



House of Commons  
Public Administration  
Select Committee

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**Government By Inquiry**

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*Written Evidence*

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## The Public Administration Select Committee

The Public Administration Select Committee is appointed by the House of Commons to examine the reports of the Parliamentary Commissioner for Administration, of the Health Service Commissioners for England, Scotland and Wales and of the Parliamentary Ombudsman for Northern Ireland, which are laid before this House, and matters in connection therewith and to consider matters relating to the quality and standards of administration provided by civil service departments, and other matters relating to the civil service; and the committee shall consist of eleven members.

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Mr Kevin Brennan MP (*Labour, Cardiff West*)  
Annette Brooke MP (*Liberal Democrat, Mid Dorset and Poole North*)  
Mrs Anne Campbell MP (*Labour, Cambridge*)  
Sir Sydney Chapman MP (*Conservative, Chipping Barnet*)  
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The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at:  
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### Committee staff

The current staff of the Committee are Philip Aylett (Clerk), Clive Porro (Second Clerk), Lucinda Maer (Committee Specialist), Jackie Recardo (Committee Assistant), Jenny Pickard (Committee Secretary) and Phil Jones (Senior Office Clerk).

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# An Issues and Questions Paper

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## INTRODUCTION

PASC—the Public Administration Select Committee—is looking into **the use of investigatory inquiries by Government**. This paper sets out some of the issues on which the Committee wishes to hear views. It contains a list of questions which is not exhaustive, but which outlines the main areas for discussion. The Committee is publishing this paper to encourage debate and provide a basis for evidence in the inquiry.

## Definitions

The term “independent public inquiry” is a loose one. It is applied equally to investigations surrounding accidents in transport or other industries and to commissions of independent expert advisers producing proposals for public policy reform. It is also applied to everyday inquiries such as those held under planning legislation or company law.

This inquiry is concerned with none of these. Rather it will be considering those inquiries set up by ministers to investigate particular, controversial events giving rise to public concern. They are often termed judicial inquiries in so far as they are often chaired by a leading judge (Hutton, Phillips, McPherson, Saville, Bingham, Scarman to name a few). But this is not invariably the case (e.g. Sir Ian Kennedy’s chairmanship of the Bristol Inquiry, Dr Iain Anderson’s Inquiry into Lessons to be Learnt from Foot and Mouth and now Sir Michael Bichard’s Inquiry into the Soham murders). The investigatory process may statutory or conducted by means of *ad hoc* procedures.

## Development of the independent public inquiry

From the middle of the 19<sup>th</sup> century until 1921, the usual method of investigating events giving rise to public disquiet about the alleged misconduct of ministers or other public servants was by means of a Select Parliamentary Committee or Commission of Inquiry. It was therefore one such Select Committee which was appointed to investigate the allegations surrounding what became known as the Marconi Scandal of 1912 concerning widespread rumours that the Government had corruptly favoured the Marconi Company in the construction of a chain of state owned wireless telegraph stations throughout the British Empire and that certain prominent members of the Government had improperly benefited from the transaction. At the end of the investigation the Committee, and then the House, divided on strictly party lines.

As a result when allegations were made by a Member of Parliament against officials in the Ministry of Munitions in 1921 Parliament decided to enact instead an investigatory mechanism to deal with this and any other matters which might arise in future. The Tribunals of Inquiry (Evidence) Act 1921 however still requires a resolution of both Houses to establish an inquiry tribunal.

A number of significant events have since been investigated under the Act, such as the unauthorised disclosure of information relating to the Budget by the Colonial Secretary in 1936 and the employment of the Soviet spy William John Vassall in the Admiralty in 1962.

Some twenty one tribunals of inquiry were established between 1921 and 1978 followed by a hiatus lasting until the mid-1990s since when four more inquiries have been called (Shipman, Bloody Sunday, Child Abuse in North Wales and Dunblane).

## **Powers and Legal Basis**

The powers for statutory inquiries are mainly derived from the 1921 Act. This provides for the tribunal to have all the powers, rights and privileges that are vested in the High Court. It can enforce the attendance of witnesses whom it may examine under oath, and it may compel the production of documents. Failure to comply can lead to the Chairman certifying the offence to the High Court where the witness may be punished in the same way as if he had committed contempt of court. The Act however contains no provisions concerning the procedure to be followed by a tribunal. Legislation concerning certain parts of the public service such as the NHS, or the police also makes provision for tribunals of inquiry in given circumstances. Section 84 of the National Health Service Act 1977, for example, gives an inquiry powers to compel persons to give evidence or to produce papers; and to take evidence on oath or affirmation.

However a number of the most high profile inquiries in recent years have been non-statutory, where the power to summon witnesses and evidence has been based on the determination of the chairman and the willingness of the Government in particular to cooperate. The earliest example is probably the Denning inquiry into the Profumo affair in the early 1960s. The Hutton, Phillips and Scott inquiries are three more recent instances of such non-statutory investigations, which have been increasingly favoured by ministers.

A relatively rare variant of *ad hoc* inquiries is the Committee of Privy Counsellors, one of which has just been established under the chairmanship of Lord Butler of Brockwell. Prior to that Mrs Thatcher set up a Committee led by Lord Franks to review the actions of the Government in the period leading up to the invasions of the Falkland Islands. Another was established in 1955 to examine security procedures in the public services as a result of the defection of Burgess and MacLean. This sort of committee is particularly appropriate where much of the evidence is likely to be highly sensitive, related to security or intelligence matters and can be made available on “privy counsellor terms”.

The concept of the Privy Counsellors’ committee is partly reflected in the system of parliamentary oversight of the security services. Although not necessarily Privy Counsellors, members of the Intelligence and Security Committee are senior Parliamentarians. The Committee is set up by statute and reports to the Prime Minister. Their access to information however is subject to possible restrictions.

## **The Salmon Royal Commission**

The Royal Commission chaired by Lord Salmon (Cmnd 3121) reported in November 1966. It examined the tribunal model established under the Tribunals of Inquiry (Evidence) Act 1921 and whether it should be replaced by other inquiry forms when cases concerning alleged instances of lapses in accepted standards of public administration or other matters causing public concern required investigation to allay public anxiety. Setting up the Commission, the then Prime Minister Harold Wilson observed that, “in recent years anxiety about the working of the [1921 Act] has been expressed on every occasion on

which the report of a tribunal set up under the Act has been debated in this House”. Although by then alternative procedures such as the Denning Inquiry had been developed he did not think the Government was quite satisfied that “we have yet found the right answer” (HC Deb, July 1965, col 1842)

The Salmon Commission explored various alternatives including Parliamentary Select Committees. It concluded in favour of retaining the Act with certain amendments. In particular the Commission established six “cardinal principles” which should underpin such inquiries in future to safeguard fairness. It favoured retaining existing procedures for setting up tribunals under the Act because the need for a Parliamentary resolution implied that “the matter is ventilated and the Government has to justify before Parliament its decision [...]”. The Commission also recommended the Chairman should be “a person holding high judicial office”, because “without a judge of high standing as chairman we think it unlikely that the findings of tribunals would achieve the same measure of public confidence and acceptance as they have in the past”. It also rejected allowing appeals from findings because “it is of the utmost importance that finality should be reached and confidence restored with the publication of the report”.

The Commission also dealt in some detail with parliamentary inquiries given that it was the discrediting of the Marconi inquiry that led to the 1921 Act. It concluded that to resurrect this form of inquiry would be “a retrograde step”. Select committees were suitable for many purposes “but the investigation of allegations of public misconduct is not one of them. Such matters should be entirely removed from political influences”. Among the drawbacks listed by Lord Salmon were that: Committees were composed of members representing the relative strength of the parties in the House; Parliamentary Committees do not hear counsel; some, if not all of its members will have no experience of taking evidence or cross-examining witnesses; and witnesses might not enjoy the same absolute privilege as under a tribunal set up under the Act.

## **Developments since the Salmon Commission**

Arguably with the establishment in 1979 of departmental select committees Parliament acquired renewed means to undertake these sorts of investigations. Examples include the Foreign Affairs Committee’s inquiry into the Pergau Dam Affair in 1994; the Trade and Industry Committee’s inquiries into the Iraqi Supergun in 1991 and Export Licensing and BMARC in 1996 and the Public Administration Select Committee’s consideration of the events at the DTLR in 2002. However commentators and indeed Committees themselves have recognised their limitations. Evaluating its own experience in the BMARC case the Trade and Industry Committee believed that detailed inquiries involving examination of a very large number of documents and witnesses posed difficulties for Select Committees because the demand on Members’ time risked important aspects of departments’ current work becoming neglected.

Instead it proposed that the House or committees should be able to instigate their own external inquiries in order to establish factual information on complex subjects which would otherwise occupy too much committee time. They took as their model the relationship between the National Audit Office and the Public Accounts Committee. Such a “parliamentary commission” would proceed independently of a committee. Its results would then be examined by the committee which would itself make a report to the House.

The Public Service Committee when it considered the whole question of accountability and select committees as part of its post-Scott Inquiry scrutiny endorsed this proposal, noting that the procedure provided for in the Tribunals of Inquiry (Evidence) Act 1921, might be adapted to provide the necessary mechanism for this.

The 1996 Scott Inquiry made certain recommendations about inquiry procedures. Scott concluded that most *ad hoc* inquiries are of an inquisitorial character whereas civil and criminal litigation is adversarial. The Salmon principles carried “strong overtones of ordinary adversarial litigation” (para K 1.4). Scott warned therefore that while the Salmon principles should always be borne in mind consideration should also be given to their impact on the conduct of a particular inquiry. There has since been a continuing debate about the extent to which the Salmon or the Scott approach should prevail in the conduct of an inquiry.

Where judges are concerned there is a question too whether judicial skills, required to weigh the evidence to determine guilt in the criminal court or liability in the civil court, transfer easily to inquiries. The courtroom usually requires a ‘black or white’ answer which, as Scott suggested, may not be appropriate in an inquiry. Moreover the nature of judicial responsibilities is changing. The Human Rights Act 1998, for example, means that senior judges now have a constitutional role. Greater clarity in the relationship between the executive and the judiciary is being sought through current Government proposals for a supreme court and the abolition of the office of Lord Chancellor. In these circumstances it is debatable whether it is constitutionally appropriate to continue to use judges to chair inquiries, particularly those directly affecting the Government.

### **Time for reconsideration?**

This Inquiry aims to consider whether, nearly forty years after Lord Salmon examined the 1921 Act experience of the inquiry process suggests that the time is right to revisit the best way of conducting investigations into matters of serious public concern when things go wrong and what the role of Parliament should be in that if any.

Although known as “independent public inquiries” this description is subject to some qualification. Invariably it is Ministers who set up inquiries in response to political or public pressure or, more cynically, as a means of deferring a potential problem. It is Ministers who therefore are responsible for an inquiry’s composition, its terms of reference, and the powers and resources at its disposal. They may also influence its form; not all independent inquiries are necessarily conducted in public. In the recent debates about the terms of reference of the Butler Inquiry to review intelligence on WMD the Government has stated that the House cannot subcontract its responsibility for decisions to an inquiry.

However if there is to be greater parliamentary role in determining matters of public concern, consideration will need to be given to the validity of the criticisms about the shortcomings of parliamentary committees and how they can best be addressed. At minimum this could simply mean that the 1921 Act, with its requirement for Parliamentary resolutions, should always form the basis of any inquiry of this nature although it may require some consequential amendment. If Parliament is to play a more proactive role via select committees consideration will need to be given as to whether

departmental committees are the appropriate means for doing so; whether a select committee should be appointed specifically for the purpose; what its composition should be perhaps by formalising the *ad hoc* and practically bi-cameral nature of the Committee of Privy Counselors; what access to witnesses and documents they should have; and the availability of expertise and resources that might be available to them such as the use of “parliamentary commissions”; in the form of existing organisations such as the Ombudsman or through the use of Counsel as part of such an inquiry.

## HOW TO RESPOND TO THIS PAPER

PASC would like to receive responses to any or all of the questions in this paper. Although some of the questions could theoretically be answered by a simple yes or no, the Committee would especially value extended memoranda with background evidence where appropriate. Some respondents may wish to concentrate on those issues in which they have a special interest, rather than necessarily answering all the questions.

Memoranda will usually be treated as evidence to the Committee and may be published as part of a final Report. Memoranda submitted to the Committee should be kept confidential unless and until published by the Committee. If you object to your memorandum being made public in a volume of evidence, please make this clear when it is submitted.

Memoranda should be submitted by 2 April 2004 as hard copy on A4 paper, but please send an electronic version also, on computer disk in Rich Text Format, ASCII or WordPerfect 8 or email to **pubadmincom@parliament.uk**. Hard copies should be sent to Clive Porro, Second Clerk, Public Administration Select Committee, Committee Office, First Floor, Committee Office, 7 Millbank, London SW1P 3JA.

## QUESTIONS

### **General**

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?
2. In what circumstances should an inquiry be called?
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 chairs and members?
4. Should there always be a single, all encompassing inquiry into an issue or is it inevitable that other “side” inquiries will need to be conducted on certain specific aspects e.g. into professional conduct?

### **Membership**

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?
6. Is the use for expert assessors necessary for every inquiry? Should inquiries always ensure lay participation? If so what form should it take?
7. Is there value in having a trained panel from which members of an inquiry can be drawn when necessary?

### **Procedures**

8. Should the Tribunals of Inquiry (Evidence) Act 1921 (or other specific legislation) invariably form the basis for Ministers calling such inquiries or is there a continuing need for non-statutory, *ad hoc* inquiries?
9. Is the Tribunals of Inquiry (Evidence) Act 1921 effectively redundant? If so are there any of its features, such as use of the oath or powers to the power to compel witnesses to appear, which should be retained for the conduct of inquiries?
10. Should inquiries be investigatory or is there scope for an adversarial element in the procedures?
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?
12. Should inquiries always sit in public or are there circumstances when it is right to conduct an investigation in private?

### ***Parliamentary Accountability***

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

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 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?

### ***Value of an Inquiry***

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

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?

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

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

# Written evidence

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## Memorandum by Mrs S Grapes (GBI 01)

I read with interest that there is to be an examination of how governments are run and in particular the role of inquiries.

I have one point to make. In the justice system, there are only a few areas where a single judge interprets and decides the evidence, namely district judges. In other cases, either a jury, judges as panel or magistrates as a bench make the decisions on evidence.

If inquiries into the government are to be seen to be beyond political influence, then perhaps they should all be made up of three judges and the report should be a consensus of opinion and not one person's interpretation.

I hope this will be of interest.

January 2004

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## Memorandum by The Revd A Pyke (GBI 02)

I do not believe that I am alone in thinking that the Hutton Report has brought the whole concept of judicial inquiry into disrepute by the one sidedness of his findings. This must never be allowed to happen again next time there is a controversial issue to be inquired into. I suggest that two changes in procedure would help to ensure that any future inquiry would not be open to similar criticism.

1. No party with a major investment in the outcome of an inquiry should be allowed, on their own, to set the terms of reference.

2. The report should be subject to peer review by two judges before publication. I do not believe it is fair that a man like Lord Hutton should alone bear the sole responsibility for findings that may be unpopular either with Government or the public.

February 2004

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## Memorandum by PIELLE Consulting Group (GBI 04)

### SUMMARY OF MAIN POINTS

The Public Administration Select Committee's current investigation into "Government by Inquiry" queries, at Question 21 of its consultation document, whether major issue inquiries "change the conduct of public life".

Following a review of existing practices, we submit that Lord Hutton's Inquiry into the death of Dr David Kelly set, in its judgement, new and lower standards on the duty of care that organisations have towards individuals, including on the protection of the privacy of individuals and the confidentiality of information held about them.

The PASC also seeks to establish, at Question 22, if there should be *formal systems for following up on the recommendations of these inquiries*, their impact and who should be responsible.

We submit that there should be formal systems for following up on the recommendations of Inquiries.

We recommend that judgements made by such inquiries should be subject to follow up to ensure that there is no conflict between the judgement in a specific case and the established processes, procedures and best practices generally applied by Government, public service organisations and the people working for them. Similarly, for their impact on the private sector particularly where it is subject to a common regulator and/or market conditions influenced or set by government.

PIELLE Consulting, as an established specialist communication firm, has conducted a review to inform this investigation, into the influence Lord Hutton's rulings on the duty of care and disclosure may have in respect of changing the conduct of public life.

We believe we have established that these rulings, if adopted as new "standards", will change existing issue of communication protocols and alter the way in which future communication guidelines deal with the disclosure and confidentiality:

- Key sources we looked at were: The Department of Health, The Chartered Institute of Personnel and Development, the Press Complaints Commission, The Institute of Public Relations and the Home Office and the Department for Constitutional Affairs.

- The existing guidance, codes and best practices were compared to the ruling that Hutton gave to justify the actions of the MoD, identifying that the ruling itself set out new possible boundaries for issues of disclosure.
- Each of the organisations reviewed, had specific rules and guidelines that establish the way they or their members should deal with matters of disclosure and confidentiality.
- The judgement of Lord Hutton that the MoD was not at fault in revealing Dr Kelly’s identity into the public domain as “it would not have been practical to keep Dr Kelly’s name a secret” due to the intense media attention, does not align with existing communication protocols and management practices.
- Hutton acknowledged that the MoD did not fully exercise its duty of care, but also justified its actions in the treatment of Dr Kelly.
- Hutton also stated that the MoD had no choice but to disclose Dr Kelly’s name, “otherwise they would have been charged with a serious cover up”.
- These “justifications” for disclosing the identity of an individual undermine the basic duty of care of organisations to individuals and affect the conduct of public life by potentially having lasting effects on communication practices in dealing with disclosure.

#### FULL SUBMISSION

Lord Hutton, in his report, set a new precedent for communication practices by justifying the Ministry of Defence’s (MoD) decision to disclose the identity of Dr Kelly. He created possible new boundaries on the issue of disclosure and duty of care.

#### 1. *Introduction*

1.1 The MoD, as recognised by Lord Hutton in his inquiry, did not meet the standards required to ensure that Dr Kelly was given a proper duty of care and support in the lead up to his death. However, Lord Hutton also recognised that Dr Kelly had “a difficult nature” and branded him as a man “who was hard to help”, which, in conjunction with the intense media pressure gave the MoD sufficient grounds to disclose his name to the public domain. This, Hutton saw as a good enough reason to justify the actions of the MoD, in turn paving the way for new guidelines in which confidentiality issues on exposure no longer seem as important as they should be.

As established expert communication practitioners, PIELLE Consulting has examined the issues surrounding the duty of care and disclosure in the Hutton inquiry. Our aim was to examine whether the ruling that Lord Hutton gave changed guidelines in communication practices for what is already seen as accepted protocols for information and public relations practitioners in dealing with confidentiality and disclosure.

#### 2. *Establishing duty of care*

2.1 In order for Hutton to change protocols and shift the boundaries concerning disclosure, it was necessary to first identify established guidelines or codes of conduct to which companies and organisations adhere.

2.2 When looking at confidentiality issues and the disclosure of information, the Data Protection Act (1998), set boundaries for the release of information to protect the data subject or person, especially in cases where consent could not be given by those in question. This ensured that vital personal information was not disclosed and acts as a general guideline for organisations and companies to follow.

2.3 PIELLE Consulting, in common with other communications professionals, uphold The Institute of Public Relations’ Code of Practice (October 2000). This states that without specific permission, information should not be disclosed. It also adds a responsibility for honesty and fairness when dealing with clients as well as staff:

- *IPR Principles*
  - ii—Deal Honestly and fairly in business with employers, employees, clients, fellow professionals, other professions and the public.
- *IPR Principles of Good Practice*

Not disclosing confidential information unless specific permission has been granted or the public interest is at stake or if required by law. [1]

2.4 These guidelines, although broad, set firm foundations when the issue of disclosure and confidentiality are concerned.

### 3. *Department of Health*

In dealing with patients and staff at health organisations, these guidelines become more complex, but they still keep to the underlining principles.

3.1 The common law alongside the Data Protection Act 1998 and the Human Right's Act 1998 all protect the privacy of patients and their information, which must not be used without their consent. This shows that health organisations have codes that they must adhere to when dealing with confidentiality. The NHS also developed a code of conduct for their managers in October 2002, giving a general duty to ensure the safety of patients and their personal details. The code states the need for confidentiality, as managers have access to vital information and not all to do with patients. It clearly recognises that there is a need, and an expectation of the managers for maintaining patient confidentiality:

- Respect patient confidentiality;
- Use the resources available in an effective, efficient and timely manner having proper regard to the best interests of the public and patients. [2]

3.2 Health care organisations must then, adhere to a set of rules that govern their procedures on releasing information showing that they have a duty of care to provide to both their employees and their patients. Intense media pressure would not, we submit, be sufficient justification for releasing patient information or the identity of an individual patient.

### 4. *Chartered Institute of Personnel and Development*

4.1 This organisation specialises in ensuring the development of good practice in the management of people. They set out guidelines that are followed by managers for their staff and company making sure that they uphold the highest possible standards for the development of employees, which benefit the organisation for which they work. The CIPD's current Code of Professional Conduct and Disciplinary Procedures was introduced in 2002.

4.2 This code outlines the responsibilities human resource and other managers of people have to their colleagues and other members of staff. While focusing on the development of good practice for managers and human resource, it confirms responsibility for confidentiality:

- Must respect legitimate needs and requirements for confidentiality. [3]

4.3 While the Data Protection Act governs personnel records and record-keeping, human resource managers are specifically reminded by this element of their code of conduct of their responsibility to individuals to maintain confidentiality as part of an employer's duty of care.

### 5. *Press Complaints Commission*

5.1 The BBC was an important element in the debate surrounding Dr Kelly's death. Dr Kelly had told the MoD in good faith that he had met a BBC journalist, although he knew disciplinary action may follow.

5.2 The MoD acted on this information and sought confirmation from the BBC that Dr Kelly was indeed their "single source".

5.3 The BBC did not confirm the identity of their source in line with the established practices of journalists in broadcast and print media, highlighted in the journalists' code of practice of the Press Complaints Commission (2003):

- Journalists have a moral obligation to protect confidential sources of information. [4]

5.4 In protecting Dr Kelly's identity, and even that of the "single source", the BBC adhered to the Press Complaints Commission's code of conduct and exercised their duty of care to their informant.

### 6. *Home Office; Department for Constitutional Affairs*

6.1 The Freedom of Information Act (2000) identifies a range of responsibilities, including for Government and the conduct of public life including:

- To maintain high standards of care in ensuring the privacy of personal and commercially confidential information; and
- To preserve confidentiality where disclosure would not be in the public interest or would breach personal privacy or the confidences of a third party. . . . [5]

6.3 The Act states that access to information should not be restricted, provided that personal information, concerning individuals or organisations, is treated confidentially.

## 7. Changing protocols

7.1 It is evident from the transcripts within the Hutton report that boundaries were shifted in the responsibility of an employer to its employees in terms of duty of care and the disclosure of identity, impacting on existing communication practices.

## 8. Disclosure of Dr Kelly's name

### 8.1 Lord Hutton's report states:

- “The MoD was at fault in not having set up a procedure whereby Dr Kelly would be informed immediately his name had been confirmed to the press and in permitting a period of one and a half hours to elapse between the confirmation of his name to the press and information being given to Dr Kelly that his name had been confirmed to the press.” [6]
- “The idea of Dr Kelly's name being made public had not been discussed with him. The time that you would have had to consider it, between when he was consulted about the final version of this statement and when it went out, would have been insufficient for him to consider it properly and to make what other arrangements he needed.” [7]
- “I consider that once the decision had been taken on 8 July to issue the statement, the MoD was at fault and is to be criticised for not informing Dr Kelly that its press office would confirm his name if a journalist suggested it.” [8]

8.4 After the MoD revealed Dr Kelly's name, he was only informed about one hour and half later, leaving him insufficient time to relocate himself without being exposed to the media that was then trying to locate his whereabouts.

8.5 Procedures were not put in place by the MoD to have Dr Kelly relocated to avoid media pursuit and exposure. Pamela Tere had stated that there clearly was insufficient time especially to make any other arrangements. They advised him to either stay in a hotel or stay with a close relative. Nothing had been offered to Dr Kelly; he had to make his own arrangements.

- Dr Kelly telephoned her (Mrs Wilson, Chief press officer in the MoD) and said that Nick Rufford (reporter from the Sunday Times) had been in contact with him and asked him why he was not now in a hotel. Dr Kelly told Mrs Wilson that he was now minded to go to family or friends... [9]

8.6 While Dr Kelly was away, the MoD was trying to reach an agreement for his appearance in front of the two select committees. It was said that even though they would allow Dr Kelly to be present in front of both committees, questions from the Foreign Affairs Select Committee should be limited to those concerning Mr Gilligan, as their report had been completed. Sir Kevin Tebbit, the permanent secretary of the MoD, did not tell Dr Kelly of this agreement put forward by the MoD to the select committees:

- Given that Dr Kelly is a relatively junior official who played only a limited role in the preparation of the Dossier, we should invite Donald Anderson to agree that the Committee will confine its questioning to matters directly relevant to Andrew Gilligan's evidence. [10]

8.7 As a result, before going to the committee, Dr Kelly had requested that he be accompanied by a colleague, so that they could answer any technical questions that might be asked. While in a briefing with the MoD, Dr Kelly was told that he had no specific guidelines to keep to when answering the questions from either committee, and on this basis Dr Kelly then withdrew his application for the assistance of a colleague to accompany him:

- Wells asked Kelly how he wanted to take forward his wish to be accompanied by a colleague to the FAC. Kelly replied that, on the basis of this present meeting, he did not feel the need to have a colleague alongside him. He was aware that Wells would be accompanying him to the evidence sessions. [11]

8.8 In the interview with the FAC, Dr Kelly was asked whether he was aware that he was being treated differently to other civil servants:

### 8.8 (a)

- *Q166: Andrew Mackinlay:* Do you know of any other inquiries, which have gone on in the department to seek the source—to clarify in addition to you or instead of you or apart from you?  
None whatsoever?  
*Dr Kelly:* No. [12]

## 8.8(b)

- *Q155: Sir John Stanley:* Who made the proposition to you, Dr Kelly, that you should be treated absolutely uniquely, in a way which I do not believe any civil servant has ever been treated before, in being made a public figure before being served up to the Intelligence and Security Committee?

*Dr Kelly:* I cannot answer that question. I do not know who made that decision. I think that is a question you have to ask the Ministry of Defence.

*Q156: Sir John Stanley:* So you did not make it yourself?

*Dr Kelly:* Certainly not.

*Q157: Sir John Stanley:* We have to assume therefore that your ministers then are responsible for treating you uniquely as a civil servant in highly publicising you before going to the Intelligence and Security Committee?

*Dr Kelly:* That is a conclusion you can draw. [13]

9. *Setting New Protocols*

9.1 While Hutton was critical of the lack of appropriate support to Dr Kelly, he justified their actions, shifting the basis of standards in communication practices and duty of care to individuals and their privacy:

## 9.1(a)

- “The decision by the MoD to confirm Dr Kelly’s name if, after the statement had been issued, the correct name were put to the MoD by a reporter, was not part of a covert strategy to leak his name, but was based on the view that in a matter of such intense public and media interest it would not be sensible to try to conceal the name when the MoD thought that the press were bound to discover the correct name, and a further consideration in the mind of the MoD was that it did not think it right that media speculation should focus, wrongly, on other civil servants.” [14]

## 9.1(b)

- “It was reasonable for the Government to take the view that, even if it sought to keep confidential the fact that Dr Kelly had come forward, the controversy surrounding Mr Gilligan’s broadcasts was so great and the level of media interest was so intense that Dr Kelly’s name as Mr Gilligan’s source was bound to become known to the public and that it was not a practical possibility to keep his name secret.” [15]

9.2 Lord Hutton gave other reasons that he described as “mitigating circumstances” as to why the MoD and the Government treated Dr Kelly the way they did:

- These criticisms are subject to the mitigating circumstances that (1) Dr Kelly’s exposure to press attention and intrusion, whilst obviously very stressful, was only one of the factors placing him under great stress; (2) individual officials in the MoD did try to help and support him in the ways which I have [previously] described and (3) because of his intensely private nature, Dr Kelly was not an easy man to help or to whom to give advice.” [16]

9.3 Lord Hutton further justified the actions of the MoD and the Government by stating that:

- “. . . In the midst of a major controversy relating to Mr Gilligan’s broadcasts which had contained very grave allegations against the integrity of the Government, and fearing that Dr Kelly’s name as the source for those broadcasts would be disclosed by the media at any time, the Government’s main concern was that it would be charged with a serious cover up if it did not reveal that a civil servant had come forward.” [17]

10. It can be seen that Lord Hutton effectively shifted protocols on management and communication practices, potentially setting a precedent for future communication management within the government and for communication practitioners, thus changing the conduct of public life.

10.1 Mitigation of the breadth given by Lord Hutton’s judgement could readily be deployed in the face of “media pressure” on, for example:

10.2 Any organisation—public or private sector—when the media is in pursuit of a story involving an employee, contractor or customer

10.3 Any organisation—public or private sector—when a campaigning group is in pursuit of its aims and seeks to target an individual [an anti-abortion group, for example, seeking information on the identity of health care practitioners].

11. *We conclude that*

11.1 In judgements made by Lord Hutton in his report on the inquiry he conducted into the circumstances leading to the death of Dr Kelly, Lord Hutton has potentially set new—and lower—standards in the duty of care of an organisation to an individual, particularly in respect of disclosure of identity or other personal information.

11.2 Inquiries of this nature can, therefore, demonstrably, change the conduct of public life.

11.3 In so doing, Inquiries of this nature should have their recommendations and judgements followed up and assessed against existing practices, guidelines and codes to ensure that new standards are not set by default.

11.4 Any post enquiry review of the impact of recommendations and rulings on established and existing practices, guidelines and codes of behaviour should not be limited to the machinery of government and the public sector alone. The active involvement of those parts of the private sector likely to be impacted by any new de-facto standards should be involved in any such review together with the relevant professional and vocational membership bodies responsible for those codes of conduct and best practice that govern the conduct of their members.

12. *Sources*

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- [2] — CIPD, Code of Professional Conduct and Disciplinary Procedures, section 4.1.7
- [3] — IPR Code of Conduct, section A, October 2000
- [4] — Press Complaints Commission, Code of Practice, No. 15
- [5] — *Source*: Home Office, Department for Constitutional Affairs, code of practice to access government information, section two.
- [6] — The Hutton Report, Chapter nine, section 439
- [7] — The Hutton Report, Chapter nine, section 296
- [8] — The Hutton Report, Chapter nine, section 439
- [9] — The Hutton Report, Chapter three, section 83
- [10] — The Hutton Report, Chapter four, section 88
- [11] — The Hutton Report, Chapter four, section nine, part (VI)
- [12] — The Hutton Report, Chapter four, section 103, question 166
- [13] — The Hutton Report, Chapter four, section 103, question 155
- [14] — The Hutton Report, Chapter nine section 428
- [15] — The Hutton Report, Chapter 12, section four part (iii)
- [16] — The Hutton Report, Lord Hutton's Statement, section 71
- [17] — The Hutton Report, Chapter nine, section 427

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Department of Health, NHS Code of Practice, November 2003

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#### **Memorandum by the Law Reform Commission of Ireland (GBI 05)**

The Law Reform Commission published its Consultation Paper on Public Inquiries Including Tribunals of Inquiry on 31 March 2003.

At present, there are several legislative codes, which provide the legal framework for different types of public inquiry in Ireland. The Consultation Paper dealt with a number of these, namely: Company Inspectors; the Commission to Inquire into Child Abuse, Parliamentary Inquiries, and Tribunals of Inquiry. It also considers five themes, which are significant to all forms of inquiry, namely, constitutional justice, publicity and privacy, information gathering, costs, and the difficulties arising in a subsequent criminal trial, where this covers the same ground as an inquiry. Although, these issues were dealt with mainly in the context of tribunals of inquiry, the Commission was of the view that the comments and proposals made in respect of them are relevant to the other types of public inquiry.

The legal code presently governing Tribunals of Inquiry is made up of six separate and inconvenient-to-use statutes. To meet this difficulty, the Commission included in its Paper a comprehensive draft Bill that not only consolidates the existing legislation but also incorporates a number of substantive changes. Among these is a requirement that a tribunal of inquiry should be under a legal obligation to comment on its terms of reference within four weeks of beginning its work. In addition, various methods are proposed for fast-tracking judicial review proceedings taken in respect of decisions of tribunals of inquiry. The Commission also proposed that an express power should be given to the relevant minister or the Government, acting on foot of a resolution of both Houses of the Oireachtas, to terminate a tribunal of inquiry where it has been sitting for some time and seems unlikely to bear fruit. The Commission also examined the question of whether tribunal proceedings should be broadcast. It specifies certain circumstances in which broadcasting should be permitted, and includes a draft section that sets out guidance to those chairing inquiries in deciding whether to allow broadcasting. In the Appendix to the Consultation Paper, there is a written protocol, dealing with such questions as: camera angle, editing or copyright, which is presently being used in relation to the broadcasting of the Dr Shipman Inquiry in Britain.

This Consultation Paper noted that a very extravagant measure of constitutional justice has been granted sometimes in circumstances where it was not legally or constitutionally required. For instance, though it may have been considered appropriate for other reasons, it was not constitutionally required that the victims, for instance, of child abuse should be separately represented, since the questions put on their behalf could have been asked by counsel for the tribunal. Likewise, those who make allegations against a person whose conduct is under investigation, such as the deputies before the Beef Tribunal who had relayed their constituents' allegations against Goodman International, need not be separately represented any more than the witness in a court case. It bears saying, too, that the amplitude of constitutional justice granted may have something to do with the fact that inquiries have sometimes been designed to go beyond what the Commission considers should be their primary task of discovering what happened and why, and venturing into the role of assigning blame, which may best be left to a criminal trial.

The Commission also addressed the question of how far, consistent with fair procedures, it is possible, by altering the features of public inquiries, to reduce the entitlement to constitutional justice, which creates much of the attendant expense and delay. The Commission reached the conclusion that the best way of doing this would be to ensure that the inquiry has one or more of the following characteristics:

- (i) It would be held in private, though, at the same time, the report emanating from the inquiry may be published. The obvious advantage of this is that accusations against a person, made by possibly prejudiced witnesses and often amplified by the mass media, are not bruited forth to the world immediately. At most, if the inquiry finds the accusations to be substantiated, a version of them will appear in the final report, together with the inquiry's measured judgment;
- (ii) The inquiry report would emphasise the flaw or malfunctioning of the institution, big business or profession involved, rather than the sins of an individual wrongdoer;
- (iii) As well as the conclusions, where a point is disputed, the Report would include comments on or even disagreement with those conclusions by any person whose good name or conduct is called into question. Thus, each side of the argument is recorded.

Based on this analysis, the Commission recommended that legislation be enacted providing for private, low-key inquiries which concentrate on the wrong or malfunction in the system and not on the wrongdoer.

The Commission also examined the issue of costs. The Commission emphasised that, under the existing law, the State is not legally or constitutionally required to pay the costs of all parties represented before a tribunal. Costs were not paid to every party, for instance, in the Whiddy or Stardust Tribunals of Inquiry, and this only came to be regarded as the common practice in the Beef Tribunal. The Commission proposed legislation that would make this even clearer than it is in the existing law.

As regards the separate question of how to minimise the amount of costs, the Commission emphasised that the inquiry itself should give considerable thought to what level of representation it engages and allows for particular tasks. There is some scope for a closer match between the difficulty of the work and the ability and experience (and therefore cost) of the lawyer retained to do it; for instance, not paying a senior counsel to do work which could be done as well by a junior counsel. Secondly, the arrangements regarding the division of subject-matter and the sequence in which topics are taken, which have been adopted in recent tribunals, should be followed, so as to minimise wasted time. Thirdly, the Commission suggested that a means of calculating legal costs and expenses be devised, which is more appropriate to pay for guaranteed employment for several months or years, rather than the present system of a daily rate, which was originally designed for a trial which lasts several days or, at most, weeks. (Such a formula would naturally take it into account that a barrister who has been employed full-time by a tribunal for some time, cannot immediately resume private practice at the same level, because the solicitors who sent work will have briefed other barristers.) However, it must be said that, if leading practitioners are to continue to be attracted to this work, the change in the way payment is calculated will not necessarily mean a significant reduction in the total cost. Fourthly, it is also suggested that a "scheme" whereby a barrister is remunerated for work done rather than simply on a daily basis be put in place where it is appropriate. Finally, the Commission recommended that where possible, legal representation should be pooled, where parties might have interests in common.

*April 2004*

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### **Memorandum by Robert Francis QC (GBI 06)**

#### **1. INTRODUCTION**

A review of the use and structure of public investigatory inquiries is timely and to be welcomed. The range of circumstances in which such inquiries come to be used is vast, from inquiries of addressing allegations of widespread systems failures, such as Bristol and McPherson, to those dealing with the treatment of one particular individual, such as the so-called homicide inquiries.

I offer these submissions from the perspective of a barrister who has been instructed to appear before some inquiries, and rather more limited experience as a chairman. The views expressed are entirely personal and should not be taken to be made on behalf of any organisation of which I am an officer or a member. It is not my intention to offer an answer to all the questions posed in the Committee's comprehensive list: some require a political steer before practical solutions can be found, and some issues are clearly outwith my professional competence.

## 2. WHY HAVE AN INQUIRY AT ALL? [QUESTION 2]

Demands of inquiries seem to be an everyday event. Any disaster or tragedy, large or small, is followed by such demands not only from those directly affected but also by politicians, interest groups, journalists and members of the public. In not all such cases is a public inquiry necessary or desirable. With a few exceptions, such as homicide inquiries,<sup>1</sup> the decision whether or not to hold a public inquiry is in the discretion of Parliament, the Government, a Minister, or a statutory agency. The search for principles from past practice is likely to be difficult because of the wide range of circumstances in which the decision has to be taken, and the wide range of discretion available.

Following the Human Rights Act 1998 there may be circumstances in which the obligation of the State to protect life under Article 2 of the European Convention may mean that there is a duty to hold an inquiry.<sup>2</sup>

The Committee will doubtless be aware of the advice circulated by the then Lord Chancellor in 1991.<sup>3</sup> He identified the public interest requirements following a major disaster were:

- (i) A detailed but speedy investigation of the facts to establish how the disaster occurred, whether it could have been avoided, and whether or how it is necessary to improve safety for the future.
- (ii) A means of establishing (where necessary) how each deceased met his death.
- (iii) Mechanisms for the assessment and apportionment of blame, with application of (a) procedures for penalising those who are criminally culpable and (b) mechanisms for the award of compensation.

He observed that:

The overriding reason why judicial inquiries are held is the gravity of the incidents and the belief that both the public anxiety they cause and the interests of the victims can only be satisfied by such an inquiry.

He went on to warn of the disadvantages of full-blown judicial inquiries and the desirability of considering other options such as technical inquiries.

More recently Lord Justice Clarke identified the purposes of an inquiry succinctly:<sup>4</sup>

There are therefore two purposes of a public inquiry, namely ascertaining the facts and learning lessons for the future.

He counselled caution in the use of inquiries to seek out fault, pointing out that it was not the role of an inquiry to establish civil liability or whether a crime had been committed, arguing that these aspects made inquiries longer and more expensive:<sup>5</sup>

I do not think that it is in the public interest to allow parties to use public inquiries as a dry run for their civil litigation or to prepare a case for later prosecution.

The Bristol Royal Infirmary Inquiry identified five functions for an inquiry: the recognition and identification of different, genuine perceptions of the truth, learning, discipline, catharsis and reassurance.<sup>6</sup> It suggested the following criteria for any decision whether to establish a public inquiry:

The issue to be examined must not only be of significant public importance in its own right, but must also be such as to raise matters of wider public concern.

Public confidence in government, local or national, in the area under scrutiny, if it is to be restored, cannot readily be restored without an independent examination of the issue in public.

The issue cannot be dealt with in another way which is less expensive, less elaborate and more speedy . . .<sup>7</sup>

3. It is suggested that among the questions which need to be asked before it is decided to hold a public inquiry include the following:

- (a) Is the matter under consideration so serious that an independent inquiry into what happened is necessary?

<sup>1</sup> Such an inquiry is required under HSG (94) 27 which addresses good practice in the discharge of mentally disordered patients into the community. Where a homicide occurs involving a mentally ill person the guidance states [para 34] that "it will always be necessary to hold an inquiry which is independent of the providers involved". While the circular purports to give guidance, a decision not to hold an inquiry contrary to the guidance could well be the subject of judicial review. For an illuminating book on such inquiries see *Inquiries after Homicide*, ed Jill Peay, Duckworth 1996.

<sup>2</sup> *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520, [2001] UKHRR 1399 para 41; *R v Secretary of State for the Home Department ex parte Amin* [2003] UKHL 51.

<sup>3</sup> Disasters and the Law: Deciding the Form of Inquiry (16 May 1991) first placed in the public domain in the *Thames Safety Final Report (2000)* (Cmnd 4558) Annex D: see *R (Wagstaff) v Secretary of State for Health* [2001] WLR 292 (QBD).

<sup>4</sup> Thames Safety Final Report (2000) (Cmnd 4558) para 5.3.

<sup>5</sup> *ibid* paras 5.5–5.6.

<sup>6</sup> The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984–1995 (July 2001) chap 2, paras 11–16, citing Lord Justice Clarke, and Lord [Lowe from a paper in *Inquiries after Homicide* [above]].

<sup>7</sup> Report [above] chap 2 para 9.

- (b) Can public confidence be restored without resort to a public inquiry?
- (c) Is it likely that a public inquiry will identify important lessons to be applied in future?
- (d) Is an inquiry the best way to bring those responsible to account?
- (e) Is there any lesser means available which is likely to achieve these aims?

It is also suggested that it should be part of the duty of any inquiry to consider whether it has achieved the aims for which it was set up, and for those commissioning the inquiry to undertake an audit of the inquiry's effectiveness. It has been said of homicide inquiries, for example, that:<sup>8</sup>

[they] are inherently unsuited to looking into service levels and operation in a detailed way; these are far better addressed by "service audit"<sup>9</sup>. . . there have been so many that, apart from having a direct impact on the local services related to the inquiry, they are less likely to inform policy making more generally.

#### 4. THE BURDENS OF INQUIRIES

In deciding on whether a public inquiry is necessary for the reasons suggested above, I suggest that weight must be given not only to whether the inquiry will achieve any of the purposes considered above, but the benefits of so doing must be weighed against the burdens that inquiries of any public nature place on those who are party to them, and the public in general. These burdens include:

- (a) The anguish imposed on victims and bereaved families in seeing events relived in public. While in many cases those with grievances will wish to see and be present at an investigation, there will often be others who do not share that wish and are compelled to suffer an inquiry they would have preferred not to take place. In some instances, for example the Bristol case, there will be those affected who do not believe that a "scandal" has occurred. It is for consideration whether even those who are expressing grievances on an issue and demanding an inquiry necessarily always appreciate the effect an inquiry may have on them.
- (b) The administrative and other burdens imposed on the public and other bodies who are the subject of the investigation or who are expected to assist in the investigation. These can have an impact on their ability to deliver services.
- (c) Any independent inquiry, large or small, will have an impact on the staff of the organisation under scrutiny, whether or not they are expecting to be criticised. This also can have an adverse effect on the delivery of services.
- (d) Those who are likely to be criticised face the prospect of public opprobrium. In many cases it might be thought that this is deserved. However it needs to be borne in mind that there are often other means for carrying out punishment or discipline. Thus in both in the Bristol and Neale<sup>10</sup> inquiries, for example, the investigation included examination of the activities of doctors who had already faced disciplinary proceedings before the General Medical Council. Many inquiries start with an at least implicit assumption that there has been wrongdoing or conduct worthy of criticism. Those who are potentially subject to criticism may feel that an inquiry, particularly one which is inquisitorial, fails to provide adequate opportunity to them to present their account and perspective.
- (e) The costs of inquiries are notorious. For example there has been much recent publicity concerning the costs of the Bloody Sunday inquiry. Costs are likely to be high where the inquiry is conducted strictly in accordance with the Salmon principles, but can be just as high where a more inquisitorial approach is adopted: the Bristol Inquiry cost over £14 million, excluding the legal costs of parties not funded by the inquiry.<sup>11</sup>

It may be thought that a public inquiry should not be undertaken unless it is likely that the benefits are anticipated to be worth the burdens.

#### 5. WHO SHOULD TAKE DECISIONS [QUESTION 3]

A minister or body statutorily or hierarchically responsible for the area of activity under scrutiny usually commissions inquiries. It is possible to confer on statutory authorities the power to investigate the activities of others, for example the Commission of Health Improvement or the Independent Police Complaints Commission. However it is likely that the public authorities accountable to Parliament, or Parliament itself, will have to make the decision on whether to set up ad hoc inquiries.

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<sup>8</sup> *Community Care Tragedies: a practice guide to mental health inquiries*, Margaret Reith, Venture Press 1998; this survey of homicide inquiries confirms the depressing similarity of the recommendations they issue, and the impression that the lessons identified seem to have been ignored repeatedly.

<sup>9</sup> *Towards an Audit of Inquiries*, Eastman, *Inquiries after Homicide*, Peay, Duckworth 1996, chap 10, pp 157–8.

<sup>10</sup> Committee of Inquiry to investigate how the NHS handled allegations about the performance and conduct of Richard Neale [still in progress].

<sup>11</sup> Report [above] Appendix 4.

Whoever makes that decision has to define the scope of the inquiry. Therefore the decision-maker is effectively obliged to decide on the terms of reference. These should, however, always be open to reconsideration in the light of the views of the inquiry members, when appointed. In practice a process of dialogue can be constructive in producing terms of reference which are clear and practical.

The essence of a public inquiry, whatever its form, is that it is independent. For independence to be established it may be thought that the inquiry members should not only be independent of the commissioning authority, but appointed independently. The continuing debate on the appointment of the judiciary indicates that the appearance of independence can no longer be taken for granted. Where the commissioning authority itself is to be the subject of the inquiry, the independence of the inquiry members will always be open to question if the commissioning agency appoints them. In many cases the members are then remunerated by the commissioning agency. A solution would be to provide for an external body, such as the Judicial Appointments Commission, to make appointments. I understand that the current practice, where a judge or legal chairman is required is to approach the Department of Constitutional Affairs. While I am unaware of any criticism of the quality of appointees obtained by this route, the DCA appears to be about to divest itself substantially of its appointments function.

#### 6. PARALLEL OR COLLATERAL INQUIRIES [QUESTION 4]

Where inquiries concern events which are actually or potentially also the subject of other proceedings, there is a danger of delay, duplication of investigatory effort, repeated exposure of those criticised to different types of procedure, and difficulties about the effect of one proceeding on another. It is highly desirable to avoid this if possible, but often very difficult to achieve this. The Bristol Inquiry followed a lengthy GMC disciplinary inquiry. In some health service cases it is possible to envisage internal disciplinary procedures, police investigations, complaints procedures, inquests, GMC proceedings, civil litigation, all competing with a public inquiry as a means of airing grievances and establishing the facts. It is probably impossible to avoid these problems by producing some form of all embracing inquiry, but it should be feasible to create a guide to good practice in fields where this form of duplication is most common.<sup>12</sup>

#### 7. SHOULD JUDGES CHAIR INQUIRIES? [QUESTION 51]

This question might usefully be expanded in scope to include consideration of legally qualified chairmen and women. It is not the invariable practice to make such appointments; the Climbié inquiry is an example of what many perceive to have been a successful inquiry which was not conducted by a lawyer. However, it is suggested that any inquiry at which it will be necessary to establish facts from evidence, or to allocate blame to persons other than government ministers, it is important to have a legally qualified person on the inquiry panel. At the risk of being accused of self-interest, the following reasons can be advanced in favour of this:

- (a) Legal training is helpful in the analytical task of considering the evidence and forming conclusions from it.
- (b) The rights of parties affected by the inquiry may be better understood and adjudicated upon by a lawyer.
- (c) Lawyers are accustomed to the development and application of procedures designed to elicit facts and afford fair opportunities to affected parties to advance or respond to contentions. Although our legal system still largely resolves disputes by adversarial means, legal practice in the investigation and preparation of cases allows a lawyer to devise and supervise inquisitorial procedures.
- (d) Almost inevitably any substantial inquiry will be assisted by counsel to the inquiry and attended by legal representatives of interested parties. There are increasingly frequent excursions to the courts for judicial review of inquiry decisions.<sup>13</sup> Issues of law will frequently be raised. An inquiry panel without a legally qualified presence may be at a disadvantage in such circumstances.

This is not to say that a judge is invariably required. This will depend on the importance and complexity of the inquiry. Many smaller inquiries are conducted by practising lawyers. The lawyer need not be the chairman in every case. In some inquiries it may be advantageous to have an inquiry panel led by an eminent person from a different field.

<sup>12</sup> The Clinical Disputes Forum, of which I am a member, is considering a project in relation to good practice in parallel processes in the health field.

<sup>13</sup> See for example *R (A) v Lord Saville of Nevidgate* [2001] 1 WLR 1249.

#### 8. QUALITIES REQUIRED OF A CHAIRMAN [QUESTION 5]

The qualities required of a chairman of a public inquiry are likely to be many. They include:

- (a) Independence and impartiality: above all the chairman must be independent and impartial and seen to be so. If the conclusions of an inquiry are to attract confidence, the public require assurance that the person holding it is not going to be swayed by career prospects, pressure etc.
- (b) Appropriate seniority and standing: the requirement for independence and impartiality means that persons of the appropriate seniority and eminence are required.
- (c) Courage and resolve: this includes the ability to report that there is no criticism to make [where there may be a public expectation of criticism] as well as a willingness to make criticism where it is required by the evidence. An inquiry must be able to come to unpopular conclusions as well as popular ones.
- (d) Awareness of the needs of victims and aggrieved persons: following a tragedy, large or small victims and the bereaved have very special needs at an inquiry. It is essential that this is addressed and their needs accommodated. This requires a social awareness and a willingness to reach out to those affected by the subject matter of the inquiry.
- (e) An ability to communicate clearly and concisely: a chairman has to make him/herself understood both orally during the inquiry and in writing in the report. Complex issues may have to be considered, but they must be reduced to a text which can be understood and acted upon.
- (f) Resolve to complete the task: the pressure at an inquiry will always be to delay to consider new matters, review old ones, allow further submissions etc. The need to allow this must always be balanced against the objectives of the inquiry and a reasonable timescale.

#### 9. EXPERT ASSESSORS [QUESTION 6]

Almost all inquiries concern events and practices which cannot be understood without the assistance of relevant experts. Such assistance can be obtained in a number of different ways. Many inquiries commission experts to report on specified issues. When this is done care needs to be taken to ensure that the inquiry is furnished with the range of available opinion on a subject, rather than the particular view of the expert(s) instructed.

In some circumstances an inquiry may find it helpful to have expert assessors who can advise the inquiry panel in private. However such a process lacks transparency unless the opinion of the assessor is itself made available to the public and to the interested parties for comment. It is suggested that in most instances the better approach is for experts to make reports to the inquiry and, where appropriate, they are made available to be questioned by counsel to the inquiry or on behalf of the parties where this is allowed.

#### 10. SHOULD THERE BE A TRAINED PANEL OF POTENTIAL INQUIRY TEAM MEMBERS? [QUESTION 7]

An advantage of appointing members of the judiciary (full and part-time) as inquiry members is that they already have training, provided by the Judicial Studies Board, in judicial techniques, procedure and conduct. While none of that training is currently specifically addressed to public inquiries, some at least of it is relevant.

Training of some sort would undoubtedly be an advantage. Currently when persons are appointed to chair inquiries, they effectively start with a blank sheet, when it ought to be possible to collate and share the common experience and practice of inquiries

The creation of a panel is more problematic. Currently it may be doubted whether many participate in more than one inquiry. The experience of one inquiry may deter many from wanting to repeat it! Equally it may be questioned whether the public interest gains a great deal from seeing the views of a small number of "professional" inquiry members repeated in a number of different cases. This is not to say that the relevant authorities could not benefit the public by having a procedure to identify persons who are both suitable and willing to sit on inquiries if asked to do so. This would allow a wider range of people, particularly lay people, to participate in important areas of public life. Names could be selected for inclusion on a list after an appropriate objective and fair selection process. Were such a procedure thought desirable, the case for devolving the appointment of inquiry members on an independent body as suggested above would be strengthened.

It is suggested that if such a list were created, it would be a waste of resources to offer specific training before appointment to a specific inquiry.

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## 11. PROCEDURES [QUESTIONS 8–9]

The Tribunals of Inquiry (Evidence) Act 1921 contains elements which are likely to be beneficial to the efficient conduct of almost any inquiry, whether or not currently conducted under the Act:

- (a) The compulsion of witnesses to attend: an inquiry which lacks this power always runs a greater risk of failing to get to the truth, because of the unwillingness of witnesses, particularly those who may be criticised, or even prosecuted, to cooperate. An inquiry which possesses this power rarely has to use it. It may be thought that if a public inquiry of the type under consideration, at any level, is worth having, then the grant of a power to compel witnesses to attend is desirable. Any abuse of that power can be controlled by judicial review.
- (b) The power to compel the production of documents: the first and most important task of almost any inquiry is to collect the relevant documentary evidence. There can be considerable reluctance on the part of those holding the documents to undertake what can be a formidable task of investigation, and collation of their own. This is not always motivated by a desire to conceal wrongdoing, but more by a reluctance to devote the necessary resources to the task. Again excessive or unnecessary use of such a power can be controlled through judicial review.
- (c) Control and security of proceedings: unfortunately inquiries and those who attend them do on occasion need protection from threatening behaviour, or conduct designed to deter persons from giving evidence, or to sway the inquiry. A power in relation to contempt proceedings is a valuable tool, which, if available, will rarely be needed.
- (d) Immunity: inquiries which do not have the protection of the 1921 Act do not confer absolute privilege on those who give evidence. This in itself can be a deterrent. While most evidence is likely to be the subject of qualified privilege, absolute privilege is a better protection and better designed to encourage witnesses to be candid.

The disadvantage of the 1921 Act is that its application is restricted to inquiries commissioned pursuant to a resolution of both Houses of Parliament. It is suggested that there are many inquiries which could benefit from the statutory powers considered above, but which are not of a level where Parliamentary time need be taken in setting them up. It might be desirable to consider an amendment to the statute allowing statutory inquiries with these powers to be commissioned in other ways.

## 12. INVESTIGATORY OR ADVERSARIAL? [QUESTION 10]

The trend has been away from adversarial inquiries. They tend to be longer and more costly, but investigatory inquiries, perhaps better described as inquisitorial inquiries, are not exempt from length or expense: the Bristol inquiry is an example. There can be no universal procedure as each inquiry has to consider what procedure best suits the accomplishment of its task. From the point of view of a barrister representing a party who may be the subject of serious criticism at an inquiry an exclusively inquisitorial approach is distinctly unsatisfactory for a number of reasons:

- (a) A person in such a position invariably wants to put forward a rebuttal to the allegations made against him/her. While this can be done by way of a written statement, this is unlikely to have as much impact as oral evidence. Yet oral evidence is effectively confined to cross-examination, which is intended to undermine the witness's case. Evidence given in re-examination by the witness's own advocate will rarely be perceived as being as effective. Given the importance in many cases of the court of public opinion, written evidence will rarely be given the same prominence in the media as oral evidence.
- (b) In order for a defence to potential criticism to be mounted properly it is often necessary to demonstrate that other evidence is inaccurate or lacks credibility. Sometimes there is a direct conflict of evidence: either the party vulnerable to criticism is telling the truth or a protagonist is. In such circumstances it is less than satisfactory to the person involved for counsel to the inquiry to ask the questions which his own advocate has requested should be put.
- (c) At some inquiries evidence is given to the panel in private and without a transcript being shared with interested parties, who rely on the inquiry lawyers to inform them by way of Salmon letters of matters on which they anticipate that the interested party has relevant evidence. This approach runs the risk that inaccurate evidence is left unchallenged because it is not deemed to be controversial.

One solution in appropriate cases is a combination of the inquisitorial and adversarial approaches. Thus there might be a first round of evidence taking in which the inquisitorial method is used, followed by the recall of witnesses whose evidence is in conflict. At this stage the advocate of each witness might be permitted to develop the witness's own evidence before cross-examination, as well as to challenge the evidence of others re-called by cross-examining them. Strict constraints could be imposed on the time taken and the issues on which such questioning is permitted, to ensure that control of the proceedings is not lost.<sup>14</sup>

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<sup>14</sup> The Hutton Inquiry appears to have adopted a similar procedure.

13. WHAT IS NECESSARY FOR AN EFFECTIVE INQUIRY? [QUESTION 11]

Again the elements necessary will vary according to the nature and purpose of the inquiry.

The following features are likely to be universal:

- (a) Any inquiry must not only be independent and impartial, but seen to be so.
- (b) The inquiry must have access to all relevant documentary material, and the resources to undertake an independent analysis of it.
- (c) Any person or body requested or required to assist the inquiry by giving evidence should be afforded advance guidance of the matters on which evidence is required, and access to all documentary material which either the inquiry or the witness considers necessary for this purpose.
- (d) Any person whose evidence is apparently contradicted by other evidence should be afforded a fair opportunity to respond to it.
- (e) Where any person or body may be the subject of a finding of fault or criticism they must be given a fair opportunity to respond, having been given reasonable notice of the nature of the potential finding.
- (f) There should be as much transparency both for interested parties and the public as possible, consistent with the public interest and the rights of individuals affected.
- (g) No inquiry is truly a public inquiry unless its report is available to the public. While there may be circumstances where all or some of a report should not be published, these must be the exception not the rule.

14. SHOULD INQUIRIES ALWAYS SIT IN PUBLIC OR ARE THERE CIRCUMSTANCES WHEN IT IS RIGHT TO CONDUCT AN INQUIRY IN PRIVATE? [QUESTION 12]

The fact that an inquiry is necessary in the public interest does not necessarily mean that it has to take place entirely or at all in public. While most major disasters are made the subject of an inquiry held in public, this is not so of inquiries into individual deaths or events perceived to be of lesser significance. The so-called homicide inquiries almost invariably take place in private. There is a bureaucratic preference for private inquiries if only because of the perceived expense of public ones. However such inquiries can lead to charges of “cover-ups” and may not satisfy the purposes considered above.

This is an area in which the courts are invited to intervene with increasing frequency. An initial decision by the relevant Minister for an inquiry into the Shipman case in private was overturned.<sup>15</sup> The following factors were accepted as indicating that there should an inquiry in public:<sup>16</sup>

- The fact that when a major disaster occurs involving a loss of many lives it has often been considered appropriate to hold a full public inquiry, enhanced in that case by: (a) an issue as to the number of deaths attributable to Dr Shipman; (b) the deaths having occurred over a long period without detection; and (c) likely widespread loss of confidence in a critical part of the NHS.
- Positive known advantages from taking evidence in public, namely: (a) witnesses are less likely to exaggerate or try to pass on responsibility; (b) others come forward; (c) openness helps to restore confidence; and (d) the absence of significant risk of leaks leading to distorted reporting.
- The particular circumstance of the case: (a) an open inquiry was what the families wanted and the Secretary of State had been wrong to think otherwise; (b) the wide terms of reference led those friends and relatives of the deceased, who had not figured in the indictment, to believe the inquiry would investigate how and why their relatives died; (c) what had been said in the House of Commons about the nature of the inquiry had led to a misunderstanding; (d) there was no obvious body of opinion in favour of evidence being received behind closed doors.
- Given an inquisitorial procedure and firm chairmanship there was no reason why the inquiry should take longer if evidence were taken in public, nor was there reason to believe any significant evidence could be lost.
- A presumption the inquiry would proceed in public in the absence of persuasive reasons to the contrary.
- The additional public confidence its report and recommendations would command, restoration of public confidence being a matter of high public importance.

On the other hand decisions to hold the inquiries into the activities of Mr Neale and Dr Ayling in private were upheld.<sup>17</sup> The factors which weighed with the court were:

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<sup>15</sup> *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.

<sup>16</sup> As summarised in *R (Wright) v Secretary of State for Health* [2002] QB 830, 844.

<sup>17</sup> *Wright* (above).

- The encouragement to candour available at a private hearing<sup>18</sup>
- The purpose of the inquiries was largely to look forward to the lessons to be learned rather than backwards to the allocation of blame.
- The greater degree of formality and tendency to adversarial conduct in public hearings.
- The aggrieved patients did not have a right of access to information which those holding it were unwilling to impart protected by Article 10 of the European Convention.

More recently the Minister's decision to hold an inquiry into the foot and mouth outbreak in private was upheld.<sup>19</sup> It was held that there was no legal presumption of openness and that the decision was a political one for the Minister. He had to weigh the competing considerations having regard to all the circumstances of the case. The factors involved included:

- The speed and cost of an inquiry in public.
- The likely candour of witnesses.
- The purpose of the inquiry whether forward or backward looking.
- Article 10 of the European Convention did not require the State to facilitate freedom of expression by providing an open forum to achieve wider dissemination of views.

Clearly the resolution of this issue will vary according to the circumstances, but in every case those setting up the inquiry must make a reasoned and rational decision as to whether the inquiry should be in public or private.

#### 15. PARLIAMENTARY ACCOUNTABILITY [QUESTIONS 13–18]

I only wish to offer two comments on these essentially political questions:

- (a) Independent inquiries need not undermine ministerial accountability to Parliament. If the result of the inquiry is made available to Parliament, either directly, or through general publication, they can only enhance democratic accountability by making facts known which might otherwise have remained unknown and enabling politicians to make judgments. Parliament can never be bound by the conclusions of inquiries with which it disagrees, but they do provide a means of investigating issues in a manner which may not be available otherwise.
- (b) If it became a requirement that all public inquiries had to be authorised by Parliament, their use would be reduced. At present they are authorised, not only by Ministers, but also by a range of public authorities. Assuming a working Government majority, it seems unlikely that inquiries would be ordered any more readily than by Parliament itself. What might be more important is to ensure that Parliament receives the reports of all inquiries.

#### 16. PUBLICATION OF THE REPORT [QUESTION 19]

The Advice of the Council on Tribunals to the Lord Chancellor in 1996<sup>20</sup> felt that the report of a statutory inquiry fell outside the scope of the advice it had been asked to give, but did make the following comments:

- 7.17 Inquiries of the kind under consideration will invariably involve the inquiry, or the inquiry team, in preparing a written report for submission to the Minister. The preparation of the report falls outside our terms of reference. However we agree with a number of commentators who urge that inquiry reports of any length should provide for an executive summary of the findings and recommendations.
- 7.18 It will almost always be appropriate for the inquiry report to be published, even if the inquiry has been conducted in private. It is to be expected that Ministers will be involved in the arrangements for publication, and will explain any editing that might have been necessary.

In most instances the duty of the inquiry is to deliver its report to the person or body which commissioned it. Usually this will be expected to take place before any wider publication is given. Such a scheme has many advantages for the commissioner of the inquiry, and few for anyone else. The commissioner receives the considerable privilege of being able to consider the report, its findings and recommendations before any other party knows of them. The impact of adverse findings can be prepared for. Recommendations can be considered and even implemented in advance of publication. Whether this is always in the public interest may be debateable.

In the case of a statutory inquiry the interested parties are unlikely have any right to prepublication disclosure of the report, any more than parties to litigation are entitled to sight of a draft of the court's judgment. In the case of private or informal inquiries the answer is probably the same. The commissioning

<sup>18</sup> As the court commented: "If the Secretary of States perception is correct, this is a sad reflection on the attitude and probity of some NHS managers and on one view suggests that such people ought to be subjected to searching cross-examination in public" [p 846].

<sup>19</sup> *R (Persey) v Secretary of State for the Environment* [2003] QB 794.

<sup>20</sup> *Annual Report 1995–1996, Council on Tribunals*, (HC 114, 1995–96) (London, HMSO, 1996).

authority is entitled to set the terms of reference for its inquiry into any matter affecting it, and in that sense the process is its property, not that of others who may be interested in the contents or outcome of the investigation.

17. Where the inquiry concerns the treatment of a particular individual by a public authority the question may arise whether he/she has a right under the Human Rights Act or freedom of information legislation to disclosure. The inquiry may have considered a wide range of confidential personal information about the individual. It is possible that his/her rights could be infringed although I am unaware of any authority which gives any guidance on the point. However it is difficult see how there can be a right to see a draft: there may be no pure Article 6 rights invoked as an inquiry, whether public or private is unlikely to involve a determination of civil rights and obligations.

18. Conceivably, if the inquiry has exceeded its terms of reference, or failed to follow its own procedure to the detriment of an interested party, it might be prohibited from delivering a report until a relevant step had been taken. It is unlikely that an inquiry would be prevented from expressing its view of conduct or making a recommendation, unless this was wholly irrational or without foundation on the evidence before it. However, if a party has had access to a draft and asserts that the findings are irrational or not based on the evidence before the inquiry, an application for judicial review seeking an order that the report be revised may be entertained.

19. While the publication of the report beyond the commissioning authority may be left in the hands of the inquiry team this will not always be the case. In a statutory public inquiry it will be clear where the responsibility lies, and is highly unlikely that there will be any question over whether the report should be published unless a matter of national security is involved.

In the case of private or non-statutory inquiries this may not be the case. It should be remembered that the responsibility of the inquiry panel is to deliver its report to the commissioner. It may have been decided in advance that the report will be published. This may not provide relief from the consequences of doing so, and the matter will always require careful consideration in the light of the report actually delivered. Very few reports contain no information or opinions which some person affected would rather was not published.

The commissioning authority may consider that the report contains conclusions or criticisms which are without any rational justification or for which no supporting evidence exists. If these are adverse to named individuals, publication despite that knowledge could lay the authority open to defamation proceedings on the ground that the protection of qualified privilege may not apply. An affected party may seek a court order preventing publication in such circumstances.

## 20. LEARNING THE LESSONS [QUESTIONS 20, 22]

Much lip service is paid to inquiry recommendations when they are published, but often there is little continuing monitoring to ensure that, once officially accepted, recommendations are actually implemented. The experience of homicide inquiries is that inquiries repeatedly make the same recommendations.<sup>21</sup> As suggested above there might be something to be said for requiring a follow-up of inquiries by way of an audit of the implementation of their recommendations and the effectiveness of them. This task could be given to each inquiry panel by way of the terms of reference, or delegated to an independent body such as the Council on Tribunals.

## BACKGROUND

1963–68	Uppingham School
1968–71	Exeter University LL.B
1973	Called to Bar
1992	Queen’s Counsel
1996	Assistant Recorder
1999	Consultant Editor Lloyd’s Law Reports: Medical
2000	Recorder
2000	Joint Head of Chambers, 3 Serjeants’ Inn [with John Grace QC]
2002	Bencher Inner Temple
2003	Chairman Professional Negligence Bar Association

## PRACTICE PROFILE

Robert Francis has for many years specialised in medical law in all its aspects.

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<sup>21</sup> See *Community Care Tragedies: a practical guide to mental health inquiries* [above].

*Clinical negligence*

He undertakes clinical negligence actions on behalf of claimants (publicly or privately funded or on conditional fee arrangements) and defendants, including NHS bodies, private healthcare providers, all the medical defence organisations, and insurers. He is frequently instructed both at first instance and on appeal in high value claims and those involving complex medical and legal issues.

*Medical ethics*

He is instructed in cases involving difficult or controversial ethical dilemmas and problems in relation to treatment decisions for patients unable to make their own decisions, withdrawal or withholding of life prolonging care, socially controversial treatment such as sterilisation of mental patients, treatment of patients refusing consent to treatment etc. He has appeared in many of the leading cases in this field in the Court of Appeal and House of Lords.

*Professional discipline and regulation*

He appears on behalf of practitioners before professional conduct committees of regulatory bodies such as the General Medical Council, the General Dental Council and on appeals from them to the Judicial Committee of the Privy Council or the High Court. He has sat as a legal assessor to professional disciplinary committees of the General Optical Council and the Chartered Society of Physiotherapists.

*Medical employment issues*

He receives instructions for professional staff and for employers in internal disciplinary procedures, including those held under HC (90)9 and associated court proceedings and appeals. He has also acted as chairman of NHS internal disciplinary inquiries under HC (90)9.

*Public inquiries*

He is currently acting as chairman of a high profile inquiry the care and treatment of a psychiatric patient convicted of homicide [Michael Stone]. He appeared at the Bristol Royal Infirmary Inquiry, the Royal Liverpool Children's Inquiry, and the Inquiry to investigate how the NHS handled allegations about the performance and conduct of Richard Neale.

*Public law*

He undertakes applications for judicial review in relation to all areas of his practice.

*Criminal cases*

He is instructed in criminal cases, particularly those involving medically or professionally related issues.

## REPORTED DECISIONS

*Medical negligence*

D v East Berkshire Community NHS Trust CA [2003] 4 All ER 796; [2003] Lloyds Rep Med 552 (*Duty of care in diagnosis of child abuse*)

AD v East Kent NHS Trust QB [2002] Lloyds Rep Med 424; CA [2003] 3 All ER 1167 (*Unwanted birth to mentally ill mother*)

Burke v Leeds Health Authority [2001] EWCA CIV 51 (unreported 29/1/01) (*causation*)

Brown v Lewisham & North Southwark HA [1999] Lloyds Rep Med 110 (CA) (*causation*)

Howard v Wessex RHA (1994)45 Med LR 57 (QB) (*proof of negligence*)

Gascoine v Haringey Health Authority (1992) 3 Med LR 291 (*want of prosecution*)

King v Weston Howell [1989] 1 WLR 579 (CA) (*negligence and costs*)

Roberts v Johnstone [1989] 1 QB 878 (CA) (*damages Jbr costs of accommodation*)

*Medical treatment*

Leeds Teaching Hospital NHS Trust v A & Others QB [2003] Lloyds Rep Med 151; [2003] FLR 109 (*IVF error*)

A Health Care Worker v Associated Newspapers [2002] EWCA Civ 195 (*confidentiality of treatment information—freedom of press*)

B v A NHS Trust (Family Division, 22/3/02) (*Refusal of consent to artificial ventilation*)

In re A [Mental patient: sterilisation] [2000] 1 FCR 193

In Re MB (Caesarean Section) (1997) 8 Med LR 217 (*Non-consensual Caesarean Section*)

In Re: T (a minor) (Wardship: medical treatment) [1997] 1 WLR 242

In re S (Hospital Patient: Court's Jurisdiction) [1995] Fain 26 (CA) (*custody of incapacitated patient*)

B v Croydon Health Authority [1995] Fain 26 (CA) (*force feeding*)

Airedale NHS Trust v Bland [1993] AC 789 (HL) (*persistent vegetative state*)

Re J (A minor)(Child in care: medical treatment) [1993] Fain 15 (CA) (*withdrawal of treatment*)

Re A [1992] 3 Med LR 303 (Fain) (*definition of "death"*)

F v. Berkshire Health Authority & Another (Mental Health Act Commission intervening) [1990] AC 1 (HL) (*sterilisation of mentally handicapped adult*)

*Mental Health*

R (Muniaz) v Mersey Care NHS CA [2003] 3 WLR 1505; [2003] Lloyds Rep Med 534 (*'Seclusion of mental patients'*)

Masterman-Lister v Brutton CA [2003] 1 WLR 511; [2003] Lloyds Rep Med 244 (*Capacity to manage property and affairs and to litigate*)

*Crime*

R v Derby Magistrates Court ex parte B [1996] AC 487 (HL) (*legal professional privilege*)

R v Woodward (Terence) [1995] 1 WLR 375 (CA) (*intoxication in death by dangerous driving*)

Regina v Ghosh [1982] 1 QB 1053 (CACrimD) (*definition of dishonesty*)

*Public law*

S v Airedale NHS Trust Admin [2003] Lloyds Rep Med 21 (*Seclusion of detained mental patient*)

R v North Thames RHA & Others Ex parte L (1996) 7 Med LR 386 (QBD) (*medical employment when must discipline*)

Roy v Kensington & Chelsea & Westminster FPC [1992] 1 AC 624 (HL) (*CI' terms of service*)

*Disciplinary*

R (Dowd) v General Medical Council Admin [2003] All ER(D) 310 (*serious professional misconduct—meaning*)

Pembrey v General Medical Council PC [2003] All ER(D) 275 (*serious professional misconduct—treatment of mentally incompetent patients*)

R (Cream) v General Medical Council (Administrative Court, 31/1/02) (*serious professional misconduct—meaning*)

R (Nicolaidis) v General Medical Council Admin [2001] EWHC Admin 625 (*Whether evidence untrue—serious professional misconduct*)

Borees v General Medical Council (Privy Council Appeal No 71 of 2000) (unreported 31/8/01) (*serious professional misconduct*)

Royle v General Medical Council [1999] Lloyd's Rep Med 139 (*serious professional misconduct: chief executive of Trust; alleged bias of Chairman*)

*Public inquiries*

Independent Inquiry into the Care and Treatment of Michael Stone [chairman]

Inquiry to investigate how the NHS handled allegations about the performance and conduct of Richard Neale

Bristol Royal Infirmary Inquiry

Royal Liverpool Children's Inquiry

## PROFESSIONAL ACTIVITIES

Member, Court of Appeal Mediation Panel [pilot scheme]

Consultant Editor: *Lloyds Law Reports: Medical*

## Professional Associations

Professional Negligence Bar Association

Executive committee [1998–2001]

Vice Chairman [2001–03]

Chairman [2003– ]

## Member of:

The London Commercial and Common Law Bar Association

Personal Injuries Bar Association

The Criminal Bar Association.

## Bar Council

Chaired working group which prepared Bar Council's response to the Chief Medical Officer's report, *Making Amends*

Prepared submissions on its behalf to Law Commission on medical ethical issues, and to the Department of Health on the General Medical Council

Member of Bar Council chambers arbitration scheme

Member, Summary Procedure Panel

## Clinical Disputes Forum

2001: Member of regulatory appeals working group [submissions to Department of Health on reforms to appeals process in medical professional disciplinary cases]

2003– : Member of Forum

## Society of Advanced Legal Studies

2001: Member of Working Group on End of Life Issue, Chair Peter Harris (*Submissions to LCD on welfare choices in connection with "Who Decides?"*)

## BOOK

Medical Treatment Decisions and the Law Francis & Johnston, Butterworth Tolley, April 2001

## OTHER PUBLICATIONS

Whose Choice Life or Death: Doctor, Patient or Judge? *Philosophy Today* Vol 15 No 40, May 2002

Consent (Chapter) *Risk Management and Litigation in Obstetrics and Gynaecology* Clements & Brennan, RCOG-RSM 2001

Compulsory Caesarean Sections *Journal of Contemporary Health Law & Policy* (Catholic University of America) Vol 14 1998

The Role of Leading Counsel *Clinical Negligence* 3rd edition, Powers & Harris 2000

Treatment of the Unconscious Patient *Clinical Risk* 1995

Elective Ventilation *British Medical Journal* 18 March 1995

Does Doctor Know Best—What is the Scope for non-consensual treatment? *Medico-Legal Journal* 1995 Vol 63 Pt 1 page 63

## LECTURES AND SEMINARS

The Legal Implications Inquiries in the Public Sector, The House Magazine, The Royal Society of Arts, March 2004

Legal Update 10th Clinical Negligence Conference, Professional Negligence Bar Association, Oxford, September 2003

Legal Update 15th Clinical Negligence Conference, Association for the Victims of Medical Accidents, Brighton, July 2003

Human Rights and the Work of the Medical Profession, PNBA seminar with Laura Cox QC, London May 2002

Life and Death—Whose Choice? Lent Lecture, King's College London, March 2002

Disciplinary proceedings and Human Rights, Clinical Negligence Seminar, Professional Negligence Bar Association, Queen's College, Cambridge, September 2001

The Report Handling Public Inquiries, Winkworth Sherwood, Westminster, 11 September 2001

Access to Treatment, *13th Annual Clinical Negligence Conference*, Association for the Victims of Medical Accidents, Brighton, July 2001

Right to a fair trial and patient complaints *The Human Rights Act and Healthcare*, IBC conference, London 2001

Non-consensual medical treatment *JBC Conference*, Nicosia, Cyprus 2000

Consent to medical treatment *Family Law Bar Association/National Council for Family Proceedings* 11 November 1998

How to avoid being sued *Clinical Risk Management in Obstetrics and Gynaecology*, Cafe Royal, London IBC Conference 2 October 1997

Life after Bland *UKCC* February 1997

Settlement or Trial *The 1997 Medical Negligence Conferences*, CLT conference 1997

Consenting Patients *Norfolk and Norwich Medico-Legal Conference*, University of East Anglia, 12 September 1996

Establishing Quantum *Cerebral Palsy*, IBC Conference, London 26 June 1997 and 17 October 1996

Nervous Shock *Eversheds Insurance Seminar*, Norfolk 21 May 1995

The Date of Knowledge under the Limitation Act *Professional Negligence Bar Association*, Manchester 29 February 1996

The End of Life *Union International des Avocats*, London, 5 September 1995 [Paper published and chaired discussion]

Does Doctor Know Best—What is the Scope for Non-consensual Treatment?, *Medico-Legal Society*, Royal Society of Medicine 13 October 1994

Terminating Medical Treatment, *Hammersmith Postgraduate Medical School*, 23 September 1993

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### **Memorandum by Ann Abraham, Parliamentary and Health Service Ombudsman (GBI 07)**

#### INTRODUCTION

1. This note is my response to the Public Administration Select Committee's issues and questions paper on the use of investigatory inquiries by Government.

2. I have not attempted to respond to every question posed in the Committee's paper, as many of them deal with matters on which I do not feel it would be appropriate to comment. I have instead focused my response on setting out some general reflections on the use of investigatory inquiries, which have been informed by the experience of my Office.

#### BACKGROUND

3. The Committee knows that my role as Parliamentary and Health Service Ombudsman is defined in statute, specifically by the Parliamentary Commissioner Act 1967 and by the Health Service Commissioners Act 1993, both as amended.

4. That role is to investigate individual complaints that maladministration by a central government body has caused an unremedied injustice or that failure in a service funded by the NHS has caused hardship or injustice to the person making the complaint.

5. The core function of my Office is thus an investigatory one—with the aim of resolving complaints—and it is with this in mind that I make the following observations.

#### THE PURPOSE OF INVESTIGATORY INQUIRIES

6. It is perhaps a particularly appropriate time to consider the role of inquiries established by Government to investigate specific, controversial events giving rise to public concern. There has been much public debate about the role of inquiries following the recent publication of a number of inquiry reports, ranging from Hutton (into the circumstances surrounding the death of Dr David Kelly) to Penrose (into the circumstances surrounding the closure to new business of Equitable Life).

7. What these inquiries share—as the Shipman Inquiry, the Climbié Inquiry and all the other investigatory inquiries of recent years do—is an origin in a set of circumstances, first, where it appears that a system of oversight, regulation, accountability or duty of care has failed to deliver what was expected of it and, secondly, where there is no agreement as to the cause or causes of that failure.

8. However, the use of investigatory inquiries is only one possible mechanism in such circumstances. Other alternatives include:

- recourse to the relevant Ombudsman where the events in question have caused an injustice or hardship to individuals or groups of individuals and where an independent and balanced account of what went wrong is required;
- resorting to the courts where there is no prospect of the parties accepting anything other than binding decisions about liability made as a result of an adversarial process;
- consideration by Parliament—through the Select Committee system—of the relevant events, especially where policy decisions by Government are central to the events in question, as part of its role of scrutinising the Executive and of holding those in public office to account; and
- referral of the matters to a judicial inquiry or statutory tribunal.

9. The circumstances of each failure will determine which of the above mechanisms is the most appropriate. The decision to use a particular mechanism should therefore be made with due regard to those circumstances; those making such decisions should be accountable to Parliament for their decision, the reasons for which should be made clear at the outset.

#### ENSURING EFFECTIVE RESOLUTION

10. Whichever method of investigating and resolving the issues is chosen, the experience my Office has had of conducting investigations has demonstrated to me the importance of ensuring that each mechanism is fit for purpose.

11. The principles that underpin fitness for purpose are:

- that those conducting the investigation or inquiry should be appropriately chosen and wholly independent from those under investigation: confidence in the robustness of the inquiry will only be achieved where all the parties believe that the person or persons undertaking the inquiry are suitably competent and that the process will be fair and balanced; and
- there should be clarity of purpose: the terms of reference of each inquiry or investigation should be clearly set out when it is established and should, at the very minimum, provide the means to achieve three aims:
  1. the relevant events and actions should be established on a factual basis;
  2. who or what caused the adverse outcome should be determined—while identifying where hindsight has informed this judgment—and appropriate redress identified for any individuals or groups of individuals who have suffered as a result; and
  3. lessons for the future, in terms of law, policy, practice and behaviour, should be identified and recommended in such a way that they can be implemented and can add value;
- the particular mechanism chosen should be the most appropriate in the circumstances of each case and the form of the inquiry or investigation should follow this: whether it should be held in public or in private, for example, or whether it should adopt an inquisitorial or adversarial approach should be informed by the context of the relevant events; and
- the inquiry should be provided with the necessary resources to enable it to fulfil its mandate in a timely and effective manner, with access to appropriate levels of funding, staff, professional advice and powers to obtain information, evidence or papers.

#### CONCLUSION

12. Ensuring that inquiries and other means of explaining events and of resolving complaints, claims, and disputes are fit for purpose is critical to their success and public confidence in them. I do not think that, as question 16 of the paper asks, the answer to doubts about the independence or fitness for purpose of a number of recent inquiries is to extend my powers. My powers are directed at a specific role: to investigate individual complaints.

13. Ombudsmen are, of course, a very effective means of resolving individual complaints. However, there are other circumstances where, although a full, independent investigation is necessary or desirable—such as

issues concerning the effectiveness of Government policy or whether the law has been properly observed—there are more appropriate mechanisms to achieve this.

14. I hope that the Committee finds these observations helpful.

April 2004

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### Memorandum by the Centre for Effective Dispute Resolution (CEDR) (GBI 08)

#### 1. DECLARATION OF INTEREST

1.1 CEDR (the Centre for Effective Dispute Resolution) has for the past 14 years led the development of alternative dispute resolution processes in the commercial and civil justice fields. A not-for-profit organisation with charitable status, CEDR works closely with the judiciary, government, public and private sectors to cut the costs of conflict by exploring ways in which adversarialism can be avoided through the application of commercial common sense and best practice.

1.2 Much of our work is based around the concept of mediation, the intervention of a trained neutral third party to facilitate dispute resolution processes.

1.3 More recently CEDR has been instrumental in developing innovative uses of the mediation process across a wide spectrum of situations including clinical negligence disputes, planning systems, and public-private finance initiatives. We believe the mediation process and what lies behind the increasing use of mediation in the civil justice system has much to offer the debate over Government by Inquiry. More broadly, what we have learned by encouraging “alternative dispute resolution” and seeing numerous cases resolved quickly with better client satisfaction, is that process management deserves attention as an issue in itself, compared to its neglect in favour of automatically adhering to traditional procedures for their own sake.

1.4 Responses to this inquiry will predominantly fall under the “specialist interest” category focussing on those questions to which we feel we can contribute the most.

#### 2. SUMMARY OF RECOMMENDATIONS

- Encourage research into the outcomes or lack of outcomes, and into processes used, in the inquiry process—both historic research and action research.
- Consider creating a specialist unit or neutral standing committee constituted to consider questions of process design and planning and who can build up a body of expertise and independence to benefit future inquiries.
- Ensure that effective planning, process design and relevant personnel appointments are recognised attributes of effective inquiries, and are actively considered for each inquiry.
- Recognise the value of complementing or in some cases replacing the traditional inquisitorial and/or adversarial “model” of the inquiry process to allow the deployment of focused consensual process design and imaginative outcomes to be considered.

#### 3. GENERAL

3.1 Recommendations made for changes to the purpose of the inquiry should apply equally to statutory, non-statutory and ad hoc inquiries as outlined in the Powers and Legal Basis section of the *Issues* paper.

3.2 The challenge for the PASC is to ensure that an effective system and process for an inquiry is established prior to the necessity for such an inquiry. A common failure is the triggering of an inquiry in the heat of a crisis, leaving no time to consider what we regard as essential questions: “Who should take the decisions (and what should those decisions be on) as to: (a) calling an inquiry; (b) the form it should take; (c) its terms of reference or objectives; and (d) the appointment of chair and members”.

3.3 The current knee-jerk reaction to the calling of an inquiry too often leads to a failure to capture the real complexity of what happened. It also loses the opportunity to address a range of possible outcomes or objectives as well as the opportunity to build “buy-in” to the practical effects which may emerge from the evolving understanding which is the main product currently generated by a formal intellectual inquiry.

3.4 Intrinsically linked to this failure is the apparent lack of real thought given to the question of the best mix of skills and backgrounds of those responsible for conducting the inquiry. Recognising more sophisticated objectives and flexible models for the process, carries with it a need to find personnel who can best assist in implementing these models and achieving the objectives of a particular inquiry.

3.5 Again, the time necessary for proper planning is often not feasible, given the Government's need to be seen to respond to what may be deep public concern. Without devoting the necessary time and design, however, none of the above questions can be effectively dealt with and appropriate outcomes realised. Therefore how to ensure careful planning is crucial in any approach to effective reform of the inquiry system.

3.6 One option is a specialist unit or standing committee to specialise in this area, a group which could build up experience, conduct pilots, make recommendations on purposes and process, as well as on personnel. Such an established and neutral route would assist the independence of appointment and process and avoid accusations that the inquiry process is merely a way to divert attention and take the political heat off the government of the day. We think that this is a design question in its own right, so make no premature assessment of the constitutional status or structure of such a committee or unit.

3.7 At the very least CEDR believes that research should be encouraged into past inquiries with a view to assessing the outcomes achieved, the other processes that were required to create practical outcomes, and some broad cost-benefit analysis. Some action research could also be encouraged (perhaps in some simpler inquiry contexts first) of creative alternatives to the traditional inquiry model, such as a consensus-building approach across stakeholder groups, or a more inquisitorial and investigatory versus "hearing" model.

#### 4. MEMBERSHIP

4.1 As alluded to above, the appropriate appointment of a Chair cannot be effectively made without due consideration of the purpose of the inquiry proposed. Some judges may be perfectly suited to chair an inquiry, others not so. The nearest relative to inquiries is the litigation system. Increasingly the courts and judges have been incorporating mediation as a matter of course into civil procedures. Judges have also acted as mediators in various high profile mediations with varying degrees of success. This is because judges are highly trained in determining whether or not facts are true or false according to the vagaries of the legal system. They are not trained to consider other potentially desired outcomes such as satisfying protagonists, encouraging reconciliation of opposing views, creating social or sector consensus, laying the foundation both for considerations of compensation and blame and alternatives to such considerations, or engaging in solution-finding through complex problem-solving. These are all outcomes that may legitimately be desired through an inquiry.

4.2 The answer to the question "is it appropriate for judges to chair inquiries?" is therefore linked to the answers to the two subsequent questions—only if they have the appropriate characteristics and qualities to deliver the range of outcomes likely to be required by the inquiry (and only when those outcomes have been properly identified).

4.3 In CEDR's experience, even if the underlying principles of one dispute are the same as another, the outcomes required and characters involved are invariably different. Every inquiry will also no doubt reflect these differences and it is our opinion therefore that each one needs to be assessed by an expert or expert panel who have received specialist training to deal with such issues. They would then be in a position to ascertain accurately the need for lay participation, the appropriate processes and other key matters.

#### 5. PROCEDURES

5.1 As to the nature of inquiries—whether they should be inquisitorial or adversarial—the most recent example of the Hutton Inquiry turned out to be much more like a litigation trial, both in the way it was conducted and also the public perception of the outcome. Furthermore, although there was a definite winner and a definite loser, it is doubtful whether any party would now say that they regard the outcome as wholly successful.

5.2 In either type of inquiry, responsibility for what process to pursue passes very quickly from those directly involved into third party hands. The mediation process not only offers an alternative process as a consensual route to proper outcomes, but also in appropriate cases can offer broader and more flexible remedies than available from the courts. Not least, the process offers control of decision-making and risk by parties, and not simply the interpretation of facts by a third party. The mediation process works equally well in class actions as in a two party dispute, as shown recently by the settlement of several hundred family actions against the Alder Hey Hospitals with several remedies devised that would not have been available through a court.

5.3 A significant challenge will be a clash between the necessary transparency of an inquiry and the need for confidentiality that makes mediation so successful. If however transparency of appointment of a neutral individual or body is enabled it may be more acceptable to the public to introduce elements of the process which are in part confidential to the parties.

5.4 To put it at its simplest, however, we believe that there may be certain occasions, or parts of certain inquiries, where it may be useful to consider whether value can be obtained by a process which seeks consensus first, before "judgment" (consider the Bloody Sunday inquiry); or where there may be scope for the inquiry to consider how best compensation would be allocated were compensation seen as a likely

outcome of the inquiry (consider the Penrose Inquiry). The current system can lead to a sense of gross unfairness of judgement, or lack of any meaningful practical way of proceeding post-inquiry other than to start a process all over again in the courts or via an Ombudsman.

5.5 One inquiry that did attempt to recognise practical effects emerging from the evolving understanding of intellectual inquiry was the Truth and Reconciliation Commission of South Africa which dealt with the healing and investigation that followed the Apartheid era. One which arguably has not done so, and is likely to face a degree of hostility whatever the reported outcome, is the Saville Inquiry into the events of “Bloody Sunday”.

5.6 Finally we think that the merits of adversarial versus inquisitorial methods may vary for different contexts. Flexibility should be retained, but guided by greater intelligence on the pros and cons of the two core models (which each in any case are open to significant variations of procedure). It would be useful to do further conceptual work on these different models, as well as comparative research and action research on when they are most appropriate, and, develop guidance on best practice for most situations.

## 6. PARLIAMENTARY ACCOUNTABILITY AND CAPTURING THE VALUE OF INQUIRY PROCESSES

6.1 If there were an established standing committee or specialist unit appropriately constituted to consider outcomes, processes and personnel, this could also become the vehicle for publication of eventual reports and learning (in much the same way as for example the National Audit Office publishes its own reports). It would be in a position to build up a pool of experience to handle subsequent questioning and ensure that lessons were fed back into the inquiry process in a structured way.

6.2 As to the value of inquiries, we believe that under the traditional system, outcomes are less effective and more random than they need be. Thus our emphasis that there should be more research on this topic and certainly practical experimentation with other models of process and objectives.

7. CEDR sees it as an essential part of its mission to contribute to debate and learning on these issues, and would be pleased to explore further ways to improve thinking and practice, if the work of PASC calls for further commitment of thinking on these topics. In particular, I would be pleased to offer oral evidence before the Committee and/or to meet privately with individual Committee members.

*Dr Karl Mackie*  
Chief Executive CEDR

## APPENDIX 1

### ABOUT CEDR

CEDR, the Centre for Effective Dispute Resolution, is an independent non-profit organisation supported by multinational business and leading professional bodies and public sector organisations. CEDR was launched in 1990 with the support of The Confederation of British Industry. It is a registered charity.

Our mission is to encourage and develop mediation and other cost-effective dispute resolution and prevention techniques in commercial and public sector disputes and civil litigation.

We work in partnership with business, governments and the judiciary, both in the UK and internationally, to develop effective dispute resolution practice. We have been instrumental in helping to bring mediation into the heart of business, public sector and professional practice and into the judicial system in England and Wales.

Through CEDR Solve, our dispute resolution and prevention service, we enable business and public sector organisations to cut the cost of conflict by providing a world-class mediation service and a range of professional dispute resolution, training and consultancy solutions using the foremost practitioners in the field.

CEDR Solve is not only the UK’s leading commercial mediation provider but we also offer a range of other assisted dispute resolution services, including expert determination, adjudication, early neutral evaluation, and other forms of customised “independent interventions”.

We train business people and professionals to manage and resolve disputes more effectively and train lawyers how best to represent their clients in mediation.

Our consultancy service advises business and the public sector on designing and developing dispute resolution processes and systems.

In 2003, CEDR Solve arranged 631 mediation cases of which 153 were under various schemes that we administer. We continue to arrange and mediate an average of two cases each business day. Not all mediation organisations publish their workload but we believe that this is, by some significant margin, the largest turnover of any mediation organisation in Europe. Mediations arranged by CEDR Solve cover a very wide range of sectors and dispute type.

CEDR Solve is one of the few truly independent dispute resolution providers with neither law firms, mediators nor special interest groups as financial stakeholders. We operate independently of particular professions and across diverse sectors. Because of our neutrality, we can facilitate dialogue in difficult and highly sensitive negotiations.

More information on CEDR and CEDR Solve can be supplied on request. Our web site [www.cedr.co.uk](http://www.cedr.co.uk) contains a wealth of material.

## APPENDIX 2

### PLAYING CHICKEN IS NOT THE RIGHT WAY TO DEAL WITH SERIOUS PUBLIC DEBATES (Text of an article as published in *The Times*—31 March 2004)

Now that the dust has settled on the Hutton Inquiry and the competing groups have vented their anger or appreciation at the ref, it is time to take a cooler look at the nature of inquiries, particularly as we now have a super league match to follow with the Butler Inquiry.

One comment stands out more than any other in the Hutton inquiry's work. It was in an e-mail from Tom Kelly, the Downing Street spokesman: "This is now a game of playing chicken with the Beeb. The only way they will shift is [if] they see the screw tightening." This was not the only hint of testosterone that characterised the context of the BBC-government clash over the Kelly affair. Anyone listening to the *Today* programme before David Kelly's death could also have detected easily that rival street gangs were lining up. Indeed, after the first shock wave came the demands for a replay—the terms of reference were too narrowly interpreted by a forensic mind; were overseen by a political placeman; missed the whole point of the concerns about the war (itself an underpinning adversarial event, constituting the main plot above the sub-plot).

But what has not been addressed until now is that the way in which public inquiries are organised is fundamentally flawed by their adversarial nature and lack of attempting seriously to analyse how best they can achieve their objectives.

The Commons Select Committee on Public Administration has now however launched its own investigation into "government by inquiries". Tony Wright, its chairman, favours revisiting the whole process after the inquiries into the deaths of Dr Kelly, Victoria Climbié and the Bristol baby heart patients.

Should there, MP's ask, be a review of how the terms of reference are set and the chairman appointed, and greater parliamentary involvement in setting them up? The MP's will draw on a range of inquiries over 20 years, from Lord Scarman's into the Brixton riots to Lord Saville of Newdigate's into Bloody Sunday. Views are sought by Friday [2 April 2004].

There are four key areas to look at: Is it to satisfy the protagonists or encourage a reconciliation between the parties? Or is it to look at whether there should be compensation and blame? Or to lance the boil of social distress? These are all potentially appropriate; and in many complex inquiries, several purposes may be implicit or desirable. Unfortunately, in the heat of the crisis which leads to an inquiry, there is often a failure to identify aims and how to meet them. They remain inchoate, bundled together, under the umbrella of a simple-minded intellectual and technocratic tradition that suggests that it is sufficient to "investigate and report" or "judge" for matters to move on.

This confusion, or vacuum, diminishes the chances for dealing with serious and complex issues. It misses the chance to reach a practical solution that all parties will support.

Linked to that blurring of objectives is an even more frequent failing: a lack of sophistication on how to develop bespoke ways to meet different kinds of purpose. The nearest relative to inquiries—the litigation system—has recently begun to integrate mediation into civil procedures. Why? Because of the common despair at a "one-sided" verdict and because mediation offers an alternative consensual route to justice that is controlled by the parties and can offer broader and more flexible remedies than the courts can give. A recent example was settlement of several hundred family actions against the Alder Hey Hospital, with remedies that covered non-financial as well as financial outcomes and gave a different kind of hearing to families involved.

Secondly, there is the question of personnel. The referee's origins, competencies, independence and character are a frequent source of intellectual inquiry at the best football matches. Such questions are again intimately linked with that of how to devise the most effective method. A better understanding of the inquiry's aims must lead to recognising what different approaches can achieve. Judges bring forensic skills, not necessarily social reform or consensus building expertise (or even inquisitorial background in the common law system).

The classic response by governments to sudden crises is a diversionary, knee-jerk appointment of a handy judge or former civil servant. This gives a clue to the amateurish state of the inquiry profession. One option is a standing committee to specialise in this area, a group that could build up experience, conduct pilot schemes, make recommendations on how an inquiry should proceed and who should conduct it. Such an established and neutral route would help to achieve the independence that is so often the first casualty of the traditional approach.

Finally one should not neglect the money. Reform proposals may appear at first blush to be a rather expensive notion. This may, however, be shortsighted. How would one assess the cost of the Hutton inquiry's result compared with a consensual outcome between the Government, the BBC and the Kelly family? The direct costs in legal fees of the parties to the inquiry were said to be £2 million. Even more startling, the Bloody Sunday Inquiry, begun in 2001, has already cost taxpayers £90 million and is still not concluded. Will that inquiry achieve its purposes? What if the Government had allocated even 17.5% of that budget to a parallel mediation process between the Army, Government and various communities to achieve an agreed reconciliation statement, or allocation of compensation (in other words a sort of "value added tax")?

We can't know whether it would have worked, but has Hutton worked? What value has been created, and for whom? And what should society be ready to pay to test more creative ways of tackling major social crises, to move beyond playing chicken as the model of public debate and headless chicken as its outcome?

*Dr Karl Mackie*

Chief Executive of the Centre for Effective Dispute Resolution and  
Visiting Professor of Law in the University of Westminster

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#### **Memorandum by Dr Iain S Macdonald CB (GBI 11)**

I have only recently become aware of the Committee's current concern with this subject, and I have read with interest the paper "An Issues and Questions Paper" issued by the Committee. I regret having missed the deadline for submission of memoranda, but I am grateful that the Committee may be willing to accept a late memorandum.

I was Chief Medical Officer at the pre-devolution Scottish Office during the early stages of the outbreak of bovine spongiform encephalopathy (BSE) in cattle. Some nine years after I had retired I was called as a witness at the Public Inquiry (the BSE Inquiry) chaired by Lord Phillips, which reported in October 2000.<sup>22</sup>

There was a conflict of evidence between another witness and me. The published report subsequently revealed that there had also been an undisclosed conflict of evidence between the Inquiry and me. This had arisen because the Inquiry had attributed to a relevant document extracted from a file a meaning that I would certainly have disputed.

My involvement with that Inquiry has therefore left me with concerns about how inquiries gather evidence, check it, and disclose it to witnesses who may be affected by it. These concerns include the risk of confusion over factual matters when inquiries rely upon what has been described by one commentator as "documentation which has not necessarily been tested orally".

Eloquent expressions of opinion can be found in favour of openness in public inquiries in order to allay public concern, to restore public confidence, or to satisfy the public in other respects. The need for openness towards witnesses who may be at risk of criticism or loss of reputation does not seem to have received a comparable level of attention.

Having tried to explain briefly my interest, and how it has arisen, I shall attempt to address those questions in the Committee's paper on which I feel able to comment.

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?*

Different individuals or groups will have different expectations. Some will be interested primarily in a lucid and accurate account of events. Others will hope for something more punitive. It may be more useful, for the purposes of this memorandum, to try to identify the less satisfactory features of ad hoc inquiries and consider what could be done to improve them.

4. *Should there always be a single, all encompassing inquiry into an issue or is it inevitable that other "side" inquiries will need to be conducted on certain specific aspects eg into professional conduct?*

I do not see this as an "either or" question. There are bound to be occasions when a single, all encompassing inquiry is exactly what is needed. Nevertheless, within such an inquiry a number of distinct issues are likely to present themselves and would need to be handled appropriately. I would be reluctant to call these "side" issues.

The Bristol Inquiry pointed out that while a court is asked to decide between one party and another, a public inquiry has a wider range of purposes.<sup>23</sup> That may be valid, but what may seem to an inquiry to be only one issue within its wider range of purposes can loom much larger to the individuals concerned. A

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<sup>22</sup> *The BSE Inquiry*. HMSO. London. 2000.

<sup>23</sup> *Learning from Bristol. The Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary 1984-1995*. HMSO. London. 2001. Cmnd5207(1);35.

public inquiry provides a very public platform on which such an issue is exposed to view. It may indeed be highlighted to an extent that the media could scarcely achieve, and yet an inquiry may leave it unresolved or in an unsatisfactory state.

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?*

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

I propose to comment on questions 5 and 7 together, and to consider the staffing of inquiries in a fairly broad sense.

The media tends to identify, to the public, the chairman and any members or assessors, and counsel to the inquiry. Major inquiries are however supported by a large number of individuals brought together for that purpose. This is clearly necessary because of the volume of material to be handled. Some 80 individuals supported the Phillips Inquiry. Some were lawyers, but most were not.

Lawyers have however the dominant role, and great store is set by how they decide that public inquiries should be conducted. The editor of the *British Medical Journal* (BMJ) said of a recent inquiry that had attracted criticism “. . . one problem may have been the absence of a lawyer . . . it is lawyers who know how to conduct inquiries justly . . .”.<sup>24</sup> Nevertheless, the dominance of lawyers may have an inhibiting effect.

Lord Phillips said “In many cases the assistance of lawyers in identifying and preparing the evidence will be essential. Lawyers are experienced in gathering documentary evidence and have the skills essential to ensure that witness statements cover the relevant ground, without becoming unnecessarily prolix.”<sup>25</sup> That is hardly encouraging to the witness who feels that it might be helpful to open up a little more, and perhaps even indulge in dialogue.

More information about the staffing of inquiries would be helpful. What are the backgrounds of the staff, what tasks are they expected to perform, and how do they relate one to another? I would like to know, for example, who is sent on fishing expeditions in the files, who decides what material is relevant, and who decides what it means? I would readily admit that that happens to be my personal *bête noir*.

8. *Should the Tribunals of Inquiry (Evidence) Act 1921 (or other specific legislation) invariably form the basis for Ministers calling such inquiries or is there a continuing need for non-statutory, ad hoc inquiries?*

I suspect that there will be a continuing demand for non-statutory inquiries. However, in commenting on this question the point that I would particularly wish to make is that statutory inquiries coupled with the Salmon cardinal principles seem to provide witnesses with significant safeguards. The position is less clear in ad hoc inquiries.

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

This question seems to agitate lawyers. Lord Scott said that the Salmon cardinal principles “carry strong overtones of ordinary adversarial litigation”. He expressed concern about “unnecessary involvement of adversarial techniques . . .”, but he identified “an inevitable tension between, on the one hand, the requirements of fairness and, on the other, the need for an efficient process”.<sup>26</sup> That seems to set out the present position, ie there is uncertainty about where the balance ought to lie between fairness and efficiency.

If however we consider, in simpler terms, whether or not a given procedure provides scope for the robustness of the evidence to be tested adequately, the conclusion might be that exclusively inquisitorial procedures fall short.

It would however be proper to mention that Lord Scott did endorse quite strongly the second cardinal principle. This reads “Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them’. Can that principle possibly be disputed?

<sup>24</sup> Smith R. Inquiring into inquiries. *BMJ* 2000;321:715.

<sup>25</sup> The BSE Inquiry. *Chairman's Note on Lawyers*. 5 February 1998.

<sup>26</sup> *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*. (The Scott Report) London HMSO 1996; Vol IV:1753–8.

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

Inquiries do not always sit in public, but there is usually pressure for them to do so. One might say that sitting in public has come to be seen as the norm, and sitting in private as the exception.

However, public inquiries tend to proceed in two phases, as the Phillips Inquiry did. The first phase will be concerned with establishing facts and the second with comments, criticisms and recommendations. Although it may not be possible to avoid the risk of some overlap, I believe that it would be worth exploring the possibility of a more explicit division into two separate parts.

I am therefore attracted, in principle, by the discussion on page 3 of the Committee's paper, in the second paragraph under the heading "Developments since the Salmon Commission", of ways in which these functions could be separated. That could, as the Committee appears to have been suggesting, allow more time to be devoted to establishing the facts. That would certainly be helpful to witnesses, and also, I would think, to the inquiry itself.

However, the main attraction that I see in this, which may or may not have been in the Committee's mind, is that the first phase, concerned with establishing facts, could be held in private, while the second phase could remain public if that is necessary or expedient. In a privately held first phase witnesses would be freed from the burden of knowing that in answering questions in public they are also providing material for tomorrow's newspaper headlines. That undoubtedly influences how a witness responds, or does not respond, in public and it would be idle to pretend otherwise.

Factual matters could certainly be examined more thoroughly, and straightforward facts could probably be established satisfactorily before public proceedings begin. Controversial matters which cannot be resolved may have to be taken forward into the second phase, but even in such cases the preliminary work may well prove to have been helpful. Absolute perfection may not be attainable, but I feel confident that some improvement could be achieved.

In conclusion, I trust that these comments may be of some interest to the Committee.

May 2004.

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**Letter by David Hinchliffe MP, Chair of the Health Committee (GBI 12)**

I have been reflecting on your thoughts as to the possible advantages of select committees being consulted prior to the setting up of independent inquiries. I thought I might draw your attention to the inquiry currently being conducted into the Performance and Conduct of the surgeon Richard Neale being held in York.

It seems to me that this inquiry would greatly have benefited from more input from the Health Committee. The Committee had in fact taken evidence from several patients who had suffered at Dr Neale's hands, in the course of an inquiry conducted into adverse critical incidents in the NHS. We were well aware of the problems caused by the role of the General Medical Council and would have brought to the attention of the Neale inquiry the paramount need to include the role of the GMC within its remit. The inquiry is, in my view, much harmed by the absence of this.

May 2004

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**Memorandum by Sir Cecil Clothier (GBI 14)**

**MECHANISMS OF INQUIRY**

Inquiry into past events is an activity carried on every day in a great variety of contexts and an infinite variety of ways. They range from the Managing Director who sends for a head of department, through a "death and complications" conference at a teaching hospital, to a legal trial of issues in a court of law. Some methods plainly get nearer to the truth, an elusive concept, than others. In Allitt, the Coroner's Inquest on more than one occasion failed of its purpose.

The expression, "a full public inquiry", has gained a recent parrot currency of quite unspecific meaning. The notion that a public inquiry could somehow be less than "full", meaning perhaps half-hearted or going only half the distance is manifestly absurd. Perhaps it implies some degree of public ceremonial; it certainly requires of course that to much of its proceedings the public are admitted. But it seems to overlook conveniently that the deliberating and the thinking must inevitably be in private.

The principal features of a "full public inquiry" seem to be the giving of evidence in public and the leading and testing of that evidence by advocates skilled in discrediting a witness whose evidence is hostile to a client. In criminal matters this may be a necessary process. In a civil and non-litigious setting, it can and usually does cause humiliation and distress without necessarily arriving any nearer to the truthfulness or accuracy

of the witness's utterances. The taking of an oath or the making of an affirmation often accompanies the ceremonial process. In my experience in court this ritual has never affected an honest person's determination to tell the truth, nor a liar's determination not to. Everyone who pleads not guilty in a criminal court and is then found guilty will almost always have lied on oath, an everyday event for which hardly anyone is ever prosecuted.

The more formal process also entails the power to compel witnesses to attend to give evidence. Mercifully, we can no longer make them talk after they arrive, although one can still imprison them for not talking. Also available is the power to order production of documents—that is, provided you know that they exist and where they are. If I keep a diary of events in the bottom of my wardrobe, who is to know it is there?

Allitt (and many similar inquiries) have proved these powers to be nugatory. All 94 witnesses whom we invited came voluntarily, sometimes accompanied by a friend, a union representative or a lawyer (none of whom was allowed to speak). A few of these witnesses were not very forthcoming, because they had something to hide. They would have acted the same way had they been on sub-poena.

As for documents, they came in torrents from a great variety of sources. Everything we expected to see was there. If we wanted more, we asked for and got it. It is impossible, as I have indicated, to know what if anything was hidden from us, but I very much doubt if anything of importance was missing.

Our procedure was as follows:

1. Invite witness by letter offering to pay expenses and indicating the areas of evidence to which they might speak.
2. Welcome them in private (three members of tribunal, two secretaries) in a small room.
3. Tell them that a note of the meeting would be taken and sent to them for comment.
4. Invite them to say anything they wanted and then question them, sometimes gently, sometimes firmly, never rudely.
5. Send the note of evidence to the witness, examine the response to it and either amend the note or append the response to it.
6. At the draft report stage, send any critical passage to the person or persons affected, inviting them to say:
  - (a) whether they agree the facts stated in the extract;
  - (b) whether they wish to make any observations about the balance of presentation.
7. Consider the responses and decide whether or not to amend the report in the light thereof.

The unquestionable advantage of this method was that in the absence of friends, colleagues, parents, press and other embarrassments, witnesses gradually began to speak with a frankness which was at times startling. Some of the things said it would not be right to quote and often they were deliberately couched in hyperbole to drive home the point being made. But overall they gave a wonderful glimpse of the truth. Does one ever get nearer? These things, I am quite sure, could never have been said in a public arena and if said in the presence of lawyers, would be open to a cruel and humbling cross-examination which would be noted and observed by others as a deterrent to speaking one's mind.

Finally I come to the question of costs. Time is money and the procedure of an inquiry in private is quicker. But that apart, those who find the environment of a public place of inquiry unfamiliar and frightening, naturally and properly engage spokesmen who are usually lawyers and who usually expect to be paid. Moreover, those with different interests in the outcome find it best to employ different lawyers. In Allitt there were two firms acting for parents and separate lawyers for doctors, nurses and management. This is the very least representation there would have been at a public inquiry and since each lawyer wants to hear what the others say, all must attend every day. Often they will have expenses for travel and accommodation.

Even if professional associations pay the cost of these goings-on initially, there is a big hidden burden of cost to the public, to be added to the direct costs which commonly fall on ratepayers. According to PQ/2243/1990–91 Hansard Vol 191 Col 443, the Cleveland Inquiry cost about £1.25 million. The Inquiry took just under a year. When Trent Region last estimated the cost of the Allitt inquiry a few weeks ago it amounted to £94,000, but I expect it to top £100,000 when all is done.

The end-product of all methods is a report. It will be probably be written by much the same people, or sort of people, by whatever method it is produced. Those with an interest in the outcome will deride its findings if they do not agree with them and may seek support for their rejection in attacking the means by which it was produced. The only real test of the results is the objective opinion of disinterested parties. My judgment of these matters must end here.

July 2004

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**Memorandum by Roger Masterman, University of Durham (GBI 15)**

THE SUITABILITY OF JUDGES PARTICIPATING IN PUBLIC INQUIRIES

*Summary*

1. This submission argues that the use of judges to conduct public inquiries into matters of political controversy should cease as it poses a threat to the institutional independence of the judiciary as a whole, and has the potential to compromise the “independence and impartiality” of the judge concerned in future adjudication. That this practice should be ended is entirely in keeping with the post-Human Rights Act movement towards a more formal separation of powers, pointed to by the decisions to remove the Law Lords from the House of Lords and abolish the office of Lord Chancellor.

2. The Government’s proposals to establish a new Supreme Court—independent of the legislature and the executive—and to abolish the ancient office of Lord Chancellor have been motivated both by the pressures exerted on the Law Lords and Lord Chancellor by Article 6(1) of the European Convention on Human Rights—enforceable in domestic law under the Human Rights Act 1998—and by the attendant movement towards a more formal separation of executive, legislative and judicial power in the United Kingdom system of government.

3. Inherent in these policy decisions has been the desire to increase the independence of the judiciary from both the legislative and the executive branches. That the Government is prepared to allow its reforms to be publicised on the basis of this increased autonomy while at the same time allowing it to be compromised by endorsing the use of judges to investigate matters of acute political controversy betrays the structural incoherence which has come to characterise much of the Government’s much-feted programme of constitutional reforms.

*Involvement in matters of political controversy*

4. In the consultation paper, *A Supreme Court for the United Kingdom*, published in June 2003, the concerns of the Government were made clear as regards the position of the Lords of Appeal in Ordinary concurrently being members of the House of Lords:

The Human Rights Act, specifically in relation to Article 6 of the European Convention on Human Rights, now requires a stricter view to be taken not only of anything which might undermine the independence or impartiality of a judicial tribunal, but even of anything which might appear to do so. So the fact that the Law Lords are a Committee of the House of Lords can raise issues about the appearance of independence from the legislature.<sup>27</sup>

5. Prior to the enactment of the Human Rights Act—and on the basis of convention alone—the Law Lords, in their capacity as members of the Upper House of the United Kingdom legislature, did not seek to participate in debates on matters of political controversy. Partly as a result of the Pinochet episode, partly due to external pressures following the judgment of the European Court of Human Rights in *McGonnell v United Kingdom*,<sup>28</sup> the Law Lords were placed under increased scrutiny regarding any extra-judicial activity which might have the potential to cast doubt upon their judicial integrity.

6. In June 2000, following the recommendations of the Royal Commission on Reform of the House of Lords, this convention was reiterated by Lord Bingham of Cornhill, the Senior Law Lord. The announcement was made in the following terms:

First, the Lords of Appeal in Ordinary do not think it appropriate to engage in matters where there is a strong element of party political controversy; and secondly the Lords of Appeal in Ordinary bear in mind that they might render themselves ineligible to sit judicially if they were to express an opinion on a matter which might later be relevant to an appeal to the House.<sup>29</sup>

7. Examples of members of the judiciary participating in debates in the House of Lords and subsequently having to stand down, or being accused of lacking the requisite “independence” are few. Nevertheless there are a number of pertinent examples illustrating the confusion of the dual legislative and adjudicative roles exercised by the Law Lords: Lord Hoffmann, for example, was required to stand down from the libel proceedings involving Albert Reynolds, the former Irish Taoiseach, and David Lange, formerly Prime Minister of New Zealand, after counsel raised concerns about his prior involvement in the passing of the Defamation Act 1996.<sup>30</sup> Similarly, Professor Diana Woodhouse has recounted the confusion over the boundary between the Law Lords legislative and judicial roles which became apparent during the *Pepper v Hart* litigation as, “several of the Law Lords hearing the case had . . . expressed strong feelings for or against the principle [that *Hansard* could be used as a tool of statutory interpretation where the intention of

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<sup>27</sup> Department of Constitutional Affairs, *A Supreme Court for the United Kingdom* (CP 11/03), July 2003, at para.3.

<sup>28</sup> (2000) 30 EHRR 289.

<sup>29</sup> HL Debates, 22 June 2000, Cols.419–420.

<sup>30</sup> See: “Pinochet law lord replaced again as judge”, *The Guardian*, 8 July 1999.

Parliament is unclear] in a debate in Parliament two years previously.”<sup>31</sup> And in relation to the famous Fire Brigades Union case, Professor Robert Stevens has noted that constituting a bench for the purposes of hearing the appeal was problematic, “since so many Law Lords had already spoken out, legislatively, against the Howard proposals.”<sup>32</sup>

8. It is this confusion—and the potential compromising of future judicial conduct—which formed a part of the rationale for the Government’s proposals of June 2003. However, that the Government was not as committed to enhancing judicial independence as its rhetoric would have us believe also became apparent upon the publication of the Consultation paper on the proposed Supreme Court. Despite the declaration that “judges who are appointed to the final court of appeal should be judges, not legislators”<sup>33</sup> and the overall aim of establishing a Supreme Court to “reflect and enhance the independence of the judiciary from both the legislature and the executive,”<sup>34</sup> it seems that the Government remains prepared for the potential conflict of interests that may result from judges of the new Supreme Court taking part in public inquiries.

9. In its discussion of the size of the proposed Supreme Court the Government consultation paper states that having a number of judges in excess of the current 12 Lords of Appeal in Ordinary would allow for more cases to be dealt with concurrently (assuming that the new Supreme Court continues to sit en banc) and would also allow “for the continued release of members of the court to undertake functions such as the chairing of public inquiries.”<sup>35</sup>

10. The Government stance was elaborated on in the consultation paper, *Effective Inquiries*:

The Government believes that it can be appropriate for judges to chair inquiries, because their experience and position make them well suited to the role. The judiciary has a great deal of experience in analysing evidence, determining facts and reaching conclusions, albeit in an adversarial rather than inquisitorial context.<sup>36</sup>

11. The argument against judges participating in such extra-judicial (and executive-endorsed) activities is simply put and resonant of the argument against their participation in the legislative and scrutiny work of the House of Lords:

[T]here may be concerns about judges being too intimately involved in the operation and needs of government, particularly in cases where they are drawn upon to give advice on a matter about which they are subsequently drawn upon to adjudicate.<sup>37</sup>

12. While the involvement of a judge in an inquiry which is for largely fact-finding purposes may be justifiable, the “borrowed authority”<sup>38</sup> of the judiciary is equally often used to investigate matters where there is a “strong element of party political controversy”—the very matters in which, as members of the House of Lords, the Government was concerned to distance the judiciary from.

13. Just as examples exist of serving Law Lords contributing to Parliamentary debates and going on to sit in judicial proceedings involving the same subjects, examples can be given of judicial decisions which can be said to have been influenced by previous involvement in such extra-judicial activities. Lustgarten and Leigh have detailed examples of this exact conflict of interest in the particularly sensitive context of intelligence and national security:

An equally serious danger is to the appearance of impartiality when judges with inside experience of reviewing intelligence matters subsequently sit to hear cases involving questions of national security. Although apparently unnoticed at the time, Lord Radcliffe sat in the House of Lords’ appeal in *Chandler v DPP* immediately after completing his review of security procedures in the public service. It is difficult to read Lord Denning’s judgment in the *Hosenball* case or Lord Griffiths’s speech in the second House of Lords decision in *Spycatcher* without forming the impression that the tone was influenced by their extra-judicial experiences. Similarly it would be natural to expect that Lord Diplock’s approach to questions of secrecy and the classification of documents in the *Guardian Newspapers* case might have been influenced by his chairmanship, two years earlier, of the Security Commission investigation into security procedures, which, among other things, reviewed the classification categories . . . whether it is wise for judges publicly associated with extra-judicial investigations to continue to sit thereafter in cases arising in the same field is at least debatable.<sup>39</sup>

<sup>31</sup> D Woodhouse, “The Office of Lord Chancellor: time to abandon the judicial role—the rest will follow” (2002) 22 *Legal Studies* 128, at p 138.

<sup>32</sup> R Stevens, “A Loss of innocence?: Judicial Independence and the Separation of Powers” (1999) 19 *Oxford Journal of Legal Studies* 365, at p 370.

<sup>33</sup> HL Debates, 14 July 2003, Col 637 (*per* Lord Falconer of Thoroton).

<sup>34</sup> *A New Supreme Court for the United Kingdom*, at p 4.

<sup>35</sup> *ibid.*, at pp 23–24.

<sup>36</sup> Department of Constitutional Affairs, *Effective Inquiries*, CP 12/04 (6 May 2004), at para 46.

<sup>37</sup> A W Bradley and K D Ewing, *Constitutional and Administrative Law* (13th ed, London: Longman, 2003), at p 374.

<sup>38</sup> G Drewry, “Judicial Inquiries and Public Reassurance” [1996] *Public Law* 368, at p 368.

<sup>39</sup> L Lustgarten and I Leigh, *In From the Cold: National Security and Parliamentary Democracy* (Oxford: Clarendon Press, 1994), pp 490–491.

14. The explicit motivation of the policy of establishing a new Supreme Court was at least in part a result of the desire to reduce the potential for judicial involvement in matters of party political controversy within Parliament. That the Government is clearly willing to countenance that extra-judicial intercourse with matters of political controversy will continue in different fora undermines the laudable aim of enhancing judicial independence by separating the Law Lords from Parliament. As Professor Stevens has observed:

It is ironic that a series of documents that insist that the judiciary and politics live in totally different systems and never the twain shall meet should offer the judges on the sacrificial altar of public inquiries, which inevitably have a greater or lesser political content.<sup>40</sup>

*The Human Rights Act 1998 and appearances of independence*

15. The coming into force of the Human Rights Act has bolstered the common law on issues surrounding judicial bias with the extensive jurisprudence of the European Court of Human Rights on Article 6(1), the right to a fair trial by an independent and impartial tribunal—“independent of the executive and also of the parties.”<sup>41</sup> Importantly, the requirements of Article 6(1) are not confined to issues of actual bias, but the Convention is “concerned with risks and appearances as well as actualities.”<sup>42</sup> Thus, the appearance, or perception, of bias may suffice for a breach of Article 6(1) to be found.

16. Of course, from the Government’s perspective, appearances are also important, as a member of the judiciary is perceived as having a “certain lofty detachment from the rough and tumble of party politics,”<sup>43</sup> and “they are appointed because they bring to such inquiries the symbolic qualities of independence and impartiality.”<sup>44</sup> Slightly more cynically perhaps, they may be appointed to bestow upon the proceedings a “vener of legality.”<sup>45</sup>

17. Aside from specific issues of subsequent adjudication being affected by a judge’s previous involvement with an inquiry—a challenge to which may have an increased chance of success on Article 6(1) grounds—there exists the potential to damage the reputation of the judge or judiciary more generally. Unfortunately for many of the judges who have been involved in such inquiries the collective memory of the episode in many minds seems to be of their unsuitability for the role. Sir Richard Scott, now Lord Scott of Foscote, was vocally criticised for his lack of knowledge of the workings of government following the delivery of his report on the Arms to Iraq scandal.<sup>46</sup> Lord Hutton has recently been the subject of much criticism in the press, labelled as an “establishment man” before the inquiry even began, and accused of pandering to the executive since.

18. While it may be hard to gauge the effect of reactions such as this from politicians and the press on the idea of judicial integrity as a whole, it would not be beyond reason to suggest that the involvement of the judiciary in inquiries into matters of controversy—and the frequently adverse coverage which accompanies such investigations—will affect public perceptions of the judge in question often to his or her detriment.

19. Although there is certainly weight in the argument that a judge will—because of this “symbolic quality of independence and impartiality”—appear to be better placed to impartially examine matters of political controversy than, say, a politician, it is hard to think of another person or persons whose future career and professional reputation could be as adversely affected by an accusation of partiality than that of a judge.

*The separation of executive and judicial powers*

20. The second development which has accompanied the coming into force of the Human Rights Act is the movement towards an increased formality to the separation of powers in the United Kingdom. Despite the fact that the jurisprudence of the European Court of Human Rights has consistently stressed that:

. . . neither Article 6 nor any other provision of the Convention requires States to comply with any theoretical constitutional concepts regarding the permissible limits of the powers interaction.

<sup>40</sup> R Stevens, “Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner and Brave New World” (2004) 24 *Legal Studies* 1, at pp 34–35.

<sup>41</sup> *Ringeisen v. Austria* (1979–80) 1 EHRR 455, at para 95.

<sup>42</sup> Lord Bingham of Cornhill, *A New Supreme Court for the UK* (London: Constitution Unit, 2001), at p 3.

<sup>43</sup> G Drewry, “Judicial Inquiries and Public Reassurance” [1996] *Public Law* 368, at p 368.

<sup>44</sup> B Thompson, “Judges as Trouble-Shooters” (1997) 50(1) *Parliamentary Affairs* 182, at p 183 (quoted in Jack Beatson, “Should Judges Conduct Public Inquiries?” The 51st Lionel Cohen Lecture, 1 June 2004, p 22 (available at [www.dca.gov.uk](http://www.dca.gov.uk)).

<sup>45</sup> C Gearty, “A Misreading of the Law” 26(4) *London Review of Books*, 19 February 2004.

<sup>46</sup> *Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*, Chaired by the Rt Hon Sir Richard Scott VC, HC 115 (1995–96).

It can be said with some certainty that:

. . . the notion of the separation of powers between the political organs of government and the judiciary has assumed a growing importance in the court's case-law.<sup>47</sup>

21. Following the coming into force of the Human Rights Act 1998 domestic courts have noted this growing importance of the separation of powers doctrine in the eyes of the European Court of Human Rights and have—in the context of the separation of executive and judicial powers—declared that it is not only an “essential part of a democracy” but that the “complete functional separation of the judiciary from the executive” is “fundamental, since the rule of law depends on it.”<sup>48</sup> That the domestic judiciary seem increasingly willing to assert the doctrine—in spite of the fact that the United Kingdom has “never embraced a rigid doctrine of separation of powers”<sup>49</sup>—has led one commentator to suggest that the decision of the House of Lords in *ex parte Anderson*:

. . . may also be a starting point for building a separation of powers jurisprudence which, although rooted in Article 6, extends beyond the existing objective and subjective tests for independence and impartiality.<sup>50</sup>

22. In both the decision to abolish the office of Lord Chancellor and in the severing of links between the Law Lords and the House of Lords can be seen a desire to achieve a clearer separation of powers between the three branches of government. Yet this aim is compromised by the continued policy of allowing judges to participate in public inquiries into controversial matters: “by using judges, [public inquiries] breach the doctrine as regards the dual use of personnel since, strictly speaking members of the judicial branch are giving advice to the executive branch.”<sup>51</sup>

23. As the Committee's “Issues and Questions Paper” pointed out:

Invariably, it is Ministers who set up inquiries in response to political or public pressure or, more cynically, as a means of deferring a political problem. It is Ministers who therefore are responsible for an inquiry's composition, its terms of reference, and the powers and resources at its disposal. They may also influence its form . . .

The association of members of the judiciary with such manifestly executive action could not be countenanced in a jurisdiction which observed a more formal separation of powers. And as Professor Woodhouse has noted, a number of jurisdictions have subscribed to the view that the “use of judges for such purposes is unconstitutional”:

In the United States . . . the Supreme Court has stated: “The legitimacy of the Judicial Branch ultimately depends upon a reputation for impartiality and non-partisanship.” It continued: “That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.” The Australian High Court, similarly mindful of the need to safeguard judicial independence, has recently supported this view.<sup>52</sup>

24. Should the Constitutional Reforms announced in June 2003 and the jurisprudence under the Human Rights Act 1998 be pointing the United Kingdom government towards a more strict separation of powers, then it would be entirely in keeping with that movement if the practice of involving the judiciary in public inquiries was ended.

25. As Lord Steyn has written:

The incorporation of the Convention into our law has generally accelerated the constitutionalisation of our public law. A culture of justification now prevails . . . As citizens we may now ask the executive to justify . . . inroads on the rule of law, judicial independence and the separation of powers.<sup>53</sup>

If the use of members of the judiciary in public inquiries is to continue then the onus should be on the government of the day to provide compelling grounds to justify this inroad into the separation of judicial and executive power and more importantly, the independence of the judiciary.

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<sup>47</sup> *Kleyn v Netherlands* (2004) 38 EHRR 14, at para 45. Also see the more recent judgment of the European Court of Human Rights in *Pabla KY v Finland* (22 June 2004) for the dissenting opinion of Judge Borrego Borrego: “In my opinion the separation of powers is an essential component of a state based on the rule of law and presupposes the separation of the relevant bodies.”

<sup>48</sup> *R v Secretary of State for the Home Department, ex parte Anderson* [2003] 1 AC 837, at p 899 (per Lord Hutton) and p 882 (per Lord Bingham).

<sup>49</sup> *Ibid*, at p 886 (per Lord Steyn).

<sup>50</sup> M Amos, “*R v Secretary of State for the Home Department, ex parte Anderson*—Ending the Home Secretary's Sentencing Role” (2004) 67(1) *Modern Law Review* 108, at p 123.

<sup>51</sup> I Steele, “Judging Judicial Inquiries” [2004] *Public Law* (Winter Issue—forthcoming).

<sup>52</sup> D Woodhouse, “Constitutional and Political Implications of a UK Supreme Court” (2004) 24 *Legal Studies* 134, at p 139.

<sup>53</sup> Lord Steyn, “The Case for a Supreme Court” (2002) 118 *Law Quarterly Review* 382, at p 385.

**Memorandum by Lee Hughes CBE, Head of Judicial Competitions (Courts) Division (GBI 16)**

You asked me to provide some written evidence to the Committee, as I was unable, due to illness, to give oral evidence in June.

I attach a copy of my procedural report which covers a number of general points.

You asked about the arrangements for the disclosure of information provided to the Inquiry. Lord Hutton, in his evidence, said that it was his decision that every piece of evidence provided to the Inquiry should be disclosed to the public, unless there were good reasons not to do so. Of course, at that time we did not know what information we would receive as evidence. However my role at that stage was to discuss with the parties to the Inquiry the circumstances in which we would agree not to disclose information. I gave evidence to the Inquiry on 21 August 2003 in which I stated that we followed, as far as practicable, the exemptions in the Code of Practice on Access to Government Information when deciding what information should be disclosed or withheld. We reached agreement with the parties that they would identify information they did not wish to be disclosed publicly and give reasons why. We set out on the website all documents received and gave a reason where the document itself was not disclosed.

Very few documents were withheld on national security grounds. The main reason for non disclosure was to protect personal privacy. You asked if we had any kind of certification procedure to ensure that we had all the information we needed. We did not operate such a system. The legal team considered all the documents received and were able to identify possible gaps in our knowledge and we then sought further information as appropriate. We received full co-operation from all parties.

You asked whether I consider that the Inquiry's disclosure policy will have any effect on the interpretation of the Freedom of Information Act. As noted above, we used the Code of Practice on Access to Government Information as the basis for our disclosure policy. But both the Code and the Act have a public interest override on exemptions.

In the case of the Inquiry there was widespread consensus that the public interest in disclosure was very great and therefore there was a great deal of information disclosed, on public interest grounds, where in less exceptional circumstances, an exemption might apply.

You also asked about the financial constraints on the Inquiry. I was the accounting officer for the Inquiry, reporting on this matter directly to the Permanent Secretary at the Department for Constitutional Affairs, at the time Sir Hayden Phillips. We did not set a budget for the Inquiry at the outset, as we simply did not have significant information about the length or nature of the Inquiry to do so. But we, wherever possible, used existing contracts, or Departmental facilities (such as the courtroom in the RCJ) to keep costs down or to ensure "planning gain" from the Inquiry.

## THE HUTTON INQUIRY

### *Report on procedures by the Secretary to the Inquiry*

#### INTRODUCTION

1.1 The Permanent Secretary for the Department for Constitutional Affairs and the Head of Litigation at Treasury Solicitors asked for a report on the procedural successes and failures for retention and for use as a learning tool for future Inquiries. I understand that Senior Counsel and the Solicitor to the Inquiry will also provide similar reports.

1.2 The aim of this report is primarily to draw out points which may be useful for consideration in future Inquiries. But, as the Select Committee on Public Administration has decided to undertake an investigation into Inquiries generally, the report may assist the Government in its development of evidence to the Select Committee, or its response, in due course, to the Committee's report. I have already discussed points in this report with the Inquiry Policy Division in DCA for this purpose.

1.3 The Hutton Inquiry was set up by the Government on 18 July 2003. Its terms of reference were:  
"urgently to conduct an investigation into the circumstances surrounding the death of Dr Kelly".

1.4 The setting up of the Inquiry was announced by the Secretary of State for Defence, Mr Hoon, but the sponsor Department for the Inquiry was the Department for Constitutional Affairs. This arrangement was confirmed in Lord Hutton's letter of appointment of 22 July.

1.5 The Inquiry was set up on an *ad hoc* basis—it did not have any powers under the Tribunals of Inquiries (Evidence) Act 1921. However, as regards Government witnesses, the Cabinet Secretary wrote on 7 August stating that the Government expects witnesses to cooperate fully with the Inquiry and to give full and frank testimony. An undertaking was given to Government Servants that nothing which any official provided to the Inquiry by way of evidence, whether orally or in writing, would be used in subsequent disciplinary proceedings against that official, or any other official. This undertaking was subject to three limitations:

- it did not apply to anyone charged with having deliberately misled the Inquiry by telling lies or deliberately omitting important information in their evidence;

- it did not apply to allegations of misconduct so serious as to justify summary dismissal for gross misconduct; and
- there would be no immunity against prosecution for any criminal offences.

1.6 On 21 July 2003, Lord Hutton made the following statement:

“The Government has invited me to conduct an investigation into the tragic death of Dr David Kelly which has brought such great sorrow to his wife and children.

My terms of reference are these:

“urgently to conduct an investigation into the death of Dr Kelly.”

The Government has further stated that it will provide me with the fullest cooperation and that it expects all other authorities and parties to do the same.

I make it clear that it will be for me to decide as I think right within my terms of reference the matters which will be the subject of my investigation.

I intend to sit in public in the near future to state how I intend to conduct the Inquiry and to consider the extent to which interested parties and bodies should be represented by counsel or solicitors. In deciding on the date when I shall sit I will obviously wish to take into account the date of Dr Kelly’s funeral and the timing of the inquest into his death.

After that preliminary sitting I intend to conduct the Inquiry with expedition and to report as soon as possible. It is also my intention to conduct the Inquiry mostly in public.

I have appointed Mr James Dingemans QC to act as Counsel to the Inquiry and Mr Lee Hughes of the Department for Constitutional Affairs will be the Secretary to the Inquiry.

#### APPOINTMENT AND ROLE OF KEY STAFF OF THE INQUIRY

2.1 Lord Hutton was appointed by the Secretary of State for Constitutional Affairs, on behalf of the Government, to conduct the Inquiry. The subject matter of the Inquiry was considered, by the Government, to be sufficiently significant to justify the appointment of a Lord of Appeal in Ordinary to conduct the Inquiry.

2.2 Lord Hutton appointed Mr James Dingemans QC as Senior Counsel to the Inquiry on 18 July 2003. Mr Peter Knox was appointed junior counsel to the Inquiry by Lord Hutton on 24 July 2003.

2.3 The role of Counsel to an Inquiry is described by the Council on Tribunals as follows (report to the Lord Chancellor, July 1996):

“In certain types of inquiry . . . it is usual to have Counsel to the Inquiry, to assist in eliciting and laying before the Inquiry the relevant evidence, and ensuring that the representatives of interested parties do not set the agenda. Even in a purely inquisitorial inquiry, Counsel to the inquiry can fulfill a useful role in relieving the inquiry of the burden of asking questions, and in avoiding the danger of the inquiry being seen to descend into the arena. Where there is a need for forceful questioning of witnesses, it is often better if this is undertaken by Counsel to the inquiry, rather than by the tribunal itself. Otherwise, the tribunal may be seen as having already formed a certain view. And if objection is taken to specific questions, it is less embarrassing for the inquiry to adjudicate if the questions come from Counsel. Counsel to the inquiry may also be helpful in eliciting technical evidence.

. . . If Counsel to the inquiry is appointed, he or she will, of course, work closely with the inquiry chairman . . . in working out the general direction of the inquiry. However it is important, not least from the presentational viewpoint, that Counsel should not be seen to be part of the inquiry panel. At the hearing the roles of the tribunal and Counsel should be seen to be distinct. For example, as noted above, it may be necessary from time to time for the tribunal to intervene to stop a particular line of questioning by Counsel. The perception of the separate roles of tribunal and Counsel is greatly enhanced if they are physically separated from each other in the inquiry room.”

2.4 The solicitor to an inquiry is usually provided by Treasury Solicitors. However on 29 July 2003 Lord Hutton announced that Clifford Chance LLP had been appointed to act as solicitor to his Inquiry, the practice being represented by Martin Smith. In his statement, Lord Hutton said:

“The Government Legal Service would normally provide solicitors for a judicial inquiry. Lord Hutton would have complete confidence in the independence and integrity of the Government Legal Service in carrying out that role, but because of the nature of his Inquiry he considers that public confidence would best be served by the appointment of an independent firm of solicitors.”

2.5 The letter of appointment described the role of solicitor to the Inquiry as follows:

“The Inquiry’s terms of reference are set out in the enclosure. In the broadest terms you will be responsible for offering advice on any legal issue out of those terms of reference or out of the conduct of the Inquiry. You will be expected both to respond to requests for advice or to participate in discussion with Lord Hutton, leading and junior Counsel or the Inquiry team, and to be proactive in raising issues with them. The following is a non-exhaustive list of responsibilities:

- obtaining evidence relevant to the inquiry;
- offering advice and assistance on any ancillary litigation involving the Inquiry and, where appropriate, conducting it;
- liaising with other organisations in respect of documentation and procedures eg the police, Government Departments, the BBC etc;
- dealing with claims for legal and other costs where public funds are involved;
- advising on and carrying out the “Maxwellisation” process;
- assisting with the drafting of the Inquiry report;

It is of paramount importance that, as well as being clear and accurate, your advice should at all times be independent and impartial, setting out your best understanding of the law without reference to the interests of the parties to or persons affected by the Inquiry. Your duty of care is to Lord Hutton as chairman of the Inquiry.

The Inquiry’s remit is to act with urgency and, subject to the overriding requirements of accuracy, clarity and independence, you will be required always to act with the utmost expedition.”

2.6 We understand that the Hutton Inquiry may be the first public inquiry where solicitors have been appointed directly from the private sector (as opposed to private sector solicitors assisting Government lawyers with specific aspects of an inquiry’s work). It is worth noting that the arrangements have worked very well.

2.7 The Secretary to the Inquiry is usually appointed by the sponsoring department, as was the case in this Inquiry. The job description for the post of secretary was determined by the sponsoring Department and was as follows:

“To lead the Inquiry Secretariat to enable the Inquiry to fulfil its terms of reference effectively, fairly and having regard to cost. The key tasks are:

- (i) to provide strategic advice and briefing to the Inquiry Chairman on the management of the Inquiry, to enable him to achieve a target date for completion of the Inquiry by the end of October 2003;
- (ii) to devise a strategy for recording the evidence given to the Inquiry and to produce the Inquiry report;
- (iii) to ensure that the Inquiry’s external communication and relations with witnesses and other parties support the Inquiry’s objectives of openness, fairness and thoroughness;
- (iv) to ensure that the Secretariat is appropriately staffed to fulfil the Inquiry’s terms of reference, ensuring any necessary briefing and training is given, and to lead the staff of the Secretariat, providing direction and guidance;
- (v) to manage expenditure in accordance with Government accounting requirements, ensuring the Inquiry is properly carried out, but that resources are not expanded unnecessarily. This task includes:
  - the preparation of a budget and forecast out-turn;
  - regular monitoring of expenditure and revision of forecast out-turn in the light of the best information available on the time-table for the Inquiry.
- (vi) to ensure that there is a full and effective documentary record of the Inquiry, including a full account of procedural success and failures, for retention and for use as a learning tool.

2.8 In practice the role of Secretary followed the job description fairly closely. Points to note include:

- (i) participation in the selection process for the solicitor to the Inquiry. As this was the first occasion, as far as can be ascertained, that it has been necessary to procure the services of a solicitor to an Inquiry from outside the Government Legal Service, there was some uncertainty as to what to put in the tender documents. It became clear, really only during the interviewing process, that what was needed was someone who would be part of the Inquiry team, backed up by wider expertise which could be drawn on as required. This arrangement was delivered and, as noted above, worked well.
- (ii) there was some tension between my role as Secretary to the Inquiry and my position as a civil servant. As secretary my role was to support Lord Hutton. Occasionally this required me to undertake functions which are not usually undertaken by civil servants—such as issuing press releases in my own name, or writing letters to the press. Though, as this was always on the express authority of Lord Hutton, no problems arose. I also had to negotiate with those Departments

directly involved in the Inquiry over issues such as the availability of witnesses, the prompt submission of evidence and arrangements for the publication of the report. Though, on balance, the interaction with other Departments was not a great deal more difficult than one might expect to find in discussions on contentious policy issues, it could have been difficult if the Secretary had been appointed from the MoD or the Cabinet Office. In order to minimise potential conflict it may be appropriate to ensure that for future inquiries, the Secretary, as in this case, comes from a Department not directly involved in the Inquiry. If legislation on Inquiries is contemplated, it may be worthwhile setting out the duties and responsibilities of the Secretary in legislation (presumably in secondary legislation to provide for a relatively easy method for amendment) so that all can be clear about lines of responsibility.

2.9 It is also worth considering whether one Department, such as the Department for Constitutional Affairs, should normally act as sponsor Department for Inquiries. This would make it easier for a “collective knowledge” of Inquiries to be built up for future use— though acknowledging that both Cabinet Office and Treasury Solicitors have helpful guidance available.

2.10 In the case of the Hutton Inquiry, there were no potential conflicts of interest as regards the solicitor to the Inquiry, as he was appointed from the private sector and therefore the professional relationship was clearly between the solicitor and the Inquiry. But conflicts may emerge if the solicitor is a member of the Government Legal Service, which is the usual case as regards Inquiries. Therefore the recommendations in paragraph 2.8 above may also be relevant to the position of solicitor to the Inquiry.

#### PROCEEDINGS AND EVIDENCE

3.1 The Inquiry was conducted in two stages: the first stage consisted of neutral examination of witnesses by Counsel to the Inquiry. In stage 2, witnesses were examined by their own Counsel, and limited cross-examination by Counsel to other parties to the Inquiry was allowed, including Counsel to the Inquiry.

3.2 In determining the procedures to be used in the Inquiry Lord Hutton considered the common law duty of fairness and the Salmon Principles. The Salmon Principles were set out in the report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon (as he then was). These principles were intended to safeguard the position of citizens called to give evidence before Tribunals of Inquiry established under the 1921 Act, but have since been applied generally to all judicial inquiries. The principles are:

- (1) Before any person becomes involved in an Inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
- (2) Before any person who is involved in an Inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
- (3) (a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.  
(b) His legal expenses should normally be met out of public funds.
- (4) He should have the opportunity of being cross examined by his own solicitor or counsel and of stating his case in public at the Inquiry.
- (5) Any material witnesses he wishes called at the Inquiry should, if reasonably practicable, be heard.
- (6) He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.

3.3 Following the Scott report, recommendations were made as to the relevance of the Salmon principles to inquisitorial Inquiries. The Scott report commented that the Salmon principles: “carry strong overtures of ordinary adversarial litigation.”

3.4 In the case of the Hutton Inquiry, the principles were met in the following way:

- (i) witnesses were invited to give evidence to the Inquiry— their invitation specified the areas on which they would be questioned and invited then to submit a written statement beforehand (principles 1 and 3a);
- (ii) following stage 1, any witnesses who might be the subject of criticism were informed of the possible grounds for criticism, invited to submit a written statement before appearing in stage 2 of the Inquiry, and, in stage 2, had the opportunity of being examined by their own Counsel (principles 2 and 4);
- (iii) all parties to the Inquiry were invited to submit evidence or to call witnesses, if not called by the Inquiry (principle 5);
- (iv) all parties were invited to seek the agreement of Lord Hutton to cross-examine other parties’ witnesses on specified issues. Lord Hutton agreed to these requests if he was satisfied that the cross-examination would assist the Inquiry (principle 6);

- (v) in the circumstances of this Inquiry, all parties to the Inquiry were public bodies, or employees of public bodies, and therefore their costs were, by definition, met from public funds, with the exception of Dr Kelly's family. Lord Hutton sought the agreement of the sponsoring Department that the Inquiry should meet the family's legal costs which was agreed (principle 3b).

3.5 There were some discussions about the procedures to be adopted by the Inquiry. Lord Hutton determined that the Inquiry would proceed in two stages. Stage 1 consisted of neutral examination of witnesses by Counsel to the Inquiry. At the end of stage 1, Lord Hutton determined which witnesses might be liable to criticism in his report. Those witnesses received notification of the potential criticisms and were invited to appear before the Inquiry in stage 2 where they would be able to answer those criticisms. Other witnesses were recalled in stage 2 to provide further evidence, even though they were not under any threat of potential criticism. A few witnesses were called for the first time in stage 2.

3.6 During stage 2 witnesses could be examined by their own counsel and further examined by counsel to the Inquiry. Lord Hutton also permitted cross-examination by counsel for other parties where he thought that such cross-examination would aid the work of the Inquiry. Cross-examination was limited to agreed areas and indicative time limits were imposed.

3.7 These arrangements were intended to ensure both fairness and expedition of the proceedings. Stage 1 appears to have been widely regarded as fair and effective, though there have been some concerns expressed that stage 2 may have been a little too rushed and therefore not all the points that counsel for witnesses wanted to make, were made. These concerns were partly satisfied by the ability of all parties to submit written final submissions.

3.8 Two other "fairness" issues arose regarding the proceedings. Parties to the Inquiry were keen that witnesses should be able to consult their legal advisers whilst giving evidence. Lord Hutton felt that this was unnecessary as counsel to the Inquiry would be examining witnesses in a neutral way. There was also speculation that witnesses would receive extracts of the report, relevant to themselves, prior to publication, to offer them a final opportunity to refute criticisms (the so-called "Maxwellisation" process). Lord Hutton decided that this was unnecessary as potential criticisms were notified to relevant witnesses prior to stage 2. In the end this seemed to work satisfactorily, though there were some concerns that the letters of potential criticism may not have been sufficiently explicit as to the conduct in question.

3.9 Evidence for the Inquiry was sought initially by the Inquiry writing to relevant parties seeking documents and statements. On receipt and consideration of those documents and statements, further information was sought by the Inquiry as gaps were identified. For the most part, information was provided promptly and in full.

#### ORGANISATION, TECHNOLOGY AND MEDIA HANDLING

4.1 When an Inquiry is announced, there appears always to be an issue of where it is to take place. We were able to make use of the Department's estate. We were able to secure a courtroom at the Royal Courts of Justice for the hearings. Though the room was decommissioned as a court, the layout and ambience was highly suitable for use for the Inquiry. A second, decommissioned courtroom was available next door, for use as an overflow for the public and the media. The main room was sufficient to hold all the parties' legal representatives, and to allow 70 press, 25 officials and 10 members of the public to be present. The overflow had space for a further 60 journalists and 30 members of the public. It quickly became clear when hearings began that this process was insufficient. A marquee was erected in an adjacent car park to provide 200 extra spaces for the media—leaving the overflow courtroom available solely for the public.

4.2 We were fortunate that the Inquiry's hearings took place during the long vacation and therefore space was available for us to use. As a courtroom is likely to be a suitable venue for many types of inquiry, it may be worthwhile for the DCA to designate a courtroom for use by Inquiries and to fit it out with appropriate technology. This could be made available, where appropriate, for inquiries set up by Government, but used for other purposes if no Inquiry is in progress.

4.3 We used "livenote" as an instantaneous transcription service. As well as providing a feed to the legal teams, the public and the media were able to follow the transcriptions on monitors both in the hearing room itself and in the annexes.

4.4 All evidence submitted to the Inquiry was scanned into a database. We were able to retrieve the evidence as required and display it in the hearing room. This avoided the need for evidence "bundles" to be prepared and copies for each party. As with the transcription, the evidence was displayed also on monitors for the public and media.

4.5 The daily transcripts and evidence were published twice daily on the Inquiry's website so that the public could be as fully informed as possible as to the proceedings. Where it was necessary to withhold evidence from publication, the Government's Code of Practice on Access to Government Information was used to justify non disclosure.

4.6 The openness of the Inquiry and the website were very popular with the press and the public and significantly reduced press calls to the Inquiry itself or to press office.

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## 5. CONCLUSION

5.1 I was very grateful for the briefing Treasury Solicitors gave me shortly after my appointment and for the help other secretaries to Inquiries, in particular Hugh Burns and Christine Pulford provided. In return I have held meetings with the Secretaries to the Holyrood, Bichard and Mubarek Inquiries about our experiences.

*October 2004*

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### **Memorandum by Professor Jeffrey Jowell QC (GBI 17)**

#### 1. ROLE OF THE JUDICIARY

I do believe that it is wrong in principle for serving judges to chair inquiries of a “political nature”. However, that term does not define itself easily. It includes most obviously inquiries which, even if directed to apparently narrow issues, in effect require a judgment as to whether the government was wise or right to act in a certain way. In addition, there may be inquiries which, although not requiring political judgment, are in effect set up in order to achieve a political purpose (eg the purpose of sweeping the matter under the carpet for a period of time; or for seeking to demonstrate the government’s resolve not to hide anything, etc). In those circumstances judges are being used to reassure the public and to deflect political criticism. This is what I meant by “symbolic reassurance”.

Article 6 of the ECHR only engages when a person’s civil rights and obligations are in issue. Most public inquiries are investigatory or advisory only and not executive in character, so would not fall within Article 6.

I do not think the judicial role in public inquiries can or should be made immune from judicial review. Nor do I think that they should be able to be challenged by further appeal. This, again, is because their recommendations do not normally have executive effect.

#### 2. MINISTERIAL ACCOUNTABILITY

Ministerial accountability to Parliament is weakening. Select committees are, however, seeking to strengthen that accountability. I can’t see any device which could force a recommendation of a public inquiry to be implemented, but auditing is a good idea to try and ensure that the inquiry is genuine and not cynical.

#### 3. NEED FOR A CHANGE?

I have no doubt that public inquiries chaired by judges have yielded some useful results. But that does not counteract my point that (a) the independence of the judiciary could be damaged by judges chairing inquiries of a political nature, and (b) that non-judges are often just as well qualified to conduct those inquiries. Those without judicial experience may not always be as skilled as judges in assessing evidence and fact, but many senior lawyers do possess those skills. And any such lack of skill on the part of eg senior civil servants (such as Lord Butler or Franks) may be more than compensated for by insights into the subtleties of government decision-making that lawyers of all kinds tend to lack.

Finally, I would think that a taxonomy of public inquiries would be a useful exercise. It would assist not so much judicial review, but the question of whether the inquiry was suitable for a judge to investigate and, if not, what skills would best be employed for the task in hand.

I hope this is helpful and was sorry not to be able to give evidence in person.

*October 2004*

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### **Memorandum by Graham Mather, President, European Policy Forum (GBI 20)**

#### HOW SHOULD INQUIRIES BE CONSTITUTED?

1. After the Franks inquiry into the Falklands, Jim Callaghan famously remarked that Lord Franks “for 338 paragraphs painted a splendid picture, delineated the light and the shade, and the glowing colours in it, and when Franks got to paragraph 339 he got fed up with the canvas he was painting, and chucked a bucket of whitewash over it”.

2. Complaining that Lord Hutton refused to pass judgement on the matters which had been heard in his court on Iraq, Nick Cohen considered that Lord Hutton “has brought a belated but deserved disgrace to judicial inquiries”.

3. In Matrix Churchill, Sir Nicholas Scott seemed overwhelmed by the scale and volume of his own report to the extent that he seemed unable to draw conclusions from it, whilst at enormous cost Lord Widgery's inquiry into Bloody Sunday is being revisited by Lord Saville.

4. And there was astonishment when Andrew Marr asked Lord Butler's press conference who was to blame for defective Iraq intelligence analysis, only to be told that no-one was to blame for anything, and that all decisions had been collective.

5. It may be time to redesign the way in which public inquiries, the ultimate backstop of accountability, are designed and operate.

6. The methodology seems no longer to work. One approach is that they should operate either under the control of a single judge (Scott, Hutton). Another is that they are headed by a mandarin assisted by Privy Councillors (Franks, Butler).

7. The judicial route has two profound difficulties. Most serious is the historic hesitation of judges to stray into matters which can, at least in theory, be resolved by Parliament. Since *Stockdale v Hansard* in the mid 19th century judges have systematically fought shy of any challenge to parliament: the attempts by Lord Denning "be you never so high the Law is above you" to impose heavy legal constraint on executive action was atypical.

8. There is probably no better means of untangling evidence than a single judge, assisted by counsel of the standard of Presley Baxendale or James Dingemans. But judges visibly run out of steam as they contemplate the interaction of the facts they have disinterred with the incoherent complexities of cabinet government and collective responsibility, British style.

9. Elsewhere in administrative law many established Tribunals assist single judges with a pair of assessors to reintroduce an element of public involvement, special knowledge or just common sense. The result can help ensure that His Lordship hasn't missed the point in his forensic examination of the detail. It seems at least possible that an assessor sitting alongside Sir Nicholas Scott would have suggested that a system which had very nearly sent innocent men to prison for acts in which the state had been closely involved required some redesign.

10. An outside voice in Scott or Butler would probably have said that it would not be good enough to say that all involved in collective decisions with profoundly unsatisfactory outcomes had "shown good faith" a comforting but ultimately unsatisfactory confusion which leads inquiries to fail to make a long term difference.

11. Inquiries run by mandarins have another different problem. Most very senior and high officials believe that the way in which British government operates is, if not perfect, as close to perfection as can be expected. High officials can be shocked by the way in which events panned out in particular cases. They can frequently identify quite large numbers of quite small steps which might prevent the same situation occurring again. The Butler inquiry generated a large number of these, and the career of the Committee on Standards in Public Life has also shown that such bodies can close stable doors on public appointments and parliamentary misfeasance. These achievements are not to be denigrated.

12. Yet taken in the round the lesson of Franks, Scott, Hutton and Butler may be that inquiries neither effectively attribute responsibility—because it is always deemed to be collective—nor adequately redesign malfunctioning systems—because they prefer to tweak them against the unlikely risk of the disaster into which they are inquiring happening again in the same way.

13. Recently, however, into this narrow, somewhat complacent and clearly inadequate approach has come an astonishing model of how a good inquiry can work and an opportunity for change. Sir Michael Bichard's report into the way into child protection measures, record keeping, vetting and information sharing in Humberside and Cambridge police following the murders of Holly Wells and Jessica Chapman is an astonishing ray of light on how inquiries could be run.

14. The choice of inquirer was the first encouraging sign. Michael Bichard was an unconventional mandarin, with a background in local government, who never seemed entirely to buy the package that everything existing systems did was for the best in an imperfect world.

15. His report is startlingly different from the others. He does not hesitate to comment on the facts—which are analysed in microscopic detail—as the story builds up. Names are named throughout. In the 9-11 Commission staff reports, the various failures of entry control, visa checking and inter departmental communication failures are listed—but only the people who broke the mould by going beyond the call of duty or performing their jobs outstandingly get named. In Bichard they do as well—but so do those whose performance was scarcely acceptable.

16. The conclusions are blunt, precise and have a ring of truth. "Huntley alone was responsible for and stands convicted of these most awful murders. None of the actions or failures of any of the witnesses who gave evidence to the inquiry, or the institutions they represented, led to the deaths of the girls. However, the inquiry did find omissions, failures and shortcomings which are deeply shocking. Taken together, these were so extensive that one cannot be confident that it was Huntley alone who 'slipped through the net'."

17. Following Bichard one chief constable has been suspended. It is difficult to see how that could have happened without so authoritative and clear a report. Major recommendations have been made for system changes, in each case defining responsibility.

18. In its fact-finding Bichard resembles the 9-11 Commission. A narrative is built up but, unlike the usual Whitehall style of report, the tone is not neutral and even but inquisitive and from time to time surprised.

19. In Bichard, as in 9-11, there is a tone that terrible things have happened and we are all, inquirers and public, struggling to find out why they went wrong and to put them right.

20. It makes for a tougher style of inquiry. Many responsible for airport security, immigration control, as well as air traffic control will have winced as they read the 9-11 report, just as many police and social services staff look sloppy and incompetent in the way they handled Huntley. Yet grown up inquiries like Bichard and 9-11 recognise that life is full of sloppiness and incompetence; they don't hesitate to be blunt about its manifestations, to praise the exceptional people who performed their duties outstandingly and imaginatively, but above all to learn the lessons.

21. Where Bichard considers that there are issues outside his remit, for example, he gives a clear steer to other inquiries.

22. "It is not for me to reach conclusions about Social Services' handling of the early contacts with Huntley. This is a matter for Sir Christopher Kelly's Serious Case Review. I have, however, referred to him my misgivings about several aspects of these contacts." (Bichard then sets out four paragraphs of concerns).

23. The 9-11 Commission follows the same approach. It has recommended far reaching changes to the US intelligence coordination system and the signs are that these will be implemented. The Commission has promised to monitor this. And Sir Michael Bichard will reconvene his inquiry six months after it closed to examine what has happened to his recommendations.

24. We have a choice. Inquiries can find the facts and close stable doors, or find the facts and be serious about changing things. Sir Michael Bichard's work in Britain, and the 9-11 Commission's approach in the US, have given us two powerful models of how inquiries can make a difference and public confidence in them can be restored.

25. Yet it remains uncertain how best to constitute inquiries to attempt to secure their most effective outcome and to guard against the suggestion that those conducting them are too establishment-minded to reach an effective combination of fact finding, responsibility allocation and lessons for the future.

26. Some believe that the risk of "whitewash" is best avoided by institutionalising the selection process and pre-selecting suitable inquiry chairmen in the form of a standing panel.

27. A variant would be to hand to an appointments commission at arms' length from ministers the task of allocating inquiry chairmen.

28. Yet a panel of potential inquiry chairmen may itself be seen as a quintessential collection of the great and the good and those making the selection may err on the side of caution given the uncertainties of the role which is to be fulfilled, thereby failing to meet one concern.

29. Since a successful inquiry will require a careful matching of skills to the particular issue a panel would have to be sizeable if there were to be any prospect of pre-selecting genuinely appropriate candidates. Instead of selecting from an infinite number of candidates, albeit with a risk that they were seen as hand picked, there is a counter risk that the pool of the pre-selected would be seen as worthy but not particularly expert.

30. Attempting to solve the problem by an appointment commission might assist. It would clearly remove the appointment from two classes of figures who may have quite serious potential conflicts of interest: ministers and senior civil servants.

31. On the other hand an appointments commission would possibly add some delay to the process and make quick and decisive inquiries less easy to secure. It would be obliged to follow more established procedures than has been the case in recent years, the cumbersome nature of which may explain why formal inquiries under the Tribunal and Inquiries Act of 1921 have fallen out of favour.

32. A third option would be to involve a cross party range of politicians, perhaps at Privy Council level, in the conduct of inquiries, thereby attempting to increase public confidence in the process. In the US the 9-11 Commission undoubtedly benefited from a perception from the outset that the Commission involved a wide range of political representatives. The Butler Committee, however, was based on this approach but did not for whatever reason seem to gain much benefit from the presence of some senior serving politicians among its membership, although such a structure may have helped to ensure that political parties themselves were "embedded", to some degree, in its work.

33. This review of recent experience suggests that there it may be in the public interest to continue to allow inquiry chairmen to be chosen from a wide range of public figures, allocating them quickly and with reference to demonstrated expertise.

34. An appointments commission might prove unwieldy in practice, but the Committee on Standards in Public Life might usefully be asked to examine afresh best practice in appointments and conduct of inquiries.

35. One change, however, could be introduced without either delay or complication. It would be to assist the inquiry chairman, whether judge, mandarin or other public figure, with two lay assessors in the way familiar from specialised judicial tribunals.

36. Assessors help to maintain proper procedure and to deter “short cuts”. They are a guard against attempts to influence chairmen through a quiet word, and a force for thorough examination of the evidence. They assist in maintaining good procedures and can provide real collegiate support for the chairman in what are frequently difficult and testing decisions of heavy responsibility. No less important in coming to conclusions for the future they can provide a check based on common sense: has the report covered all bases? Do its conclusions stand up? How will the public, rather than insiders and the establishment, see this? What should happen next? All these questions are better answered if a judge or a former senior civil servant has alongside him the support of two independent assessors to share his responsibility and assist his work.

*Graham Mather*

*November 2004*

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### **Memorandum by the National Foot & Mouth Group (GBI 23)**

#### **INQUIRY INTO GOVERNMENT USE OF THE INQUIRY MECHANISM**

We would be grateful if the Committee would have regard to the following issues when preparing its report relating to the above matter.

The National Foot & Mouth Group submitted detailed written and oral evidence to all the Inquiries set up by the UK Government in relation to the UK Foot and Mouth epidemic of 2001. We were also fully involved in the EU Parliament FMD Inquiry.

We submit the following in relation to the manner in which the Government’s Lessons Learned Inquiry was conducted. It is our contention that the way the Inquiry was conducted militated against many of the key issues being raised, investigated and appraised. As a result the Inquiry procedure has not fulfilled its brief and many of the lessons of the 2001 FMD experience have not been learned.

Our representation is based on our experiences of that Inquiry.

#### **1. CONTEXT AND PRINCIPLES**

In order to fully identify and assess the relevant issues involved the Inquiry needed to be transparent and open. However from Day 1 we did not know who had been called to give evidence, what that evidence was, and whether it had been subject to the appropriate questioning to test and determine its validity.

Unlike a Public Inquiry process; where the scope and remit of an Inquiry is determined in a pre-inquiry meeting where statements of case are presented, with the Lessons Learned Inquiry we had no way of knowing what issues were to be raised by the Government in determining its response to the Inquiry, nor what the Government’s position on these issues would be.

It should be noted that the only statements of the Government’s stance prior to and during the Inquiry had been by way of press releases, statements to the House or press coverage of Ministerial statements and Government advisers during and since the epidemic.

Unlike a Public Inquiry process, there was no disclosure of written or oral evidence from any witnesses either in advance of the Inquiry—or even during the Inquiry.

Most importantly the Lessons Learned Inquiry allowed no examination or questioning of either written or oral statements of any of the Government representatives, advisers or agencies in order to assess their validity or veracity.

We are still of the view that much of the evidence presented on behalf of the Government has not been subject to objective analysis, examination and assessment by those competent so to do.

#### **2. SELECTION OF THOSE CALLED TO GIVE EVIDENCE TO THE INQUIRY**

We do not know what mechanism was used to select which witnesses were called to give evidence to the Inquiry.

However it is apparent that, with the exception of our organisation and one other, the remaining witnesses were all those that had been involved in delivering the Government’s policies and responses to the epidemic.

We append at Appendix 1<sup>54</sup> the list published by the Lessons Learned Inquiry of those called to give evidence. It is evident that the vast majority were drawn from Government offices, Government advisers or Government agencies.

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<sup>54</sup> Ev not printed.

Most notable in its exceptions is that of Dr Paul Kitching. As Head of FMD at the Institute of Animal Health at Pirbright when the disease first appeared on 19 February 2001 he was immediately involved in advising the Government on disease control.

He continued to advise MAFF, the Chief Veterinary Officer and the Minister, Nicholas Brown, for the first eight critical weeks of the epidemic, until his departure to take up a pre-arranged post at Winnipeg University.

Dr Kitching presented evidence to the EU Inquiry which was critical of the UK handling of the disease—and yet he was not called to give evidence to Lessons Learned.

We append the transcript of this evidence—Appendix 2<sup>55</sup>. It was, and is, of fundamental importance in determining the lessons of the 2001 epidemic to establish whether the right policies had been pursued. It was therefore crucial to the Inquiry that such evidence should have been heard.

Our contention is that the Government Inquiry failed to take evidence from those with differing views to that of the Government.

In addition, there were several scientists and leading members of the veterinary profession who had expressed deep concerns and reservations at the policies adopted by the Government in controlling the epidemic, and they too were not called to give evidence. However they were called to the EU Inquiry. See our letter to the PM of 24 July 2002 already submitted to the Select Committee for details of this.

In failing to take account of differing and dissenting views than those that were being expressed by the Government and its advisers the Inquiry process has failed to fully assess many of the key issues.

Many of these issues were contentious during the outbreak and have continued to give rise to subsequent concerns; namely in relation to the costs of the epidemic and in regard to what actions would be taken in the event of a future outbreak.

As yet they still remain unresolved. It is worth noting that only in the past week the EU had determined not to pay the UK compensation for many of the costs incurred during 2001. Only one third of the sum claimed by the UK will now be paid by the EU.

In failing to take into consideration the expert witness of those who questioned the efficacy of the adopted policies and the manner in which those policies were executed, the Inquiry has omitted significant and relevant information from its investigation.

The Government Inquiry mechanism is not capable of delivering true and accurate findings if it cannot take into consideration and assess those views at variance to those of the Government.

### 3. LACK OF INDEPENDENCE

The Lessons Learned Inquiry was conducted under the auspices of the Cabinet Office. It never felt free of Government control or independent in exercising its duties. We have already raised the issues of those called to give evidence and the closed nature of the Inquiry. Our experience of dealing with the Lessons Learned Inquiry was in total contrast to that afforded by the European Parliament Inquiry.

The European Inquiry was accessible to all those wishing to submit evidence. All written evidence was made available on a dedicated web site. Oral sessions were held in public and were freely reported in the press. We were asked on two occasions to take part in EU Parliament Inquiry hearings. The EU Parliament also took oral evidence from us during two open sessions in the UK; extending its number of visits here to specifically take oral evidence from the Group.

By contrast it was extremely difficult to gain access to the Lessons Learned meetings, entrance was by invitation only and were not open to the press. We append two letters sent to the Inquiry on the matter. Firstly, that we had no notice of its private visit to Gloucestershire. We subsequently had to obtain tickets and travel to Builth Wells—a 200 mile round trip—to take part in the only meeting in the area. We then wrote again to the Inquiry asking for a meeting as we had only two minutes to raise our concerns in Builth Wells. Appendices 3<sup>55</sup> and 3a<sup>55</sup>.

When we were eventually afforded an oral session with the Inquiry we did not meet Dr Anderson, but the secretary and two assistants. The report that the Lessons Learned Inquiry then prepared of our two hour session was so brief as to be meaningless. It was sent to us for agreement only days before the report was published.

After several emails and phone calls the secretariat did eventually agree to an extended report—we append both the LLI draft and the final version to demonstrate this and to show the detail of issues raised and the cursory manner in which the LLI wished to represent them. Appendices 4<sup>55</sup> & 5<sup>55</sup>.

<sup>55</sup> Ev not printed.

#### 4. CONCLUSIONS

This organisation, many others and individuals felt completely disillusioned and let down by the Lessons Learned Inquiry and its modus operandi. We were indeed very grateful to the EU Parliament for conducting such an open and transparent investigation which properly assessed the issues and addressed the concerns.

Having witnessed at first hand the economic, social and personal costs which ensued from the adopted policies none of us who presented evidence wanted to endure or undergo the experiences of 2001 ever again.

However the aspect which most concerns us is that the purpose of the Government's Lesson Learned Inquiry has not been met; ie to assess what lessons must be learnt to ensure we are in a better position to respond should another FMD outbreak occur.

In excluding so much expert witness evidence and by conducting the Inquiry in private the Inquiry failed to fully and properly investigate the efficacy and validity of the adopted policies and their execution.

In addition the Inquiry chose to completely ignore the empirical data which we submitted to demonstrate the failure of the adopted policies and their ensuing cost. Several scientific papers have now emerged, including those commissioned by Defra, which further demonstrate that the adopted control measures and, in particular, the contentious pre-emptive culls, were not the best way for the epidemic to have been handled in the 2001 epidemic.

It would indeed be timely for a proper, open and fully independent Inquiry to now be conducted to fully assess the matter—and for lessons truly to be learnt.

If Government inquiries are to have a meaningful role we urge that the Public Administration Select Committee ensures that future Government Inquiries are open, transparent and independent of Government influence and, most importantly, seen to be so.

*Janet Bayley*  
NFMG Co-ordinator

We append the various documents referred to in our submission and would be grateful if the Select Committee would also have regard to our letter to the PM submitted by Nicholas Soames MP on our behalf and already presented to the Select Committee by Mr Liddell-Grainger.<sup>56</sup>

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#### Memorandum by Iain McLean, Professor of Politics, Oxford University (GBI 26)

##### ON NOT SCRAPPING THE TRIBUNALS OF INQUIRY (EVIDENCE) ACT 1921

1. This note is a very belated response to your "Issues and Questions Paper". I am sorry to intervene so late in the discussion. I will therefore be very brief. In particular, I agree with the points made in the written and oral evidence given in summer 2004 by Lord Norton of Louth.

2. What I have to add to his evidence derives from the work I have published with Martin Johnes on the Aberfan disaster (21 October 1966), when 144 people, most of them schoolchildren and their teachers, were killed by the slide of a colliery waste tip down a mountain. This work was based on public records released by the National Archives on 1 January 1997 and 1 January 1998. See especially I McLean and M Johnes, *Aberfan: Government and Disasters* (Cardiff: Welsh Academic Press 2000) and our website at <http://www.nuff.ox.ac.uk/politics/aberfan/home.htm>.

3. The Aberfan disaster was the fault of a body which in 1966 was to all intents and purposes a Government department, namely the National Coal Board (NCB). The gross (it is not too strong to say grotesque) failures of the NCB were not spotted by its regulator, HM Inspectorate of Mines and Quarries. The Ministry of Power, we argue from evidence in the National Archives, operated more to protect the coal industry than the people of Wales. The Charity Commission intervened when it should not have done, and failed to intervene when it should have done. It tried to force the Disaster Fund to withhold payments from bereaved families until it had satisfied itself that they had been "close" to their deceased children; and to prevent it from building the memorial in Aberfan cemetery. It did not protect the Disaster Fund against the raid on its assets by the Government of the day in 1968, which forced the Disaster Fund to pay some of the cost of removing the Aberfan tips. (This money was repaid by the Rt Hon Ron Davies in one of his first actions as Secretary of State for Wales in 1997).

4. The disaster therefore demonstrated comprehensive failure by various public bodies for which Secretaries of State were answerable, directly or indirectly.

5. The "controversial events giving rise to public concern" that are the subject of your inquiry will very often involve allegations that a public body did something wrong.

6. When a Secretary of State orders an inquiry, therefore, s/he is often in the position of arranging an inquiry into possible misdeeds for which, if proved, s/he must answer to Parliament.

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<sup>56</sup> Appendices not printed.

7. The incentives facing the Secretary of State are therefore to arrange the inquiry in such a way as to minimise his/her own exposure to blame.

8. It is therefore essential that the 1921 Act, or a successor, should be preserved as a mechanism for either House to insist on an inquiry in the event of a Secretary of State refusing to hold one.

9. I would go further. I agree with various of your witnesses (notably Lord Norton and Lord Howe of Aberavon<sup>57</sup>) that there should be a template for a standard statutory inquiry; that this template should include the provision of “wing members” to give specialist expertise and a standard level of legal powers and rights to representation; that a collective memory and secretarial capacity for such inquiries should be retained in the Department of Constitutional Affairs; and that either House should have the power to object to an inquiry announced by a Secretary of State if it does not fit the standard model.

10. There is a tricky question of what rights to representation to accord to witnesses. It is easy to say, in reaction to the cost and time of the Saville inquiry, that “things have gone too far” and that inquiries must be streamlined and their cost reduced.

11. On the other hand, I am convinced by my reading of the Aberfan documents released in 1997 and 1998 that, had the Aberfan inquiry been anything less than a “1921 Act” inquiry, justice to the bereaved and the survivors would not have been done. Nor would the important policy lessons drawn in the tribunal report have been drawn.

12. The Aberfan inquiry was the longest to be held under the 1921 Act up to that date. The hearings occupied 76 days. Lord Ackner, who as Desmond Ackner was counsel for the Aberfan Parents’ and Residents’ Association, has stated that the sole reason for the length of the inquiry was the extreme reluctance of witnesses for the NCB to admit any liability—indeed, even to admit such facts as the presence of springs underneath the fatal tip. Not until Day 70 of the Inquiry, in dramatic cross-examination of the Rt Hon Lord Robens, Chairman of the NCB, did Ackner elicit any admission of responsibility.

13. My answers to the relevant questions in your *Issues and Questions Paper* are therefore:

- (a) Q8. Yes, the 1921 Act should be used in preference to *ad hoc* inquiries.
- (b) Q9. No, the 1921 Act is not redundant.
- (c) Q10. They should be investigatory. The role of Counsel for the Inquiry is important, as Aberfan and Scott (albeit Scott was not a 1921 Act inquiry) showed.
- (d) Q12. They should always sit in public, and go in camera only if all parties represented agree to that.
- (e) Q13a. Yes b. No.
- (f) Q14. Yes, but a minimalist approach. For the reasons given by the Salmon Royal Commission, parliamentary committees are not themselves equipped to conduct this sort of inquiry.
- (g) Q16. A parliamentary commission, working in conjunction with the permanent secretariat to be located in the Department of Constitutional Affairs.
- (h) Q19. The report should (continue to) be a House of Lords and/or House of Commons paper. Ministers should not get advance sight of it. Its publication should be under the control of the House(s) that called for it, not of the executive.
- (i) Q20. In the case of Aberfan, yes.
- (j) Q21. Yes
- (k) Q22. Yes. The authorities of the House(s) that called for the report.

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<sup>57</sup> Whose evidence is given even more authority because he was Counsel for the British Association of Colliery Management and the National Association of Colliery Managers at the Aberfan disaster inquiry: HL 316, HC 553, 1967.