



***Checks and Balances –
Public law lessons from Covid-19***

**Philip Havers QC
Dominic Ruck Keene
Henry Tufnell**

10th June 2021
A challenge to the lockdown

(R (Dolan) v S/S for Health and S/S for Education)

1. The nature of the challenge
2. The grounds of challenge
3. 6 July 2020: Lewis J
4. 1 December 2020: Court of Appeal [2020] EWCA Civ 1605
5. 12 December 2020: Supreme Court
6. Where to next?

Key cases

Challenge to Coronavirus Regulations:

[R\(Francis\) v Health Secretary \[2020\] EWHC 3287 \(Admin\)](#)

Interference with Article 9:

[R\(Hussain\) v Health Secretary \[2020\] EWHC 1392 \(Admin\)](#)

[Philip v Scottish Ministers \[2021\] CSOH 32](#)

Interference with Article 1 Protocol 1:

[R\(Adiatu\) v HM Treasury \[2020\] EWHC 1554 \(Admin\)](#)

[R\(United Trade Action Group Ltd\) v Transport for London \[2021\] EWHC 72 \(Admin\)](#)

Failure to consult:

[R\(Shaw\) v Education Secretary \[2020\] EWHC 2216 \(Admin\)](#)

[R\(Article 39\) v Education Secretary \[2020\] EWCA Civ 1577](#)

Police powers:

[Neale v DPP \[2021\] EWHC 658 \(Admin\)](#)

PPE procurement:

[R\(Good Law Project\) v Health Secretary \[2020\] EWHC 3609 \(TCC\)](#)

Care Homes:

[R\(Gardner\) v Health Secretary CO/2123/2020](#)

The Covid-19 Inquiry

1. The Prime Minister, House of Commons, 12 May 2020:

"I can confirm today that the Government will establish an independent public inquiry on a statutory basis, with full powers under the Inquiries Act 2005.

*...We will consult the devolved Administrations before finalising the scope and detailed arrangements, so that this inquiry can consider all key aspects of the UK response."*¹

Timing

2. The Prime Minister has stated that:

"I expect that the right moment for the inquiry to begin is....in spring 2022.

.....

*The steps taken to set out the terms of reference and establish the chair of the inquiry will happen before the spring of next year...."*²

3. The statement from the Prime Minister is consistent with section 5 of the Inquiries Act 2005 ("the Act"), in that the terms of reference and the appointment of the chair of the inquiry will have to take place before the spring 2022:

"(1) In the instrument under section 4 appointing the chairman, or by a notice given to him within a reasonable time afterwards, the Minister must–

(a) specify the date that is to be the setting-up date for the purposes of this Act; and

(b) before that date–

(i) set out the terms of reference of the inquiry;

(ii) state whether or not the Minister proposes to appoint other members to the inquiry panel, and if so how many."

4. It is important to note section 5(2) of the Act, which sets out that there should be no consideration of the evidence before the setting up date.

"... (2) An inquiry must not begin considering evidence before the setting-up date...."

¹ <https://hansard.parliament.uk/commons/2021-05-12/debates/208947E3-6883-4425-AF8A-1AB661422CC8/Covid-19Update>

² <https://hansard.parliament.uk/commons/2021-05-12/debates/208947E3-6883-4425-AF8A-1AB661422CC8/Covid-19Update>

Chair/Panel/Assessors

Chair

5. Section 3 of the Act provides that the chair can sit alone or with a panel:

“(1) An inquiry is to be undertaken either—

(a) by a chairman alone, or

(b) by a chairman with one or more other members.

(2) References in this Act to an inquiry panel are to the chairman and any other member or members.”

6. The Act does not require a judge to act as chair and there was no indication given by the Prime Minister when announcing the inquiry in May 2021 that it would be judge led. Historically however, judges have been the preferred choice to chair most public inquiries since 1990: out of the 68 public inquiries run between 1990 and 2017, 44 had judicial chairs.³
7. If the minister proposes to appoint a judge to the inquiry, then he must do so in consultation with the Lord Chief Justice or a senior judicial figure (see section 10 of the Act).

Panel

8. Following the appointment of the chair, panel members can be appointed to assist with expert knowledge and the report. They are appointed by the minister in consultation with the chair, pursuant to section 4 of the Act:

“(1) Each member of an inquiry panel is to be appointed by the Minister by an instrument in writing.

(2) The instrument appointing the chairman must state that the inquiry is to be held under this Act.

(3) Before appointing a member to the inquiry panel (otherwise than as chairman) the Minister must consult the person he has appointed, or proposes to appoint, as chairman.”

9. When appointing a panel to the inquiry, the minister must have in mind the suitability of the expertise of the prospective member, pursuant to section 8 of the Act:

“(1) In appointing a member of the inquiry panel, the Minister must have regard—

³ <https://www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change>

(a) to the need to ensure that the inquiry panel (considered as a whole) has the necessary expertise to undertake the inquiry;

(b) in the case of an inquiry panel consisting of a chairman and one or more other members, to the need for balance (considered against the background of the terms of reference) in the composition of the panel.

(2) For the purposes of subsection (1)(a) the Minister may have regard to the assistance that may be provided to the inquiry panel by any assessor whom the Minister proposes to appoint, or has appointed, under section 11."

Assessors

10. A further option is to appoint assessors to provide technical assistance to the inquiry panel. The legislative basis for the appointment of assessors is set out at section 11 of the Act:

"(1) One or more persons may be appointed to act as assessors to assist the inquiry panel.

(2) The power to appoint assessors is exercisable—

(a) before the setting-up date, by the Minister;

(b) during the course of the inquiry, by the chairman (whether or not the Minister has appointed assessors).

(3) Before exercising his powers under subsection (2)(a) the Minister must consult the person he proposes to appoint, or has appointed, as chairman.

(4) A person may be appointed as an assessor only if it appears to the Minister or the chairman (as the case requires) that he has expertise that makes him a suitable person to provide assistance to the inquiry panel.

(5) The chairman may at any time terminate the appointment of an assessor, but only with the consent of the Minister in the case of an assessor appointed by the Minister."

Terms of Reference

11. The Prime Minister stated that there would be a consultation on the terms of reference:

"... We will consult the devolved Administrations before finalising the scope and detailed arrangements, so that this inquiry can consider all key aspect of the UK response...

*...Of course, it is right that the bereaved, along with many other groups should be consulted about the Terms of Reference..."*⁴

12. There does seem to be some acceptance that the inquiry will not be able to cover every aspect of the pandemic. One of the recommendations from the Parliamentary Public Administration and Constitutional Affairs Committee in its Fifth Report of Session 2019-2021, "A Public Inquiry into the Government's response to the Covid-19 pandemic," set out that:

"The Government should, alongside the terms of reference, set out its plans to cover issues that cannot be included in the public inquiry. This will allow those who are impacted by the wider issues to understand how and when they can contribute to lessons learned and allow the public inquiry to focus on the issues with which it has been tasked."

13. Clearly the hardest part of the inquiry will be drawing a line in respect of what elements of the Covid-19 pandemic will be examined. For example, an inquiry with a narrow scope will have an increased effectiveness with a limited number of focused recommendations that can be implemented. Yet at the same time, the inquiry should be as comprehensive as possible to ensure credibility with the bereaved families and the wider public.

Length and Cost Comparisons

14. Inquiries have a reputation for being slow-moving and since 1990, inquiries have taken an average of two-and-a-half years to report and nine have taken five years or more to produce their final reports.⁵ It does therefore seem wholly unrealistic for the inquiry to be reporting before the next election, especially given the magnitude of the task.
15. Inquiries can also be expensive. For example, the Bloody Sunday inquiry not only took 12 and half years but also cost £191.5m. The figures for the Grenfell Inquiry from 1 August 2017 to 31 March 2019 totalled £40.2m.⁶

⁴ <https://hansard.parliament.uk/commons/2021-05-12/debates/208947E3-6883-4425-AF8A-1AB661422CC8/Covid-19Update>

⁵ These are the Mirror Group Newspapers plc Inquiry (1992–2001), the Saville Inquiry (1998–2010), the FV Gaul Inquiry (1999–2004), the Rosemary Nelson Inquiry (2004–11), the Penrose Inquiry (2008–15), the Vale of Leven Inquiry (2009–14), the Al-Sweady Inquiry (2009–14), the Chilcot Inquiry (2009–16) and the Robert Hamill Inquiry, which was initiated in 2004, published an interim report in 2011, but has had its final report embargoed indefinitely while criminal proceedings are conducted.

⁶ <https://assets.grenfelltowerinquiry.org.uk/inline-files/Grenfell%20Tower%20Inquiry%20financial%20report%20to%2031%20March%202019.pdf>

Chair:

Philip Havers QC



Year of call: 1974

Year of silk: 1995

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Philip Havers QC has a wide ranging practice with particular emphasis on medical law, public law and human rights law. He appears regularly in the Court of Appeal and the Supreme Court. He was Head of Chambers from 2006 – 2018. He is recognised as a ‘Star Individual’ by Chambers & Partners and Tier 1 by Legal 500. He has been named ‘Clinical Negligence Silk of the Year 2020’ by Chambers & Partners.

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- **Hon. Chief Justice of Trinidad and Tobago v The Law Association of Trinidad and Tobago [2018] UKPC 23:** Appeal concerning lawfulness of an investigation into allegations in the local press.
- **Black v Secretary of State for Justice [2016] EWCA Civ 125:** Claim by prisoner in respect of the Government’s failure to apply the statutory ban on smoking to state prisons on the grounds of Crown immunity.

Speakers:

Dominic Ruck Keene



Year of call: 2012

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Dominic Ruck Keene has a varied practice in all the core areas of Chambers' work, in particular inquests, public law and human rights, personal injury and clinical negligence. He also has a growing practice in the specialist areas of child abuse compensation, cyber and data protection, as well as employment and equality law. As a member of the Attorney General's C Panel, he is regularly instructed by a number of different Government departments in cases involving a wide spectrum of different areas of law.

As a former Regular Army officer and serving Reservist Army officer (currently second in command of a Reserve Light Cavalry Regiment), Dominic has a particular interest and expertise in all nature of cases involving service personnel, as well as National Security more generally.

Henry Tufnell



Year of call: 2018

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Henry Tufnell joined chambers as a tenant following the successful completion of his pupillage at 1COR. He is developing his practice in all areas of chambers work.

Before commencing pupillage, Henry acted as a Trade Union representative for The Cleaners and Allied Independent Workers Union (CAIWU) representing claimants in the Employment Tribunal in unfair dismissal, wages and discrimination cases. During his legal studies, he was a Student Director of The School Exclusion Project, responsible for running the project as well as providing representation for pupils who had been excluded from school.

Prior to coming to the Bar, Henry majored in history at Brown University, Rhode Island. After graduating, he ran professionally in the 800m and 1500m, spending months training at altitude in the Pyrenees and Kenyan mountains.



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