

Inquisitorial justice in action: learning from public inquiries.

Fiona Scolding Q.C.

The myth of the adversarial system.

- The English system prides itself on being adversarial: but in many situations, the tribunal adopts an inquisitorial, or quasi- inquisitorial jurisdiction:
- Coroners
- The family justice system in respect of removing children from their parents and resolving disputes about where their children should live and how they should be brought up , and how money should be divided following relationship breakdown.
- Very many Tribunals : such as for example, in welfare benefits cases, about people's detention in psychiatric institution, about the education of their disabled children .

These systems make up a significant proportion of “ordinary people’s “ involvement with the legal system.

What is the difference in practice?

- Not confined to the argument of either side
- Able to clearly identify issues and decide what is relevant for the resolution of the dispute
- Focused upon getting the right result, not the result which either side wishes.
- Has flexibility in the approach to evidence gathering and can commission evidence the Tribunal/Court consider is required – including in some processes, expert evidence.
- Focussed upon in many cases what is in someone's best interest
- Can be more “descent into the arena” by the judge/tribunal.

Public Inquiries

- Been common in the UK since the nineteenth and into the twentieth century: codified in the Inquiries Act 2005.
- Currently a number in England: subjects vary from child sexual abuse, the fire in a tower block, the police shooting of a young man, a terrorist attack, the infection of those with hemophilia and others who received blood transfusions in the 1970's – 1980's leading to their infection with HIV or hepatitis, the actions of police officers when conducting operations against political groups from the 1950s – present day.
- Government has signaled its intention to have a Covid 19 inquiry: this will involve 4 separate inquiries for England, Scotland , Wales and Northern Ireland, and potentially a “super inquiry” covering all these jurisdictions (if the politicians can agree).

When do they happen?

- Decided by a Minister when :
 - (a) Particular events have caused, or are capable of causing, public concern
 - (b) There is public concern that particular events may have occurred.
- They become “statutory” inquiries (there can also be other forms of public inquiry which are non-statutory but that does not give any power to compel evidence) .
- There is no power to apportion civil or criminal liability , but is not inhibited from acting if the likelihood of liability being inferred from facts that it determines or recommendations that it makes
- Its procedure and conduct is up to the Chair of the Inquiry, save that it must act with fairness and avoid unnecessary cost (to all).

Inquisitorial

- Do not have a standard of proof: Chairs have recently stated that the standard of proof is flexible – so possibilities, likelihood, preponderances can all be set out.
- Designed to learn lessons - they all make recommendations
- Designed to provide a “national” insight or catharsis into what happened, why it happened and how it could have happened (some emphasise one more than the other)
- Can gather evidence in all sorts of ways: although most seek documentary evidence, have witness statements, and have public (or closed) hearings at which live evidence is given and written evidence is adduced.

Inquisitorial (2)

- The Chair defines the terms of reference (but usually consults with relevant parties) which are then signed off by the Minister
- It is usual for a secretariat to be established and there must be a secretary to the Inquiry and a solicitor to the Inquiry and counsel to the Inquiry (under the legislation).
- The Chair decides how evidence is to be taken, who is to be called, and about what. Witness evidence is produced in response to specific questions asked by the Chair (called the Rule 9 process), as is documentary evidence. Whilst those who may be “core participants” – who are people either involved in the concern, are bodies or organisations involved in the issues or are likely to be the subject of criticism, can make submissions, the Chair has a very wide discretion.

How does questioning happen?

- Varies between inquiries
- Counsel to the Inquiry asks the questions: meant to be fair and neutral .
- Core participants can put in questions for CTI to ask on their behalf.
- The Chair ultimately decides if they will or will not be asked.
- No right for parties to examine a witness
- May be permitted depending on the nature of the issues /if CTI considers that they should not ask various questions (because it would overstep the bounds of neutrality) but answers to those questions may be useful – although my experience there is never a question one cannot ask if it is relevant and put respectfully and courteously.

What are the advantages of this system?

- It avoids the inquiry being sent off on tangents
- It builds consensus and encourages collaboration (it is unworkable unless everyone has confidence in CTI) .
- It marshals evidence (which can otherwise be unmanageable) into order.
- It enables focus and so a “proportionate” approach
- It makes individuals more likely to come forward to give evidence (as they know they will not be cross examined without respite).
- It focusses upon trying to understand, and to get explanations for what happened – which again makes people more likely to open up .
- Its neutrality enables diverse parties to maintain confidence in the system .
- It saves time and money.

What are the disadvantages?

- Interest groups may consider that they have not been given a “voice” and feel impotent/ignored.
- It often means that issues which may be of wider political importance but may not be directly relevant are not aired and so again undermines public confidence.
- Its neutrality can be seen as an evasion of accountability.
- It can limit exploration of issues which may turn out to be highly cogent.
- It can lack the “spark” or “fire” of adversarial systems.

Thank you for listening

© Copyright Landmark Chambers 2021

Disclaimer: The contents of this presentation do not constitute legal advice and should not be relied upon as a substitute for legal counsel.

London

180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham

4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us

✉ clerks@landmarkchambers.co.uk
🌐 www.landmarkchambers.co.uk

Follow us

🐦 @Landmark_LC
🌐 Landmark Chambers