could provide valuable advice and experience and so avoid the need to re-think the core structural and administrative issues afresh each time.”

Council on Tribunals

It was felt that an inquiries unit could provide a valuable overview of the inquiry process in capturing both consistency and lessons learnt. Consultees thought that it could also provide an effective starting point for inquiries and aid in them being set up expediently. Many responses suggested that it could act as a knowledge base advising on issues such as inquiry accommodation, IT equipment and effective record management systems. It was also felt that it could promote best practice, produce initial guidance and provide ongoing support for the inquiry on procedural elements. Other suggestions included collating and holding information on past inquiries, explaining and publishing a Minister’s rationale on whether an inquiry was to be held and increasing standardisation by providing examples of common inquiry documents such as Salmon Letters.

It was also thought that such a unit could hold information on individuals interested in becoming future participants in an inquiry. However, one consultee felt that an inquiry unit advising on possible chairman would be a step too far. Several responses stressed that the value of such a unit would lie in its independence and impartiality. One consultee expressing concern that a unit being too closely involved with the inquiry process could encourage a trend to follow a predetermined model that might undermine the need for flexibility. A further two responses found it hard to envisage how such a unit would justify a continuous role due to the uncertain nature of when inquiries are established.

The role the unit could play in media handling was noted, but one response felt that it would be of greater benefit for such a unit to facilitate the placement of a press officer swiftly. Several responses also suggested that the unit should incorporate some form of monitoring and reporting on progress, or implementation of recommendations from past inquiries.

- The Government recognises there is a case for a dedicated Inquiries Unit and will consider the matter further.
8. **Should the Tribunals of Inquiry (Evidence) Act 1921 (or some other specific legislation) invariably form the basis for Ministers calling such inquiries or is there a continuing need for non-statutory, ad hoc inquiries?**

Nine consultees commented on this question. They offered a range of views, with some believing that all inquiries into matters of public concern should be set up on statutory basis, while others felt that there was still a role for non-statutory inquiries.

“We believe that it is desirable that all public inquiries which are the subject matter of this consultation paper (namely public inquiries to investigate particular controversial events giving rise to public concern) should be established under a statutory scheme. This would enable inquiries under the Tribunals of Inquiry (Evidence) Act 1921 and ‘ad hoc’ inquiries to be established under a comprehensive new statutory scheme. Existing specific legislation (for example section 2 of the National Health Service Act 1977) could remain but it is considered desirable for all inquiries of the type covered by this paper to be dealt with pursuant to one statutory regime.”

Bar Council of England and Wales

“Provision should continue to be made for non-statutory, ad hoc inquiries, as they are flexible enough to cope with a range of issues with which an inquiry may have to deal and they function well in circumstances where all parties cooperate and where there is no need for formal powers of compulsion.”

Northern Ireland Human Rights Commission

9. **Is the Tribunals of Inquiry (Evidence) Act 1921 effectively redundant? If so are there any of its features, such as the use of the oath or powers to compel witnesses to appear, which should be retained for the conduct of inquiries?**

18 consultees commented on this question.

Seven responses felt that the 1921 Act should be revised, four thought that there was still value in its use and seven were undecided. Consultees also pointed out
that there is additional subject specific legislation on inquiries, which includes similar powers.

Some of those who favoured retaining the 1921 Act argued that it is concise and capable of engaging all of the essential issues pertinent to inquiries. One consultee believed there was value in retaining an inquiry model that could be established on the authority of both Houses of Parliament to look into particularly serious matters. However, those who argued for the revision of the 1921 Act believed that calling a 1921 Act inquiry was cumbersome and that it would be preferable to replace this Act with new provisions for Ministers to set up an inquiry without the need for resolution of both Houses of Parliament. A discussion group thought that the perceived need for a judicial chair would discourage use of the 1921 Act. Some consultees mentioned particular shortcomings in the provisions of the 1921 Act, some of which are discussed in later sections.

“The 1921 Tribunals of Inquiry (Evidence) Act needs modernising. It was brought in at a very different time from today.”

Steeles (Law) LLP

There was a strong view that it was less a case of the 1921 Act being redundant, but more that the whole legislative framework for inquiries needed to be overhauled. It was thought unhelpful that other statutory inquiries currently operated under a number of different legislative provisions. For example, one response talked of the problems concerned with establishing inquiries under the NHS Act 1977. They felt that when such an inquiry needed to consider the actions of individuals outside of a NHS context it could be difficult to reconcile this with the inquiries’ terms of reference. Consultees suggested that any matter of sufficient seriousness to warrant an inquiry should be properly addressed under a single piece of legislation (see responses to question one).

However, consultees agreed that many of the provisions of the 1921 Act had merit. In particular, ensuring the co-operation of witnesses was commonly mentioned as a benefit of the 1921 Act, and this was one of the main provisions that consultees thought must be retained if there were new legislation.

“The society believes that the relevant provisions of the 1921 Act should be replicated in any new legislation providing for a wider framework for Inquiries.”

Royal Pharmaceutical Society
Formal powers for inquiries to enforce the attendance of witnesses, compel the production of documents and examine witnesses under oath or affirmation

28 consultees commented on this question.

26 responses believed that inquiries should have formal powers available to them, two responses did not offer an opinion either way. Consultees acknowledged that non-statutory inquiries have the benefit of being more informal and often receive full co-operation. However, it was generally felt that inquiries should not have to depend on the goodwill of all participants and should have access to formal powers to guarantee co-operation.

The point was made at the discussion groups that persuasion can be more effective than a summons in securing co-operation. However, it was also acknowledged that this approach can be more time-consuming and some consultees considered that formal powers, or the threat of them, are helpful in moving people to co-operate, therefore speeding up the inquiry process.

“Inquiries work to tight timetables, and even “willing” witnesses are often unwilling to co-operate within the inquiry's timescale. We are in no doubt that the existence of statutory powers make it much easier for the NHS and ourselves to get the co-operation of witnesses.”

Capsticks

A few responses commented on the usefulness of formal powers in providing reassurance to individuals who are willing to participate, but who are concerned about the implications of co-operating without a formal summons. For example, the Medical Protection Society noted that doctors, who must take into account the duty of professional confidence, can be reassured by being summoned, rather than simply requested, to attend or hand over records.

“Given an anticipated increasing reluctance of individuals to appear before informal inquiries without safeguards, the availability of formal powers may be advantageous in all inquiries.”

Royal Liverpool Children’s NHS Trust

There was agreement that the key powers are those that compel witnesses to attend and that compel the production of evidence. Fewer responses commented
specifically on the power to take evidence under oath. One view, expressed in a discussion group, was that witnesses were often content to give evidence under oath because they felt it made their evidence more persuasive.

- The Government envisages that any new legislation on inquiries should contain powers to enforce the attendance of witnesses, to examine witnesses on oath or affirmation and to compel the production of documents.

Power to issue a commission or request to examine witnesses abroad

10 consultees commented on this question.

Eight responses supported retention of such a power and two felt that it was unnecessary. Responses acknowledged that video technology could be used, or witnesses could be flown to the UK, although it is not certain that these approaches would meet the needs of every situation. Some responses commented, for example, that video technology is not available everywhere. Consultees therefore felt that, even if it is rarely used, an inquiry should have the power to obtain such evidence.

“We support formal powers in this area. It seems a sensible precaution given the increasingly European and international dimension of many areas of public administration.”

Consumers’ Association

Sanction for non-compliance with an order of the inquiry

14 consultees commented on this question.

All responses agreed there should be sanctions for not complying with an order of the inquiry under its formal powers, although no clear view emerged about the
most suitable sanction to use. Of the two responses in favour of contempt, one consultee considered that prosecution was less likely to act as a deterrent because it enabled people to buy their way out of attending or serving time in jail, without complying with the inquiry. It was thought a sanction for contempt could be imposed until the contempt was purged. However, discussion groups noted that giving the Tribunal the power of the High Court increases the pressure for the chairman to be a High Court judge. One response felt that criminal prosecution was more suitable because contempt was too associated with court proceedings. Another consultee suggested the inquiry should have both routes available, with the inquiry taking a view as to the most effective sanction on an individual basis.

The point was raised at the discussion groups and in responses that any sanction has the potential to delay and disrupt the inquiry. Some consultees in the discussion groups said that the enforcement mechanism should be removed from the inquiry itself. It was mentioned that the High Court has powers to enforce any order of an inquiry under the 1921 Act, for example to prevent the identity of anonymous witnesses being revealed. The criminal sanctions suggested by the Government in *Effective Inquiries* would not offer such protection. However, the requirement in the 1921 Act for the chairman to certify the matter to the Court means that it can only enforce orders whilst the inquiry is still in existence. So, for example, it would be unable to protect anonymous witnesses after the inquiry had finished.

- The Government acknowledges that sanctions for non-compliance are a difficult area for inquiries and should only be used as a last resort.
- The Government considers that the threat of criminal prosecution would provide a strong deterrent against non-compliance.
- However, the Government can also see advantage in an additional power for the High Court to enforce orders of the inquiry, if necessary, which could offer a broader range of options for ensuring compliance. The inquiry could choose which route would be most appropriate.
- The Government does not believe that an inquiry chairman should have the power to hold people in contempt, because an inquiry is not a court and the chairman may not be a judge, but it could be possible for the High Court to hold a person in contempt when enforcing an order.
Sanction for destruction, suppression or distortion of evidence

15 consultees commented on this question.

All responses supported a sanction against destruction, suppression or distortion of evidence. Four responses commented specifically about the appropriate penalty. One response favoured an indictable rather than summary offence, while one consultee supported an “either-way” offence capable of being dealt with either by magistrates or the Crown Court.

Two responses considered that any sanction should also cover knowingly distorting evidence in the expectation that an inquiry will be set up, although acknowledging that any sanction could only be applied once an inquiry had been announced.

“The consequences of the action are the same – creating a serious obstacle to the pursuit of truth and justice - and penalties should be provided to govern such action, regardless of when it occurs.”

Committee on the Administration of Justice

One response underlined the importance of making clear as soon as an inquiry is announced what evidence, from which individuals or organisations, is likely to be needed.

- The Government envisages that a sanction for the intentional destruction, suppression or distortion of evidence should be included in any new legislation and that this should take the form of a summary offence. The Government agrees that an inquiry must make clear at the outset what documents are likely to be required but considers it is only practicable for sanctions to apply to actions taken once an inquiry has been announced.

Statutory protection and privileges for witnesses

The Government asked for views on four aspects of this issue.

(i) Immunity from civil proceedings arising from their evidence

(ii) Privilege to refuse to answer on grounds of self-incrimination
17 consultees offered comments on these two areas.

16 responses supported both these protections. One response did not, going on to raise the issue of whether these protections could hinder some inquiries from establishing all the facts. One response considered that protection should be limited to defamation. The majority view was that such protections are crucial if an inquiry is to obtain the full picture.

“In my professional experience witnesses can often be extremely reluctant to co-operate in the preparation of witness statements, the disclosure of documents and the offering of complete and frank answers to questions by the fear that the material resulting will be used against them in some way. Often these fears are ill-founded, but assurance is at present often hard to give. If there is a public interest in holding a public inquiry whether “statutory”, or ad hoc, there must be a public interest in the inquiry hearing the full truth.”

Robert Francis QC

One consultee considered that the same levels of immunity afforded to witnesses and the panel should apply to participants and their legal representatives.

- The Government agrees that statutory protections for witnesses are important to the effective functioning of an inquiry and envisages that any new legislation provides witnesses with immunity from civil proceedings brought as a result of their evidence and also includes the right to refuse to answer on the grounds of self-incrimination.

(iii) Legal professional privilege
(also referred to in responses as lawyer-client privilege)

Eight consultees commented on this area.

All responses agreed that legal professional privilege should apply to inquiries. Two responses expressed the view that any future legislation on inquiries should confirm that privilege applies.

- The Government agrees that the legal professional privilege should apply to communications between witnesses or participants and their lawyers.
(iv) Privilege to refuse to disclose what has taken place in Parliament

Five consultees offered comments on this area.

Four responses did not support retaining this privilege and one response did support retention in relation to inquiries. Two responses considered that this provision was no longer necessary with regard to inquiries, while three responses were opposed to the privilege in principle.

- The Government acknowledges that such a privilege may not be necessary in the context of inquiries.

Statutory protection for the inquiry panel, solicitor to the inquiry, counsel to the inquiry and inquiry secretariat

14 consultees commented on this question.

All responses believed that this was an area that should be covered in legislation and supported some form of statutory protection for individuals working for the inquiry. Four responses considered individuals should receive immunity from all civil proceedings, and a further six responses questioned whether the immunity should be absolute and/or suggested qualified privilege. Among those responses favouring limited immunity it was suggested the immunity cover defamation but not negligence.

“This makes sense, at the very least for the inquiry panel, the solicitor to the inquiry and counsel to the inquiry. Absolute privilege protects judges and lawyers in court proceedings and also statements made before other tribunals having functions of a judicial nature. Judges and lawyers may be protected in court proceedings even if they make statements maliciously. We would not suggest that protection for inquiry panels, solicitors or counsel be extended that far.”

Clifford Chance LLP

One response noted that immunity should not impact on the human rights of those who may seek to challenge an inquiry. Two responses considered that an indemnity was a more appropriate form of protection for inquiries.
• The Government agrees that individuals working for the inquiry should receive statutory protection for their actions during the inquiry. Whilst it is recognised that providing full immunity is a very high level of protection, the Government considers that this is necessary to ensure the panel and assessors are able to speak freely without fear of litigation. As a safeguard, individuals would always have recourse to judicial review.

10. **Should inquiries be investigatory or is there scope for an adversarial element in the procedures?**

31 consultees commented on this question.

22 responses believed that inquiries should be primarily inquisitorial in nature and one response felt that inquiries should be mainly adversarial. Eight consultees believed decisions would need to be made on a case by case basis.

Most pointed out that adversarial elements were usually introduced into an inquiry only when witnesses were facing potential criticism or when there was a suggestion that blame would be apportioned. A strong view emerged from the responses that it should be made very clear that the purpose of an inquiry was not to apportion blame.

> “If the growth of adversarial tactics is to be stemmed, much more will have to be done through rules of conduct to ensure that apportionment of blame cannot be adduced from the evidence or findings of an inquiry.”

C P Vellenoweth

However, many consultees implied that sometimes witnesses could still face potentially damaging criticism, even if the purpose of the inquiry were not to apportion blame. Consultees had differing views on the extent to which adversarial elements were necessary to ensure that witnesses were treated fairly. For example, some believed that cross-examination was necessary in order for a witness to refute possible criticisms, as set out in the Salmon Principles, whereas others felt that it was possible to operate a fair procedure in which all questions were put by counsel to the inquiry.
“Inquiries of this nature perform an investigative function and their procedures are essentially inquisitorial. The Salmon principles should be regarded in that light and may properly be adapted (as nowadays they often are) according to the circumstances. In the interests of fairness (and sometimes efficiency too) it may on occasion be desirable to introduce elements more closely associated with adversary procedures, such as cross-examination by one ‘party’ of another’s witnesses. The extent to which this should be allowed may vary according to whether Counsel to the inquiry has been appointed. In the Council’s view the appointment of Counsel to the inquiry to ask questions of witnesses is often a very effective way of eliciting the relevant facts without imposing too heavy a burden on the panel.”

Council on Tribunals

A number of consultees also went on to comment on the practice of issuing Salmon letters. Several felt that Salmon letters were an important tool in ensuring fairness, although it was pointed out that the process could be slow and cumbersome, that it would not always be possible to predict what criticism might arise during questioning and that there might need to be flexibility in the operation of the Salmon procedure.

“Our view is that, as a matter of procedure, consideration must always be given to the issue of forewarning parties of intended allegations/criticism but this should be decided on each individual case - weighing up the concept of procedural fairness/natural justice against the need to proceed expeditiously and the risk of prejudice that may be caused to the witness if allegations only become known after his/her evidence has been given. There will often be a need to recall interested parties/witnesses to deal with allegations/criticisms that have been raised subsequent to the giving of evidence. Whilst not ideal, this respects the concept of an overriding objective of administering the Inquiry on a cost effective basis.”

Eversheds LLP

- The Government agrees that inquiries should be inquisitorial and that adversarial elements should be avoided where possible.
11. What are the main elements necessary for the conduct of an effective inquiry, for example access to witnesses and documents? Is the implementation of the Freedom of Information Act likely to affect this?

In Effective Inquiries, the Government made a number of suggestions in response to this question. Consultees’ views on these suggestions, and on other elements that may contribute to an effective inquiry, are summarised below.

Rules of Procedure

28 consultees commented on this question.

17 responses supported some form of procedural rules for inquiries, nine did not support procedural rules and two responses did not offer an opinion. On the other hand, the majority of participants in the discussion groups felt that an inquiry would benefit from available guidance rather than set procedural rules. Some of those who supported rules highlighted the need for inherent flexibility rather than an overarching procedure.

“A Code of Rules need not be absolute; it could be permissive, containing a catalogue of powers and duties from which those appropriate to the particular form of inquiry could be selected.”

Sir Roy Beldam

This view was reinforced by a response saying that although procedural rules would be helpful they should be few in number, and easily understood by the public. Another stated that although they did not think a comprehensive set of rules would be feasible, a power to make statutory rules covering core concerns such as witnesses, legal representation and public and private hearings would be very useful. There was also a common feeling that procedural rules would benefit all participants to an inquiry and there were several suggestions that the need for witnesses to have a route of appeal for inquiry decisions was of importance.

“Statutory Rules of Procedure would bring clarity to the Inquiry process.”

Royal Pharmaceutical Society

Nine responses discussed the potential relationship of judicial review to procedural rules. Of the responses in favour of rules, there was an even split (3/3) between
those who felt that rules could reduce the scope for judicial review and those who believed that rules would increase its potential.

“It seems to us that any statutory procedure is likely to carry with it a relatively easy peg on which to hang an application for judicial review. Accordingly, we doubt whether it would be wise to lay down statutory rules.”

Team of Counsel to the BSE Inquiry

However, it was also suggested that:

“Rules would also avoid the need for last minute Judicial Review Applications as generally any regulations setting out the procedural rules would have been drafted in the light of the Human Rights Act 1998 and be human rights compliant.”

Royal Liverpool Children's NHS Trust

Of the nine responses that were not in favour of procedural rules, three mentioned that they thought rules could increase the potential for judicial review. Four responses from those not in favour of procedural rules thought that owing to the circumstances giving rise to inquiries naturally being varied, the procedural needs would therefore shift from inquiry to inquiry. It was also suggested that this lack of flexibility could detract from the ability of the chairman to make rules that specifically suited the inquiry in hand.

“Different circumstances require different solutions and one of the important aspects of the public inquiry is the ability to make its own rules in order to discharge the task it has been set.”

Steeles (LAW) LLP

Of the nine responses that did not support rules, six instead proposed some form of guidance, with several proposing that an Inquiries Unit could be responsible for its production.

“As an alternative, the inquiries unit proposed in the consultation paper could produce information and guidance on procedural matters which an inquiry could take into account (to ensure some consistency and fairness), while
leaving the final decision on procedure to the individual inquiry to ensure flexibility."

Clifford Chance LLP

There was also discussion about the possibility of providing theoretical models for inquiries to follow. One response felt that it would be very difficult to provide a ‘one size fits all’ set of rules for inquiries, but that it may be possible to have a series of models. Some consultees suggested that inquiries should be encouraged to follow a two-stage approach, with initial fact-finding followed by more detailed testing of the evidence. However, other responses felt that the present system did allow flexibility and that an inquiry would suffer from having to chose one particular model.

In Effective Inquiries, the Government also asked for views on additional areas in which procedural rules might be of assistance. Consultees made the following points:

- There should be a clear statement of the principles that should govern inquiries, such as transparency and the avoidance of conflicting interests by chairman and members of the inquiry.

- Rules could cover the potential trespass into disciplinary and court matters in order to protect the rights of the individuals involved.

- It should be a requirement that all narrative, findings and comments contained in inquiry reports are cross referenced to evidence, whether the hearings are in public or not.

- Although it would not be appropriate in every case, the use of discussion papers circulated by the inquiry, followed by groups and working groups would help to surface and clarify key issues.

- Time limits could be set out in relation to the dispatching of Salmon letters and the disclosure of any documents that witnesses may be questioned on, thereby ensuring witnesses have an adequate opportunity to respond.

- The Government believes rules of procedure could provide significant assistance to the chairman in running an inquiry, helping to control costs and the length of inquiries. The Government acknowledges
Effective Inquiries Summary of responses

Concerns that rules should not be too restrictive or complicated, but believes that it should be possible to draft rules with sufficient flexibility to suit all inquiries.

Judicial immunity for a costs judge

Six consultees offered comments on this topic. All responses were in favour of such a provision.

“A common structure for the award and funding of costs would be welcome. It certainly appears to be logical that costs judges charged with assessment of costs should have the same level of immunity as when they act in a judicial capacity.”

Robert Francis QC

It was felt that provision for a costs judge to assess legal bills with immunity would also ensure cost effectiveness by keeping legal fees within reasonable bounds. It was suggested that such a procedure could also apply to the assessment of non-statutory inquiries and that immunity should extend to the assessment of costs after an inquiry had concluded its work.

- The Government agrees that providing in statute for assessment of costs by a costs judge would be an effective measure to help maintain reasonable costs of inquiries and envisages such a provision should be included in any new statutory framework on inquiries.

- However, it is not intended that a costs judge would assess bills in every case. Usually it will be perfectly possible for the inquiry to reach agreement without the need for a costs judge to be approached.

Statutory requirement for the chairman to have regard to costs

12 consultees commented on this question. Eight responses were in favour of such a statutory obligation and four responses were not.
Those in favour felt that this would ensure the protection of public funds and that an inquiry remained focused on its terms of reference.

“Such a requirement could strengthen the Chairman’s ability to limit the possible costly elements in the Inquiry.”

Senior Costs Judge P. T. Hurst

A view proposed in several responses was that costs should be regularly monitored and made available to the inquiry. Another respondent felt that although an inquiry must have regard to costs when initially planning, it would be unreasonable to draw up an indicative budget if this in any way sought to restrict expenditure, and went on to suggest that the primary obligation of the chairman must be to establish the facts and draw lessons from the subject in hand. However, participants in discussion groups believed that there was a need for greater budgetary control on inquiries, and that it was helpful to draw up an initial budget, even if adjustments had to be made later on.

- The Government envisages that any new legislation on inquiries should include a statutory requirement on the chairman to have regard to the potential costs to public funds and to inquiry participants when planning and conducting the inquiry.

**Formal requirement to publish the final costs of an inquiry**

12 consultees commented on this question. 11 responses were in favour of such a proposal and one response was not.

“There should be a requirement for the Minister to publish the final costs of an inquiry, including the fees paid to counsel and lawyers. It is public money that is expended on inquiries and the public have a right to know how that money is being spent.”

Solicitor/Secretary to the Shipman Inquiry

It was suggested that costs could be broken down to detail such factors such as legal representation, witness expenses and administration. Although it was
acknowledged that publishing the final costs of an inquiry might not always increase public confidence, it was generally felt that it would add transparency and inform any future assessment of the inquiry process.

- The Government envisages that any new legislation on inquiries should include a statutory obligation to publish the final costs.

Discretionary broadcasting of inquiries

14 consultees commented on this topic.

13 responses agreed with a procedure for discretionary broadcasting and one response offered mixed opinions.

It was thought that this system had worked successfully in the past and would continue to do so. A point raised by several responses and also during a discussion group was that the media can often seek out the most sensational elements during inquiry proceedings which can in turn lead to a distortion of the public’s perception of events.

“The need for an interesting headline at the outset of a news programme, or for an arresting piece of dialogue during a two or three minute slot, is a powerful driver. There is thus a temptation for a broadcaster to take utterances from a witness out of context, thus creating a misleading impression as to the witness’s position.”

Laura Dunlop QC - Advocates Library

Another response pointed out:

“Press interest in general should be encouraged as it signals to the public a healthy openness and is conducive to maintaining fair remit.”

MV Derbyshire Family Association

Consultees raised the issue of the effect of broadcasting on the witnesses involved, with one response suggesting that witnesses should be allowed to decide
whether their evidence could be broadcast, provided they were not placed under any pressure either to permit or prevent filming. Another suggestion proposed by several responses was that placing evidence transcripts immediately on the internet provided a satisfactory way to avoid unnecessary strain on a witness, whilst at the same time ensuring the transparency of the inquiry’s proceedings. However, it was also suggested that although transcripts were helpful they often failed to present the whole picture that broadcast images could provide.

There was also discussion about the practicalities involved with the broadcasting of proceedings, for example the artificiality that filming could impose on the inquiry venue, such as closed windows in order to reduce noise levels or enhanced lighting for the cameras. It was one consultee’s view that as participants would normally have to wear a microphone during filming, it could render confidential communication with instructing solicitors, clients or other representatives difficult.

The use of written evidence

15 consultees offered comments on this topic.

13 responses agreed with the use of written evidence in appropriate circumstances whilst two responses disagreed with its use. Consultees cited their experience of written evidence being employed as the usual practice in several past inquiries, and it was felt that it had saved both time and reduced potential stress on witnesses. It was also thought that written submissions would be of particular use where evidence was of a highly technical or of an emotionally distressing nature.

“Written evidence should be encouraged because it allows more measured thought and does not put the nervously disposed at a disadvantage.”

MV Derbyshire Family Association

However, where clarification or expansion of a statement was needed it was still considered the best option to call that witness in person. It was also thought that this procedure should never be used purely to speed up the inquiry or reduce costs to the detriment of the inquiry’s aims. One response voiced concern that not all people wishing to give evidence to an inquiry would be sufficiently literate to convey their information in writing, and that it would be easier to make false or malicious allegations in written submissions.
Disclosure of criminal records

10 consultees offered comments on this topic.

Seven responses believed that the panel should make decisions on disclosure of criminal records on a case-by-case basis, whilst three responses did not favour disclosure. Responses acknowledged the sensitivities of this issue, but the overall view was that records should be made public if the panel felt the matter was relevant to the subject of the inquiry or called into question the honesty of the witness.

“We agree with the proposal (paragraph 98) that the use of written evidence, where appropriate, could help to speed up the inquiry process and also to limit the strain on some witnesses. We do not believe that it is necessarily the case that fairness requires that witnesses always be required to give oral evidence.”

Herbert Smith

Only one response commented on whether there should be a specific power to order disclosure, taking the view that a statutory provision was not necessary.

- The Government agrees that disclosure of criminal records should be a matter for the inquiry panel and does not consider that there is a need for any new legislation to include a specific provision about this area. The factors to be considered by the panel in deciding whether a record should be disclosed could be set out in procedure rules.

Recovery of costs

16 consultees commented on this topic.

Nine responses were not in favour of such a proposal whilst seven responses were in favour of some form of recovery.

Although the reasoning behind this proposal was recognised, concerns were expressed that it might be seen as a form of ‘penalty’ and discourage organisations from participating in inquiries. It was thought that such a proposal could heighten
an adversarial element, in turn leading to issues such as legal challenges, higher costs and unnecessary controversy.

“As far as organisations are concerned, there does not seem to be any point in recouping money from those that are directly or indirectly funded by public money. It would seem unfair to treat private organisations differently from public ones, and any attempt to exercise this power might in any event attract satellite litigation.”

Capsticks

Some responses favoured costs recovery on a limited basis, suggesting that it would only be appropriate if an organisation had wilfully or unreasonably failed to co-operate and had incurred additional costs for the inquiry and its participants. It was suggested that an ability to impose a costs sanction would be a useful incentive for organisations to co-operate with an inquiry in a timely manner. However, another view was that imposing a ‘fine’ on an organisation, at a time when it should be addressing the issues highlighted by the inquiry, was not desirable.

- The Government accepts that a provision to recover some costs of the organisations involved could lead to accusations of inquiries apportioning blame and provoke legal disputes over costs. Therefore the Government does not envisage making any statutory provision to this effect.

Judicial review

Eight consultees offered views on judicial reviews in relation to inquiries.

Many responses commented that judicial review claims could slow down inquiries considerably. However, all were clear that it was important for participants in an inquiry to have access to judicial review if they had been treated unfairly. Many consultees did not believe that the introduction of procedural rules would, in itself, reduce the likelihood of judicial reviews. Several made other suggestions to reduce the potential for disruption. For example, one discussion group felt that the assistance of the courts should be sought in dealing with judicial review applications on a priority basis. Another group felt that it should be made clear that
in relation to inquiries, judicial reviews should only be used sparingly to intervene into matters of an extreme nature.

In *Effective Inquiries*, the Government suggested two possible options to reduce the potential for lengthy delays resulting from judicial review: either the introduction of a statutory route of appeal against interlocutory decisions; or, alternatively, the reduction of the time limit for judicial review applications. There was little support for a statutory appeals procedure, but several consultees could see advantage in reducing the time limit for judicial review.

“*The answer might be to have a fast track Judicial Review procedure for inquiries where the dispute could be heard and resolved within a shorter period than the 3 month timetable currently in force.*”

Steeles (Law) LLP

However, concerns were raised that any reduction in the time limit could cause difficulties for large or under-resourced groups of participants.

“*Challenges within a shorter time scale than the usual three months may be no problem for well-resourced parties, but where, say, a party consists of groups of families, a shorter time scale could present difficulties.*”

MV Derbyshire Family Association

- The Government believes that it might be appropriate to reduce the usual time limit for judicial review of procedural decisions during an inquiry. However, the Government accepts that there may be exceptional circumstances in which the deadline would need to be extended.

- The Government does not see a case for reducing the time limit for judicial review applications relating to matters arising after the production of the inquiry report.

**Freedom of information and data protection**

Five consultees commented on the potential impact of the Freedom of Information and Data Protection Acts on the inquiry process.
One response noted that after an inquiry had concluded, the presumption is that its records would pass over to a public authority and hence be subject to the Freedom of Information Act. One consultee argued that inquiries themselves should be made public authorities for the purposes of the Freedom of Information Act. However, the National Archives pointed out that there would be little point in bringing the inquiries within the scope of the Act, given the fact that the exemption for court records would cover inquiry records:

“We understand that the rationale for the argument is that for a statutory inquiry to be subject to FOI it would need to be brought in using the s4 process. Given the absolute exemption for court records that would seem to be a fruitless exercise. The presumption is that once the inquiry is over that the records will pass to a public authority (which is subject to FOI). The information will then be potentially disclosable, subject to the exemptions within the Act. We strongly recommend that paragraph 104 should reiterate that in a statutory inquiry the records remain public records under the Public Records Act and will need to be managed and appraised accordingly. This underlines the importance of best practice records management deployed from the outset of any inquiry."

The National Archives

One consultee felt that the Freedom of Information Act would have no significant effect on the remit of inquiries gathering information, because it would increase the disclosure of documents. This consultee was not aware of any inquiry in which the Data Protection Act had provided an insurmountable obstacle.

12. Should inquiries always sit in public or are there circumstances when it is right to conduct an investigation in private?

32 consultees commented on this question.

24 responses thought that there were circumstances when it was right to hold an inquiry in private, three responses thought that inquiries must always be held in public and five responses were undecided on the issue.
“We believe that inquiries should not always sit in public. The inquiry chairman should have discretion and take into account, whether publicity will help or hinder in full witness disclosure, damage victims or potential victims and help or hinder the process of improvement.”

Royal College of Psychiatrists

A number of consultees expressed the view that an inquiry must take the form that best enabled it to achieve its aims, which, it was suggested, could be decided on a case by case basis.

11 of the 32 responses, although agreeing that there were justifications for private elements in an inquiry, felt strongly that there should be few exceptions to public treatment.

“Open sessions provide a better opportunity for individuals to question conclusions and provide new data. Openness avoids the criticism of a cover-up and reduces the possibility of a lack of trust in Government on the issue.”

Professor Malcolm Ferguson-Smith

Four responses said that any decision to hold in private must be accompanied by a public statement clarifying the decision to do so and two responses called for a clearly defined set of criteria on holding private, or partially private inquires.

Only a few consultees expressed a view on who should make the decision as to whether an inquiry should be held in public or private. In general, the emphasis was placed on the importance of explaining decisions, rather than on questioning who should make them. However, two responses proposed that rather than the establishing Minister, the chairman should make any such decisions, after hearing representation from interested parties. There was a suggestion that procedural rules should govern such decisions, and that it should be possible to appeal against them. Another consultee felt that the decision should rest with the Minister in the first instance:

“Initially, this decision should be for the Minister setting up the inquiry, though there should be a power for the Chairman of the inquiry to deal with certain evidence in private, if that is necessary.”

Solicitor/Secretary to the Shipman Inquiry
Reasons for holding an inquiry in private

The most commonly cited reason to hold a private inquiry was national security, with most consultees agreeing that this was an acceptable reason for private treatment. However, two responses, which focussed particularly on the Northern Ireland context, were keen to emphasise that national security should not be used as an excuse for covering up politically embarrassing information. Another thought that even though national security could provide compelling reasons, it should in most cases only lead to part of the evidence being heard in private.

There was also discussion about whether a private inquiry could help to reduce costs and lead to quicker outcomes.

“Inquiring in private, where this is feasible, can save time and expense, and avoid ‘playing to the media’ which tends to be a feature of inquiries in public.”

Sir Robin Ibbs

Some consultees also believed that adverse levels of stress on participants, the sensitivity of relatives or unjustifiable intrusion into the privacy of an individual could provide valid reasons for sections of an inquiry to sit in private. Several responses also discussed the need to protect privileged or confidential information and a further three cited personal privacy as circumstances in which to hold an inquiry in private.

“When dealing with sensitive clinical information, it must be possible to hold at least part of an inquiry in private, to protect patient confidentiality if a patient so wishes or, if a patient is not competent, if it is considered in that person’s best interests to do so.”

Medical Defence Union

Others mentioned that a private inquiry could be beneficial with regard to witnesses being more open with their evidence.
“There should be greater use of private inquiries, where witnesses would feel more able to express opinions as well as giving factual evidence.”

Rail and Safety Standards Board

The Government agrees with the majority of consultees that there may be occasions where it is necessary for inquiries to conducted wholly or partially in private. Depending on the circumstances, it may be appropriate for the Minister to make the decision at the time of establishment or for the chairman to make decisions about particular parts of the inquiry as it progresses.

13. Are independent inquiries an appropriate investigatory device within a parliamentary democracy? Do they undermine the principle of ministerial accountability to Parliament?

10 consultees commented on this question.

Nine responses believed that independent inquiries were an effective investigatory device within a parliamentary democracy and one consultee did not.

“Independent inquiries provide an expert way of ensuring effective democratic governance, and an important form of scrutiny into matters of grave public interest. Well-run, independent, impartial, inquiries reinforce rather than undermine the democratic process.”

Committee on the Administration of Justice

It was generally held that such inquiries provided an effective means to investigate situations that have given rise to public concern, both strengthening democracy and reinforcing Ministerial accountability. It was felt that since inquiries examined a specific area with the aim of establishing the facts, they were well placed to then inform subsequent Parliamentary discussion and assessment.
14. Should there be greater parliamentary involvement in the setting up of such inquiries? If so what form should this take? For example should it be a ‘minimalist’ approach involving the use of parliamentary resolutions to agree terms of reference, membership and procedures or a more ‘maximalist’ option which could see parliamentary committees undertaking inquiries of this nature themselves?

15. If the maximalist approach were to be pursued what should be done to address the limitations which many believe are inherent in select committees taking forward such inquiries?

16. Would the use of privy counsellors or senior parliamentarians, and the use of counsel or other experts suffice or is a more permanent machinery such as a parliamentary commission or perhaps extended powers for the Ombudsman more appropriate and effective?

17. What powers should such a committee of inquiry or parliamentary commission have in relation to witnesses and papers which select committees do not already enjoy?

18. What considerations, if any, arise concerning parliamentary privilege in the event of potential criminal, civil or disciplinary proceedings which might result from the evidence?

Six consultees responded to questions in this section, opinions were mixed throughout.

One consultee felt that the presence of an accountable Minister in Parliament, whose decisions were open to judicial review and the courts, negated the need for wider involvement, which could expand both the cost and length of an inquiry.

One response thought that the role of Parliamentary select committees in conducting inquiries should be expanded, and that there should be a right of appeal to the House of Commons.

“The role of Parliamentary committees in conducting inquiries should be enhanced.”

Bar Council of England and Wales

However, another pointed out the practical difficulties that would arise if select committees were to conduct these types of inquiries themselves.
“As to the issue of whether parliamentary committees themselves should undertake inquiries, we simply do not see how they could ever have the time to conduct the sort of major inquiry that might otherwise be thought to need their involvement.”

Capsticks

Consultees noted the differences between the type of work undertaken by select committees at the moment and the inquiries discussed in *Effective Inquiries*.

“While APIL accepts that parliamentary select committees perform an important role in their ability to question civil servants, their powers are more limited than those of an inquiry and their remit tends to be wider – i.e. an inquiry will look at a specific incident, while a select committee will consider a more general question or topic. APIL believes that the advantages of a select committee do not outweigh those of a full inquiry.”

Association of Personal Injury Lawyers

One response pointed out that any inquiry undertaken by a select committee would have to be compatible with the Human Rights Act and any new inquiry procedures for committees would have to be developed with this in mind. A further response felt that political participation should be kept to a minimalist approach so as to reduce any potential complications with cross-party committees.

Few consultees commented on the issues surrounding Parliamentary privilege. One response felt that the same terms of protection for Parliamentary privilege could apply to committee inquiries as those for the present system of tribunals. A further response went on to say that regardless of the individual or body involved, if a party’s actions have been negligent, an inquiry should be able to recommend criminal proceedings, i.e. Crown immunity would not apply.

19. **How should the publication of the eventual report be handled? Who should be responsible for this?**

11 consultees offered views on this question.

Consultees were in favour of as much of an inquiry report as possible being published. Protecting national security and the public interest were mentioned as
reasons that could sometimes justify withholding specific sections of the report, but the presumption was on full disclosure.

“If there is any reason why it might be inappropriate to publish some or all of the report the Chairman should give a firm recommendation to the commissioning Minister in that regard – the commissioning Minister would then need good reason before departing from that recommendation.”

Herbert Smith

Several consultees suggested that if a commissioning Minister declined to publish a full report a public statement explaining their reasons should be released. Several consultees also discussed the position that participants should hold in relation to the report. One felt that participants should not be able to comment on the content of the report before publication and the other believed that no one participant should be permitted prior access ahead of another.

Consultees suggested that there should be set rules or recommendations for the inquiry to follow over publication of its report. It was also proposed that reports should be published within set timeframes, one response recommending that the terms of reference should establish a time limit for publication. A further response suggested that as long as it was feasible for the inquiry, such a move could deflect criticisms that reports had been delayed because they may be viewed as critical or unfavourable to the Government.

There were mixed views over who should be responsible for the publication of an inquiry’s report. Some felt that it should be a matter for the Chairman:

“Publication of a report should be handled entirely by the tribunal and its staff, usually, but not necessarily, using government agencies to do the work of printing and distribution. To allow a government department to superintend the publication of a report is a departure from the notion of independence.”

Sir Cecil Clothier

Others believed that responsibility should lie with the commissioning Minister.

“In every inquiry of any sort we have been involved with, responsibility for publication has lain with the commissioner of the inquiry. In our view the responsibility for publication should always remain with whoever
commissioned the inquiry. The commissioner may well delegate that authority to the inquiry chairman (as in Hutton) but that decision is rightly one for the commissioner of the inquiry.”

Capsticks

- The Government agrees that there are situations where either option, of responsibility for publication resting with the chairman or with the Minister, will be suitable.

20. Has the conduct of inquiries over the years ensured that lessons giving rise to the matter under investigation have been learnt?

21. Has the outcome of inquiries made any discernible difference to the conduct of public life?

Seven consultees offered comments on these questions.

Five took the view that inquiries had certainly had some impact, and that some lessons had been learnt, but that there was more that could be done. One believed that lessons had not been learnt from inquiries, and one called for further research on the question. In general, a view emerged that the use of inquiries had been beneficial, even if they had not always been successful in eradicating the systemic problems that they had been set up to investigate.

“Although inquiries may not have an immediate impact, and although not all the lessons they hold are necessarily learnt, they do serve to set down parameters for what will be regarded as acceptable behaviour in the future. The risk that an inquiry may be held also may act as a curb on unacceptable behaviour, particularly on the part of those in public office.”

British Irish Rights Watch

22. Should there be a formal system for following up the recommendations of inquiries and their impact? If so, what form should this system take and who should be responsible for it?

18 consultees commented on this question.
12 responses proposed mechanisms for following up the recommendations of individual inquiries, stressing the importance of putting such follow-up systems in place. Three responses were not in favour of a formal system for recommendations and three responses offered no opinion either way.

There was little support for the idea of a single system for following up inquiry recommendations, because the appropriate follow-up action would vary from case to case.

“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.”

JUSTICE

There were a number of different suggestions, including:

- a role for Select Committees in monitoring the response to inquiry recommendations;
- a duty on the Minister to respond to each recommendation and state whether he intends to act on it;
- a role for an inquiries unit, with appropriate experts, to co-ordinate the follow-up action;
- a role for the inquiry panel or a person appointed by the panel to monitor the follow-up action; or
- responsibility for following up recommendations to be passed to an appropriate independent body, such as the Healthcare Commission for NHS inquiries.

No single suggestion emerged as a clear favourite.

Only one consultee believed that there should be a duty on Ministers to implement the recommendations of an inquiry. Another disagreed strongly, noting that:

“This would make the recommendations, mandatory and thus much more than recommendations.”

Royal College of Psychiatrists
Many consultees, including those at discussion groups, believed it was important that any decision not to implement particular recommendations was explained fully.

- The Government believes that different mechanisms will be appropriate for following up recommendations in different cases. It will always be appropriate for Ministers to state what they intend to do in response to an inquiry’s recommendations.

23. Is there anything for the UK to learn from other countries about the conduct of investigatory inquiries?

Three consultees commented on this question. Two responses believed that research and comparison with other countries would be useful and one response saw no value in such comparison. No consultees gave any details about other inquiry systems.
Conclusions

The Government has stated its conclusions on some key questions of this consultation paper, and has outlined features that should be incorporated in any legislation implementing the policies discussed in this consultation. Overall, the Government has noted that the majority of consultees were in favour of the suggestions made in the paper, and the Government is considering legislation accordingly.
Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation process rather than about the topic covered by this paper, you should contact the Department for Constitutional Affairs Consultation Co-ordinator, Laurence Fiddler, on 020 7210 2622 or email him at consultation@dca.gsi.gov.uk

Alternatively, you may wish to write to the address below:

Laurence Fiddler
Consultation Co-ordinator
Department for Constitutional Affairs
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given on page 3.
The Consultation Criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.

2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.

3. Ensure that your consultation is clear, concise and widely accessible.

4. Give feedback regarding the responses received and how the consultation process influenced the policy.

5. Monitor your department’s effectiveness at consultation, including through the use of a designated consultation co-ordinator.

6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.
Annex A – List of Respondents

Representative Organisations
Association of Personal Injury Lawyers
Bar Council of England and Wales
British Irish Rights Watch
British Medical Association
Chief Police Officers Staff Association
Committee on the Administration of Justice
Consumers’ Association
Falsely Accused Carers and Teachers
General Medical Council
JUSTICE
Medical Defence Union
Medical Protection Society
MV Derbyshire Family Association
National Patient Safety Agency
Northern Ireland Human Rights Commission
Rail Safety & Standards Board
Royal College of General Practitioners
Royal College of Psychiatrists
Royal Liverpool Children's NHS Trust
Royal Pharmaceutical Society of Great Britain

Government Agencies / Public Bodies
Council on Tribunals
Financial Services Authority
Health & Safety Commission
HM Customs and Excise
Law Commission
London Borough of Ealing
Parliamentary and Health Service Ombudsman
Prisons and Probation Ombudsman
The National Archives
The Planning Inspectorate

**Private Firms**
Capsticks Solicitors
Clifford Chance LLP
Dennis Woolf Productions
Eversheds
Herbert Smith
Linklaters
Steeles (Law) LLP
WordWave International

**Individuals**
C P Vellenoweth
Dr Matthew Flinders
Henry Palin, Solicitor/Secretary to The Shipman Inquiry
Jean Ritchie QC
John Hine
Laura Dunlop QC
Lord Justice Potter
Peter Berman
Professor Malcolm Ferguson-Smith
Richard Lingham
Robert Francis QC
Senior Costs Judge P. T. Hurst
Sir Cecil Clothier QC
Sir Robin Ibbs
Sir Roy Beldam
Stephen Jones
Team of Counsel to BSE Inquiry