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House of Commons

Public Administration
Select Committee

Government By Inquiry

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.

Current membership

Tony Wright MP (*Labour, Cannock Chase*) (Chairman)
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*)
Mr David Heyes MP (*Labour, Ashton under Lyne*)
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Mr Ian Liddell-Grainger MP *(Conservative, Bridgwater*)
Mr Gordon Prentice MP (*Labour, Pendle*)
Hon Michael Trend, CBE MP (*Conservative, Windsor*)
Mr Brian White MP (*Labour, Milton Keynes North East*)

Powers

The committee is one of the select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 146. These are available on the Internet via www.parliament.uk.

Publications

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:
www.parliament.uk/parliamentary_committees/public_administration_select_committee.cfm

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

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 inquires 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 19th 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

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

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

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*

[1] — DoH, NHS Managers' Code of Conduct, section 1

[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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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

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,[1] 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.[2]

The Committee will doubtless be aware of the advice circulated by the then Lord Chancellor in 1991.[3] 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:[4]

> 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:[5]

> 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.[6] 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 . . .[7]

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?

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[1] 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.

[2] *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 exparte Amin* [2003] UKHL 51.

[3] 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).*

[4] Thames Safety Final Report (2000) (Cmnd 4558) para 5.3.

[5] *ibid* paras 5.5–5.6.

[6] 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].

[7] 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:[8]

> [they] are inherently unsuited to looking into service levels and operation in a detailed way; these are far better addressed by "service audit"[9]. . . 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[10] 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 in 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.[11]

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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[8] *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.

[9] Towards an Audit of Inquiries, Eastman, Inquiries *after Homicide,* Peay, Duckworth 1996, chap 10, pp 157–8.

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

[11] 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.[12]

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 Climbie 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.[13] 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.

[12] 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.

[13] See for example *R (A) v Lord Saville of Neivdigate* [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.

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.[14]

[14] 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.[15] The following factors were accepted as indicating that there should an inquiry in public:[16]

— 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.[17] The factors which weighed with the court were:

[15] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.
[16] As summarised in *R (Wright) v Secretary of State for Health* [2002] QB 830, 844.
[17] *Wright* (above).

— The encouragement to candour available at a private hearing[18]

— 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.[19] 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[20] 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

[18] 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].

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

[20] *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.[21] 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.

[21] 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: sterilisationi [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 freding)*

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 (Nicolaides) 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)*

Roylance 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?")*

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

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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

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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 Professsion, 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 Councilfor Family Proceedings* 11 November 1998

How to avoid being sued *Clinical Risk Management in Obstetrics and Gynoecology,* 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 l3 October 1994

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

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

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 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

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.[22]

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.[23] 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

[22] *The BSE Inquiry*. HMSO. London. 2000.

[23] 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 . . . .".[24] 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."[25] 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".[26] 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?

[24] Smith R. Inquiring into inquiries. BMJ 2000;321:715.

[25] The BSE Inquiry. *Chairman's Note on Lawyers*. 5 February 1998.

[26] *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.

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

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

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.[27]

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*,[28] 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.[29]

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.[30] 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

[27] Department of Constitutional Affairs, *A Supreme Court for the United Kingdom* (CP 11/03), July 2003, at para.3.
[28] (2000) 30 EHRR 289.
[29] HL Debates, 22 June 2000, Cols.419–420.
[30] See: "Pinochet law lord replaced again as judge", *The Guardian,* 8 July 1999.

Parliament is unclear] in a debate in Parliament two years previously."[31] 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."[32]

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"[33] 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,"[34] 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."[35]

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.[36]

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.[37]

12. While the involvement of a judge in an inquiry which is for largely fact-finding purposes may be justifiable, the "borrowed authority"[38] 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.[39]

[31] 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.

[32] R Stevens, "A Loss of innocence?: Judicial Independence and the Separation of Powers" (1999) 19 *Oxford Journal of Legal Studies* 365, at p 370.

[33] HL Debates, 14 July 2003, Col 637 (*per* Lord Falconer of Thoroton).

[34] *A New Supreme Court for the United Kingdom*, at p 4.

[35] *ibid,* at pp 23–24.

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

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

[38] G Drewry, "Judicial Inquiries and Public Reassurance" [1996] Public Law 368, at p 368.

[39] 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.[40]

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."[41] 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."[42] 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,"[43] and "they are appointed because they bring to such inquiries the symbolic qualities of independence and impartiality."[44] Slightly more cynically perhaps, they may be appointed to bestow upon the proceedings a "veneer of legality."[45]

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.[46] 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.

[40] 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.

[41] *Ringeisen v. Austria* (1979–80) 1 EHRR 455, at para 95.

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

[43] G Drewry, "Judicial Inquiries and Public Reassurance" [1996] *Public Law* 368, at p 368.

[44] 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).

[45] C Gearty, "A Misreading of the Law" 26(4) *London Review of Books,* 19 February 2004.

[46] *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.[47]

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."[48] 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"[49]—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.[50]

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."[51]

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.[52]

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.[53]

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.

August 2004.

[47] *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."

[48] *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).

[49] *Ibid,* at p 886 (per Lord Steyn).

[50] 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.

[51] I Steele, "Judging Judicial Inquiries" [2004] *Public Law* (Winter Issue—forthcoming).

[52] D Woodhouse, "Constitutional and Political Implications of a UK Supreme Court" (2004) 24 *Legal Studies* 134, at p 139.

[53] 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 inquisitional 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 been 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 a 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 inquisitional 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.

5. Conclusion

5.1 Iwas 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

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 inquires 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

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 Presiley Baxendale or James Dingemanns. 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 th 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 b 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

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[54] 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.

[54] 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[55]. 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[55] and 3a[55].

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[55] & 5[55].

[55] 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.[56]

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.

[56] 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[57]) 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.

December 2004

[57] 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.

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R. (ON THE APPLICATION OF MOUSA) v SECRETARY OF STATE FOR DEFENCE

Court of Appeal (Civil Division)

Maurice Kay, Sullivan and Pitchford L.JJ.: November 22, 2011

[2011] EWCA Civ 1334; [2012] H.R.L.R. 6

LT Armed forces; Detained persons; Duty to undertake effective investigation; Inhuman or degrading treatment or punishment; Iraq

H1 *ECHR art.3—allegations of ill treatment of Iraqis by British Armed Forces—refusal to order public inquiry—independence of existing investigatory mechanisms.*

H2 The appellant was a representative of a group of over 140 Iraqis who had brought civil claims for personal injury and/or judicial review applications alleging that they were ill treated by British Armed Forces. The appellant had sought judicial review of the Secretary of State's refusal to order an immediate public inquiry into allegations that persons detained in Iraq at various times between 2003 and 2008 were ill treated in breach of art.3 of the European Convention on Human Rights by members of the British Armed Forces. The appellant argued that the obligation under art.3 to conduct an independent and effective investigation into the allegations could only be met by the Secretary of State's use of his powers to order a public inquiry. The Secretary of State had set up a team, the Iraq Historic Allegations Team (IHAT) to investigate the allegations and a separate panel, the Iraq Historic Allegations Panel (IHAP) to ensure proper and effective handling of information concerning the cases. The Administrative Court [2010] EWHC 3304 (Admin) decided that IHAT was sufficiently independent for the purposes of an art.3 investigation and that art.3 did not require a public inquiry to be established immediately but that it was permissible for the Secretary of State to adopt a wait-and-see approach pending the outcome of IHAT's investigation and the completion of other inquiries. The appellant appealed.

H3 **Held:** allowing the appeal,

H4 (1) To establish a lack of independence, it was not necessary to prove that some element or person in IHAT actually lacked impartiality. One of the essential functions of independence was to ensure public confidence and, in this context, perception was important.

H5 (2) Here IHAT lacked the requisite independence. Provost Branch members of IHAT were participants in investigating allegations which, if true, occurred at a time when Provost Branch members were involved in matters surrounding the detention and internment of suspected persons in Iraq. If the allegations were true, questions would arise about their discharge of those responsibilities.

H6 (3) The existence of IHAP did not dilute or mitigate concerns about IHAT. The raw material destined for consideration by IHAP was the product of IHAT therefore IHAP's independence was compromised.

H7 (4) It was not lawful for the Secretary of State to adopt a wait-and-see approach pending the outcome of IHAT's investigation and the completion of other inquiries.

H8 **Cases referred to in the judgment:**
Jordan v United Kingdom (2003) 37 E.H.R.R. 2
Lawal v Northern Spirit Ltd [2003] I.C.R. 856
R. (on the application of Amin) v Secretary of State for the Home Department [2004] 1 A.C. 653; [2004] H.R.L.R. 3
R. (on the application of L) v Secretary of State for Justice [2009] EWHC 2416 (Admin); [2010] H.R.L.R. 4

H9 **Legislation judicially considered:**
European Convention on Human Rights art.3

H10 **Appeal** from the decision of the Administrative Court [2010] EWHC 3304 (Admin) that the actions of the Secretary of State were compatible with ECHR art.3.

H11 *Michael Fordham QC*, *Dan Squires* and *Rachel Logan*, instructed by Public Interest Lawyers, for the appellant.
James Eadie QC, *Phillip Havers QC* and *Kate Grange*, instructed by Treasury Solicitors, for the respondent.
David Wolfe, for the Equality and Human Rights Commission, intervener.
Redress Trust, intervener.

JUDGMENT

MAURICE KAY L.J. (PRESENTING THE JUDGMENT OF THE COURT TO WHICH ALL THREE MEMBERS HAVE CONTRIBUTED):

1 It sometimes seems that part of the choreography of public accountability in this country is the clamour for a public inquiry into suspected wrongdoing by agents of the state. Usually the ministerial decision to order or to refuse such an inquiry is a matter of discretion. However, where the suspected wrongdoing involves breaches of arts 2 and/or 3 of the European Convention on Human Rights and Fundamental Freedoms(ECHR), the investigatory obligation of those provisions is engaged. It may be satisfied in various ways, depending on the circumstances of the case. The central issue on this appeal is whether it was permissible for the Secretary of State to adopt a specific procedure which fell short of a public inquiry.

2 The context and the rival contentions of the parties are set out with admirable succinctness in the judgment of the Divisional Court (Richards L.J. and Silber J.) [2010] EWHC 3304 (Admin) at [1]-[3]:

> "… The court has before it an application for judicial review of the Secretary of State's refusal to order an immediate public inquiry into allegations that persons detained in Iraq at various times between 2003 and 2008 were ill-treated in breach ofarticle 3 … by members of the British Armed Forces.

> The claimant is representative of a group of over 140 Iraqis who have brought civil claims for personal injury and/or have made judicial review applications alleging that they suffered ill-treatment.
> The claimant's case is that the obligation under article 3 … to conduct an independent and effective investigation into the allegations, including arguable systemic issues arising out of the individual allegations, can only be met by the Secretary of State's use of his powers under the Inquiries Act 2005 to order a public inquiry now and that his failure to order such an inquiry is therefore unlawful. Specifically, it is said … that such an inquiry should consist of 'a comprehensive and single public inquiry that will cover the UK's detention policy in South East Iraq, examining in particular the systemic use of coercive interrogation techniques which resulted in the … ill-treatment and which makes it possible to learn lessons for the future action of the British military.
> The Secretary of State has made clear that he is very concerned about the allegations and extremely anxious to establish whether they are well-founded and, if they are, to ensure that lessons are learned for the future. He does not seek to defend article 3ill-treatment of detainees. He has set up a team, the Iraq Historic Allegations Team (IHAT), to investigate the allegations with a view to the identification and punishment of anyone responsible for wrongdoing. He has also set up a separate panel, the Iraq Historic Allegations Panel (IHAP), to ensure proper and effective handling of information concerning cases subject to investigation by IHAT and to consider the results of IHAT's investigations, any criminal or disciplinary proceedings brought in any of the cases, and any other judicial decisions concerning the cases, with a view to identifying any wider issues which should be brought to the attention of the Ministry or of Ministers personally. He points, in addition, to the fact that there already exist two significant public inquiries into specific allegations of ill-treatment of detainees in Iraq, namely the Baha Mousa Inquiry and the Al-Sweady Inquiry … He has not ruled out the possibility that, in the light of IHAT's investigations and the outcome of the existing public inquiries, a public inquiry into systemic issues may be required in due course. He does not consider it appropriate, however, to set up such an inquiry now and he does not accept that it is unlawful for him to wait."

3 Since the hearing of the present appeal, the Baha Mousa Inquiry, chaired by Sir William Gage, has reported (September 8). Baha Mousa died whilst in detention in 2003. The Al-Sweady Inquiry is concerned with allegations of unlawful killing on May 14 and 15, 2004 and ill-treatment at Camp Abu Naji and Shaibah Logistics Base between May 14 and September 23, 2004. It is in its very early stages. The allegations in the present case relate to far more detainees held in various detention facilities between 2003 and 2008.

4 It is apparent from the judgment of the Divisional Court (at [5]) that it was common ground that, for an investigation to satisfy the requirements of art.3, it must be independent, effective and reasonably prompt. This led the Court to define the primary issue as "whether IHAT is sufficiently independent for the purposes of an Article 3 investigation – if it is not, it is accepted that a public inquiry providing the requisite degree of independence may be needed now." It defined the second issue as "whether in any event Article 3 requires a public inquiry to be established now because of the existence of arguable systemic issues which will

not or may not be covered by IHAT's investigation of the individual allegations". Interwoven with both these issues is the question of timing, that is to say whether the Secretary of State was entitled to adopt a "wait and see" policy pending the outcome of IHAT's investigation and the completion of the Baha Mousa and Al-Sweady Inquiries.

The factual allegations

5 The claimant has provided a detailed account of ill-treatment. It is set out in [9] of the judgment of the Divisional Court. He was arrested on November 16, 2006 by British soldiers and detained in several locations before his release in November 2007. His account is one of violence and wide-ranging ill-treatment. It includes several of the manifestations of alleged ill-treatment covering all the complainants and tabulated for the hearing. The Divisional Court summarised it as follows (at [11]):

> "(1) techniques on sensory deprivation (including hooding, sight deprivation by the wearing of blackened goggles or other means, forced silence, sound deprivation by the use of ear muffs and prolonged solitary confinement); (2) techniques on debility (including food or water deprivation, sleep deprivation, stress techniques such as prolonged kneeling, forced exertion such as forced running, temperature manipulation such as detention in unbearably hot locations or dousing with cold water and sensory bombardment or use of noise); (3) other excessive techniques (including forced nakedness or exposure of genitals, threats or rape/violence, running/dragging in a zigzag, prolonged and direct shouting, other 'harshing' techniques, restrictions on access to toilets and prolonged cuffing); (4) sexual acts (including forced watching/listening of pornographic videos, sexual intercourse or other sexual acts between soldiers in front of detainees, masturbation by soldiers in front of detainees, attempted sexual seduction of detainees, and no privacy on toilet or in shower; (5) religious/cultural humiliation (including urinating on detainees, not allowing detainees to pray, and taunting at prayer or other interferences); (6) other abuse (including mock executions, beatings with weapons or fists or feet, punching, slapping, kicking, spitting and dragging along the ground)."

6 The case for the claimant is that all this amounts to a credible allegation of systemic abuse in that, given the number of people and places, it is not merely fortuitous or the result of rogue members of the Armed Forces but must have a common or underlying cause which requires investigation.

7 The allegations have yet to be proven as facts but it is accepted on behalf of the Secretary of State that they are not incredible, that they raise an arguable case of breach of art.3 and that in their present form they raise arguable systemic issues, although it is suggested that these may change or fall away in the light of the findings of IHAT and the reports of the Baha Mousa and Al-Sweady Inquiries.

The judgment of the Divisional Court

8 Having considered the arrangements in the context of the statutory structure, the Divisional Court rejected the contention that IHAT lacks the requisite independence for the purposes of an art.3 compliant investigation into the

allegations. It considered that any problem that arises can be dealt with appropriately (for example, by recusal) and that compliance need not be jeopardised: see [87]. Turning to the allegation of systemic abuse, the Court said (at [113]–[114]):

> "In our view it raises issues so closely related to the circumstances of the individual allegations of abuse … as to be capable of falling within the scope of the investigative obligation under article 3. Most obviously, the prevalence of certain types of alleged abuse across a range of facilities and over a lengthy period of time raises questions as to whether such abuse, if it occurred, was the result of specific training or deliberate policy or practice, or of a failure of supervision or inspection. An examination of training, policy etc may indeed be relevant when determining the credibility of individual allegations, as well as being relevant to an assessment of the seriousness of any allegations found proved. In any event, such questions cannot sensibly be dismissed as matters for wider debate falling outside the scope of article 3.
>
> It does not follow, however, that article 3 requires a public inquiry to be established or, in particular, that it requires a public inquiry to be established now. There is very considerable force in the Secretary of State's 'wait and see' approach."

9 The Court then further considered the "wait and see" approach before concluding that it was legally permissible. Its reasons included the observations that "the core fact-finding exercise already under way through IHAT is liable to impact on the systemic issues" (at [124]); that the Baha Mousa and Al-Sweady Inquiries overlap with the issues in the present case; that civil claims may provide further answers; and that the "very heavy resource implications" merit "real weight" (see [124]–[134]).

10 All this demonstrates the centrality of the primary issue of the independence of IHAT. Plainly if, contrary to the conclusion of the Divisional Court, it does not have art.3-compliant independence, its potential as an investigator of systemic issues and as a justification of "wait and see" is compromised.

11 Permission to appeal to this Court was granted by the Divisional Court on February 10, 2011. It considered that the issue of the independence of IHAT was an issue of sufficient importance to merit the attention of this Court. It was also concerned that one passage in its judgment was now conceded by the Secretary of State to be erroneous. It was concerned with the role of the General Police Duties branch (GPD) of the Royal Military Police (RMP). In [81] of its judgment, the Divisional Court said that "the GPD has no part to play now in the conduct of investigations within IHAT". This was in the context of a finding that "the primary involvement of the RMP on the ground in Iraq was that of members of the GPD" (ibid). In response to the application for permission to appeal, it was conceded on behalf of the Secretary of State that "it is not correct to state that the GPD has no part to play in the conduct of the IHAT investigations".

The law on independent investigations

12 Before turning to the minutiae of the specific structure of IHAT, it is appropriate to set out some of the legal principles, although they are not significantly in dispute. Although this is essentially an art.3 rather than an art.2 case, the Divisional Court considered and it is common ground that the same basic principle applies. In *Jordan*

v United Kingdom (2003) 37 E.H.R.R. 2, it was stated by the European Court of Human Rights (ECtHR) in these terms (at [106]):

> "… it may generally be regarded as necessary for the persons responsible for and carrying out the investigations to be independent from those implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence."

13 The purposes of the investigation were described by Lord Bingham in *R. (Amin) v Secretary of State for the Home Department* [2004] 1 A.C. 653 (at [31]):

> "… to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their loved ones may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others."

In an art.3 case, that satisfaction would accrue to a proven victim in person.

IHAT

14 The judgment of the Divisional Court (at [15]) contains the following description of IHAT:

> "The establishment of IHAT was announced to Parliament on 1 March 2010. IHAT's written terms of reference provide that it is to investigate within a reasonable time allegations of mistreatment of individuals by British forces in Iraq during the period March 2003 to July 2009, in order to ensure that those allegations are, or have been, investigated appropriately. It is to be led by a civilian, described as the IHAT Head, who is to report directly to the Provost Marshal (Army) ('the PM(A)'), the head of the RMP. It is to be structured into a number of functional sub-teams staffed by a combination of RMP and civilian staff: the Command Team, the Case Review Team, Investigations Teams, a Major Incident Room, and Admin Support. All elements of IHAT will ultimately report to the IHAT Head, who is solely responsible to the PM(A) for the effective and efficient running of IHAT and the achievement of its objectives. All work undertaken by IHAT must be in accordance with the requirements of the Armed Forces Act 2006 and be carried out in accordance with RMP practice and such strategies and policies, agreed with the PM(A) and consistent with legal advice, as are put in place by the IHAT Head. Provision is made for review and investigation of cases. Once the IHAT Head is satisfied that a case has been investigated appropriately, he is to make a written report of the investigation promptly to the PM(A) along with a recommendation on what action should follow. The final decision will be for the PM(A)."

15 In the event of the work of IHAT leading to prosecution or disciplinary proceedings, the relationship between the investigation process and the charging functions of the Director of Services Prosecutions (DSP) and of commanding officers under the Armed Forces Act 2006 is brought into play. This aspect of the

arrangements received detailed consideration in the judgment of the Divisional Court (at [45]–[67]).

16 The civilian IHAT Head is Mr Geoff White. In his third witness statement he describes the membership of IHAT. He has a Deputy Head in relation to investigations who is a commissioned officer in the rank of Major in the Special Investigation Branch (SIB) of the RMP. The IHAT command team also includes a Deputy Provost Marshal (a Colonel who acts as Chief of Staff and senior military representative for all non-investigative aspects of IHAT business), a Royal Navy Legal Adviser and a RMP Executive Officer (who acts as Mr White's personal staff officer). There is a Secretariat comprising seven Ministry of Defence civil servants. There are a further 38 civilian staff of whom the majority are retired civilian police officers. In addition there are six "RMP, SIB investigators" and "30 RMP GPD personnel". The total establishment is therefore 86.

17 The Deputy Head is in overall charge of investigations. Some of the investigating teams are led by SIB officers with GPD staff acting as support. There is an Intelligence Cell with 37 staff which deals with the initial identification, recovery, analysis and dissemination of all material that may be relevant to all IHAT investigations. Twenty of its 37 members are GPD. The Investigations Cell includes four teams. The head of the interviewing team is a SIB Warrant Officer Class One. Management and coordination of the interviews are the responsibility of a SIB Warrant Officer Class Two. The team includes two other SIB and one GPD member in addition to six contracted civilian investigators. Investigation Team 1 includes a SIB Captain. Investigation Team 2 includes four GDP NCOs. Investigation Team 3 is an *ad hoc* group of three which investigates video footage showing the apparent abuse of an Iraqi made by British Forces in 2003. The group includes an SIB Warrant Officer Class One and a Warrant Officer Class Two from the interviewing team. The Major Incident Room has seven personnel attached to it. They are involved in collation. They include four GPD members who discharge the functions of exhibits officer, disclosure officer and indexers.

18 We have taken this summary from the third witness statement of Mr White. It was not before the Divisional Court but was made for this appeal "in order to clarify the role of the RMP and GPD personnel within IHAT". In it Mr White further states:

> "One of my key tasks is to design, agree with PM(A) and put in place strategies and policies to ensure that IHAT performs its functions."

19 The PM(A) is the head of the Provost Branch of the Adjutant General's Corps which includes RMP (SIB and GPD). RMP comprises about 1800 personnel (about 200 SIB and 1600 GPD). The Provost Branch also includes the Military Provost Staff (MPS).

The involvement of the Provost Branch in events in Iraq

20 Having considered the evidence before it, the conclusions of the Divisional Court under the heading *The direct/indirect involvement of the RMP and PM (A)* included the following:

(1) It accepted the evidence of Colonel Ian Prosser, Deputy Provost Marshal (Custody and Guarding) that the MPS had been too few in number (between 6 and 12 in the years since 2003 in Iraq) to have had a permanent presence

in every operational custody facility or place of detention. They were based at the Divisional detention facility (initially the Theatre Internment Facility at Camp Bucca, then the Divisional Temporary Detention Facility (DTDF) at Shaibah Logistics Base, and then the Divisional Internment Facility (DIF) at Basra Airport. They were under the command of the officer commanding (OC) the Divisional detention facility in question, not of the PM (A), and it was to the OC that they were responsible for ensuring that those detained were held in a safe and secure environment. They were not routinely present at the temporary holding facilities or at the Brigade Processing Facility. (Paragraph 70).

(2) As regards the RMP, a distinction was to be drawn between the SIB and the GPD. The primary involvement on the ground in Iraq was that of members of the GPD though even in their case the number of personnel was small and they were present in only a small number of facilities. The involvement of the SIB was more limited still. "The GPD has no part to play now in the conduct of investigations within IHAT" and the involvement of the SIB on the ground in Iraq was not on such a scale as to give cause for concern about the independence of RMP investigations within IHAT. (Paragraph 81)

The part of that last sentence which we have set out in direct speech is the one that was conceded, after judgment, to be erroneous.

21 The Divisional Court concluded (at [85]):

> "… there is no reason to believe that IHAT will investigate the allegations any less thoroughly, or will be affected in any way in the referrals and recommendations it makes, because of the limited role of RMP investigators or the PM (A) in Iraq."

22 To the extent that there was a contrary risk, it could be met by the recusal provisions which were written into IHAT's arrangements and appropriate oversight of those involved. Thus, the Divisional Court accepted the Secretary of State's case which, in its simplest form, was that the members of Provost Branch on the ground in Iraq had minimal involvement and, in any event, were under the command of the OC, not the PM (A).

23 In order to see whether these conclusions are sustainable, it is necessary to refer to passages of evidence, some of which were before the Divisional Court but others of which were produced for the first time in the Court of Appeal, probably as a result of the identification of the error concerning the involvement of the GPD in IHAT.

24 CSM Winters, 522 Squadron, 23 Pnr Regiment, was deployed to Basra in September 2007 and was in command of the outer security of the DIF. He states:

> "We were … trained by the RMP on arrest and restraint techniques. All of this specialist training was only aimed at a basic level due to the MPS, who were the Subject Matter Experts in this field, actually running the DIF, my troops were only there to assist … [They] did not hold any keys to the cells, this was entirely down to the MPS … There would always be MPS present when the Ground Force were with the detainees."

He observed blindfolding and disorientation of detainees prior to questioning by the Joint Forward Interrogation Team (JFIT).

25 Major David Spencer took command of the DIF Basra in May 2007. He too refers to the MPS as the Subject Matter Experts on how to run a detention facility and to their being instrumental in guiding his staff.

26 These descriptions of the role of the MPS by outsiders are effectively confirmed by Staff Sergeant Simon Lewis who served with the MPS at the DIF between December 2005 and June 2006. He states:

> "Within the DTDF the key personalities are the Sergeant Major of the MPS who runs the facility together with the current OC of the Ground Force. The MPS S Sgt would act as the CQMS while the MPS Sgts would be the shift commanders with the Ground Force soldiers working on the ground and in the sangers around the perimeter … The MPS did all the escorts as we were the keyholders."

27 On the basis of the evidence of these witnesses, whilst the MPS were no doubt formally under the command of OC rather than the PM (A) when carrying out these duties, it is clear that they were Provost Branch members with an important role in the conduct of the detention facilitees. Indeed, the Divisional Court described them as "responsible for ensuring that those detained were held in a safe and secure environment" (at [70]). However, it emphasised the command of the OC rather than the PM (A).

28 We turn to the position of the PM (A). He is the head of Provost Branch which includes the RMP (both the GPD and the SIB) and MPS. The SIB recruits from the RMP. The current PM (A) is Brigadier Edward Forster-Knight. Although he was only appointed PM (A) in May 2009, in May 2003 he assumed command of 1st Reg RMP and was Provost Marshal, 1 UK Armed Division, in Iraq. In July 2003 he became Provost Marshal (Germany). In 2005 he was appointed Deputy Provost Marshal (Investigations) responsible for the SIB among others. He made three witness statements for the Baha Mousa Inquiry and a further one in these proceedings. His first witness statement to the Baha Mousa Inquiry dated March 26, 2010 was before the Divisional Court, but his statement in these proceedings was not (it being dated July 6, 2011). His evidence includes the following:

1) When he became Provost Marshal, 1 UK Armed Division on 1 May 2003, one company of RMP was deployed in Basra City. They were to support the Black Watch and the 2nd Battalion Royal Regiment of Fusiliers. A second company was deployed outside Basra City.
2) During the warfighting phase RMP personnel were embedded with units to provide advice and support with regard to the handling of prisoners, search and the collection and collation of evidence as the battlegroups carried out operations. However, in April and May 2003 they were "re-roled" as custody sergeants and placed in every detention facility.
3) From May 2003, after the fighting phase, he, along with others, provided custody and detention advice.
4) He exercised direct command over the two companies referred to in (1) above. He also had a functional and coordinating responsibility for the other RMP units in theatre although they remained under the direct command of their respective formations or units to which they were providing support.

Amongst other things, he acted as adviser to GOC 1 (UK) Armed Div on policing, custodial and detention matters. As PM, he had direct access to the GOC.

5) The MPS, "who are the Army's custody and detention experts", were spread thinly across Theatre and initially they provided training and technical expertise to the brigades and battlegroups as well as providing support to the main prisoner of war camp during warfighting operations. After the fighting phase, they also manned Al Maqel Prison and provided support to the Theatre Internment Facility (TIF) where detainees and internees were housed.
6) MPS personnel were placed in the TIF to handle detainees and to provide specialist technical advice and training to the guard force. The PM (A), in his then capacity as Provost Marshal, 1 UK Armed Division, visited the TIF on a few occasions between May and early July 2003 to liaise with the MPS personnel and to ensure that any issues were being handled correctly.
7) He was aware that custody and detention issues, including the handling of prisoners, would be a key issue in the post-conflict phase and so he specifically retained Major Simon Wilson RMP in theatre to lead on the policy issues, allowing the limited MPS staff to engage in the various theatre detention facilities where their technical expertise and guidance was much in demand.
8) After July 2003 there was only one RMP company deployed in Iraq (a reduction from 250 to about 70). Small numbers of RMP NCOs worked in support of battlegroups in the second phase.

29 The next source of evidence to which we should refer is a miscellany of contemporaneous documents. These include a series of reports of inspection of detention and internment facilities which took place between April 2006 and November 2007. They were carried out on behalf of the PM (A) so as to ensure acceptable practice and enable the PM (A) to determine whether internees were being held under "the safest and most humane conditions that are reasonably attainable". The May 2006 report contains an entry suggesting that the Geneva Convention was not being complied with, apparently on the assumption that it did not apply. The June 2007 report includes this passage:

> "Deprivation of both senses of sight and hearing should not take place concurrently – this practice should cease. This was commented on strongly in the April 06 inspection report and again in the follow-up inspection of Oct 06. It is surprising and disappointing that remedial action has not been taken."

The report of November 2007 referred to dual sensory deprivation as "now heavily constrained" and stated that "default is now no sensory deprivation".

30 We should also refer to a more controversial document. On May 8, 2003, Brigadier Forster-Knight, then the Lieutenant Colonel and Provost Marshal 1 UK Armed Division, wrote a document headed "Detention Procedures" which was distributed to, amongst others, the RMP companies stationed in and outside Basra City "for action" and to various other RMP personnel (including "MPS Det") "for information". It stated that a review of custody and detention procedures had been conducted to ensure compliance with the United Nations Declaration of Human Rights and the ECHR. It continued:

> "It has been determined that current procedures are not consistent with UK legislation and accepted 'best practice' in relation to custody and detention. It may also be argued that current procedures are inconsistent withArticle 5 of [the ECHR]. Remedial action is, therefore, required."

31 It concluded with the words: "The imperative is to ensure that RMP acquits itself lawfully". This document was only disclosed shortly before the hearing in this Court, but had been referred to by Brigadier Forster-Knight in his evidence. Counsel for the Secretary of State told us on instructions that the document was concerned exclusively with those arrested and detained on suspicion of "civilian" offences and was not intended to apply to those detained as posing a danger. On the face of it, the document does not seem to be so limited. In his first witness statement to the Baha Mousa Inquiry, Brigadier Forster-Knight did not ascribe such a limited purpose to it. He said that it was written "to highlight the need to change procedures in light of the move from warfighting operations to post warfighting operations where the restoration of law and order was paramount". However, he added:

> "The review of the policies referred to in … the document was carried out to ensure the correct processing of internees and detainees in the complex post-warfighting phase, as the existing procedures needed clarifying and supplementing for the changed context … Because I was not in direct command of all RMP units, these units were copied into the directive for information but I expected them to follow these guidelines as well."

We also observe that in the document, whilst some of its contents may be more referable to the policing of "civilian" offences, it also refers to detention by a battlegroup for "posing a threat to Coalition Forces". It would be wrong to attach too much significance to this document.

32 Another contemporaneous document disclosed shortly before the hearing casts light on the role of the Provost Marshal on the ground in Iraq. In June 2006, the PM (A)—then Brigadier Findley—issued a directive to one of his RMP COs appointing him Provost Marshal in Iraq. We infer that he was a successor to Brigadier Forster-Knight in that role. The directive stated:

> "I am appointing you Provost Marshal MND (SE) for Operation Telic 8, the deployment to Iraq. You will deploy under Operational Command … of General Officer Commanding … and you will be my functional representative in Theatre. As such you are to discharge the functions and responsibilities conferred on me by statute, by the Queen's Regulations for the Army and other relevant orders and instructions …
> … while acknowledging that custody and detention on operations is a chain of command issue, you are to ensure the safe and secure custody and detention of Internees and Detainees."

It then referred to the PM (A)'s role in relation to inspection of detention facilities in Theatre and required a monthly report on matters including "Provost reputation and discipline". Notwithstanding the chain of command, it is clear that the PM (A) had responsibilities in relation to inspection and advice in connection with detention facilities which included the giving of advice up the chain of command.

33 In his witness statement dated July 6, 2011, Brigadier Forster-Knight emphasised the relatively small numbers of Provost Branch personnel in Iraq from 2004 onwards—fewer than 100 GPD, between 9 and 14 SIB and between 6 and 12 MPS.

Is IHAT independent?

34 The key question is whether the involvement of the Provost Branch in Iraq has been such as to transgress the requirement that IHAT be hierarchically, institutionally and practically independent, having regard to the role of the PM (A) and members of RMP (GDP and SIB) in IHAT. Much of the judgment of the Divisional Court addressed the hierarchical and institutional criteria by way of a detailed analysis of the complex statutory and regulatory framework. On behalf of the Secretary of State, Mr Philip Havers QC repeated and expanded his submissions on this aspect of the case before us. However, it seems to us that the central concern in this case is not related to the formal chain of command or to the niceties of the hierarchical or institutional military arrangements. It is to do with the reality of the situation on the ground in Iraq and the extent to which that may impact on the practical independence of IHAT in view of the involvement of the Provost Branch.

35 Before going any further, we should emphasise two points. First, there is no evidence that any individual member of the Provost Branch was involved in reprehensible conduct towards detainees or internees in Iraq. The parameters of this case are that ostensibly credible allegations of mistreatment by British soldiers have been made; that they require investigation; and that the investigation must bear the hallmark of independence to which I have referred. Secondly, for the appellant to succeed in establishing a lack of independence, it is not necessary for him to prove that some element or person in IHAT actually lacks impartiality. One of the essential functions of independence is to ensure public confidence and, in this context, perception is important. As Lord Steyn said when giving the single opinion of the Appellate Committee in *Lawal v Northern Spirit Ltd* [2003] I.C.R. 856, albeit in a different context (at [14]):

> "Public perception of the possibility of unconscious bias is the key."

This statement was adopted by Laws L.J. in *R. (on the application of L) v Secretary of State for Justice* [2009] EWHC 2416 (Admin) at [37].

36 We refer again to the composition and structure of IHAT as described by Mr White, its civilian Head, whose evidence we summarised in [16] and [17] above. In our judgment, when one places it (recalling that his third witness statement was not before the Divisional Court) alongside the evidence about the involvement of the Provost Branch on the ground in Iraq (see [24] to [34] above), it is impossible to avoid the conclusion that IHAT lacks the requisite independence. The problem is that the Provost Branch members of IHAT are participants in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and "surety for detention operations". If the allegations or significant parts of them are true, obvious questions would arise about their discharge of those responsibilities. SIB, GPD and MPS members would all come under scrutiny. Moreover, the PM (A) himself and his predecessors would also be likely to be called to account, given his position as head of the Provost Branch and the nature

of his responsibilities in Iraq as Brigadier Forster-Knight has described them. It is, of course, to him that IHAT is required to report.

37 None of this is contradicted by the Secretary of State's "chain of command" case to the effect that, for the most part, the RMP personnel in Iraq came under the direct command not of the PM (A) but of the OC, who is not of Provost Branch. The fact remains that, under the IHAT arrangements, Provost Branch members are investigating allegations which necessarily include the possibility of culpable acts or omissions on the part of Provost Branch members. Nor is it a satisfactory answer (as counsel for the Secretary of State submit) that practical independence is underwritten by IHAT's recusal arrangements. If anything, their operation has compounded the cause for concern. Notwithstanding the relatively small numbers, there have been seven full recusals and nine partial recusals in relation to RMP members of IHAT. This simply goes to confirm the extent of the role of Provost Branch members in Iraq.

38 We are conscious that, in reaching these conclusions, we are differing from the judgment of the Divisional Court. However, it is a fact that, as was rapidly appreciated, that judgment rested in part on a misapprehension about the involvement of GPD members in IHAT and, in any event, we have received significant evidence that was not before the Divisional Court. In the event, we do not consider this to be a marginal case. On the contrary, we are of the view that the practical independence of IHAT is, at least as a matter of reasonable perception, substantially compromised.

IHAP

39 It will be recalled that IHAP is separate from IHAT and that its functions include consideration of the results of IHAT's investigations and other matters including the question whether any wider issues should be brought to the attention of the Secretary of State. We have considered whether the existence of IHAP dilutes or mitigates our concerns about IHAT. It does not. Its chair is Mr Peter Ryan, a senior civil servant and Director Judicial Engagement Policy at the Ministry of Defence. Its core membership includes the Director of Personal Services (Army) who is the Army's policy lead on matters including standards of conduct and the maintenance of discipline. It is also attended by the PM (A) and an "IHAT or RMP case officer as appropriate". If, as we have found, IHAT suffers from a lack of practical independence and the raw material destined for consideration by IHAP is the product of IHAT, IHAP's independence is itself compromised. Moreover, it comprises representatives of the three bodies—the Ministry of Defence, the Army chain of command and the Provost Branch—which would be vulnerable to criticism if the case on systemic abuse is established.

"Wait and see"

40 We have described the basis for the conclusion of the Divisional Court that the Secretary of State's "wait and see" stance was permissible. Its ultimate conclusion was expressed in these terms (at [134]):

> "Taking everything into account, we are satisfied … that the investigative obligation under Article 3 does not require the Secretary of State to establish an immediate public inquiry. It is possible that a public inquiry will be required

> in due course, but the need for an inquiry and the precise scope of the issues that any such inquiry should cover can lawfully be left for decision at a future date."

41 We mean no discourtesy to the submissions of Mr James Eadie QC, who dealt with this aspect of the case on behalf of the Secretary of State, when we say that "wait and see" cannot survive as a policy once the independence of IHAT has been rejected.

42 The policy rested on the hypothesis that it would be untimely to establish a public inquiry before IHAT had completed its task, at which point the need could be assessed on the basis of fuller information. Waiting for the outcome of an independent preliminary investigation is one thing. However, once that investigation is adjudged to lack the necessary independence, it cannot be permissible to rely on it as the main reason for postponing a decision. That by itself leads us to the conclusion that "wait and see" is not a tenable position.

43 We should also refer to the reliance that was placed by the Divisional Court on the Baha Mousa Inquiry and, to a lesser extent, the Al-Sweady Inquiry as factors in favour of "wait and see". Since the hearing of the present appeal, Sir William Gage has produced his report following the Baha Mousa Inquiry. We invited and received written submissions from the parties on anything relevant to this appeal which emerged from Sir William's report. The Secretary of State points to the anticipated overlap between that Inquiry and report and the issues raised in the present case. That there is an overlap is unquestionable. Moreover, Sir William has addressed systemic issues insofar as they were susceptible to findings based on the evidence he received. However, the fact remains that his limited terms of reference focused on the death of Baha Mousa in detention at the Temporary Detention Facility in Basra on September 15, 2003 when his custodians were members of the 1st Battalion the Queen's Lancashire Regiment. Whilst he was able to explore the background and culture as it had developed to that date and to make findings and recommendations which addressed systemic issues on that basis, he was not in a position to consider the present allegations which cover the whole period from 2003 to 2008 in a number of different locations.

44 Sir William stated (Vol.I, Pt I, para.1.5):

> "I have not been asked to examine any other incidents where the practice of conditioning detainees may have been used; nor any other incidents involving allegations of ill-treatment of detainees. I have adhered to these terms of reference and have only investigated other satellite incidents where they appear to throw light on the issues with which I am directly concerned."

45 In the context of the practice known as "hooding", he stated (Vol.III, Ch.XIII, para.13.97):

> "… there is more than a hint that hooding, if not other conditioning practices, was more widespread than in just 1 QLR. However, to have investigated thoroughly whether and to what extent any of the five techniques were used by other Battlegroups would have extended the scope of this Inquiry disproportionately."

These statements are unsurprising. It was entirely predictable that Sir William's terms of reference would limit his ability and authority to investigate further in the way he describes.

46 We can understand why the Divisional Court attached significance to the Baha Mousa Inquiry when coming to its conclusion on "wait and see" but that was in conjunction with the finding that IHAT is independent. However, it is not simply the benefit of hindsight or wisdom after the event that disposes us to the view that, at the time when the ongoing Baha Mousa Inquiry was being relied upon as part of the justification for "wait and see", it was entirely foreseeable that it would not and could not satisfy the art.3 investigative obligation in relation to later allegations spreading over several years in various locations involving different units.

47 The other point to which the Divisional Court accorded "real weight" was "the very heavy resource implications". Again, however, that weight inevitably reduces in the face of a conclusion that IHAT lacks independence.

48 For all these reasons, and notwithstanding Mr Eadie's eloquent submissions, we do not consider that the "wait and see" policy can be justified.

Conclusion

49 It follows from what we have said that we allow this appeal. It will be for the Secretary of State to reconsider how the art.3 obligation should now be satisfied.

[PRIVY COUNCIL]

PETER THOMAS MAHON . . . . . APPELLANT

AND

AIR NEW ZEALAND LTD. AND OTHERS . . . RESPONDENTS

[APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND]

1983 July 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27; Oct. 20

Lord Diplock, Lord Keith of Kinkel, Lord Scarman, Lord Bridge of Harwich and Lord Templeman

Natural Justice—Opportunity to meet charge—Royal Commission's investigation—Airline crash in Antarctica—Commission's investigation into cause—Finding that airline's management planned to conceal cause of crash—Whether facts consistent with finding—Whether persons likely to be adversely affected given opportunity to adduce additional material—Whether finding contrary to natural justice

New Zealand—Royal Commission's report—Whether open to judicial review—Royal Commission's investigation of cause of air crash—Airline's management found to have planned to conceal cause of crash—Airline ordered to pay part of costs of commission—Whether order for costs open to judicial review—Whether to be quashed—Whether commission's finding contrary to natural justice—Commissions of Inquiry Act 1908 (No. 25 of 1908), s. 11[1]*—Judicature Amendment Act 1972 (No. 130 of 1972), ss. 3, 4 (as amended by Judicature Amendment Act 1977 (No. 32 of 1977), ss. 10, 11)*[2]

The captain and the first officer of a DC-10 commercial aircraft belonging to Air New Zealand were briefed 18 days before an intended sightseeing flight over Antarctica on a route that would take the aircraft well to the west of Mount Erebus, a volcano of 12,500 feet. Shortly before the flight and without informing any member of the crew, the route was altered so that the aircraft would fly over the mountain and the revised flight plan was fed into the aircraft's computer which would have been used as the principal navigation aid. The aircraft while being flown at less than 2,000 feet crashed into the side of the mountain. The 237 passengers and crew of 20 were killed instantaneously. An inquiry was immediately held by the Chief Inspector of Air Accidents and he found that the probable cause of the accident was the decision of the captain to continue the flight at low level over an area of poor surface and horizon definition when the crew were not certain of their position. His report was published the day after a judge of the High Court, the appellant, had been appointed by the Governor-General as a Royal Commissioner to investigate the cause and circumstances of the disaster. The judge found that the dominant cause of the accident was the act of the airline in changing the computer track of the aircraft without telling the aircrew. He exonerated the captain and other members of the crew from blame. He also found that there had been a predetermined plan of deception

[1] Commissions of Inquiry Act 1908, s. 11: see post, p. 816E–F.
[2] Judicature Amendment Act 1972, s. 3: see post, p. 818A–B.
S. 4: see post, p. 817D–H.

on the part of officials of the airline with the result that he had had to listen "to an orchestrated litany of lies." He made an order under section 11 of the Commissions of Inquiry Act 1908 that the airline should pay $150,000 towards the cost of the Royal Commission. The airline applied by motion for an order of judicial review of the order that it should pay part of the costs of the commission. The motion was removed from the High Court to the Court of Appeal and that court held, inter alia, that the judge, in making the order for costs, had acted in breach of the rules of natural justice.

On appeal by the judge to the Judicial Committee:—

Held, (1) that in making an order for costs under section 11 of the Commissions of Inquiry Act 1908, the judge was exercising a statutory power of decision and, therefore, the court had jurisdiction under section 4 of the Judicature Amendment Act 1972 to entertain the airline's application for judicial review of the order for costs contained in the Report of the Royal Commission (post, p. 818C–D).

(2) That the rules of natural justice required the judge as a Royal Commissioner investigating the cause and circumstances of the accident to make findings based upon material that logically tended to show the existence of facts consistent with those findings and, if he disclosed his reasons to support those findings, to ensure that the reasoning was not self-contradictory; that natural justice also required the judge to ensure that any person represented at the inquiry that might be affected adversely by a finding should know of the risk of such a finding being made and be given an opportunity to adduce additional material that might have deterred the judge from making that finding; and that, since there was no material of probative value that tended by a process of logical reasoning to show that there had been a predetermined plan of deception and since certain witnesses had not been given an opportunity to answer the criticisms made against them, the order that the airline pay part of the costs of the Royal Commission had been properly set aside (post, pp. 820E—821C, 832H—833B, 836B–F, 838B–C).

Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 Q.B. 456, C.A. applied.

Decision of the Court of Appeal of New Zealand [1981] 1 N.Z.L.R. 618 affirmed.

The following cases are referred to in the judgment of their Lordships:

Cock v. Attorney-General (1909) 28 N.Z.L.R. 405

Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore [1965] 1 Q.B. 456; [1965] 2 W.L.R. 89; [1965] 1 All E.R. 81, C.A.

Royal Commission on Thomas Case, In re [1982] 1 N.Z.L.R. 252

The following additional cases were cited in argument:

Attorney-General v. Ryan [1980] A.C. 718; [1980] 2 W.L.R. 143, P.C.

Australian Consolidated Press Ltd. v. Uren [1969] 1 A.C. 590; [1967] 3 W.L.R. 1338; [1967] 3 All E.R. 523, P.C.

Barnard v. National Dock Labour Board [1953] 2 Q.B. 18; [1953] 2 W.L.R. 995; [1953] 1 All E.R. 1113, C.A.

Browne v. Dunn (1893) 6 R. 67, H.L.(E.)

Bushell v. Secretary of State for the Environment [1981] A.C. 75; [1980] 3 W.L.R. 22; [1980] 2 All E.R. 608, H.L.(E.)

Campbell (Donald) & Co. Ltd. v. Pollak [1927] A.C. 732, H.L.(E.)
Daemar v. Gilliand [1981] 1 N.Z.L.R. 61
Daganayasi v. Minister of Immigration [1980] 2 N.Z.L.R. 130
Dyson v. Attorney-General [1911] 1 K.B. 410, C.A.
Edwards v. Bairstow [1956] A.C. 14; [1954] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.)
Furnell v. Whangarei High Schools Board [1973] A.C. 660; [1973] 2 W.L.R. 92; [1973] 1 All E.R. 400, P.C.
Geelong Harbor Trust Commissioners v. Gibbs Bright & Co. [1974] A.C. 810; [1974] 2 W.L.R. 507, P.C.
General Medical Council v. Spackman [1943] A.C. 627; [1943] 2 All E.R. 337, H.L.(E.)
Harder v. Auckland District Law Society [1983] 1 N.Z.L.R. 15
John v. Rees [1970] Ch. 345; [1969] 2 W.L.R. 1294; [1969] 2 All E.R. 274
Kanda v. Government of Malaya [1962] A.C. 322; [1962] 2 W.L.R. 1153, P.C.
Landreville v. The Queen (1973) 41 D.L.R. (3d) 574
Landreville v. The Queen (No. 2) (1977) 75 D.L.R. (3d) 380
Minister for Immigration and Ethnic Affairs v. Pochi (1980) 31 A.L.R. 666
O'Reilly v. Mackman [1983] 2 A.C. 237; [1982] 3 W.L.R. 1096; [1982] 3 All E.R. 1124, H.L.(E.)
Pergamon Press Ltd., In re [1971] Ch. 388; [1970] 3 W.L.R. 792; [1970] 3 All E.R. 535, C.A.
Reg. v. Board of Visitors of Hull Prison, Ex parte St. Germain [1979] Q.B. 425; [1979] 2 W.L.R. 42; [1979] 1 All E.R. 701, C.A.
Reg. v. Criminal Injuries Compensation Board, Ex parte Lain [1967] 2 Q.B. 864; [1967] 3 W.L.R. 348; [1967] 2 All E.R. 770, D.C.
Reg. v. Gaming Board for Great Britain, Ex parte Benaim and Khaida [1970] 2 Q.B. 417; [1970] 2 W.L.R. 1009; [1970] 2 All E.R. 528, C.A.
Reg. v. Secretary of State for the Environment, Ex parte Brent London Borough Council [1982] Q.B. 593; [1982] 2 W.L.R. 693; [1983] 3 All E.R. 321, D.C.
Rex v. Licensing Authority for Goods Vehicles for the Metropolitan Traffic Area, Ex parte B. E. Barrett Ltd. [1949] 2 K.B. 17; [1949] 1 All E.R. 656, D.C.
Ridge v. Baldwin [1964] A.C. 40; [1963] 2 W.L.R. 935; [1963] 2 All E.R. 66, H.L.(E.)
Ritter v. Godfrey [1920] 2 K.B. 47, C.A.
Royal Commission on Licensing, In re [1945] N.Z.L.R. 665
Royal Commission to Inquire into and Report upon State Services in New Zealand [1962] N.Z.L.R. 96
Thames Jockey Club Inc. v. New Zealand Racing Authority [1974] 2 N.Z.L.R. 609
Timberlands Woodpulp Ltd. v. Attorney-General [1934] N.Z.L.R. 270
Webster v. Auckland Harbor Board (unreported), 22 March 1983

APPEAL (No. 12 of 1983) by the appellant, Peter Thomas Mahon, from the decision and order of the Court of Appeal of New Zealand (Woodhouse P., Cooke, Richardson, McMullin and Somers JJ.) [1981] 1 N.Z.L.R. 618 made on 22 December 1981 quashing an order made by the appellant in his capacity as Royal Commissioner that the first respondent, Air New Zealand Ltd., should pay to the Department of Justice of New Zealand the sum of $150,000 by way of contribution to the public cost of the inquiry of the Royal Commission into the crash on

A Mount Erebus, Antarctica, of a DC-10 aircraft operated by Air New Zealand. The appeal was brought by special leave of Her Majesty in Council granted on 22 December 1982. The second and third respondents to the appeal were Morrison Ritchie Davis, the Chief Executive of Air New Zealand Ltd., and Captain Ian Harding Gemmell, the airline's Flight Manager (technical). Her Majesty's Attorney-General for New Zealand, representing the public interest, was joined as the fourth B respondent.

The facts are stated in the judgment.

Sir Patrick Neill Q.C., David Baragwanath Q.C. (of the New Zealand Bar), *Nicolas Bratza* and *Robert Chambers* (of the New Zealand Bar) for the appellant.

Robert Alexander Q.C., Lloyd Brown Q.C. (of the New Zealand C Bar) and *R. J. McGrane* (of the New Zealand Bar) for the first respondent.

D. A. R. Williams and *L. L. Stevens* (both of the New Zealand Bar) for the second and third respondents.

R. P. Smellie Q.C. (of the New Zealand Bar), *David Widdicombe Q.C.* and *Noel Anderson* (of the New Zealand Bar) for the fourth D respondent.

Cur. adv. vult.

20 October 1983. The judgment of their Lordships was delivered by LORD DIPLOCK.

E *Introduction*

This appeal to Her Majesty in Council is part of the unhappy aftermath of what in terms of loss of human life and family bereavement was the worst disaster to strike New Zealand since the end of World War II. It happened on 28 November 1979 when, in the hours of broad daylight, a DC-10 aircraft, operated by Air New Zealand Ltd. ("A.N.Z.") F and engaged on a sight-seeing trip to the Antarctic, flew at a height of 1,500 feet straight into the lower snow-clad slopes of a 12,500 feet high volcano, Mount Erebus, causing the instantaneous death of all the 237 passengers and 20 members of the crew who were aboard.

As soon as the news reached Auckland that the aircraft was still missing somewhere in Antarctica after the time had passed when the fuel on board G would have been exhausted, a statutory investigation was set on foot. It was conducted by the Chief Inspector of Air Accidents, Mr. R. Chippindale. Such an investigation is held in private; it leads to a report by the inspector to the Minister of Transport in which, among other matters, he expresses such conclusion as he has been able to form as to the probable cause of the accident. The decision whether the inspector's report shall be published and, if so, when, rests with the minister.

H In the case of Mr. Chippindale's report on the Mt. Erebus disaster ("the Chippindale Report") the minister caused it to be published on 12 June 1980, the day after the formal appointment by the Governor-General of a Royal Commission to inquire into the cause and circumstances of the crash. He appointed as sole commissioner a distinguished judge of the

crash. He appointed as sole commissioner a distinguished judge of the High Court of New Zealand of some ten years' standing, Mahon J. ("the judge") who is appellant in the appeal to this Board. It will become necessary for their Lordships to refer to some specific provisions in his terms of reference, but this may conveniently be left until later in this judgment which unavoidably must be lengthy.

The original warrant of appointment required the judge to report his findings and opinions to the Governor-General not later than 31 October 1980. This proved to be much too short a time for what turned out to be a highly complicated and wide-ranging investigation; and no less than four successive extensions were called for, of which the last expired on 30 April 1981. The judge's report ("the Royal Commission Report") was in fact presented to the Governor-General on 16 April 1981.

It is convenient at this early stage to mention briefly three salient facts that were known both to Mr. Chippindale and to the judge when they wrote their respective reports. Those salient facts, the evidence about which it will be necessary for their Lordships later to examine in some detail, were: *first* that the pilot of the ill-fated aircraft, Captain Collins, and the Flight Officer, First Officer Cassin, had been briefed for the flight, some 18 days previously, upon a flight plan which incorporated co-ordinates of latitude and longitude of its southernmost waypoint that would have taken the aircraft on a route passing over an area of ice-covered sea to the west of Mt. Erebus and well clear of it. The *second* was that shortly before the departure of the flight on 28 November 1979 the co-ordinates of the southernmost waypoint of the flight plan had been altered into one that flew directly at and over Mt. Erebus and it was this latter flight plan that, at the pre-despatch briefing on 28 November, was supplied to the aircrew to be fed into the aircraft's computer for use as the principal navigational aid. The *third* was that neither Captain Collins nor First Officer Cassin nor any other member of the aircrew was told of the change. Unfortunately, though the omission is readily explicable by the pressure of time within which the judge was required to produce his report, he overlooked the paragraph 1.17.7 of the Chippindale Report which made it crystal clear that the third of these salient facts, as well as the first and second, had been disclosed to Mr. Chippindale in the course of his statutory investigation.

The Chippindale Report and the Royal Commission Report reached different conclusions as to the effective cause of the disaster. Mr. Chippindale in paragraph 3.37 of his report which dealt with probable cause said:

> "The probable cause of this accident was the decision of the captain to continue the flight at low level toward an area of poor surface and horizon definition when the crew was not certain of their position and the subsequent inability to detect the rising terrain which intercepted the aircraft's flight path."

In effect, although there are criticisms elsewhere in his report of management practices of A.N.Z. in relation to Antarctic flights, Mr. Chippindale ascribed the principal blame for the tragedy to pilot error.

A The judge's view was very different. It is summarised in paragraphs 393 and 394 of the Royal Commission Report, which can helpfully be prefaced by an introductory sentence extracted from paragraph 392:

> "392 . . . The dominant cause of the disaster was the act of the airline in changing the computer track of the aircraft without telling the aircrew . . ."
>
> B "393. In my opinion, therefore, the single dominant and effective cause of the disaster was the mistake made by those airline officials who programmed the aircraft to fly directly at Mt. Erebus and omitted to tell the aircrew. That mistake is directly attributable, not so much to the persons who made it, but to the incompetent administrative airline procedures which made the mistake possible.
>
> C "394. In my opinion, neither Captain Collins nor First Officer Cassin nor the flight engineers made any error which contributed to the disaster, and were not responsible for its occurrence."

These findings, which fall fairly and squarely within the Royal Commission's terms of reference and for which there was ample supportive evidence at the inquiry before the judge, were not sought to be challenged in the D proceedings for judicial review of the Royal Commission Report that were brought by A.N.Z. in the High Court and removed into the Court of Appeal, whose judgment in that matter is the subject of the present appeal. They are not susceptible to challenge in proceedings of this kind; but their Lordships have had occasion to read and to re-read with close attention before, during and since the hearing of the appeal all 167 printed E pages of the Royal Commission Report. Having done so, they would desire to place on record their tribute to the brilliant and painstaking investigative work undertaken by the judge (with the support of counsel appointed to assist him) in the course of hearings which lasted for 75 days and other investigations that he or counsel assisting him undertook in addition to the public hearings. Deserving of mention also are the patience F and courtesy with which those hearings were conducted by the judge.

The judge and those counsel who were assisting him, however, laboured under a severe handicap to which, in their Lordships' view, the unfortunate sequelae of the Royal Commission Report are in large part attributable. That handicap was pressure of time. The Chippindale Report, ascribing to pilot error the principal blame for this dreadful accident from the shock of G which the people of New Zealand had not yet recovered, had just been published. It is understandable that the Executive Council should want the result of the inquiry by the Royal Commission to be made available to the public with as little delay as possible; but the short time limit of 31 October 1980 for reporting that was set by the first Royal Warrant, meant that by 23 June when, by acting with the utmost expedition, the judge was able to H hold the preliminary hearing to discuss procedure, he had only a little over four months to undertake all necessary inquiries and investigations in New Zealand, Antarctica and, as it turned out, in other countries too and to draft his report thereon.

The procedure followed at the hearings

The preliminary hearing was attended by counsel representing ten parties of whom for present purposes it is necessary to list only A.N.Z., the Civil Aviation Division of the Ministry of Transport ("C.A.D."), the estates of Captain Collins and of First Officer Cassin and a consortium of estates of deceased passengers. The New Zealand Airline Pilots Association ("A.L.P.A.") were not represented at that preliminary hearing but shortly afterwards were added as parties to the inquiry and through their counsel called witnesses and took a very active part. The procedure to be adopted at the inquiry was outlined by counsel assisting the judge. He proposed that apart from Mr. Chippindale, who would give his evidence first, witnesses should be called by the interested parties and in an order corresponding to the chronology of the events to which they would speak—an order that was broadly followed to begin with, but to which it later proved impracticable to adhere. At that stage it was contemplated that the parties represented should furnish to counsel assisting the judge written briefs of the evidence to be given by their witnesses and that this should be done well in advance of those witnesses being called, so as to enable the evidence to be collated and, if need be, elaborated. But, under pressure of time, this sensible proposal had to be abandoned, and the practice that in fact was followed was that copies of the written brief of the evidence which each witness was intending to give were distributed to the judge, to counsel assisting him and to counsel for other parties represented, at the moment when that particular witness went into the witness box and not before. This procedure, departing as it did from that which had originally been intended, had the inevitable consequence that facts to which the judge, in his report, was ultimately going to attach the utmost significance seemed to be emerging only piecemeal as successive witnesses were called.

An investigative inquiry into facts by a tribunal of inquiry is in marked contrast to ordinary civil litigation the conduct of which constitutes the regular task of High Court judges in which their experience of the methodology of decision making on factual matters has been gained. Where facts are in dispute in civil litigation conducted under the common law system of procedure, the judge has to decide where, on the balance of probabilities, he thinks that the truth lies as between the evidence which the parties to the litigation have thought it to be in their respective interests to adduce before him. He has no right to travel outside that evidence on an independent search on his own part for the truth; and if the parties' evidence is so inconclusive as to leave him uncertain where the balance between the conflicting probabilities lies, he must decide the case by applying the rules as to the onus of proof in civil litigation. In an investigative inquiry, on the other hand, into a disaster or accident of which the commissioner who conducts it is required, as the judge was in the instant case, to inquire into and to report upon "the cause or causes of the crash," it is inevitable, particularly if there are neither survivors nor eyewitnesses of the crash, that the emergence of facts, and the realisation of what part, if any, they played in causing the disaster and of their relative importance, should be more elusive and less orderly, as one unanticipated piece of evidence suggests to the commissioner, or to particular parties represented at the inquiry, some new line of investigation that it may be

worth while to explore; whether, in the result, the exploration when pursued leads only to a dead end or, as occurred in one particular instance in the present case, it leads to the discovery of other facts which throw a fresh light on what actually happened and why it happened.

The emergence of the evidence piecemeal, which was a consequence of the abandonment under pressure of time of the original proposal that counsel for the parties represented should furnish in advance the written briefs of witnesses for collation and for elaboration where necessary, was not, in the event, compensated for by affording to those counsel an opportunity of giving to the judge at the outset of the inquiry a summary, either orally or in writing, of the salient facts to which the evidence that they proposed to call would be directed. In the circumstances as they presented themselves at that early stage to all concerned in the inquiry, this too is understandable. Nevertheless, looking at it as their Lordships are able to do with the benefit of hindsight, it seems to them that, taken in conjunction with the failure to adhere to the plan for the advance furnishing of written briefs, the procedure adopted had unfortunate effects in colouring the judge's view of what he referred to as the "stance" which the management of A.N.Z. had adopted as soon as the news of the crash had reached it and to which he considered it had adhered from beginning to end of the inquiry. It was what the judge said and did about that so-called "stance" that made his report vulnerable to judicial review.

The governing statutes

There are two fields of New Zealand law that are particularly relevant to this appeal. The first is the law relating to the appointment, functions and powers of Royal Commissions of inquiry; the second is the law relating to judicial review.

The use of Royal Commissions for the purpose of conducting inquiries into matters of public importance is much more common in New Zealand than in the United Kingdom. Between 1972 and 1981 there were 15 such commissions, many of these consisting of, or presided over by, a judge of the Supreme Court. Royal Commissions are appointed by the Governor-General acting on the advice of the Executive Council. The source of his authority to do so is two-fold: the Letters Patent of 11 May 1917 and the Commissions of Inquiry Act 1908 (as subsequently amended). As in the instant case, the warrant of appointment of a Royal Commission habitually relies on both the prerogative and the statutory source of power.

Section 2 of the Commissions of Inquiry Act 1908 empowers the Governor-General to appoint any person or persons to be a commission to inquire into and report upon any question arising out of or concerning, among other things:

> "(*e*) Any disaster or accident (whether due to natural causes or otherwise) in which members of the public were killed or injured or were or might have been exposed to risk of death or injury."

Where the commission consists of or includes a judge of the Supreme Court, section 13 gives to him and to any other members of the commission, for all the purposes of the inquiry:

"the same powers, privileges, and immunities as are possessed by a judge of the Supreme Court in the exercise of his civil jurisdiction under the Judicature Act 1908."

So whatever is written about anyone to his discredit in the report of a commission so constituted is the subject of absolute privilege under the law of defamation, devoid though the allegation may be of any factual foundation and notwithstanding (though this is not suggested in the instant case) that it also be inspired by malice. So he who has been traduced is deprived of any remedy by way of civil action to vindicate his reputation.

Royal Commissions by the terms of their appointment have a wide discretion as to the manner in which their inquiries are to be conducted. Having regard to the nature of their functions Royal Commissioners are not required to follow the rules of evidence applicable to civil litigation; but they are vested with the power to summon witnesses to give evidence on oath and to produce documents; a knowingly untrue statement made by a witness to a Royal Commission on oath amounts to the crime of perjury.

It lies within the discretion of the Royal Commission to decide in the first instance who shall be cited as parties to the inquiry; but by section 4A of the Act (inserted by Commissions of Inquiry Amendment Act 1958 (No. 58 of 1958), section 3):

"Any person interested in the inquiry shall, if he satisfies the commission that he has an interest in the inquiry apart from any interest in common with the public, be entitled to appear and be heard at the inquiry as if he had been cited as a party to the inquiry."

It was pursuant to this provision that A.L.P.A. became represented at the inquiry in the instant case.

Finally as respects the statutory powers of tribunals of inquiry, attention must be drawn to the important provision contained in section 11 of the Act:

"11. Power to award costs. The commission, upon the hearing of any inquiry, may order that the whole or any portion of the costs of the inquiry or of any party thereto shall be paid by any of the parties to the inquiry, or by all or any of the persons who have procured the inquiry to be held: . . ."

Their Lordships turn next to the law of judicial review as it is currently applied in New Zealand. The extension of judicial control of the administrative process has provided over the last 30 years the most striking feature of the development of the common law in those countries of whose legal systems it provides the source: and although it is a development that has already gone a long way towards providing a system of administrative law as comprehensive in its content as the droit administratif of countries of the Civil Law, albeit differing in procedural approach, it is a development that is still continuing. It has not yet become static either in New Zealand or in England.

Their Lordships' consideration of the reports of cases from New Zealand, England and other Commonwealth jurisdictions that have been helpfully included in the documents provided for them by the parties to this appeal does not leave them in any doubt that the principles underlying

the exercise of judicial review in New Zealand and in England, at any rate, are the same. But the machinery and practices by which governmental power, central or local, is exercised to control or otherwise to affect the activities of private citizens in the two countries are not identical; and the detailed application in New Zealand of the principles of judicial review to particular indigenous kinds of administrative action is, in their Lordships' view, best left to the New Zealand courts without obtrusion by this Board where such a course is not essential to enable an appeal to be disposed of by Her Majesty in Council. In point of fact the Judicature Amendment Act 1972, which introduced the procedure of application for review in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power, anticipated by five years the adoption of an analogous, though by no means identical, procedural reform in England by the remodelling of R.S.C., Ord. 53. So this is a procedure of which, in a rapidly developing field of law, the New Zealand courts have had practical working experience that is twice as long as the experience that English courts have had in operating their own reformed procedure.

The Judicature Amendment Act 1972 was itself amended in 1977 [by the Judicature Amendment Act 1977 (No. 32 of 1977), sections 10 and 11]. Their Lordships will refer to the Act as so amended as the Judicature Amendment Act. The only provisions of the Act that it is necessary to cite for the purposes of this appeal are section 4(1) to (3) and parts of section 3 (the interpretation section):

> "4. Application for review. (1) On an application by motion which may be called an application for review, the Supreme Court may, notwithstanding any right of appeal possessed by the applicant in relation to the subject matter of the application, by order grant, in relation to the exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power, any relief that the applicant would be entitled to, in any one or more of the proceedings, for a writ or order of or in the nature of mandamus, prohibition, or certiorari or for a declaration or injunction, against that person in any such proceedings. (2) Where on an application for review the applicant is entitled to an order declaring that a decision made in the exercise of a statutory power of decision is unauthorised or otherwise invalid, the court may, instead of making such a declaration, set aside the decision. (2A) Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or an order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section. (3) Where in any of the proceedings referred to in subsection (1) of this section the court had, before the commencement of this Part of this Act, a discretion to refuse to grant relief on any grounds, it shall have the like discretion, on like grounds, to refuse to grant any relief on an application for review.

"3. Interpretation. In this Part of this Act, unless the context otherwise requires,— . . . 'Decision' includes a determination or order: . . . 'Statutory power' means a power or right conferred by or under any Act . . .(*b*) To exercise a statutory power of decision; . . . (*e*) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person: 'Statutory power of decision' means a power or right conferred by or under any Act . . . to make a decision deciding or prescribing or affecting—(a) The rights, powers, privileges, immunities, duties, or liabilities of any person; . . ."

The costs order in the Royal Commission Report

In the instant case, in circumstances and for expressed reasons that it will be necessary for their Lordships to discuss in detail, the judge incorporated in his report an order under section 11 of the Commissions of Inquiry Act 1908 that A.N.Z. should pay to the Department of Justice the sum of $150,000 ("the costs order") by way of contribution to the public cost of the inquiry, which amounted in all to $275,000.

It is not and could not sensibly be disputed that the costs order was made in the exercise of a statutory power of decision and that to this extent, if to no other, the Royal Commission Report was subject to review under section 4 of the Judicature Amendment Act.

The order that A.N.Z. should pay more than half the costs of the inquiry was in the final part of the report which bore the heading "Appendix". It appeared at the end of the very last paragraph of that appendix which also contained directions, which A.N.Z. did not seek to make the subject of judicial review, that the costs and disbursements of A.L.P.A. and the estates of Captain Collins and First Officer Cassin should be paid as to two-thirds by A.N.Z. and one-third by C.A.D. The reasons for the judge's ordering A.N.Z. to pay the greater part of the public cost of the inquiry were explained in the immediately preceding unnumbered paragraphs. The explanation in turn harked back to, and became intelligible only by reference to, detailed findings by the judge contained in various numbered paragraphs in earlier parts of the report and culminating in his finding in paragraph 377, expressed in the following terms:

"No judicial officer ever wishes to be compelled to say that he has listened to evidence which is false. He always prefers to say, as I hope the hundreds of judgments which I have written will illustrate, that he cannot accept the relevant explanation, or that he prefers a contrary version set out in the evidence. But in this case, the palpably false sections of evidence which I heard could not have been the result of mistake, or faulty recollection. They originated, I am compelled to say, in a pre-determined plan of deception. They were very clearly part of an attempt to conceal a series of disastrous administrative blunders and so, in regard to the particular items of evidence to which I have referred, I am forced reluctantly to say that I had to listen to an orchestrated litany of lies."

A The parties to the plan of deception and conspiracy to commit perjury which this paragraph charges are readily identified in the body of the report as consisting of Mr. M. R. Davis, the Chief Executive of A.N.Z., Captain Eden, the Director of Flight Operations, Captains Gemmell, Grundy, Hawkins and Johnson, senior officers employed in the department responsible for flight operations and sometimes referred to as "executive pilots," since they divided their time between spells of actual flying duties B and executive work at the headquarters of A.N.Z. in the Flight Operations Division. Another executive pilot, Captain Wilson, who was responsible for briefing pilots and navigators for Antarctic flights, was acquitted by the judge of joining in the litany of lies but his withdrawal from the pre-determined plan of deception was referred to in paragraph 289(k) of the report as seeming to have "the hallmarks of a last-minute decision." The report also identified as co-conspirators all four members of the Navigation C Section of Flight Operations, namely Messrs. Amies, Brown, Hewitt and Lawton.

The application for judicial review

The findings of the judge in this and certain earlier paragraphs as well as his decision mulcting A.N.Z. in the sum of $150,000 as a contribution to D the public cost of the inquiry were sought by A.N.Z. to be made the subject of judicial review in proceedings started on 20 May 1981, to which the judge was made a respondent. However, although he was represented at the review proceedings his representatives took no active part. The Attorney-General was made a respondent as representing the public interest in maintaining the costs order and it was he who in the Court of E Appeal defended it and other parts of the report that came under attack.

In respect of paragraph 377 and the other findings of which complaint was made the relief sought in the application for review was for orders that the findings should be set aside and for declarations that they had been made in excess of jurisdiction and in circumstances involving unfairness and breaches of the rules of natural justice. The relief sought in respect of the costs order was that it be set aside.

F As mentioned earlier, the application for review was removed from the High Court into the Court of Appeal and heard by all five regular members of that court presided over by Woodhouse P. Although two separate judgments were delivered, one by Woodhouse P. joined by McMullin J. ("the Woodhouse judgment") [1981] 1 N.Z.L.R. 618, 620, the other by Cooke, Richardson and Somers JJ. ("the Cooke judgment") G [1981] 1 N.Z.L.R. 618, 652, both judgments were at one in holding that on reading the report an ordinary New Zealander, who had been exposed to the publicity that had followed on the disaster and the successive investigations by Mr. Chippindale and the Royal Commission into its causes, would understand the reason for the costs order having been imposed upon A.N.Z. to be to punish it for organising a pre-determined plan of deception, including conspiracy by members of the management of H A.N.Z. to commit perjury, with which paragraph 377 had charged them. It was submitted to their Lordships at the hearing before the Board that there is no linkage between the costs order and any charges earlier in the report of conspiracy to deceive or to commit perjury. Their Lordships

would in any event hesitate long before rejecting the unanimous opinion of the members of a New Zealand Court of Appeal as to how an ordinary New Zealander reading a report published for the information of New Zealanders would understand it; but their Lordships' own impressions on first and subsequent readings of the report have coincided with those of the members of the Court of Appeal.

The Court of Appeal were likewise unanimous that A.N.Z. was entitled to have the costs order set aside, upon the ground that the judge had made it for reasons upon which in law he was not entitled to rely i.e. his findings in paragraph 377 of a conspiracy by members of the management of A.N.Z. to commit perjury at the inquiry. In both the Woodhouse judgment and the Cooke judgment it was held that in making this finding the judge had acted contrary to natural justice and in excess of jurisdiction. The only significant difference between the two judgments is that Woodhouse P. and McMullin J. would have been prepared to go further than the other three members of the court and, in addition to setting aside the costs order, would have dealt with the findings in paragraph 377, together with another paragraph of the report numbered 348, by either setting them aside or making declarations that these paragraphs were invalid.

For reasons to be explained later their Lordships have not found it necessary, for the purpose of disposing of this appeal to go into the questions whether, in making his finding in paragraph 377, the judge acted in excess of his jurisdiction as a Royal Commissioner, or whether the court itself, upon an application for review of a Royal Commission Report under section 4 of the Judicature Amendment Act, had jurisdiction to set aside that paragraph or to declare it to be invalid: nor do their Lordships consider it desirable that they should make this an occasion for doing so. The appeal to this Board can, in their Lordships' view, be disposed of on the ground that in the process of arriving at the finding set out in paragraph 377, which was the reason why he made the costs order, the judge failed by inadvertence to observe the rules of natural justice applicable to a decision to make a finding of this gravity that, put at its highest in the judge's favour, was collateral but not essential to his decisions upon any of those matters upon which his terms of reference required him to report.

The rules of natural justice that are germane to this appeal can, in their Lordships' view, be reduced to those two that were referred to by the Court of Appeal of England in *Reg. v. Deputy Industrial Injuries Commissioner, Ex parte Moore* [1965] 1 Q.B. 456, 488, 490, which was dealing with the exercise of an investigative jurisdiction, though one of a different kind from that which was being undertaken by the judge inquiring into the Mt. Erebus disaster. The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value in the sense described below. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon *some* material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

The second rule requires that any person represented at the inquiry who will be adversely affected by the decision to make the finding should not be left in the dark as to the risk of the finding being made and thus deprived of any opportunity to adduce additional material of probative value which, had it been placed before the decision-maker, *might* have deterred him from making the finding even though it cannot be predicted that it would inevitably have had that result.

Any determination whether the judge's finding of fact in paragraph 377 of the Royal Commission Report was flawed by a combination of failures to observe these two rules calls for some examination by their Lordships of what evidence there was at the inquiry of the alleged conspiracy and to what extent allegations of conspiracy were put to members of the management identified in the report as being parties to it. Since this task has been undertaken in the judgments of the Court of Appeal, to which reference may be made, their Lordships will endeavour to avoid mere repetition of facts that are to be found stated in these judgments.

The fatal flight of 28 November 1979 was the fourteenth in a series of sightseeing flights to Antarctica that A.N.Z. had undertaken. The history concerning the previous flights is set out in meticulous detail in the Royal Commission Report and a comprehensive summary of it can be found in the Woodhouse judgment in the Court of Appeal. The findings of the judge as to the cause of the disaster, viz. "the mistake made by those airline officials who programmed the aircraft to fly directly at Mt. Erebus and omitted to tell the aircrew," and as to the occurrence of a whole series of previous inexcusable blunders and slipshod administrative practices by the management of A.N.Z., of which this mistake was the result, are for the most part also dealt with in one or other of the judgments of the Court of Appeal. That such blunders did occur has not been the subject of any challenge in the proceedings for judicial review of the Royal Commission Report. Their Lordships will therefore try, so far as possible, to avoid repeating an already twice told tale and will concentrate upon the three matters which have been relied upon by his counsel as entitling the judge, without any breach of either of the rules of natural justice to which their Lordships have referred, to find that the senior officials responsible for the management of the flight operations of A.N.Z. were guilty of a pre-determined plan of deception, including conspiracy to commit perjury.

The matters canvassed at the hearing of the appeal to this Board

The three matters were (1) the deliberate destruction on the orders of Mr. Davis, the Chief Executive, of all documents which would disclose the mistake that had been made over the co-ordinates in the flight plan used for briefing Captain Collins and the different co-ordinates in the flight plan issued to the aircrew for use in the aircraft's computer on the actual flight. (2) The concealment that there had been an intentional adoption by the

airline management, as the southernmost waypoint for their Antarctic sightseeing flights, of the waypoint used at Captain Collins' briefing with co-ordinates that would take the aircraft over ice-covered sea to the west of Mt. Erebus and well clear of it. (3) The denial by senior officials of A.N.Z. that they knew that aircraft engaged on sightseeing flights to Antarctica, when they got there in visual meteorological conditions ("VMC") with visibility at 20 kilometres or more, flew at heights lower than 6,000 feet.

It was these matters that were canvassed in exhaustive (though not, in view of the importance of the case, excessive) detail by counsel for the appellant judge and the respondent airline during the 14 days of hearings by the Board. Their Lordships wish to express their appreciation of the helpful way in which this appeal has been conducted not only by leading counsel for the parties who addressed their Lordships orally, but also by the other members of their respective legal teams who were assiduous in supplying written notes, collating the references extracted from the mass of documents that were before the Board that bore upon particular issues and summarising the submissions on those issues of the party whom they represented. By these means the burden upon the Board of hearing and determining this difficult and complicated case was greatly eased.

Topography and flight plans for Antarctic flights

To put into their true perspective the three matters that were canvassed before their Lordships it is necessary to mention briefly the topography of the area in Antarctica that was visited in the course of the series of sightseeing flights. The flights in DC-10 aircraft were non-stop from Auckland to a southernmost point at or adjacent to a United States military Antarctic base known as McMurdo which provided air traffic control ("ATC") consisting of a Tactical Air Navigation System ("TACAN") and a non-direction beacon ("NDB") situated some 2 miles from the TACAN. There was an ice airstrip at McMurdo known as Williams Field but it was not one at which a DC-10 aircraft could land, and after sightseeing in the area the aircraft turned round and returned direct to Christchurch. This was its first and only stopping place.

McMurdo is situated on a peninsula forming the most southerly part of Ross Island on which island there are three mountains of which the highest is the 12,500 feet Mt. Erebus. To the south Ross Island adjoins and merges into the Ross Ice Shelf which forms the southern boundary of the Ross Sea. A part of the Ross Sea between 40 and 32 nautical miles in width, known as McMurdo Sound, lies to the west of Ross Island and separates it from the coast of that portion of the Antarctic Continent that is called Victoria Land. The southern areas of the Ross Sea, including in particular McMurdo Sound, are ice-covered for much of the year, but the ice breaks up as the summer advances and areas of water are visible between the ice floes.

The flight plan of an aircraft undertaking an Antarctic sightseeing flight comprised a series of successive waypoints on the route, of which the co-ordinates of latitude and longitude were given, together with the heading and distance to the next waypoint. The flight plan, when fed together with other information into the aircraft's computer at the beginning of the flight,

A enabled the aircraft to be navigated automatically and with great accuracy on a pre-determined course (referred to as "nav track"). At the pilot's discretion, the nav track can be switched off and the aircraft navigated manually on such other course as the pilot may think preferable. This is known as changing from nav track to "heading select." On the nav track for the Antarctic flights the penultimate waypoint on the outward run was at Cape Hallett, a geographical feature towards the northern tip of the B coast of Victoria Land at a distance from McMurdo of 337 miles. From Cape Hallett south to McMurdo it was possible to fly direct over the Ross Sea and down McMurdo Sound and during the journey to maintain contact with ATC at McMurdo. This was the route that was adopted by U.S. military aircraft flying to and from McMurdo from the north. After reaching McMurdo and completing sightseeing the A.N.Z. flights were programmed to return to Christchurch.

C A brief mention is also needed of what had happened on previous flights so that it may be understood what significance is properly to be attached to the practice of "low flying" that had been adopted by pilots on previous Antarctic flights. Some of the airline officials (untruthfully as the judge found) professed to be unaware of the practice. The history of these earlier flights is set out in the Woodhouse judgment. Suffice it here to say D that the two pioneer flights in February 1977 were planned with a nav track approved by C.A.D. that took aircraft on the last stage of the outward journey on a heading from the waypoint at Cape Hallett that passed directly over Mt. Erebus to McMurdo at a stipulated minimum altitude of 16,000 feet. For the October and November flights in 1977, of which there were four, the minimum authorised altitude after the aircraft had crossed Mt. Erebus was reduced from 16,000 feet to 6,000 feet in an E area to the south of the NDB at McMurdo Base if VMC subsisted there with visibility of 20 kilometres or more.

Low flying

Upon a sightseeing flight strict adherence to the flight path from Cape Hallett over Mt. Erebus to McMurdo Base rather than down McMurdo F Sound, if VMC subsisted there and the assistance of ATC at McMurdo Base was available, did not make sense from the point of view of navigation or safety. Similarly, the maintenance of a minimum altitude in VMC was unhelpful and unnecessary. In such conditions there could be no objection to flights at altitudes as low as 1,500 feet down McMurdo Sound and in the neighbourhood of McMurdo Base. The judge so found in G paragraph 150 of his report and expressed the opinion that the formal approval of C.A.D. and the U.S. authorities to such practices as respects route and minimum altitude would have been automatic. It is therefore not surprising that the highly skilled and experienced pilots who were in charge of flights from October 1977 onwards treated themselves as having a discretion to diverge laterally in VMC from the original official nav track which would have taken them in a straight line from Cape Hallett to H McMurdo over Mt. Erebus, and to fly instead on heading select down McMurdo Sound to McMurdo on whatever track and at whatever altitude above it that information obtained from ATC at McMurdo, with whom they were able to maintain continuous communication, indicated would

best serve the purpose of sightseeing. All this occurred quite openly. Senior officials of C.A.D., as the judge found, knew about it; Mr. Chippindale, in the course of his investigation immediately after the disaster, was made aware that the practice of low-flying deviation was not understood by pilots to be specifically forbidden by the pre-flight briefing. He refers to this in his report and, indeed, accounts for what he believed to have been the failure of pilots to discover that the co-ordinates of the southernmost waypoint on the flight plan were 2° west of the co-ordinates of McMurdo itself, by the fact that in all flights subsequent to the making of the error which occurred in October 1978 the pilots had approached the area in VMC and taken routes down McMurdo Sound on heading select instead of on nav track and had relied on ATC at McMurdo to advise them as to the appropriate altitude at which to fly, having regard to the height of the cloud base (if any) below which VMC subsisted.

Under the heading "Compliance by Pilots with Minimum Safe Altitudes" the judge devoted 21 paragraphs of his report to evidence of flying down McMurdo Sound and in the vicinity of McMurdo Base at altitudes of less than 6,000 feet. Apart from Captain Wilson, who had been pre-flight briefing officer for Antarctic flights in 1978 and 1979 and had said in evidence that in his briefings he had referred to a discretion to descend to less than 6,000 feet in VMC with visibility of not less than 20 kilometres, the effect of the evidence given by the other executive pilots at the inquiry was that they had no "specific" knowledge (the adjective is the judge's) of flights at below 6,000 feet. Some of them had denied all knowledge that this occurred, others conceded that they had heard rumours of flights being undertaken at lower altitudes in VMC but their notice had not been drawn to it specifically and they took no action about it.

Their Lordships accept unreservedly that the judge was entitled to take the view that, upon this particular matter, the evidence given by several of the executive pilots at the inquiry was false. But, even though false, there are two reasons why it cannot have formed part of a predetermined plan of deception adopted in "an attempt to conceal a series of disastrous administrative blunders." In the first place to permit flights down McMurdo Sound and in the McMurdo area at levels ranging from 1,500 to 3,000 feet in VMC conditions with visibility not less than 20 kilometres was not a blunder at all. It was a method of conducting the sightseeing flights that the judge himself commended in paragraph 223 of the Royal Commission Report as complying with the Civil Aviation Regulations and as preferable to maintaining 6,000 feet as a minimum permitted altitude. In the second place the only stipulated minimum altitude which was of any relevance to the occurrence of the disaster was the 16,000 feet necessary to be maintained for a safe flight directly over Mt. Erebus. If, in seeking to support the case put by A.N.Z. that this minimum altitude should have been strictly maintained by the crew of the fatal flight, those witnesses whom the judge disbelieved on this issue were, as their Lordships must accept, being untruthful, they were also being singularly naive. Quite apart from the mass of evidence of flights down McMurdo Sound at low altitudes and the publicity given to them, once it was accepted that pilots were at liberty to, and did, diverge laterally from the original flight plan over Mt. Erebus, the requirement to maintain a minimum altitude of 16,000 feet on

A a sightseeing flight in VMC could not be justified on any rational basis. Against this background it is not conceivable that individual witnesses falsely disclaimed knowledge of low flying on previous Antarctic flights in a concerted attempt to deceive anybody as to what had happened.

That, no doubt, is why the topic of "low flying" is not discussed in either of the judgments of the Court of Appeal, unless the sentence "It is possible that some individual witnesses did give some false evidence at B this inquiry," which appears in the Cooke judgment, was meant as a passing reference to it. For the like reason without intending any discourtesy to leading counsel for the judge who devoted a considerable part of his argument to the marshalling of the material probative of the judge's finding that false evidence on this matter had been given by members of the management of A.N.Z., and to exploring the extent to which in cross-examination each of them must have been made aware C that his veracity on this matter was being attacked, their Lordships do not propose to say anything more on the subject of "low flying."

Parenthesis on "whiteout"

Before turning to the two other matters that were relied upon as D justifying the judge's finding of a predetermined plan of deception including conspiracy to commit perjury, their Lordships should spend a moment in mentioning the optical phenomenon of "whiteout" experienced in polar regions. Of this phenomenon and the part that it is likely to have played as contributing to the causes of the Mt. Erebus disaster an illuminating account is to be found in paragraphs 165 to 201 of the Royal Commission Report. The judge found that the existence of this E phenomenon was not known to anyone concerned in the management of A.N.Z. nor to any of its pilots or navigators, including Captain Collins and First Officer Cassin who consequently had never been briefed about it. Nor, as the judge also found, was it known to C.A.D. although there were readily accessible sources from which information could have been obtained. Its effect, in meteorological conditions such as prevailed at the time of the crash in the area where it happened, would be to induce F in a pilot, unaware that any such phenomenon could exist, the belief that he had unlimited visibility ahead and that he was flying over a flat terrain, since "whiteout" prevents changes in level of the terrain over and towards which the aircraft is flying from being perceived by the pilot even though the change in level is as great as that of a precipitous mountainside such as that of Mt. Erebus. The judge makes out an G overwhelming case in his report that the aircraft was in a "whiteout" when it crashed into that volcano.

Destruction of documents

It was not disputed before their Lordships that the Royal Commission Report points the finger at Mr. Davis, the Chief Executive, as the H originator of the "predetermined plan of deception," and as orchestrator of the "litany of lies" that are referred to by the judge in paragraph 377. It is also not disputed that the report treats Mr. Davis' determination to embark upon a plan of deception as having been reached on 30

November 1979 as soon as there had been reported to him what their Lordships described at the outset of this judgment as the three salient facts about the change in the co-ordinates of the southernmost waypoint in the flight plans.

The destruction or deliberate concealment of all documents which might point to there having been slipshod management of its Antarctic flights by A.N.Z. is, in their Lordships' view, quite the most serious charge of deception contained in the Royal Commission Report. That the judge too so regarded it is apparent from the fact that it is made a recurring theme in the report. The Woodhouse judgment refers to many of the paragraphs in which the charge that this took place on the instructions of Mr. Davis is made either in direct statements or, more often, by innuendo. Its first appearance in the Royal Commission Report is in paragraph 45 where, after reference in the previous paragraph to the mistake about the co-ordinates, the judge said:

> "The reaction of the chief executive was immediate. He determined that no word of this incredible blunder was to become publicly known. He directed that all documents relating to Antarctic flights, and to this flight in particular, were to be collected and impounded. They were all to be put on one single file which would remain in strict custody. Of these documents all those which were not directly relevant were to be destroyed. They were to be put forthwith through the company's shredder."

Their Lordships are in agreement with, and so do not need to repeat, Woodhouse P.'s analysis of the nine following paragraphs of the report dealing with the same topic. They culminate in paragraph 54:

> "This was at the time the fourth worst disaster in aviation history, and it follows that this direction on the part of the chief executive for the destruction of 'irrelevant documents' was one of the most remarkable executive decisions ever to have been made in the corporate affairs of a large New Zealand company. There were personnel in the Flight Operations Division and in the Navigation Section who anxiously desired to be acquitted of any responsibility for the disaster. And yet, in consequence of the chief executive's instructions, it seems to have been left to these very same officials to determine what documents they would hand over to the Investigating Committee."

The absence of documents in connection with the programming of Antarctic flights is commented upon in paragraphs 248, 250 and 254 in terms that are obviously indicative of incredulity; and the Chief Executive's instructions of 30 November 1979 are reverted to in paragraphs 338 to 341 in a section of the report headed "Post-Accident Conduct of Air New Zealand" where they have become a decision "that all documents relating to the Antarctic flights and to this flight in particular were to be impounded." However, the evidence that was before the judge was that, in accordance with routine practice, an In-house Committee had been set up by A.N.Z. on 30 November 1979 whose terms of reference were to gather documents and data relating to

the Mt. Erebus disaster. This committee was presided over by Mr. Watson, who was not a member of the management of A.N.Z. A representative of A.L.P.A. attended its meetings as an observer; so did representatives of other trade unions whose members had lost their lives in the crash. Mr. Oldfield, the Safety Manager of A.N.Z., was secretary. It was he who was responsible for gathering documents. He gave evidence at the inquiry as to what he had done. He obtained the original documents from the departmental files in which they were kept and caused copies to be made for the use of members and observers at meetings of the committee and one master copy for inclusion in a single file ("the Committee File") on which one copy of all documents that he had collected were assembled. The Committee File was made available to Mr. Chippindale on 11 December 1979, when he returned from Antarctica, and it became an exhibit at the inquiry before the judge. After each meeting of the committee had ended the original document was returned to the departmental file from which it had come and all copies used by the members at meetings, other than the master copy that was kept in the Committee File, were collected by Mr. Oldfield and destroyed by him. Notwithstanding this evidence by Mr. Oldfield of the procedure adopted in assembling the Committee File, to which there was no challenge in cross-examination, the judge in paragraph 341 expresses his surprise at having discovered, on his own examination of the Committee File after the hearing, that the documents it contained were copies. He ends the paragraph thus ". . . seeing that all pre-accident documents assembled on the file were copies, then where were the originals?" In the context in which it appears the innuendo that original pre-accident documents relating to Antarctic flights had been destroyed, in compliance with the Chief Executive's alleged instructions, is plain. Yet it was never put to Mr. Oldfield when he gave evidence that he had not been assiduous in the steps he had taken to ensure that the In-house Committee, on which he served as secretary, saw all original documents relating to Antarctic flights and that a master copy of each should be preserved on the Committee File.

The allegations in the report about destruction and disappearance of documents upon Mr. Davis' instructions are not confined to the In-house Committee File. Captain Gemmell, an executive pilot, had accompanied Mr. Chippindale to Antarctica immediately after the accident became known. He went as representative of A.N.Z. in a party which included, amongst others, First Officer Rhodes as representative of A.L.P.A. The site of the crash had been first located by three mountaineers from Scott Base, a New Zealand Antarctic research station near to McMurdo. Mr. Chippindale's party, because of weather conditions, were not able to reach the scene until 3 December. Then, and on the following days, the members of the party proceeded to search for and collect first the "black-box" and the cockpit voice recorder ("CVR") which had been on the aircraft and, thereafter, such other material that had been brought on to the aircraft by its passengers and members of its crew as could be found, including flight bags and documents. These had been scattered by the wind over a wide, heavily-crevassed area under a covering of snow

that had fallen since the date of the crash. It was unsafe to penetrate to considerable parts of this area.

Paragraphs 342 to 361 of the report, which are introduced as being "some unfortunate repercussions" of the instructions of the Chief Executive for the collection of all documents, are dealt with in considerable detail in both judgments in the Court of Appeal. The first four of these paragraphs take the form of ascribing to counsel who represented A.L.P.A. at the inquiry, allegations against Captain Gemmell that he had brought back from Antarctica, from which he returned to New Zealand before Mr. Chippindale, a number of documents that had been carried by Captain Collins in his flight-bag including an atlas and a ring-binder notebook; but that instead of disclosing them to Mr. Chippindale or to the Royal Commission, Captain Gemmell had impounded them in compliance with Mr. Davis' instructions. No such allegation had in fact been suggested by A.L.P.A. in its final submissions. It was a theory evolved by the judge himself as a result of a mistaken view of additional information which he had sought and obtained after the hearings had been concluded. The fact that he had been making these further inquiries from persons who had not been called as witnesses was never disclosed to A.N.Z. until they read about them in paragraphs 353 to 359 of the report; so Captain Gemmell had no opportunity of dealing with the case against him that these post-hearing inquiries are said to have been disclosed. Their Lordships agree with the Court of Appeal that this was a clear breach of natural justice; and that the breach is not one that is cured by the fact that this group of paragraphs, all of which are redolent of suspicion that Captain Gemmell had taken away documents from the wreckage of the aircraft in order to conceal their existence from any official investigation, ends with these two sentences, in paragraph 360:

> "The opportunity was plainly open for Captain Gemmell to comply with the Chief Executive's instructions to collect all documents relevant to this flight, wherever they might be found, and to hand them over to the airline management. However, there is not sufficient evidence to justify any finding on my part that Captain Gemmell recovered documents from Antarctica which were relevant to the fatal flight, and which he did not account for to the proper authorities."

This grudging verdict of "not proven" needs to be read in the light of what the judge had said in paragraph 74 about the course that he had adopted in reaching any findings of fact:

> "I am entitled, as part of my investigatory function, to reach conclusions based upon the balance of probabilities. This is the course which I have adopted. And in regard to allegations in respect of which the evidence seems to me to be in even balance, or not sufficiently tilted one way or the other, then I have held the truth of any such allegation, *likely though it may be*, to have been not established."

The emphasis in this passage has been added by their Lordships.

Paragraphs 347 and 348 also call for special mention, for the latter incorporates a gratuitous allegation against the Director of Flight Operations, Captain Eden, of exerting managerial pressure upon a subordinate to conceal the fact that documents had been removed by Captain Gemmell. Flight Officer Rhodes, who had on 1 October 1980 been called as a witness by A.L.P.A., whose representative he had been on the party that had collected material from the site of the crash, was subsequently recalled in the following circumstances. On 4 December 1980 some exploratory questions had been asked of Captain Gemmell by counsel for A.L.P.A. as to whether he had brought back from the site of the accident any documents that had been in Captain Collins' flight-bag. Captain Gemmell replied that he had not. A newspaper report which mentioned these questions evoked a letter from a Mr. Woodford, one of the mountaineers who had been first at the site and was present at all times when Captain Gemmell was there. This letter said that the flight-bag was empty when Mr. Woodford had found it some days before Captain Gemmell arrived upon the site and that at all times when Captain Gemmell had been on the site he had been in the company of other members of the party. On 8 December 1980 First Officer Rhodes was recalled, this time by A.N.Z., to confirm, as he did, that at all times when Captain Gemmell was working on the site there had been other people adjacent to him. In paragraph 348, however, (the second paragraph of the report that Woodhouse P. and McMullin J. would have set aside) there is a plain allegation that Captain Eden, the Director of Flight Operations, had intimidated First Officer Rhodes into making this exonerating statement. No suggestion had ever been put to First Officer Rhodes that Captain Eden had directed him to give the answers that he did and not the slightest suggestion that he had done so was made to Captain Eden himself when he gave evidence three days later. The charge of intimidation in paragraph 348 must have come like a bolt from the blue. It was not based upon any probative evidence and neither Captain Eden nor A.N.Z. was given any opportunity of dealing with it.

At paragraph 361 the judge comments on the briefing documents of First Officer Cassin which it was thought he had left behind at his home. Of these the judge says that they had been collected the next morning after the crash by "an employee of Air New Zealand," and he adds that they

> "certainly found their way into the custody of the airline on the day following the disaster, and have not been seen since. Presumably they were destroyed."

It was conceded in the Court of Appeal that the judge must have been in error in making this allegation. In fact the evidence had been that First Officer Cassin's documents were obtained from Mrs. Cassin by Captain Crosbie, a witness called by counsel representing First Officer Cassin's estate. He had obtained the documents, not in his capacity as an employee of A.N.Z. but as welfare officer of A.L.P.A.: and in his brief and in his oral evidence at the inquiry he was positive that there were no documents at First Officer Cassin's home that had any bearing on the accident. No suggestion to the contrary was ever made to him.

Mr. Davis himself was the last witness to give evidence at the inquiry. His written brief was primarily directed to matters of the general policies and organisation of A.N.Z. since, as he said in it, as Chief Executive he "did not know or require to know the actual details of the conduct of the [Antarctic] flights i.e. exact route, briefings, crewing etc." In the course of his oral evidence, he was asked by counsel for A.L.P.A. a number of questions about the instructions that he had given to Mr. Watson and Mr. Oldfield that a complete file incorporating a master copy of every relevant document was to be assembled by the In-house Committee and any loose copies of the same document that were not required for the file were to be destroyed. It was suggested to him that his instructions may not have been sufficiently explicit—a suggestion that he rejected and added: "Now under no circumstances and under no conditions would I have been party to the destruction of any evidence that might come before an inquiry." His explanation for requesting the loose copies prepared for the use of members at meetings of the In-house Committee to be destroyed was to prevent there being "leaked" to the media isolated documents which published out of context might give a sensational erroneous impression. And there the matter of Mr. Davis' instructions for destruction of documents was left. It was never put to him, even by counsel for A.L.P.A., much less by counsel assisting the judge or by the judge himself, that he had deliberately ordered that steps should be taken to ensure that documents which would disclose the extent to which administrative blunders by the airline management had been causative of the crash should never come to light. His own spontaneous outburst, which their Lordships have just quoted, made in reply to the suggestion that his instructions to Messrs. Watson and Oldfield had not been sufficiently specific, after which the matter of his instructions was dropped, was the only evidence about any plan on the part of the management that any document relevant to the causes of the accident should be destroyed or otherwise prevented from being produced to Mr. Chippindale in the course of his statutory investigation or to the judge at the public inquiry by the Royal Commission; and what this evidence amounted to was an indignant denial.

In their Lordships' view there was no material of any probative value upon which to base a finding that a plan of this kind ever existed. Before their Lordships counsel for the judge have not been able to point to any such material. Experienced advocates as they are, they preferred to concentrate their fire upon the second and third matters that were canvassed at the hearing: "low flying", with which their Lordships have already dealt, and the change in the southernmost waypoint to which they will be coming shortly.

That the linkage between the costs order and the judge's belief in the existence of a plan to destroy documents or by other means to prevent them from coming to light had a major influence in inducing him to make the costs order is, however, made apparent in some extracts from a passage in the Appendix in the paragraph which immediately precedes that which contains the costs order itself. (The emphasis in this quotation

has been supplied by their Lordships.) Among the facts that he says he should have been told by A.N.Z. at the outset are included:

> "that documents were ordered by the Chief Executive to be destroyed, that an investigation committee had been set up by the airline in respect of which a file was held . . ."

The paragraph ends thus:

> "So it was not a question of the airline putting all its cards on the table. The cards were produced reluctantly, and at long intervals, and *I have little doubt that there are one or two which still lie hidden in the pack.* In such circumstances the airline must make a contribution towards the public cost of the Inquiry."

The intentional adoption of a new southernmost waypoint sited in McMurdo Sound

During the three years 1977, 1978 and 1979 in which sightseeing flights to Antarctica had been undertaken by A.N.Z., there had been four different co-ordinates for the southernmost waypoints that had been fed into the computers of aircraft used for the flights.

For the two flights in February 1977 the co-ordinates for Williams Field were used. They were 77° 53′ south and 166° 48′ east. For these flights there was a single authorised minimum altitude of 16,000 feet. When permission from C.A.D. was obtained to descend to 6,000 feet in an area to the south of McMurdo Base it became desirable to select a navigational aid as the waypoint and the NDB at McMurdo whose co-ordinates were 77° 51′ south and 166° 41′ east was chosen, and these were used for the four flights in October 1977. At this period the flight plan was manual and was fed manually by the crew into the aircraft's computer.

In 1978 it was decided to store the flight plan for the Antarctic flights in the airline's central computer. Mr. Hewitt of the Navigation Section was responsible for carrying out the changeover from manually prepared to computerised flight plans. He did so by first preparing what is known as an ALPHA worksheet in which he wrote down as the co-ordinates of the southernmost waypoint the co-ordinates that had been used in the February 1977 flight plan that he obtained from a storage known as the NV 90 i.e. 77° 53′ south and 166° 48′ east; but in typing these into the computer terminal he made a mistake and typed a figure 4 instead of a figure 6, so that the longitudinal co-ordinates of the southernmost waypoint of the flight track that went into the computerised flight plan became 164° 48′ east, (instead of 166° 48′) which put it at a point in McMurdo Sound some 25 nautical miles to the west of the NDB where there was no physical feature by which it could be identified ("the Western Waypoint"). This is the error referred to in the Chippindale Report as having remained undetected for 14 months. Cogent evidence that this happened by mistake, albeit a mistake that involved negligence and was blameworthy, was supplied by the ALPHA worksheet and by the fact that no corresponding alterations were made in the track and distance information in the flight plan. The heading from Cape Hallett remained at 188·9° and the distance 337 nautical miles, whereas for a

longitudinal co-ordinate of 164° 48′ east they would have been 191° and 343 nautical miles respectively.

The fourth and final change in the southernmost waypoint was that made in the airline computer on the night before the fatal flight and not reported to the aircrew at their pre-despatch briefing although it had been incorporated in the flight computerised track with which they were supplied. Notice had been given by the United States authorities of their intention to cease operating the NDB, thus leaving the TACAN as the only available navigation aid at McMurdo. The co-ordinates of the TACAN were 77° 52·7′ south and 166° 58′ east, i.e. a difference of 10′ of longitude which represented a point some 2·1 nautical miles to the east of the NDB. The evidence of the members of the Navigation Section was that all that they intended and all that they believed that they were doing, was to substitute the co-ordinates of the TACAN for those of the NDB.

The judge deals with these changes of waypoint in considerable detail in paragraphs 224 to 255 of his report. They include repeated references to absence of contemporaneous documents recording and reporting the reasons for the successive changes. Mr. Davis in his evidence had explained that he preferred and had adopted in A.N.Z. an administrative system that relied upon oral communication between the executive officers concerned rather than spending time upon the preparation of written reports and instructions. The adoption of such a system is not of itself probative of any sinister intentions, although it may well be indicative of inefficient management particularly where, as in the case of the executive pilots, their time is divided between administrative and operational duties, with the result that they will not be aware of all that has been happening in Flight Operations Division during those periods while they have been away on actual flying duty.

A critical analysis of the reasoning of the judge in paragraphs 224 to 255 of his report is to be found in the sections of the Woodhouse judgment that bear the sub-headings "The Western Waypoint," "Correction of Co-ordinates" and "Advice of the change." Their Lordships are in broad agreement with this analysis. Throughout their consideration of this aspect of the inquiry into the judge's findings on which were factors that led to his accusation in paragraph 377 of conspiracy to commit perjury and have been relied upon before this Board as justification for it, their Lordships have been at pains to remind themselves, as did the Court of Appeal, that in relation to findings of fact made by the judge in his report they are not exercising the functions of an appellate court in civil litigation where they would be entitled, while paying due deference to the advantages enjoyed by the trial judge of seeing and hearing the witnesses give evidence in person, to make their own assessment of the weight of the evidence and to determine for themselves whether it is sufficient to justify the findings of fact that the trial judge has made. As courts whose functions in the instant case have been restricted to those of judicial review, both the Court of Appeal and this Board are disentitled to disturb findings of fact by the decision-maker whose decision is the subject of review, unless (1) the procedure by which such findings were reached was

unlawful (in casu by failure to observe the rule of audi alteram partem) or (2) primary facts were found that were not supported by any probative evidence or (3) the reasoning by which the decision-maker justified inferences of fact that he had drawn is self-contradictory or otherwise based upon an evident logical fallacy.

It is mainly, though not exclusively, on the first and third of these grounds that, in their Lordships' opinion, the Court of Appeal and this Board are entitled to reject the judge's findings of fact as to the intentional adoption of a new southernmost waypoint sited in McMurdo Sound, which formed in part the basis of his finding of a conspiracy to commit perjury.

The Woodhouse judgment draws attention to various inconsistencies in the reasoning by which the judge reached the conclusion that the adoption of the Western Waypoint was intentional. One to which their Lordships would particularly draw attention is that the judge stated that he specifically refrained from finding that the substitution of the longitudinal co-ordinates 164° 48′ east for 166° 48′ when the Antarctic flight track was computerised in September 1978 was intentional and not due to a careless mistake by Mr. Hewitt. Forgetful of the evidence of the ALPHA worksheet that Mr. Hewitt had used on that occasion, the judge stated in paragraph 255(a) that the single reason for his refraining from making a positive finding that the change to the Western Waypoint at the time of computerisation of the flight track was deliberate, was that "it was not accompanied by the normal realignment of the aircraft's heading so as to join up with the new waypoint." He went on, however, to express his belief that long before November 1979 when it had been reported to Flight Operations by Captain Simpson, who had piloted the flight that had preceded the one on which the crash occurred, that he had discovered, to his surprise which he thought might be shared by other pilots, that the Western Waypoint was 27 nautical miles to the west of McMurdo Base, the Navigation Section had adopted it as the officially-approved southernmost waypoint.

When, and by what member of the airline management, this adoption of the Western Waypoint as the southernmost waypoint, with a longitudinal co-ordinate known to be 164° 48′ east and thus 25 miles to the west of the nearest navigational aid at McMurdo Base, was approved is not the subject of any finding by the judge; but whenever it was, the same reason as that which of itself had made him reject deliberate selection of the Western Waypoint at the earlier date, viz. failure to make corresponding adjustments to the heading and distance from Cape Hallett, would have been equally applicable to any officially approved adoption of the Western Waypoint whenever that is supposed to have occurred thereafter.

In his finding of deliberate adoption the judge was greatly influenced by a document, Exhibit 164, of which there was evidence that it had been included (in circumstances that were not elucidated) among the documents contained in envelopes supplied to pilots at the time of the pre-despatch briefings for Antarctic flights in 1978 though not, so far as any evidence goes, in 1979. (It has never been suggested that members of the unit responsible for pre-despatch briefings and the preparation of

such envelopes for handing to departing aircrews have been parties to any conspiracy.) This document is a photocopy of an original diagram which does not extend as far south as Ross Island and McMurdo. The judge refers to it as "a track and distance diagram," incorporating a route southwards from Cape Hallett down McMurdo Sound to the west of Ross Island and another route northwards to Cape Hallett passing to the east of Ross Island along the longitude of 170° east. The lines treated by the judge as the southbound and northbound routes, from Cape Hallett and back to it, run off the southern edge of Exhibit 164 without joining up. If these lines were intended to represent a continuous route of an aircraft outbound and inbound for the purposes of sightseeing in the McMurdo area, the diagram is defective in that it fails to show the most southerly part of the route or any southernmost waypoint.

Furthermore, while Exhibit 164 does contain indications of headings and distances upon lines joining successive waypoints to the north of and including Cape Hallett, there are no such indications on the lines which the judge held to represent a track and distance diagram of a route southbound from Cape Hallett down McMurdo Sound or northbound back to Cape Hallett along longitude 170° east which is to the east of Ross Island itself. These lines form an acute-angled triangle of which the base is missing and the apex does not coincide with the position marked as Cape Hallett on the diagram. After close examination of Exhibit 164 and exhaustive consideration of the evidence relating to it to which, in view of the importance that the judge had attached to this document, his counsel has devoted considerable portions of his argument before the Board both in opening and in reply, the conclusion is, in their Lordships' opinion, inescapable that there was not any material of probative value before the judge that could justify a finding that Exhibit 164 incorporated a track and distance plan for a route southwards from Cape Hallett down McMurdo Sound or was intended or would be understood by any experienced pilot to be intended to be used for purposes of navigation.

The presence of Exhibit 164 among the documents included in the flight envelopes provided to aircrews at the pre-despatch briefings in 1978 appears to be the only reason given by the judge for his finding that the error made by Mr. Hewitt had been discovered long before November 1979, and had been followed by the adoption by A.N.Z., for use as the co-ordinates of an officially approved southernmost waypoint, of the co-ordinates of the Western Waypoint as they had been erroneously inserted in the computerised flight plan. As pointed out in the Woodhouse judgment, however, the judge's finding to this effect was accompanied by the suggestion that the management of A.N.Z. wanted to conceal its use of the route down McMurdo Sound from C.A.D., whose formal approval had been given only to a route that overflew Ross Island. This suggestion was not only never put to any of the witnesses for A.N.Z. but also conflicts with the judge's own finding that approval from C.A.D. for the variation of the route to one down McMurdo Sound would have been automatic. Had the suggestion ever been put to the witnesses, evidence could have been called that official approval was not even required from C.A.D. for a lateral variation of this kind from a previously approved route.

That A.N.Z. sightseeing aircraft were accustomed to fly to McMurdo from Cape Hallett down McMurdo Sound in VMC with visibility 20 kilometres or more was well known to the United States authorities at McMurdo. Navigational assistance for them was regularly given by ATC from the TACAN there. That the United States authorities would have objected to a direct flight track over Mt. Erebus to McMurdo, if they had known that such a route had received the formal approval of C.A.D., was information that the judge had gathered personally on a visit to Antarctica; but there was no evidence that A.N.Z. had ever been informed of this, nor was it put to any member of the Navigation Section in the course of their evidence at the hearing that they had any knowledge, or any reason to suspect, that a flight-path which overflew Mt. Erebus on a direct route from Cape Hallett would not have received United States approval.

This omission was, to say the least, unfortunate, for it led to a finding by the judge that Mr. Brown, a member of the Navigation Section, had been guilty of deliberately heinous conduct. Mr. Brown's account of what he did, as having been due to an unwitting and, as he thought, harmless error, formed an important constituent of the so-called "litany of lies." It had been the practice of the Navigation Section to arrange for the transmission to ATC at McMurdo, before the departure of each Antarctic flight, of a flight plan giving the co-ordinates of the waypoints on the journey to McMurdo and back. After the erroneous Western Waypoint was incorporated in the computerised flight track in 1978, flight plans radioed to ATC McMurdo incorporated as the co-ordinates of the southernmost waypoint the figures 77°53′ south, 164°48′ east. The flight plan for the fatal flight on 28 November 1979 that was radioed to ATC was prepared by Mr. Brown from an ALPHA Sheet on which the co-ordinates of the southernmost waypoint appeared as the figures 77°53′ south 166°48′ east. This sheet contained a number of columns: the figure "5" entered in one of these columns would result in there being printed out in the radioed flight plan either the abbreviated name of a waypoint in letters or its co-ordinates in figures, depending upon the column in which the figure "5" was entered. In the case of the southernmost waypoint Mr. Brown gave evidence that he had entered the figure "5" in the column that resulted in its appearing in the radioed flight plan as the name "McMurdo" and not as the co-ordinates of the new waypoint. Mr. Brown's evidence was that this had been inadvertent.

At paragraph 255(e) of his report, however, the judge makes a finding in these terms:

> "In my opinion, the introduction of the word 'McMurdo' into the Air Traffic Control flight plan for the fatal flight was deliberately designed to conceal from the United States authorities that the flight path had been changed, and probably because it was known that the United States Air Traffic Control would lodge an objection to the new flight path."

No such suggestion was ever put to Mr. Brown when he gave evidence at the inquiry. He was accordingly given no opportunity of

dealing with the accusation of deliberately seeking to deceive the ATC as to the direction from which to expect the aircraft that was to be made against him by the judge. This was a clear breach of the rules of natural justice which flaws the judge's finding which their Lordships have just cited, and which was specifically identified later in paragraphs 376 and 377 as being part of the "litany of lies."

Once the judge, by a process of reasoning that was self-contradictory, had reached the fixed conviction that there had been a deliberate adoption by the airline management of the Western Waypoint as the southernmost waypoint for Antarctic flights, it was inevitable that he should reject as false all evidence of primary facts that conflicted with that finding. In order to satisfy themselves that there were not any other grounds, besides those which the judge himself had stated, upon which the inference that he had drawn about deliberate but dissimulated adoption could be supported, their Lordships have examined the evidence of primary facts relevant to this matter that was given at the hearings. This they did, not for the purpose of assessing its reliability, but simply to see whether any positive evidence that supported such an inference existed; and none was to be found.

Their Lordships accept that the report contains many other findings of fact by the judge upon which there had been conflicting evidence the reliability of which it was for him to assess; with his assessments a court whose functions are limited to judicial review has no jurisdiction to act otherwise than to accept them as correct. But those particular and crucial findings which their Lordships have discussed under the present heading and the previous heading "Destruction of documents" are each of them open to rejection on judicial review for the various reasons that their Lordships have given; and, as these findings admittedly constituted a substantial part of the material upon which were based the allegations contained in paragraph 377 of a "predetermined plan of deception" and "an orchestrated litany of lies," those accusations against the management of the airline must be treated as conclusions that, in the circumstances, he was not entitled to reach, and the costs order which constituted the punishment imposed upon A.N.Z. for the conduct found in that paragraph must accordingly be set aside.

The limits on the matters decided on the appeal to this Board

It may be appropriate in a case which has attracted such wide and intense interest in New Zealand that their Lordships should draw attention to the restricted nature of the matters which they have been called upon to decide.

The Royal Commission Report convincingly clears Captain Collins and First Officer Cassin of any suggestion that negligence on their part had in any way contributed to the disaster. That is unchallenged. The judge was able to displace Mr. Chippindale's attribution of the accident to pilot error, for two main reasons. The most important was that at the inquiry there was evidence from Captain Collins' widow and daughters, which had not been available to Mr. Chippindale at the time of his investigation and was previously unknown to the management of A.N.Z., that after the briefing of 9 November 1979 Captain Collins, who had

made a note of the co-ordinates of the Western Waypoint that were on the flight plan used at that briefing, had, at his own home, plotted on an atlas and upon a larger topographical chart the track from the Cape Hallett waypoint to the Western Waypoint. There was evidence that he had taken this atlas and chart with him on the fatal flight and the inference was plain that in the course of piloting the aircraft he and First Officer Cassin had used the lines that he had plotted to show him where the aircraft was when he switched from nav track to heading select in order to make a descent to 2,000 feet while still to the north of Ross Island which he reported to ATC at McMurdo and to which he received ATC's consent. That on completing this descent he switched back to nav track is incapable of being reconciled with any other explanation than that he was relying upon the line he had himself plotted of the flight track on which he had been briefed. It was a combination of his own meticulous conscientiousness in taking the trouble to plot for himself on a topographical chart the flight track that had been referred to at his briefing, and the fact that he had no previous experience of "whiteout" and had been given no warning at any time that such a deceptive phenomenon even existed, that caused the disaster.

The other principal reason why the judge felt able to displace Mr. Chippindale's ascription of the cause of the accident to pilot error was that certain remarks forming part of the conversations recorded in the CVR of the crashed aircraft and attributed by Mr. Chippindale to the flight engineers had suggested to him that shortly before the crash they were expressing to the pilot and navigator uncertainty about the aircraft's position. The tape from the CVR which had been recovered from the site of the crash proved difficult to interpret. The judge, with the thoroughness that characterised him throughout his investigations, went to great pains to obtain the best possible expert assistance in the interpretation of the tape. The result was that he was able to conclude that the remarks attributed by Mr. Chippindale to the flight engineers could not have been made by them, and that there was nothing recorded in the CVR that was capable of throwing any doubt upon the confident belief of all members of the crew that the nav track was taking the aircraft on the flight path as it had been plotted by Captain Collins on his atlas and chart, and thus down the middle of McMurdo Sound well to the west of Mt. Erebus.

The judge's report contains numerous examples and criticisms of A.N.Z.'s slipshod system of administration and absence of liaison both between sections and between individual members of sections in the branch of management that was concerned with flight operations. Grave deficiencies are exposed in the briefing for Antarctic flights; and the explanation advanced by witnesses for the airline as to how it came about that Captain Collins and First Officer Cassin were briefed on a flight path that took the aircraft over the ice-covered waters of McMurdo Sound well to the west of Mt. Erebus but were issued, for use in the aircraft's computer, as the nav track a flight path which went directly over Mt. Erebus itself, without the aircrew being told of the change, involved admissions of a whole succession of inexcusable blunders by individual members of the executive staff. None of this was challenged

before their Lordships. No attempt was made on behalf of A.N.Z. to advance excuses for it.

These appalling blunders and deficiencies, the existence of which emerged piecemeal in the course of the 75 days of hearings, had caused the loss of 257 lives. Their Lordships can well understand the growing indignation of the judge when, after completing the hearings and for the purpose of preparing his report, he brought them together in his own mind and reflected upon them. In relation to the three matters that were principally canvassed in this appeal and upon which he based his finding that there had been a pre-determined plan to deceive the Royal Commission and a conspiracy to commit perjury at its hearings, their Lordships have very reluctantly felt compelled to hold that, in the various respects to which their Lordships have referred, the judge failed to adhere to those rules of natural justice that are appropriate to an inquiry of the kind that he was conducting and that in consequence it was not open to him to make the finding that he did in paragraph 377 of his report.

To say of a person who holds judicial office, that he has failed to observe a rule of natural justice, may sound to a lay ear as if it were a severe criticism of his conduct which carries with it moral overtones. But this is far from being the case. It is a criticism which may be, and in the instant case is certainly intended by their Lordships in making it to be, wholly disassociated from any moral overtones. In an earlier section of this judgment their Lordships have set out what they regard as the two rules of natural justice that apply to this appeal. It is easy enough to slip up over one or other of them in civil litigation, particularly when one is subject to pressure of time in preparing a judgment after hearing masses of evidence in a long and highly complex suit. In the case of a judgment in ordinary civil litigation this kind of failure to observe rules of natural justice is simply one possible ground of appeal among many others and attracts no particular attention. All their Lordships can remember highly respected colleagues who, as trial judges, have had appeals against judgments they had delivered allowed on this ground; and no one thought any the worse of them for it. So their Lordships' recommendation that the appeal ought to be dismissed cannot have any adverse effect upon the reputation of the judge among those who understand the legal position, and it should not do so with anyone else.

As respects the judge's findings that some at least of the executive pilots had given evidence as to their lack of specific knowledge that aircraft on Antarctic flights flew at altitudes lower than 6,000 feet over McMurdo Sound and in the McMurdo area which was false, their Lordships accept that there was probative material before the judge from which he was entitled to draw this inference. After the conclusion of the hearings when all the evidence had been pieced together, it became apparent, for reasons given earlier in this judgment, that official tolerance of the practice of flying lower than 6,000 feet was in no way causative of the accident. But when the executive pilots were giving evidence the causes of the crash still remained undetermined, and it is an understandable human weakness on the part of individual members of the airline management having responsibility for flight operations that

A they should shrink from acknowledging, even to themselves, that something that they had done or failed to do might have been a cause of so horrendous a disaster.

The jurisdiction of the judge to make findings of the kind challenged in the appeal

B In both the Woodhouse and the Cooke judgments it was held by the Court of Appeal that the judge's finding in paragraph 377 of a conspiracy to commit perjury at the inquiry was not only invalidated by its having been reached through non-observance of the rules of natural justice but also fell outside his terms of reference and accordingly that in making it he acted in excess of jurisdiction.

C The gravamen of the finding was that ten members of the airline management were guilty of the crime of conspiracy to commit perjury. It was so understood and in fact resulted in a police investigation which was pursued for some time but was ultimately dropped. The finding had been reached without the safeguards of trial by jury, or the benefit of the onus of proof applied in criminal prosecutions. In paragraph 74 of his report the judge expressly stated:

D > "I am not required to insist that some particular conclusion, whether founded on direct evidence or inference, shall be established beyond reasonable doubt."

In *Cock v. Attorney-General* (1909) 28 N.Z.L.R. 405 it had been held by a New Zealand Court of Appeal that there was no jurisdiction vested in the Governor-General either under the Letters Patent or the E Commissions of Inquiry Act 1908, as it then stood, to appoint a Royal Commission to inquire into a crime. At the time when the judgments of the Court of Appeal were delivered in the instant case there was pending before them an appeal in an application for judicial review entitled *Re Royal Commission on Thomas Case* which raised directly this very point and would necessitate re-examination of the 70 year old decision in *Cock v. Attorney-General.* The *Re Royal Commission on* F *Thomas Case* [1982] 1 N.Z.L.R. 252 has now been heard by the Court of Appeal and judgment in it was delivered on 30 July 1982. In that judgment it was held that an amendment made in 1970 (Commissions of Inquiry Amendment Act 1970 (No. 53 of 1970) section 2) to the Commissions of Inquiry Act 1908 did empower the Governor-General to appoint a Royal Commission with terms of reference that included G jurisdiction to inquire into a crime if to do so is necessarily incidental to the subject matter of the inquiry.

This is a particular aspect of administrative law which is currently in the process of development by the New Zealand courts. Their Lordships can well appreciate that, where the crime concerned is one of perjury at the inquiry itself, there may well be a grey area between what is permissible comment upon evidence given before the Royal Commissioner H that he has rejected, and what is a finding of criminal conduct by a witness which does not fall within the commissioner's terms of reference. The demarcation of the division of the grey area into those parts which will ultimately be held to be black and white respectively is one that can

only be arrived at on a case to case basis; and the most suitable forum in which this can be done is (for reasons that have been earlier stated) provided by the New Zealand courts themselves. Their Lordships think that it would be both premature and unwise for them to make this an occasion to formulate principles for the future guidance of the New Zealand courts on this particular matter, since the instant appeal can be decided and dismissed on the alternative ground that the finding in paragraph 377, that was the judge's reason for making the costs order, was invalidated by its having been reached in breach of rules of natural justice.

For the like reasons their Lordships will refrain from going into the question whether upon an application for judicial review of a report of a tribunal of inquiry there is jurisdiction in the reviewing court to set aside a finding of fact that is gravely defamatory of the applicant for review, or to make a declaration that such finding is invalid. This too is a matter which, in their Lordships' view, is best left to be developed by the New Zealand courts, particularly as these remedies, if they do exist, are discretionary. In the instant case all five members of the Court of Appeal were of opinion that the reputations of those who were the subjects of the finding in paragraph 377 would be sufficiently vindicated by a judgment setting aside the costs order, and that no further remedy, even if one were available, was necessary.

The quantum of the costs order

The Court of Appeal had held that the costs order was in any event invalid to the extent that it exceeded a maximum of $600 fixed by a rule made by judges in 1908 under section 12 of the Commissioners Act 1903. Brief arguments, on the one hand, that this rule was ultra vires and, on the other hand, that it was still in force and effective, were addressed to their Lordships by counsel for the judge and counsel for the Attorney-General respectively. The point of law is one that depends upon a detailed examination of the legislative history of New Zealand statutes and subordinate legislation. It is not one which this Board would have regarded as a suitable subject matter for the grant of any leave to appeal from a decision of the New Zealand Court of Appeal. It has no relevance to the vindication of the reputations of the parties which were at stake in the instant appeal, and since the costs order must be set aside, irrespective of its amount, it is unnecessary for their Lordships to go into the point, and they accordingly refrain from doing so.

The costs of the appeal to the Board

Their Lordships cannot close this lengthy judgment without expressing their conviction that the time has now come for all parties to let bygones be bygones so far as the aftermath of the Mt. Erebus disaster is concerned. There were what in retrospect can be recognised as having been faults or mistakes at the inquiry but which, in the circumstances in which the inquiry had to be held and the judge's report prepared, appear to their Lordships for the most part to have been manifestations

of human fallibility that are easy to understand and to excuse. The time has surely come by now for them to be allowed to be forgotten.

It is in that hope and in that spirit that their Lordships propose to make no order as to the costs of the appeal to this Board. It is true that the costs of the judge are in any event being met by the New Zealand Government, and that as the sole shareholder in A.N.Z. the legal costs incurred by the airline in the appeal will also fall ultimately upon the New Zealand Government, so that the main financial consequences of their Lordships' decision to make no order as to costs may be limited to avoiding the expense of taxation of the parties' costs. It is nevertheless intended also to be indicative of their Lordships' view that the time for bitter feelings is over although their Lordships appreciate that nothing can console the relatives and friends of the victims of the disaster.

Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

Solicitors: Macfarlanes; Linklaters & Paines; Allen & Overy.

H. J.