§ Law in Context

Law and Administration

THIRD EDITION

CAROL HARLOW AND
RICHARD RAWLINGS

CAMBRIDGE

CAMBRIDGE www.cambridge.org/9780521197076

13

Inquiries: A costly placebo?

Contents

Chapter 10 of this book was devoted to complaints. Adopting a 'bottom-up' perspective, we considered the machinery for complaints-handling, its place in the administrative-justice landscape and various possible components of 'proportionate dispute resolution'. In Chapter 11 we turned our attention to

tribunals, firmly established by the Franks Committee as 'machinery for adjudication'. We looked at their emergence as a two-tier system of administrative adjudication in terms of the Tribunals, Courts and Enforcement Act 2007. As the JUSTICE–All Souls Committee perceived, inquiries 'though often referred to in the same breath as tribunals . . . have quite a different origin, purpose and status and their development has been somewhat different'.[1] Wade too had noted their ambiguous character: they were, he thought, a hybrid legal-and-administrative process, and 'for the very reason that they have been made to look as much as possible like a judicial proceeding, people grumble at the way in which they fall short of it'.[2] This ambiguity is a central theme of this chapter.

The chapter looks at the genesis of inquiries as 'machinery for investigation', using procedures usually classified as 'inquisitorial'. These, however, both resemble and differ from the investigatory procedures of the Parliamentary Ombudsman studied in Chapter 12. We ask how far this inquisitorial procedure differs from the common law adversarial procedures that we have come to accept as the adjudicative norm. Have inquiries followed tribunals too far down the path of judicialisation, drifting back to the adversarial procedure that common lawyers instinctively prefer? If this is so, we ask in the final section, is the development in some cases necessary to meet the due process requirements of the ECHR? Or is it more generally a necessary step in the evolution of inquiries to yet another mechanism for independent review of government?

Wade seized on the conflictual character of inquiries, which he saw as 'one of the principal battlegrounds between legal and official opinion in the past fifty years'.[3] Since Wade wrote, there has been an exponential growth of inquiries in public life, which have come to be regarded as the cure for every manner of public ill. Somewhat cynically, Louis Blom-Cooper QC, an advocate with much experience of public inquiries, sees them as providing 'the symbolic purpose of holding up to obloquy the particular event that induced the crisis of public confidence':

> The instinct to reach for the solution of a public inquiry stems from a desire to distract the critics or deflect criticism, or to expose some fraud, fault or act of maladministration. It also arises out of the need expeditiously to restore public confidence in government or in public administration, or to scotch ill-founded rumours of scandal, by an independent investigation of the events under scrutiny. The urge also is to establish the facts other than by established methods, such as coroners' inquests, litigation (including judicial review) or criminal proceedings.[4]

[1] JUSTICE–All Souls Review, *Administrative Justice: Some necessary reforms* (Clarendon Press, 1988) (hereafter JUSTICE–All Souls).
[2] H. W. R. Wade, *Administrative Law* (Clarendon Press, 1961), p. 166.
[3] *Ibid*.
[4] L. Blom-Cooper, 'Public inquiries' (1993) 46 *Current Legal Problems* 204, 205.

As we shall see, this inclination is not always successful. Several of these 'grand inquests' into the health of the nation have been highly controversial. They have inflamed public opinion and have caused at great expense more problems than they have resolved. What are the reasons for public dissatisfaction and in what respects do public inquiries 'fall short' of public expectations?

Philip Sales, then an experienced Treasury Counsel, takes a high-minded approach. While an inquiry may in practice sometimes 'be a step taken for reasons of political expediency, to meet public pressure on some topic, or as a way of shunting off some difficult matter into a siding so that it can be forgotten about for a while', inquiries do at the same time occupy a vital place in the modern constitution:

> There is an increased recognition that in a modern state the legitimacy of governmental action may be bound up, in part, with the willingness of government to accept public scrutiny of what it has done – to operate with "transparency", to use the short-hand expression . . . Public inquiries can serve an important function in supplementing other processes for scrutiny of government action in the interests of transparency. But it is important to remember that their function is a supplementary one. It must be borne in mind that there are other well-established mechanisms for the scrutiny of government action, particularly in Parliament. The institution of the public inquiry ought not to replace those mechanisms, which are more explicitly linked to the direct democratic political control of what governments do.[5]

Lord Howe, a long-serving minister in Margaret Thatcher's Cabinets with a wide experience of public affairs, depicts inquiries as serving six rather disparate ends. The objective of an inquiry might be:

1. to establish the facts
2. to learn from events
3. to provide catharsis for 'stakeholders'
4. to reassure the public
5. to make people and organisations accountable
6. to serve the political interests of government.[6]

These objectives should be weighed and the balance between them should dictate the procedures selected. We shall find in this chapter that all too many options are available. Recently, however, the Government has moved to rationalise, introducing a model that they hope will be all-purpose in the Inquiries Act 2006.

[5] P. Sales, 'Accountability of government via public inquiries' [2004] *Judicial Review* 173.

[6] G. Howe, 'The management of public inquiries' (1999) 70 *Pol. Quarterly* 294. These objectives will be cited hereafter as (Howe, 1–6).

1. They just grew

Like so much in English administrative law, inquiries did not leap fully fledged onto the public-administration scene; they evolved slowly and without any particular thought being given to functions or shape. Before we can arrive at conclusions as to the place of inquiries in the contemporary system of government, we need to look backwards to see where they came from and how they have assumed their particular shape and characteristics.

(a) Committees and commissions

It has been suggested that planning inquiries have their origin in parliamentary private-bill procedure, which allowed objectors to the bill's procedures to appear before the parliamentary committees. As private-bill procedure fell into disfavour, the cumbersome committee procedure was replaced by inquiries that reported to the minister.[7] Parliamentary committees had other uses; committees of inquiry were commonly appointed during the nineteenth century to investigate issues of public importance and social reform, as was done, for example, to inquire into child-labour exploitation before Peel's Reform Bill in 1816. An alternative might be a royal commission of inquiry, the first of which was established in 1832 to look into reform of the poor laws. Procedurally, these committees collected evidence, listened to witnesses and asked questions, in the same way as modern select committees do. Committees investigated, advised and made recommendations but were not of course able to initiate action. This type of inquiry is either purely advisory or a stage in an administrative process; it is certainly not 'machinery for adjudication', as tribunals are now considered to be.

The pre-war Donoughmore Committee saw inquiries as 'an instrument of government'.[8] Its concern with the terms 'judicial or quasi-judicial decisions' sprang from its terms of reference and would today seem outdated, although it does serve to highlight the hybrid 'legal-and-administrative' position of public inquiries. The committee chose to focus on planning inquiries, which had for some time raised concern over procedures, especially the non-disclosure of inspectors' reports,[9] where openness was recommended: the inspector's report, together with the minister's decision should be communicated to 'the parties concerned'. Otherwise, the committee thought, two types of inquiry should be distinguished. On one side of the line stood 'public inquiries of a judicial character' prescribed by statute, as with the Town and Country Planning Acts, or set up under the Tribunals and Inquiries Act 1921; on the other were inquiries arranged by government 'in

[7] JUSTICE–All Souls [10.1–3].

[8] Terminology borrowed from R. Wraith and G. Lamb, *Public Inquiries as an Instrument of Government* (Allen and Unwin, 1971).

[9] See, e.g., *Local Government Board v Arlidge* [1915] AC 120.

the ordinary course of administration'. In the latter case, the committee 'did not wish to be misunderstood as recommending the adoption of any general rule that reports submitted by inspectors to their ministers should be made available to the public':

> Our recommendation is to be considered as limited to those cases where a public inquiry of a judicial character has been prescribed by Parliament as a step in the process of arriving at a judicial or quasi-judicial decision. It matters not for our purposes whether the holding of such an inquiry is enjoined by the relevant statute or only where certain specified conditions are satisfied or whether it is merely indicated as a step which may be taken if the Minister in his discretion thinks fit so to direct . . . This conclusion follows, as indicated above, from what in our view must be presumed to be the object of Parliament in providing for a public hearing of the parties . . . Our recommendation has no application to those cases where the Minister in the ordinary course of administration may arrange for some local inquiry or investigation, the better to inform his mind before he takes some decision which is in its competence as the head of an executive Department. In such cases the Minister, having full discretion to arrive at his decision in his own way, should be entirely free to deal as he thinks fit with such reports as may be made to him. The ordinary processes of administration might indeed be gravely impeded were the Minister to be tied down to any particular procedure and the fact that the Minister may be armed by statute with a general power to proceed by way of local inquiry in suitable cases makes no difference so long as the matter is essentially administrative.[10]

Donoughmore's uncertainty sprang from the way planning inquiries were beginning to develop and their use when the compulsory purchase of private property for public purposes was involved. While making a distinction that it clearly saw as significant between inquiries 'of a judicial nature' and advisory inquiries, the committee was unable to provide any conclusive criteria for the distinction. Drawing on the intention of Parliament, it insisted at the same time that the test was not whether an inquiry was or was not statutory in origin.

The post-war Franks Committee followed Donoughmore in focusing on planning and land inquiries, numerically the commonest form of inquiry. Once again the hybrid character of inquiries was emphasised:

> The intention of the legislature in providing for an inquiry or hearing in certain circumstances appears to have been twofold: to ensure that the interests of the citizens most closely affected should be protected by the grant of a statutory right to be heard in support of the objections, and to ensure that thereby the Minister should be better informed about the facts of the case.[11]

[10] *Report of the Committee on Ministers' Powers*, Cmnd 4060 (1932), pp. 106–7.
[11] *Report of the Committee on Tribunals and Enquiries*, Cmnd 218 (1957) [269].

Inquiries were not to be classified as 'purely administrative because of the provision of a special procedure preliminary to the decision', which involved the testing of an issue, 'often partly in public'. They were not on the other hand purely judicial, 'because the final decision cannot be reached by the application of rules and must allow the exercise of a wide discretion in the balancing of public and private interest':

> If the administrative view is dominant the public inquiry cannot play its full part in the total process, and there is a danger that the rights and interest of the individual citizens affected will not be sufficiently protected. In these cases it is idle to argue that Parliament can be relied upon to protect the citizen, save exceptionally . . . if the judicial view is dominant there is the danger that people will regard the person before whom they state their case as a kind of judge provisionally deciding the matter, subject to an appeal to the Minister. This view overlooks the true nature of the proceeding, the form of which is necessitated by the fact that the Minister himself, who is responsible to Parliament for the ultimate decision, cannot conduct the inquiry in person.[12]

Tribunals and inquiries differed in their origins and had always served different purposes. There was now general agreement that this was so. 'A reasonable balance' between judicial and administrative functions was necessary. Yet the effect of bracketing inquiries with tribunals was to undercut the emphasis on their administrative functions and the policy element which was always present. An assumption that 'what is right for a tribunal is also right for an inquiry' took hold and grew. The effects as conveniently summarised by Purdue and Popham would be to improve the legitimacy of the standard inquiry by the enactment of procedural rules, which governed not only the conduct of the inquiry but also pre- and post-inquiry procedures. This enactment of procedural rules would, at the same time, accentuate the quasi-judicial aspects of what was originally primarily an administrative function.[13] As Schwartz and Wade put it, after the Franks report the debate crystallised around 'how much "judicialisation" the inquiry procedure can stand'.[14]

(b) The coroner's inquest

A second progenitor of the inquiry is the coroner's inquest, its antiquity attested by the fact that the first edition of the standard textbook dates to 1829.[15] The office was created by Richard I in 1199 to represent the Crown in the administration of justice. Coroners are (and always have been) independent officials

[12] *Ibid*. [272–4].

[13] M. Purdue and J. Popham, 'The future of the major inquiry' (2002) *Journal of Planning & Environment Law* (*JPEL*) 137.

[14] B. Schwartz and H. Wade, *Legal Control of Government: Administrative law in Britain and the United States* (OUP, 1972), p. 163.

[15] *Jervis on Coroners*, 12th edn (Sweet & Maxwell, 2002).

holding office during good behaviour. They are commonly seen to exercise judicial or quasi-judicial functions, though they do not precisely 'adjudicate'. They are largely independent of central government, being chosen by local authorities, though the Home Secretary's approval is needed.

Under the Coroners Act 1988, which governed the inquests described in this chapter, the coroner has jurisdiction to inquire into the death of any person within his jurisdiction who has suffered a violent or unnatural death, a sudden death from an unknown cause, or who died in prison. The inquest is a limited fact-finding inquiry to establish the answers to who has died, when and where the death occurred, and how the cause of death arose. It is intended to be non-adversarial and in modern times the coroner has been expressly forbidden to consider the potential criminal or civil liability of any named individual, the possible verdicts being: death by natural causes, accident, suicide, unlawful or lawful killing and an 'open' verdict where there is insufficient evidence for any other verdict. (As we shall see, the 'riders' or recommendations added in some inquests can come very close to breaking this prohibition). There is a close parallel here with s. 2 of the Inquiries Act 2005, which provides that an inquiry 'is not to rule on, and has no power to determine, any person's civil or criminal liability'. Inquiries then do not adjudicate; they find facts, investigate, search for and try to discover 'the truth'.[16]

Deficiencies in coronial procedure were highlighted by inquests which took place into the deaths of over 200 elderly people, subsequently shown by a criminal trial and public inquiry to have been murdered by their general practitioner, Dr Shipman. The exhaustive public inquiry conducted by Dame Janet Smith concluded that the 1988 system 'was failing to protect the public and to meet the reasonable expectations of society'. She made important recommendations concerning the need for modernisation, added resources and standardisation of coroners' inquest procedure; these recommendations lie behind the changes contained in the Coroners and Criminal Justice Bill introduced into Parliament in late 2008.[17]

Many of the features of the modern public inquiry are visible in the coroner's inquest, which carries out most of the functions mentioned by Lord Howe (see p. 572 above). The coroner's primary duty is to establish the facts and reassure the public that some notice and action is being taken. Lessons can be learned from the inquest's findings; such recommendations are, however,

[16] *Ibid*.

[17] See *Death Certification and the Investigation of Deaths by Coroners*, the 3rd Report of the Shipman Inquiry, Cm. 5854 (2003); *Death Certification in England, Wales and Northern Ireland: Report of a fundamental review*, Cm. 5831 (2003). And see Home Office, *Reforming the Coroner and Death Certification Service: A position paper*, Cm. 6159 (2004); House of Commons Constitution Committee, *Reform of the Coroners' System and Death Certification*, HC 902 (2005/6); Ministry of Justice, *Coroner Reform: The Government's draft bill*, Cmnd 6849 (2006). Under the Coroners and Criminal Justice Bill, currently before Parliament, there will be a degree of centralisation with a Chief Coroner to lead the service. There will be also be a senior coroner for each coroner area.

not enforceable and no legal consequences flow if they are disregarded. All that the coroner can do is draw attention publicly to some deficiency or write to 'someone in authority', such as a council or a government department about the matter. Recommendations made by the coroner can however be very forthright. A set of inquests, for example, held by coroners into the death of soldiers in Iraq and Afghanistan, attributed the deaths to lack of care for army personnel and to defective equipment. The verdicts, which occasioned much unfavourable publicity, were highly embarrassing to government. They culminated in an unsuccessful application by the Defence Secretary to have one such verdict quashed on the ground that its language appeared to 'determine a question of civil liability'.[18] Shortly afterwards, the Government inserted into a Counter-Terrorism Bill a provision allowing inquests deemed 'a risk to the national security' to be held in secret and without a jury. This proposal occasioned such a public outcry that it was withdrawn by the Home Secretary. However, the Coroners and Criminal Justice Bill would give commensurate powers to the Home Secretary to withdraw an investigation from a coroner in cases involving national security and transfer it to a High Court judge or order that an inquest be held without a jury and in camera.

The inquest can also provide a powerful forum for catharsis, sometimes after other types of inquiry have failed. The inquest into the death of Diana, Princess of Wales in a car accident, for example, followed a French judicial inquiry and an independent inquiry by the Metropolitan Police, which took three years, established the salient facts and was published.[19] It was not, however, until the matter had been investigated in the spotlight of publicity by an inquest where the jury returned a verdict of unlawful killing, laying responsibility at the door of the driver and reporters following the car, that all those involved (the stakeholders) accepted that it must finally be laid to rest. The 'Diana inquest' introduces three recurrent themes of the modern public inquiry: cost, duplication and delay. The final verdict came ten years after her death in 1997. Eight million pounds was spent on the earlier Stevens investigation and £4.5 million on the elaborate trial-type inquest presided over by a High Court judge with a panoply of leading counsel. The proceedings provoked multiple applications for judicial review, starting with a successful application for the inquest to be conducted with a jury.[20]

[18] *R (Smith) v Assistant Deputy Coroner for Oxfordshire & Anor* [2008] EWHC 694 (Admin).

[19] Sir John Stevens, *The Operation Paget Inquiry Report into the Allegation of Conspiracy to Murder Diana, Princess of Wales and Emad El-Din Mohamed Abdel Moneim Fayed* (2006), available online.

[20] *Paul and Ors v Deputy Coroner of the Queen's Household and Anor* [2007] EWHC 408 (Admin). Following the successful review, the Coroner, Lady Butler-Sloss, resigned and was replaced by Lord Justice Scott Baker. See also *R (Mohamed Al Fayed) v Assistant Deputy Coroner of Inner West London* [2008] EWHC 713 Admin. Applications for review of a Coroner's decision my also be made under s. 13 of the Coroner's Act 1988. See also *Assistant Deputy Coroner for Inner West London v Channel 4 Television Corporation* [2007] EWHC 2513 an application by the coroner to order production of documents.

Similar issues arose in respect of the inquest into the death of Jean Charles de Menezes, an innocent man wrongly identified as a terrorist and shot by Special Branch officers following a terrorist attack in London. Death or serious injury caused by the police is routinely investigated by the Independent Police Complaints Commission (IPCC), set in place by the Police Reform Act 2002 in response to complaints that the previous system was insufficiently independent. In the Menezes case, the IPCC did hold an inquiry, initially resisted by the Metropolitan Police. But neither this report nor a subsequent prosecution brought against the police under the Health and Safety at Work Act 1974 for failure to provide for 'the health, safety and welfare of Jean Charles de Menezes' did much to assuage public concern. The inquest, delayed against the wishes of the family to allow the health and safety charges to go forward, opened three years after the shooting and was effectively the first opportunity for evidence to be adequately tested and for the public to learn what had occurred. This raises difficult issues of the relationships between the inquest and other inquiries and of the rights of relatives. The Menezes family withdrew its co-operation after the jury was banned by the coroner, Sir Michael Wright, from returning a verdict of unlawful killing; subsequently an open verdict was returned. This is just the type of inquest that could be deemed 'a risk to the national security' in terms of the new bill.

(c) Inquest procedure

As with inquiries and all inquisitorial procedure, the coroner is in charge. As guidance published by the service puts it:

> The coroner decides who to ask and the order in which they give evidence. Anyone who wants to give evidence can come forward at an inquest without being summonsed by the coroner, but the evidence must be relevant to the inquest . . . A person who wants to give evidence should contact the coroner as soon as possible after the death.
>
> Anyone who has 'a proper interest' may question a witness at the inquest. They may be represented by lawyers or, if they prefer, ask questions themselves. The questions must be sensible and relevant. This is something the coroner will decide. There are no speeches.[21]

This is paradigm inquisitorial procedure.

Over the years, however, the inquest has turned into something of an awkward hybrid. There are juries; 'interested persons' can be legally represented; there are powers to summon witnesses, who can be punished if they do not attend; all evidence is given under oath; witnesses have to answer questions (subject to the important proviso that a 'person or people suspected of causing a death if required to give evidence at the inquest will be protected against

[21] Website of the Surrey Coroner.

answering any question which may tend to incriminate him'). These features of the coroner's inquest give it something of the appearance of a criminal trial and naturally create pressure to make it more so.

2. Inquiries: A mixed bag

(a) Rolls-Royce procedure: The 1921 Act

Until 2005, the only statute of general application to inquiries was the Tribunals of Inquiry (Evidence) Act 1921. Perhaps because it required a motion in both Houses of Parliament, which takes the matter out of the absolute control of ministers, it was very little used, the two most notable examples being the inquiry into the disaster at Aberfan, after a colliery waste tip engulfed the local school, killing 144 people, mainly schoolchildren.[22] Here the choice was undoubtedly cathartic; it expressed deep grief at a national tragedy. In the 'Bloody Sunday' inquiry chaired by Lord Saville (see p. 604 below), the Act was probably invoked to underscore the legitimacy of an inquiry set up many years after the incident by a New Labour Government that wished to demonstrate its 'clean hands'. The Conservative government deliberately chose, against the express wishes of the Opposition, *not* to use the 1921 Act for the Scott inquiry into arms for Iraq (below), the motive almost certainly being desire for ministerial control. The Government left it open for Lord Justice Scott, who conducted the inquiry, to come back to the Government for a tribunal of inquiry to be appointed; in practice, however, it seems that Lord Justice Scott experienced no particular problems. Although they could not technically be subpoenaed, senior civil servants and ministers, including two prime ministers, did give evidence, though occasionally under protest. The Report notes, however, that some departments were not as co-operative as they might have been and used delaying tactics skilfully.

It is sometimes suggested that the 1921 Act was a factor in the judicialisation of inquiry procedure, partly due perhaps to the power to take evidence on oath. Much more influential was the report of another inquiry: the Royal Commission chaired by Lord Salmon, a distinguished Law Lord, into the fairness of tribunals of inquiry.[23] Lord Salmon's professional experience, like that of the High Court judges who habitually chair tribunals of inquiry, was with adversarial trial procedures, for which he may have had a natural preference. There is some support for this in the fact that the Salmon Commission was prompted by Lord Denning's report on the 'Profumo affair'. Revealing his unfamiliarity with inquisitorial procedure, Lord Denning remarked that

[22] Lord Edmund Davies, *Report of the Tribunal Appointed to Inquire into the Disaster at Aberfan on October 21st 1966*, HC 553 (1967).

[23] *Report of the Royal Commission on the Tribunals of Inquiry (Evidence) Act 1921*, Cmnd 3121 (1966); *Government response*, Cmnd 5313 (1973).

he had had to combine the functions of detective, inquisitor, advocate and judge. The procedure, which was often informal to the point of laxness, lay entirely in Lord Denning's hands and raised concerns over the position of witnesses, who had little or no opportunity to challenge evidence that in the event had a very unfavourable effect.[24] Marshall observed dryly that, as no one gave evidence on oath or was cross-examined, 'a large number of conclusions of fact rested on unpublished and unverifiable testimony and it might well have been asked why anyone should be expected to believe a word of it'.[25]

The Royal Commission's formidable list of recommendations was based on trial-type procedures. They covered rights to appear at an inquiry; legal representation; examination and cross-examination of witnesses and notice to witnesses of allegations against them, adding that witnesses should be given an opportunity to prepare a case and be assisted by legal advisers whose expenses were met out of public funds. The Government accepted and promptly implemented as an informal guide to procedure the 'six cardinal Salmon principles', which have formed the bedrock of procedure at public inquiries ever since. It did not, however, legislate. Two committees of inquiry and the unofficial JUSTICE–All Souls Review have since called for a more formal code of inquiry procedure, finally empowered by the Inquiries Act 2005 (see p. 607 below).[26]

(b) Statutory inquiries

It is more common for public inquiries to be set up under subject-specific legislation, most obviously the Town and Country Planning Acts, which are dealt with below. In Scotland, inquiries are devolved by the Scotland Act 1998 but in Wales dealt with on a piecemeal basis by transfer of functions orders made in terms of the devolution legislation. Section 250 of the Local Government Act 1972 contains similar powers. Many other statutes contain similar provisions, such as the National Health Service Act 1977, the Children Act 1989 and Police Act 1996. In a different field altogether, inquiries are authorised by the Companies Acts. This ad hoc way of proceeding can be very confusing, as the inquiry secretary complained in the inquiry into Heathrow's fifth terminal (see p. 586 below). The inquiry had to consider nearly forty linked applications and orders under seven separate pieces of legislation, 'some of which could have been the subject of a major inquiry in their own right'

[24] Lord Denning, *The Circumstances Leading to the Resignation of the Former Secretary of State for War, Mr J. D. Profumo* (HMSO, 1963).

[25] G. Marshall, *Constitutional Conventions: The rules and forms of accountability* (Clarendon Press, 1984), pp. 105–6.

[26] *Report of the Committee on Hospital Complaints Procedure* (HMSO, 1973); *Ad Hoc Inquiries in Local Government* (SOLACE, 1978); JUSTICE–All Souls [10.97].

and 'the sheer scale and complexity of the issues under consideration' had prolonged the length of the hearing considerably.[27]

Accident inquiries are dealt with by the Health and Safety at Work Act 1974 and by a miscellany of different statutes and sets of regulations, such as those made under the Civil Aviation Act 1982, the Railways Act 1974 and Merchant Shipping Act 1995. Usually conducted by inspectors, they are used routinely to investigate the cause of specific accidents, a majority of which are very small and attract only local attention. Occasionally, however, as with the inquiries into train collisions at Ladbroke Grove (Paddington) and Southall in 1999, they are very high-profile indeed, when they may be chaired (as these were) by a judge or distinguished professional expert. The two inquiries, which had occasioned much public disquiet, were followed up by a further joint inquiry commissioned by the Health and Safety Executive into the general safety of train protection systems, with the rather different function of drawing wider conclusions from the facts established by the earlier inquiries.[28] The outcome was a new investigatory body, the Rail Accident Investigation Branch, reporting directly to the Secretary of State, to handle investigations into all railway accidents.[29] Another possibility is a special, non-statutory inquiry, such as the inquiry into the sinking of the *Marchioness* pleasure boat on the Thames[30] or the football-stadium disaster at Hillsborough.[31] Such disasters have occasionally attracted a full-scale tribunal of inquiry under the 1921 Act, as with the shootings at Dunblane primary school[32] and the scandalous case of child abuse in Welsh children's homes, which lasted three years and cost £13 million but resulted in a much needed total overhaul of the child-care system in Wales.[33] All three were chaired by a (retired) judge.

Finally, there is nothing to prevent a government department or public body simply deciding to hold an inquiry without any express authority, as the Mayor of London did recently to investigate allegations of racism in the Metropolitan Police. Inquiries and royal commissions can be set up under the royal prerogative. A statutory power to set up an inquiry can be implied. Again, not every inquiry is a public inquiry; it may simply be part of the normal administrative

[27] DoT, 'The Heathrow Terminal 5 Inquiry: An inquiry secretary's perspective' *Planning Inspectorate Journal*, Jan. 2005 (available online).

[28] HSE, *The Southall and Ladbroke Grove Joint Inquiries into Train Protection Systems* (HMSO, 2001.) See also Lord Cullen, *The Ladbroke Grove Rail Inquiry* (HMSO, 2000); Professor John Uff, *The Southall Rail Inquiry* (HMSO, 2000).

[29] See the Railways and Transport Safety Act 2003.

[30] DOE, *The Marchioness/Bowbelle Formal Investigation under the Merchant Shipping Act 1995* (2001). And see *Public Inquiry into the Identification of Victims following Major Transport Accidents*, Cm. 5012 (2001) (Chair: Clarke LJ).

[31] *Final Report of the Hillsborough Stadium Disaster*, Cmnd 962 (1990) (Chair: Popplewell J).

[32] *Public Inquiry into the Shootings at Dunblane Primary School*, Cm. 3386 (1996) (Chair: Lord Cullen).

[33] Department of Health, *Lost in Care: Report of the tribunal of inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* (2001) (Chair: Sir Ronald Waterhouse).

procedures of a public authority, like the internal review or inquiry ordered by the Home Secretary in response to the Mayor of London's inquiry into racism. The wish to keep proceedings private in this way is indeed one of the most important reasons for appointing a non-statutory inquiry.

3. Inquiries and the planning process

Although planning inquiries are by no means the only form of inquiry held to advise ministers in making policy decisions, the system is by far the largest, statistically comparable to the large tribunal systems studied in Chapter 11. The final Annual Report of the Council on Tribunals records, for example, that 29,000-odd planning inquiries were held in 2006–7, a rise of 8 per cent. The majority of planning inquiries, whether into local development plans, compulsory purchase orders or planning applications, are small routine affairs which attract little publicity.

To understand the function of these inquiries, it is necessary to understand a little about the planning system, the basis of which is a series of statutes passed after World War II, from which inquiries derive their powers. The most significant was the Town and Country Planning Act 1947 (TCPA), which set in place the general machinery of land-use planning. Planning functions were generally a function of the two-tier district and county local government system, though subject always to departmental co-ordinating functions and ministerial call-in powers. The TCPA laid a positive duty on a planning authority to create development plans. This positive aspect of land use planning was enforced through development control, which required development and changes of use to be submitted to the planning authority for approval. Before a local development plan was made or changed, a local inquiry would be held by an inspector at which objections could be expressed. The inspector, who was in charge of inquiry procedures, reports to the minister or authority that appointed him, subject to cases where the decision-making power is delegated to him. These structures remain largely in place.

The development of a planning inquiry at which objections could be made has been central to acceptance of an increasingly intrusive system of land use planning. As one early study put it, the inquiry is 'part of the institutional apparatus of the state. One of its functions is to secure legitimacy for planning decisions taken by the state.' [34] This is the main reason why, as we saw in Chapter 4, there was so much concern during the 1980s to boost public participation in planning inquiries. This was an aspect of the inquiry that Franks did not consider. There was, however, a negative side to increased participation: cost and delay mounted as inquiries were prolonged. The Local Government, Planning and Land Act 1980, passed by a Conservative government in response to demands to cut the costs and delays associated with planning inquiries, was

[34] N. Hutton, *Lay Participation in Planning Inquiries* (Gower, 1986), p. 1.

a decisive step in the direction of streamlined procedures, restricting the requirement for local inquiries.

Today, most planning applications are dealt with by written representations, though they may occasionally trigger an inquiry or 'hearing'.[35] The 1980 Act was also the start of a steady process of delegation, so that inspectors today not only make recommendations but also take decisions, making the process more adjudicative. Only where the parties to a planning appeal do not agree to a written procedure is an inquiry necessary and even then the planning inspectorate has discretion whether to opt for a hearing, which takes the form of an 'open discussion led by the inspector'. On the face of things, the procedure is fully inquisitorial: the inspector is master of procedure and 'shall identify what are, in his opinion the main issues to be considered at the hearing and any matter on which he requires further explanation from any person entitled or permitted to appear'.[36] Hearings are usually quicker and cheaper than an inquiry and the shortened procedures are popular because they are cheap and speedy and legal representation is unnecessary. Here again we are seeing the search for 'appropriate' and 'proportionate' forms of dispute resolution, discussed in Chapter 10.

On the debit side, hearings are less participatory and offer none of the formal protections afforded by a planning inquiry; third parties are virtually excluded and the wider public interest may also be prejudiced. The Planning Inspectorate (PI), which handles inquiries, promises that its decisions and reports will take into account not only published planning policies and other relevant planning issues but also the views of all the parties; it is, however, far from clear how written representation or hearing procedure can accomplish this promise. Without publicity, how can 'stakeholders', other than those to whom notice must be given, be identified? The Guidance points to some of the difficulties:

> If the appeal is to be decided by a hearing, when the arrangements have been made the [Local Planning Authority] should let you know when and where it will take place. They may also publish details of the hearing in a local newspaper if they think it's necessary. There is usually more publicity about an appeal if there is going to be an inquiry. As with the other appeal procedures, if you have already written to the LPA, they should write to you. The LPA should send you details of the inquiry arrangements once the date is agreed. The appellant must display details of the inquiry, like the time and place, on the site of the proposed development two weeks before the inquiry. These are the minimum publicity requirements . . . Your LPA may give appeals more publicity.[37]

[35] See the Town and Country Planning (Appeals) (Written Representations Procedure) (England) Regulations 2000, SI 2000/1628.

[36] Town and Country Planning (Hearings Procedure) (England) Rules 2000, SI 2000/1626; Circular 05/00 [26].

[37] PI, *Taking Part in Planning Appeals, If you want to comment on someone else's appeals*, available online.

With the aim of making planning applications progress more quickly and efficiently, the Planning and Compulsory Purchase Act 2004 ended the right to a hearing.

(a) Inspectors and independence

Central to the evolution of the modern PI is public perception of its autonomy. Today the PI is an agency, carefully hived-off from central government. It stresses its 'impartial expertise' and has adopted in its mission statement the Franks principles of 'fairness, openness and impartiality' so emphasising the *judicial* nature of its functions. The independence of an inspector handling a planning inquiry is of primary importance because of the wide procedural discretion: the code that covers most routine planning inquiries provides that, 'except as otherwise provided in these Rules, the inspector shall determine the procedure at an inquiry'. In practice, the apparently unfettered discretion is heavily structured by regulations,[38] supported by a departmental code of practice. These cover in some detail the stages from notification of the inquiry: production of documents including a right to copies, appearances at the inquiry, rights to call evidence and cross-examine and, after the hearing, notification of the inspector's reasoned decision in writing and admission of new evidence. Although the rules apply only to planning, Purdue tells us that they tend to act as a benchmark for standardisation and 'although numerous different sets of rules exist for different public inquiries, they tend to follow a standard pattern and indeed, where there are no rules, it is the practice to follow this pattern'.[39]

The introduction of statutory codes opened inquiry procedures to a process of 'judicialisation from within and from without'. With a few exceptions, the regulatory provisions are immediately recognisable by anyone trained in a common law system as following the practice of our adversarial civil procedure (discovery of documents, cross-examination, etc.). Where they do not, they tend to be contested, as with the inspector's right to inspect the site without both parties being present (now statutory) or the obligation to re-open an inquiry, both areas regularly tested by judicial review. A substantial case law has developed, with which we deal in Chapter 14. The case law is equivocal. Sometimes it reflects the general progression towards 'rational decision-making' described in Chapter 3, insisting, for example, that the inspector's report must be intelligible and logical;[40] that ministerial 'policy' decisions must be based on the inspector's findings of fact and supported by sufficient evidence; that a decision to differ from the inspector's

[38] The initial text was the Town and Country Planning (Inquiries Procedure) Rules 1974, SI 1974/419. The rules are now regularly updated.

[39] M. Purdue 'Public inquiries as a part of public administration' in Feldman (ed.), *English Public Law* (Oxford University Press, 2004) [22.14].

[40] See *Save Britain's Heritage v No. 1 Poultry* [1991] 1 WLR 153.

recommendations should be justified in an adequately reasoned letter of decision; and so on. Other rulings, such as a finding that an inspector has no duty to undertake an investigatory function,[41] cast doubt on the very meaning of the term 'inquiry' and it must sometimes seem to the planners that the natural advantages of inquisitorial procedure are being watered down and undercut.

In *Bushell's* case,[42] which situates the inquiry as a step in a holistic planning process designed to 'inform the minister', the House of Lords tried to draw a line under judicialisation. By viewing it in this way rather than hiving off the inquiry as 'machinery for adjudication', judicialisation could be confined to the inquiry procedures. Even here the House of Lords was not especially generous, disallowing cross-examination. Lord Diplock justified his reasoning on the ground that:

> a decision to construct a nationwide network of motorways is clearly one of government policy in the widest sense of the term. Any proposal to alter it is appropriate to be the subject of debate in Parliament, not of separate investigations in each of the scores of local inquiries before individual inspectors up and down the country upon whatever material happens to be presented to them at the particular inquiry over which they preside.

Bushell's case was a serious setback for objectors who, before freedom of information legislation, sought to find a footing in the inquiry to contest government policy. The details of this landmark case are further discussed in Chapter 14.

(b) The 'Big Inquiry'

Purdue and Popham maintain that 'the inquiry process works reasonably well when it is confined to site-specific issues and only a small number of people are involved. It is in the case of the so-called "big inquiry" that problems arise.'[43] They identify four major inquiries involving 'projects of national significance', which have proved particularly troublesome: the site of Stansted airport (1981–3), after which the Government tried to grant permission for a larger airport than had been considered at the inquiry; extension of nuclear power stations at Sizewell B (1983–5) and Hinckley Point (1988–9); and Heathrow airport terminal 5 (1995–9).

[41] *Federated Estates Ltd v Environment Secretary* [1983] JPL 812; *Francis v First Secretary of State and Greenwich LBC* [2007] EWHC 2749 Admin. And see Current Topic, 'The scope of the inquisitorial duty of planning hearings' [2008] *JPEL* 429, 432.

[42] *Bushell v Environment Secretary* [1980] 3 WLR 22. And see p. 647.

[43] Purdue and Popham, 'The future of the major inquiry', p. 138.

Sizewell B[44] was used by protestors to fight government policy on nuclear energy and Purdue saw it as a major shift in the form of the inquiry from:

> its origin in individual rights, resting on property rights, to become an instrument of policy formulation and political decision-making in an open forum. While such a painstaking and public analysis of important national policies can turn the major inquiry into a powerful instrument of accountability and legitimization, from the government point of view it makes the processing of major projects through the planning system increasingly difficult. It also places a strain on the traditional procedures of the public inquiry and increases the costs and delay caused by the inquiry procedure. [45]

This was precisely what *Bushell's* case had tried to prevent.

The inquiry into a fifth terminal at Heathrow cost £80 million and took four years (1995–9); the report was finally published two years later. Handling an inquiry on this scale is a huge responsibility, which lay on the inspector, Roy Vandermeer QC, with a single deputy. Fifty major parties participated, including thirteen local authorities and the local planning authority, local residents and environmental groups, over 95 per cent opposing the application by British Airways. There were 700 witnesses, in excess of 27,500 written representations, mostly opposing the applications, and over 5,500 documents to be considered; in addition, the Inspectors made more than ninety site visits. The length of the inquiry is explained partly by the number of participating bodies and partly because, under the inquiry rules, all objectors, most of whom were legally represented, had a statutory right to be heard and to challenge the views of others, so that 'time had to be set aside to let them have their say'. Much time was also spent in clarifying government policy on a number of important issues, which had neither been updated nor published prior to the inquiry. Did the inquiry legitimate the decision? Not in the eyes of those who opposed the new terminal. Indeed, none of the many airport inquiries have ended protest.

Lord Hart, previously a planning solicitor, has described major inquiries as 'massive debating fora with armies of expensive experts and counsel ranged against each other, many parties with unequal firepower' and as 'a costly and time-consuming process only really suited to a two-party dispute with equal representation'. They place 'a huge and unacceptable strain on the inquiry system'.[46] The Planning Act 2008 is just the latest of many government responses to the defects and irksome delays of major planning inquiries, which include the Planning Inquiry Commission, Special Development Orders and parliamentary committees.[47] The Act facilitates

[44] Sir Frank Layfield, *Report of the Inquiry into Sizewell B* (HMSO, 1987).

[45] Purdue, 'Public inquiries as a part of public administration' [22.09]. And see T. O' Riordan, R. Kemp and M. Purdue, *Sizewell B: An anatomy of the inquiry* (Macmillan, 1988).

[46] HC Deb., col. 1172 (15 July 2008) (Lord Hart).

[47] For discussion, see Purdue and Popham, 'The future of the major inquiry'.

planning applications for 'nationally significant infrastructure projects' – a term very widely defined to extend to generating stations, nuclear reactors, highways, dams and reservoirs, waste treatment plants and much more – by taking them out of the normal planning process. They will be handled by a new Infrastructure Planning Commission appointed by a minister to handle these applications. Applications can be handled by a single Commissioner or three-person panel, though a minister may still call in an application for decision. The Act aims to settle policy and cut short debate by providing that the framework for Commission decisions will be set by 'national policy statements' published by the minister. Inquiries will be replaced by 'examination' of an application, to be conducted primarily through written representations. The Bill does, however, allow for the possibility of an 'open floor hearing' or, at the discretion of the Commissioner/panel, other oral hearings at which interested parties can make representations – subject always to the overriding discretionary powers of the panel or Commissioner as to procedure.

Introducing the bill in the House of Lords, the minister (Baroness Andrews) referred to the 'overdependence on cross-examination as the only way to test evidence':

> Inquiry processes are sometimes slow, intimidating and inefficient not just because of different regimes, different systems and different rules . . . These delays do not, perhaps, prevent those with the most resources having their say, but they make it incredibly hard for those poor in time and expertise to participate . . . The system puts the difficult decisions off until the last stage; it forces inquiries to spend enormous amounts of time debating what government policy is, and whether there is a need for infrastructure. The result is costly and there is uncertainty for communities as well as for developers. [48]

Not everyone was reassured. The government had to fight off a two-sided backbench rebellion. There were complaints of the *autonomy* of the Commission; it would be an agency composed of experts, taking decisions best left to politicians who were accountable to Parliament; and the view of inquiries as an informative and consultative stage in the administrative process would be undercut. From the other side came the familiar plea for justice for the parties: 'removing the right for interested parties to test the evidence through cross-examination' would be a retrograde step. A government concession that the IPC would have to hold a public hearing into a development order whenever 'someone affected wants it, and they will have the right to be heard at that hearing' did not satisfy the rebels, who still felt that the new hearings would prove 'grossly inferior to the current system'.

McAuslan once analysed planning law in terms of three inconsistent and competing ideologies:

[48] HL Deb., col. 1160 (15 July 2008) (Baroness Andrews).

> [First] the law exists and should be used to protect private property and its institutions: this may be called the traditional common law approach to the role of law. Secondly, the law exists and should be used to advance the public interest, if necessary against the interests of private property; this may be called the orthodox public administration and planning approach to role of law. Thirdly, the law exists and should be used to advance the cause of public participation against both the orthodox public administration approach to the public interest and the common law approach of the overriding importance of private property; this may be called the radical or populist approach to the role of law.[49]

These competing ideologies have transformed the planning inquiry into a battleground. Applying this analysis to the development of the planning inquiry, we could see it as a seesaw progression towards judicialisation interrupted at regular intervals by government attempts to 'de-judicialise'. A series of Planning Acts seeks to reintegrate planning inquiries as a stage in policy-making and to strengthen the grip of government over the process. From the standpoint of developers, the move to open up inquiries to community participation is often a threat to private property rights. From the government standpoint, however, the judicialisation of inquiry procedure is more than a take-over bid by the private property lobby and its advisers. They have found new allies in the pressure groups which are using the Big Inquiry as a tin-opener to government policy and to contest the sole right of government to represent the public interest. For both, the new legislation is nothing more than a take-off point to write in new procedural protections.

4. A Spanish Inquisition?

For Blom-Cooper, an experienced inquiry chairman, it is the *investigatory* or fact-finding function of the inquiry that justifies 'inquisitorial' procedure. He feels that:

> The adversarial procedure adopted in the legal system, admirable as it may be for the resolution of defined issues in dispute between identifiable parties, is wholly inappropriate [for an inquiry]. There are, in a public inquiry, no immediately discernible issues to be tried according to well-established rules of evidence . . . Since the parties to litigation formulate their respective cases, call their own witnesses to support one party's case or refute the other party's case, and seek adjudication on the basis exclusively of such evidence, each party may seek to establish its own perceived version of the events. The result may be a satisfactory method for determining who should win or lose the forensic contest. It does

[49] P. McAuslan, *The Ideologies of Planning Law* (Pergamon Press, 1981), p. 2. And see B. Hough, 'A material change of use: The rise of the communitarian model' (2001) *JPL* 632, who argues for planning decisions to be taken by 'trained administrators who can identify the common good'.

> not aim to establish an objective truth, still less to identify the relationship between that truth and a wider conception of the public interest. The public inquiry, on the other hand, is constructed – even instructed – precisely to elicit the truth. It will ask itself: what happened; how did it happen; and who, if anybody, was responsible, culpably or otherwise, for it having happened.[50]

This does tend to suggest that there are no conflicts of interest at an inquiry, which our study of planning inquiries shows not to be the case. Purdue, writing more generally about inquiries into appeals or objections, points out that 'there has always been an ambivalence as to whether the primary purpose is to give rights to individuals who will be affected by the outcome or to provide the minister with all the facts and arguments necessary to a sensible and rational decision'.[51] This passage, we would argue, has a wider application. Parties at an inquest may – like Mohamed Fayed at the Diana inquiry – adopt an adversarial and even prosecutorial stance; witnesses may, on the other hand, require the protections typical of adversarial procedure against trial by inquest and the media.

Lord Howe's concern is with inquiries, 'triggered not by some broad policy question but by a specific event or activity which would be inappropriate for consideration by either House of Parliament'.[52] He instances inquiries to investigate allegations of improper conduct in the public service, to establish the cause of some major disaster and learn lessons from it, or to consider some other major issue of public concern. These seemingly disparate types of inquiry have in common that they are '*inquisitorial* in substance and form'. Although he does not specifically say so, inquisitorial procedure is something with which Howe is clearly not comfortable.

We saw that at planning inquiries the inspector was responsible for assembling the evidence, shaping the case, directing the proceedings and asking the questions. In the Heathrow Inquiry, for example, the Inspector held a series of five pre-inquiry meetings to identify the main issues, discover the parties who would to play an active part in the proceedings and agree the ground rules for the day-to-day conduct of the inquiry and formal exchange of evidence. Significantly, it was decided at these meetings to adopt a topic-based and not a party-based approach to the presentation of evidence at the inquiry. Draft lists of topics were circulated for written comments, ending with an Inspector's advice note setting out the agreed list. The Inspector also announced his intention at the first pre-inquiry meeting to have daily verbatim transcripts of the inquiry proceedings.[53] In other types of public inquiry, the Chairman is

[50] L. Blom-Cooper, 'Public Inquiries' (1993) 46 *Current Legal Problems* 204, 205–6.

[51] Purdue, 'Public inquiries as a part of public administration' [22.06].

[52] Howe, 'The management of public inquiries' .

[53] DoT, 'The Heathrow Terminal 5 Inquiry: An inquiry secretary's perspective'. It should be noted that, since the reforms of civil procedure brought in after the Woolf Report on *Access to Justice* (Lord Chancellor's Department, 1996), the role of the judge in civil proceedings is somewhat similar.

responsible for procedure. As inquiry procedure has developed, however, an official counsel to the inquiry is usually appointed to do the questioning. This in itself may stimulate demands for a right to cross-examine.

To lawyers trained in an adversarial system inquisitorial procedure may seem unfair partly because they do not properly understand it, partly because it does not conform to principles of procedural justice derived from proceedings of our common law courts (see Chapter 14). Inquisitorial procedures, in other words, may seem unfair simply because they are *not* adversarial. By inquisitorial procedure, the Council on Tribunals understands that:

> It is the inquiry itself that is responsible for gathering evidence, questioning witnesses, and determining the progress and direction of the proceedings. This differs from the adversarial nature of ordinary litigation in the civil and criminal courts, where each side presents a case which is then tested by the other side. However it is not possible to draw an absolutely hard and fast distinction between the inquisitorial and adversarial modes. For example, accident inquiries can assume something of an adversarial character, with different groups of individuals having different sets of interests. The presence of Counsel to the inquiry may also introduce an adversarial element into the proceedings. Features characteristic of adversarial litigation may properly be introduced into the inquisitorial process, if that assists in the fair and efficient conduct of the inquiry.[54]

'How far this may be appropriate', the paper adds helpfully, 'will vary greatly according to circumstances.'

(a) Scott: a waste of time?

In pursuing these procedural issues, it is helpful to think about the Scott Inquiry, set up to investigate the alleged connivance of ministers and public servants in the illegal export of arms to Iraq between 1984 and 1990. Its terms of reference as agreed between the Government and Lord Justice Scott were to 'examine the facts', 'to report' on whether those involved operated in accordance with government policy, 'to examine and report' on decisions taken by the prosecuting authority and 'to make recommendations'.[55] This remit is clearly investigative and falls within (Howe, 1) and (Howe, 2) (see p. 572 above). The Opposition parties, on the other hand, hoped to use the inquiry to make people and organisations accountable (Howe, 5). As the inquiry unfolded, its

[54] Council on Tribunals, *Procedural issues arising in the conduct of public inquiries set up by ministers* (1996) [7.3] available online

[55] *Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions,* HC 115 (1995/6). The Report is the subject of a Special Issue of Public Law: [1996] *PL* 357–527; see also D. Woodhouse, 'Matrix Churchill: A case study in judicial inquiries' (1995) 48 *Parl. Affairs* 24. In our account we omit any reference to the question of claims made by ministers to public interest immunity in court proceedings, a secondary, though important, aspect of the Inquiry: see R. Scott, 'The acceptable and unacceptable use of public interest immunity' [1996] *PL* 427.

outcome and probably its real purpose were shown to be to serve the political interests of government (Howe, 6). The Government had resorted to an inquiry as a means of removing a probably improper set of ministerial actions from the dangerous political forum of the House of Commons and transferring them to a safer, quasi-judicial terrain. Legitimated by the appointment of a disinterested member of the senior judiciary as chairman, a lengthy inquiry would have the effect of sheltering those involved from political attack. Using the vocabulary of ministerial responsibility and accountability (Howe, 5), the Opposition demanded powers to summon witnesses and call for evidence generally reserved for superior courts. Their purposes were no less political; they hoped to use the findings of the 'impartial' inquiry to pull down a weak government. This is the background against which to consider the chosen procedure.

Lord Justice Scott's position with regard to procedure is outlined in the final report at considerable length. As summarised by the Council on Tribunals,[56] the report stated that inquiry procedures need to serve three objectives:

- fairness to witnesses and others whose interests may be affected by the work of the inquiry
- the need for the inquiry's work to be conducted with efficiency and as much expedition as is practicable
- the need for the cost of the proceedings to be kept within reasonable bounds.

Lord Justice Scott refused to allow legal representation of witnesses at the inquiry on the ground of length and prolixity, though he did agree to give some idea of the questions he would be asking and promised to notify in advance anyone who would be criticised in the report. But he thought that the primarily adversarial Salmon principles had little application to inquisitorial proceedings, where those who give evidence are not presenting a 'case':

> The conception that a witness needs to prepare 'a case' introduces an element inherent in adversarial proceedings but alien to an inquisitorial inquiry, at least at the investigation stage. The need to prepare 'a case' may, of course, come at later stage . . . but this stage will not arise until conclusions have been reached by the inquiry.[57]

This implies that an inquiry is purely an investigation, a view we have already contested, and merely confirms well-established principles concerning the rules of natural justice, which kick in only after a certain stage in the investigation.[58]

[56] Council on Tribunals, *Procedural Issues Arising in the Conduct of Public Inquiries Set Up by Ministers* (1996) [4.4].

[57] Sir Richard Scott, 'Procedures at inquiries: The duty to be fair' cited Howe, 'The management of public inquiries'. See also L. Blom-Cooper, 'Witnesses and the Scott Inquiry' [1994] *PL* 1.

[58] *In re Pergamon Press* [1971] Ch 388; *Maxwell v Department of Trade and Industry* [1974] Ch 523.

Lord Howe, a disgruntled witness at the Scott Inquiry, takes a very different view of the procedure:

> Throughout the three working years of the inquiry, all the evidence was adduced in response to questions from Sir Richard Scott himself or from counsel to the Inquiry, Presiley Baxendale, Q.C. No distinction was drawn by either between examination-in-chief or cross-examination of witnesses. There was no cross-examination of any witness save by the Inquiry itself, no closing speeches, no face-to-face dialogue between the Inquiry and any representative of the outside world. When I first complained that this was to be an inquiry at which – as never before in modern times – 'defence lawyers may be seen but not heard', I had scarcely believed myself. But Sir Richard Scott had indeed explicitly discarded almost every one of the established principles.[59]

Although Howe presents the dispute as an argument over adversarial versus inquisitorial procedure, it was, as he himself seemed to realise, partly an argument over the multiple functions of inquiries. Scott saw the inquiry as an investigation designed to establish the 'truth' ending with recommendations, at which stage the 'rights of the defence' may kick in; Howe saw it as a very public forum in which allegations highly detrimental to the individual could be made without any opportunity for self-defence. The victim was, in other words, stripped of the due-process protections inherent in the common law. Against this one might argue that inquisitorial procedure is always 'contradictory' in the sense that parties have an opportunity to make comments and representations; this Lord Justice Scott had given them a chance to do. It might also be argued that *witnesses* at a criminal trial are not entitled to the procedural protections for which Howe is asking; they are not represented by counsel, though there is a right against self-incrimination.

The Scott Inquiry led the Lord Chancellor to ask the Council on Tribunals for advice. Perhaps unfortunately, the Council felt that model rules or even guidance were out of the question, saying:

> It is clear that the infinite variety of circumstances that may give rise to the need for a major public inquiry make it wholly impracticable to devise a single set of model rules or guidelines that will provide for the constitution, procedure and powers of every such inquiry. All that can be done is to set out a number of objectives that should be borne in mind when an inquiry is being established, and to offer guidance in support of those objectives according to the circumstances of the particular inquiry.
>
> The extent to which these four objectives are met for a particular inquiry will be determined by decisions taken early on as to the setting-up, procedure and powers of the inquiry. Suffice it to say that the objectives of effectiveness and fairness should not, as a matter of principle, be sacrificed to the interests of speed and economy.[60]

[59] Lord Howe,' Procedure at the Scott Inquiry' [1996] *PL* 445, 446–7.

[60] Council on Tribunals, *Procedural Issues Arising in the Conduct of Public Inquiries Set Up by Ministers* [2.3] [2.9].

It is what happened when the Scott Report was finally presented to the Government that casts doubt on the absence of general procedural requirements. A public inquiry should surely be *public*. Yet the Government kept the report under wraps for eight days while preparing its own defence. Only at the insistence of the Speaker of the House of Commons was the five-volume report shown to selected Opposition MPs on condition that no photocopies were taken and mobile phones were left outside the room where they were 'carted off and locked up in a farcical test of their abilities to speed-read nearly 2,000 pages in three hours . . . a quite appalling abuse of power on the government's part [which] should never have been agreed to either by Parliament or the Scott inquiry'.[61] The manoeuvre served the Government's purpose. Interest rapidly evaporated after Opposition calls for the resignation of two ministers impugned by Scott were defeated by a slender majority in an adjournment debate on the Report.

Of the many features of inquiry procedure that contributed to this result, delay was probably most important. Set up in 1992, the Inquiry was completed three years later. By the date of publication, the kettle had gone off the boil. It did almost nothing to reassure the public, which had probably lost interest in the affair and nothing at all to secure 'catharsis', whatever that term may mean in the circumstances. Just as the Government had hoped, the inquiry had worked to defeat accountability; indeed from the accountability angle, the inquiry was largely a waste of time. In search of accountability, Lord Justice Scott had produced five very expensive volumes that almost no one would ever read.[62] It is fair to say of Scott that the sole upshot was to serve the political interests of the Government (Howe, 6).

5. Inquiries and accountability

Though primarily directed at Scott, Lord Howe's critique of inquiry procedure extends more widely. Inquiries may fulfil more than one objective: establishing facts and learning from events are not incompatible with public reassurance and catharsis. Potential conflicts are, however, built in. Findings of pervasive managerial incompetence or administrative failure do not serve to reassure the public, which tends to prefer the populist solution of 'name, blame and shame'. This is why Lord Justice Phillips, who chaired the non-statutory inquiry set up 'to establish and review the history of the emergence and identification of BSE and variant CJD in the United Kingdom, and of the action taken in response to it up to 20 March 1996',[63] warned that 'any who have come to our

[61] A. Tomkins, *The Constitution After Scott* (Clarendon Press, 1998), p. 13.

[62] See I. Leigh and L. Lustgarten, 'Five volumes in search of accountability: The Scott Report' (1996) 59 *MLR* 695.

[63] Lord Phillips, *The BSE Inquiry* (HMSO, 2000). BSE (popularly 'mad cow disease') is a neurodegenerative disease in cattle which can be transmitted to humans, when it is known as known as new variant Creutzfeldt-Jakob disease and is fatal. The means of transmission is not definitively established.

report hoping to find villains and scapegoats should go away disappointed'. The Report did not name names. Its overall conclusion was that 'in general, our system of public administration has emerged with credit from the part of the BSE story that we have examined'. It also found that bureaucratic processes had resulted at times in 'unacceptable delay in giving effect to policy' and pointed to a lack of rigour shown at times by officials in considering how policy should be turned into practice, 'to the detriment of the efficacy of the measures taken'. Entirely compatible with establishing the facts (Howe, 1) and learning lessons (Howe, 2) this measured approach deliberately downplayed the accountability function (Howe, 5), thereby attracting criticism that it was a 'whitewash'. It had failed to blame individual civil servants or censure the food industry for its unsavoury practices of recycling animal protein in animal feed (not clearly within its terms of reference).

Mulgan, in his survey of machinery for public accountability, puts considerable emphasis on accountability through the legal system (see p. 47 above). Judicial hearings 'increasingly require the Government to disclose what it has done and why; they allow members of the public the right to contest such government actions, and they can force the Government into remedial action'. This is the main reason, we suggest, why the public reaction to scandals and disasters is so often to demand a public inquiry. But this is a 'thin' definition of accountability, which (i) requires public actors to give an account of what has occurred; (ii) requires them to submit to questioning, and (iii) allows the issues to be probed and publicly debated.[64] A public inquiry is an independent forum well placed to achieve these objects. It is widely felt, however, that a fourth element of sanction is needed to 'thicken' accountability. For a public inquiry to provide reassurance (Howe, 4), it may be that (in common parlance) 'heads must roll'. After the Southall and Paddington Inquiries into serious rail crashes at Ladbroke Grove (see p. 581 above), for example, there were no immediate prosecutions. Even though the cause of the accidents was established and some remedial action taken by the rail operators, it was not until Network Rail was found guilty of an offence under s. 3 of the Health and Safety at Work Act 1974, was fined £4 million and had made financial reparation that the victims spoke of closure.[65] Significantly, this involved litigation and took ten years.

So sanction is not an essential component of the public inquiry; it specifically falls outside the remit of coroner's inquests and (since 2005) inquiries. Howe suggests, however, that it remains a very general expectation that a public inquiry will fulfil this function by pinpointing scapegoats. To offset this very general expectation, modifications of inquisitorial procedures are necessary:

[64] M. Bovens, 'Analysing and assessing accountability: A conceptual framework' (2007) 13 *European Law Journal* 447.

[65] See CPS, Press Release, 'Paddington train crash' (30 March 2007).

> It is for the sake of securing the right balance between these factors (the search for truth, the assignment of responsibility, the reassurance of the public) that certain features have over the years emerged as desirable in the inquiry process, as to the composition of the tribunal, the form of the report, the right to representation, and the nature and extent of appropriate publicity (before, during and after the inquiry itself). These questions have more than once been considered by experts, so that until recently there had been established a widespread consensus about almost all the essentials.[66]

Lord Justice Scott, complained Howe, broke this consensus.

(a) Child-abuse inquiries

Nowhere are problems of balance more evident than in child-abuse inquiries. When a child dies or is injured while in the care of the state, or at the hand of family members in circumstances involving state care services, many bodies and individuals with divergent and conflicting interests may be involved. An inquiry may be set up in one of several ways. A local authority or other body may set up an internal review, whose findings and recommendations may or may not be published. The Minister for Health or Education may set up a statutory inquiry in terms of s. 81 of the Children Act 1989. Criminal prosecutions, actions in negligence, disciplinary proceedings and coroners' inquests are additional possibilities. At least when held in public, such inquiries are inevitably concerned with accountability and even sanction; it is hard to see them as purely investigatory when many of the people involved risk prosecution, disciplinary proceedings, loss of their children or professional reputation.[67] This makes them particularly hard to handle; consequently, those most likely to prove controversial are normally chaired by judges or experienced advocates.

Not only may participants in this type of inquiry have very different interests but they approach the inquiry from different standpoints. Mashaw's models of administrative justice (see p. 447 above) help to explain why. The model of *professional treatment*, interpersonal and based on service, differs greatly from the model of *moral judgement*, Mashaw's term for the legal model we call *due process*. Just such a difference in viewpoint led the three-person panel, chaired by a Crown Court judge, to split and publish opposing reports in the inquiry into the death of Maria Colwell.[68] Professor Olive

[66] Howe, 'The Management of Public Inquiries', p. 296.

[67] A notable example was the Butler-Sloss inquiry: *Report of the Inquiry into Child Abuse in Cleveland*, Cm. 412 (1988). Parents accused of satanic practices were cleared by the inquiry and subsequently compensated, while the medical practitioners were found responsible and suffered very severely: see generally, P. Case, *Compensating Child Abuse in England and Wales* (Cambridge University Press, 2007).

[68] DHSS, *Report of the Committee of Inquiry into the Care and Supervision Provided in Relation to Maria Colwell* (1974). The Report was followed by a second, local inquiry: East Sussex District Council, *Children at Risk: A study by the East Sussex County Council into the problems revealed by the Report of the Inquiry into the case of Maria Colwell* (1975).

Stevenson, from a social-work background, refused to go down the path of the majority, who saw the inquiry as an occasion for accountability and sanction, apportioning the mistakes to individuals as well as 'inefficient systems'. Professor Stevenson called the social workers' decisions 'unfortunate'. She saw them not as breaches of accepted professional standards but as the inevitable consequence of public ambivalence over the rights of parents and the state's right to intervene in protection of children – a clash of values that should be borne in mind.

Add to these diverse viewpoints Mashaw's model of *bureaucratic rationality* and we have scope for further misunderstanding. In this managerial model the primary goal is effective programme implementation and the legitimating values accuracy and efficiency. The managers aim to establish the facts, to learn from events and reassure the public. DHSS guidance that expressed this managerial preference troubled JUSTICE–All Souls.[69] The guidance recommended: (i) that hearings should generally be held in private, as informal hearings or interviews were more effective than formal sessions; (ii) that a 'flexible and inquisitorial procedure' should be used. Conscious of the interests of social workers, the guidance advised (iii) that witnesses should not be 'treated as defendants' but fairly. They should be informed of their rights 'with an opportunity to comment on criticism of their performance made at the inquiry and access to comments on them in the inquiry report . . . Inquiries should not be used for disciplinary purposes and reports of inquiries should not be used in evidence in disciplinary proceedings.' To the JUSTICE–All Souls Committee, a committee largely composed of lawyers, this guidance 'tend[ed] to minimize and obscure somewhat the critical difficulty that confronts any inquiry where reputations are at stake'. This is true if one assumes the purpose of the inquiry is to make people and organisations accountable, more especially if it is held in public, as in the modern age of transparency is likely to be the case. If, however, the primary purpose is to learn from events and the inquiry is internal, the guidance was probably appropriate.

Two particular inquiries stand out in the long and dreary catalogue of investigations into child abuse:[70] the Jasmine Beckford Inquiry, chaired by Louis Blom-Cooper QC, and the Victoria Climbié Inquiry chaired by Lord Laming, a former chief inspector of social services. Blom-Cooper took the view that the function of the inquiry was investigatory but its objective accusatorial: 'to find out what, if anything, people have done wrong or omitted'.[71] The inquiry found systemic failure but allocated responsibility to a named social worker and

[69] JUSTICE–All Souls [10.109–12] citing DHSS Circular, *Non Accidental Injury to Children* (April 1974). See now Dept of Health, *Working Together to Safeguard Children* (1999); Dept of Health Circ, *What to do if you're worried a child is being abused* (May 2000), published in response to the Climbié inquiry, below.

[70] These are recorded in *Child Abuse: A study of inquiry reports* 1980–89 (London: HMSO) 1991.

[71] Brent LBC, *A Child in Trust: Report of the inquiry into the circumstances surrounding the death of Jasmine Beckford* (1985).

health visitor. Dingwall sees both the shape and the outcome of the proceedings as dictated by the appointment of a lawyer-chairman:

> [I]t is clear that the panel, by whatever means, came to accept that Blom-Cooper's appointment should lead to a quasi-judicial model being adopted. Their role was essentially that of spectators to an adversarial drama played by 18 counsel. The Report begins with three chapters which are almost exclusively devoted to procedural questions. Underlying these was the assumption that, just as in a criminal trial, the cause of the untoward event could be located in the behaviour of particular individuals.[72]

The effect was to shift the emphasis of the inquiry from the function of improving social services by objectively establishing facts and drawing lessons from them (Howe, 1 and 2) to the identification of symbolic wrongdoers. But Dingwall rightly goes on to underline that court (and especially criminal) procedures are shaped for the protection of the individual while inquiry procedures are not, while Blom-Cooper, an advocate of inquisitorial procedure, on this occasion combined this with 'accusatorial' goals.

Victoria Climbié was a seven-year-old girl from West Africa whose parents had sent her to Europe for a better life. After she arrived in England, Victoria was battered to death by the two adults in whose charge she was living. They were convicted of murder. There was great media interest and public concern was expressed at the lack of co-ordination between the different public bodies (notably police, education and social services) involved in the episode. It was therefore the Health Secretary who moved to set up a ministerial inquiry. The chairman, Lord Laming, sat with four assessors: a paediatrician, health visitor, detective and social services manager.[73] Lord Laming described what had happened as 'a gross failure of the system':

> Not one of the agencies empowered by Parliament to protect children . . . – funded from the public purse – emerge from this Inquiry with much credit. The suffering and death of Victoria was a gross failure of the system and was inexcusable. It is clear to me that the agencies with responsibility for Victoria gave a low priority to the task of protecting children. They were under-funded, inadequately staffed and poorly led. Even so, there was plenty of evidence to show that scarce resources were not being put to good use . . . Even after listening to all the evidence, I remain amazed that nobody in any of the key agencies had the presence of mind to follow what are relatively straightforward procedures on how to respond to a child about whom there is concern of deliberate harm.[74]

Lord Laming stressed the fact that this inquiry was 'more than just a forensic exercise. It has been charged with looking forward and making

[72] R. Dingwall, 'The Jasmine Beckford affair' (1986) 49 *MLR* 489.
[73] *The Victoria Climbié Inquiry: Report of an Inquiry*, Cm. 5730 (2003).
[74] *Report Summary*, p. 4.

recommendations for "how such an event may, as far as possible, be avoided in the future"' (Howe, 1 and 2).[75] He went on to make more than one hundred detailed recommendations for reform of the child-care services. The inquiry was followed by substantial reforms, including passage of the Children Act 2004, a new government database holding information on all children in England and Wales and the creation of the Office of the Children's Commissioner, empowered to open his own inquiries.[76]

Lord Laming had decided that, in phase one of the inquiry devoted to establishing the facts, procedure would be inquisitorial and not adversarial. Counsel to the Inquiry decided which witnesses to call and examined them. 'Interested Parties' were recognised and a number of witnesses were legally represented. With one exception, there was no cross-examination but representatives were allowed time-limited opportunities to 're-examine' witnesses and make closing submissions.[77] In his Report, he carefully reminded himself that 'those who sit in judgment often do so with the great benefit of hindsight', acknowledging that 'staff who undertake the work of protecting children and supporting families on behalf of us all deserve both our understanding and our support'. He stressed the importance of understanding how *individuals* had acted and how 'deficiencies in their organisations' had contributed to the tragedy as an essential step in moving forward. But he did name names. Several individuals were harshly criticised and suffered from the inquiry; whether their interests were adequately protected is an open question.

Five years after Lord Laming had reported, a baby was battered to death within the same social services area after months of abuse. Baby P, who had more than fifty injuries, was on the children-at-risk register and had been seen sixty times by social workers, doctors and police. Following a letter from a whistleblower, Haringey Council's child protection services were examined by the Commission for Social Care Inspection, an independent agency set up by government 'to promote improvements in social care and stamp out bad practice', which found nothing wrong. After Baby P's mother and boyfriend had been convicted of involvement in the death, the minister asked Ofsted to examine the role of all the agencies involved in this case. He also invited Lord Laming to 'prepare an independent report of progress being made, identifying any barriers to effective, consistent implementation, and recommending whether additional action is needed to overcome them'.[78]

This lends some support to Masson's sceptical view of public inquiries, which she sees as a 'central part of the "scandal politics" which has shaped the child protection system both in terms of public perception and policies and

[75] *Ibid*., p. 6.
[76] S. 3 of the Children Act 2004.
[77] *Inquiry Report* [2.14–19].
[78] HC Deb., col. 57WS, 12 Nov 2008 (Mr Balls).

practices'.[79] She questions the willingness to commit great sums of money to inquiries as disproportionate. 'Understanding what went wrong is a limited activity to which only modest resources should be committed. Developing the foundations for improving practices requires a more through evidence-based understanding which can only be obtained through research.'

(b) Alternative models

In considering these high-profile public inquiries and the procedures adopted by them, it is helpful to think about two rather similar inquiries. We have mentioned the conciliatory approach adopted by the BSE Inquiry and its efforts to avoid recriminations (see p. 593 above). Lord Justice Phillips, advised by a medical geneticist and an expert in public administration, had to deal with large quantities of technical and scientific evidence. The inquiry sat for two years and published its 4,000 pages of findings in sixteen weighty volumes. Whether the sum of £27 million spent on the inquiry was justified is questionable. If the purpose of the inquiry was *not* to allocate responsibility, less costly alternatives, such as funded research in a high-profile academic institution backed up by a Select Committee inquiry might have been more appropriate. A looser format, that allowed BSE to be considered outside a formal procedural framework and 'outside of technological, scientific and industrial process' – more like that of the Power Commission or Kennedy Inquiry (see below) – might have been more suitable.[80]

The Bristol Royal Infirmary Inquiry into heart surgery had to look back at events that took place over a number of years. It was chaired by Ian Kennedy, a professor of medical law, with a legal sociologist, nursing expert and professor of clinical medicine as panel members.[81] In its first phase, the panel worked its way through 900,000 pages of written evidence from 577 witnesses, including 238 parents. In its second phase, which focused on the future, seminars were held, which took account of the latest research and thinking. At the preliminary hearing, the chairman, introducing the panel, struck the informal note that marked this inquiry:

> I intend to conduct the Inquiry as sensitively and informally as I possibly can . . . There is a [counsel] to the Inquiry . . . His role is strictly impartial. It is to assist the Panel in its

[79] J. Masson, 'The Climbié Inquiry: Context and critique' (2006) 33 *JLS* 221–2, 244. See also B. Corby, A. Doig and V. Roberts, 'Inquiries into child abuse' (1998) 20 *Journal of Social Welfare and Family Law* 377; N. Parton and N. Martin, 'Public inquiries, legalism and child care in England and Wales' (1989) 3 *International J. of Law and the Family* 21.

[80] See K. Jones, 'BSE, risk and the communication of uncertainty: A review of Lord Phillips' report from the BSE Inquiry' (2001) 26 *Canadian J. of Sociology* 655. The Power Inquiry, *Power to the People: An independent inquiry into Britain's democratic system* (Rowntree Trust, 2006) is explained at p. 48 .

[81] *Learning from Bristol: The report of the public inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995*, Cm. 5207 (2001). The inquiry sat for 3 years and cost £14.5 million.

> investigation of the facts and its search for the truth. It is not his role to prosecute nor to prove a particular case. Instead, he is there to present all the evidence thoroughly and rigorously, and to advise me and the Inquiry members on matters of law and evidence . . . [T]he objective of the Inquiry is to understand what happened in Bristol, why it happened and what lessons can be learned for the benefit of the National Health Service as a whole. No-one is on trial in this Inquiry; it is not a trial nor a court, nor a disciplinary hearing. It is not a law suit in which one party wins and another loses. There will be no parties. It is not the same as the legal process in a criminal or civil court. We are a team of independent persons working within our terms of reference which involve . . . trying to discover first what happened, secondly why it happened, and thirdly, what lessons can be learned and recommendations made. One of our functions, inevitably, will be to offer constructive criticism. If criticisms are levelled at organisations or individuals which are relevant to these issues, we shall of course consider them and make any necessary finding. It is not our purpose, not the purpose of the Inquiry to sit in judgment. I hope, therefore, that everyone concerned both at the Inquiry and outside it will play their parts responsibly and without rancour. We want to find the facts and learn from them and, as the Secretary of State told Parliament, to do so with all reasonable speed.[82]

Like Phillips, the Bristol inquiry avoided pinning responsibility on individuals, though some 'flawed behaviour' was mentioned. It was, the panel concluded:

> an account of healthcare professionals working in Bristol who were victims of a combination of circumstances which owed as much to general failings in the NHS at the time as to any individual failing. Despite their manifest good intentions and long hours of dedicated work, there were failures on occasion in the care provided to very sick children.[83]

This is to approach the matter, as the Bristol Inquiry did, from the standpoint of professionals imbued with a culture of *professional treatment*. But where the death of a child is in issue, it is likely that both the professional and managerial models will be pushed by public opinion into moral judgements and demands for sanction.

6. The judiciary: 'Symbolic reassurance'

The appointment of an eminent judge to chair a public inquiry is, as we have seen, a common practice. The practice has been supported on various occasions by the Salmon Commission, the Council on Tribunals and more recently, in the context of new legislation, by both the Government and Lord Woolf, then Lord Chief Justice, in evidence to PASC (see p. 603 below). Judges offer obvious advantages. They have the skills needed to chair a complex inquiry,

[82] *Learning from Bristol*, Transcript of Preliminary Hearing, (27 Oct.1998) available on inquiry website.

[83] *Learning from Bristol* (Summary) [5].

deal with witnesses and handle large volumes of evidence. They have authority. Above all, they tend to be perceived by the general public as unquestionably neutral and independent, a helpful attribute in depoliticising political issues. A judicial inquiry provides what has been called 'symbolic reassurance – disinterested authority and dispassionate investigation'. The practice may, however, misfire.

(a) The Hutton Inquiry

The Hutton Inquiry was one of a number of attempts to piece together the truth behind the so called 'dodgy dossier' or, more correctly, the use or misuse by Tony Blair and his staff of intelligence concerning Iraq's possession of weapons of mass destruction in the period leading up to the second Iraq war. The intelligence services held a secret inquiry which reported directly to the Prime Minister. Lord Butler, for many years the Cabinet Secretary, chaired a five-member committee of privy councillors, which reviewed the intelligence coverage of information on 'WMD' programmes. The Butler committee had access to intelligence reports and other government papers and could call witnesses to give oral evidence but, although its report was published, worked in secret and the main Opposition parties refused to participate.[84] When the Foreign Affairs Select Committee examined the decision to go to war it had access to government papers and heard evidence from a wide range of witnesses yet complained of the Prime Minister's failure to co-operate with it; most unusually, the committee split on party lines in seven out of fourteen divisions.[85] The Hutton Inquiry's terms of reference were 'urgently to conduct an inquiry into the circumstances surrounding the death of Dr Kelly' (an official witness before the Select Committee, who had afterwards been found dead in suspicious circumstances).[86]

Twining, an expert in the law of evidence, noted the cross between inquisitorial and adversarial procedure at the Hutton Inquiry: on the one hand the Chairman rather than interested parties controlled who was called as a witness, what documents were produced and to a large extent what questions were asked; on the other hand, oral testimony, examination and cross examination of witnesses in public were allowed. Twining thought the most striking innovation was:

> the creation of a website on which almost all of the evidence was posted immediately, so that although the proceedings were not televised, the media and the public at large had access to almost all of the information presented to the inquiry. This meant that in theory

[84] *Review of Intelligence on Weapons of Mass Destruction*, HC 898 (2003/4).
[85] Foreign Affairs Committee, *The Decision to Go to War in Iraq*, HC 813 (2002/3) and *Government Response*, Cm. 6062 (2003).
[86] *Report of the Inquiry into the Circumstances Surrounding the Death of Dr David Kelly CMG*, HC 247 (2003/4).

> at least everyone could make up their own minds on the basis of almost the same evidence as Lord Hutton.[87]

This was open justice indeed; but it may be one reason why the inquiry failed either to reassure (Howe, 4) or offer any catharsis (Howe, 3). The findings, which cleared the Government of all responsibility, blamed a BBC reporter, prompting the resignation of the Director-General of the BBC. They were, however, largely discounted by the public. For Beloff too, this was an inevitable consequence of the procedure; the wealth of evidence made available on the inquiry's website meant that the public was as entitled, if not actually as qualified, as Lord Hutton to come to its own conclusion: 'judgments were generally formed before [the] inquiry and consequently unchanged by it'.[88] This public inquiry, to put this differently, was all too public.

Lord Hutton himself laid the blame on the media, which had failed to read and accurately report the evidence, concentrating deliberately 'on those parts of the evidence which, viewed in isolation and apart from the surrounding circumstances, could be regarded as harmful to the government':

> If I had delivered a report highly critical of the government in terms which conformed to the hopes of some commentators I have no doubt that it would have received much praise. However, in reality, if I had written such a report I would have been failing in one of the cardinal duties of a judge conducting an inquiry into a highly controversial matter which gives rise to intense public interest and debate. That duty is to decide fairly the relevant issues arising under the terms of reference having regard to all the evidence and not to be swayed by pressure from newspapers and commentators or any other quarter.[89]

It is hardly surprising that in the fraught circumstances after the death of David Kelly the Government should have turned to a judge. However, to ask judges to chair such inquiries places them in a dilemma. If, as Lord Hutton obviously did, they pursue the strictly legalistic line dictated by their adjudicative experience, they 'can produce extraordinary detail and openness, but at the almost inevitable cost of narrowing the issues'.[90] This is, after all, what advocates are trained to do. But, as Beloff pointed out,[91] the issues assigned to Lord Hutton were 'more political than legal. Consequently, although the exercise was in form an inquiry, it rapidly took on – at least in the perception of those that reported it – the appearance of an adversarial contest with the government on one side and the BBC on the other.'

[87] W. Twining, 'The Hutton Inquiry: Some wider legal aspects' in S. Runciman (ed.), *Hutton and Butler: Lifting the lid on the workings of power* (Oxford University Press, 2004), pp. 42, 38.
[88] M. Beloff, discussing Twining, 'The Hutton Inquiry' in *Hutton and Butler*, pp. 52–3.
[89] Lord Hutton, 'The media reaction to the Hutton Report' [2006] *PL* 807, 837.
[90] Twining, 'The Hutton Inquiry: Some wider legal aspects' .
[91] Beloff, in *Hutton and Butler*, p. 53.

The report sparked requests for a fuller inquiry into the legality of the war, firmly refused. Lord MacNally introduced an abortive Iraq War Inquiry Bill in the House of Lords. Coroners' inquests into the deaths of soldiers serving in Iraq led to a judicial application for an inquiry designed indirectly to attack the legality of the invasion by querying the quality of government legal advice. This was fought passionately but unsuccessfully up to the House of Lords.[92] In parallel, as we saw in Chapter 10, there was recourse to all available freedom of information machinery to gain access to the Attorney-General's opinion. For all the £1.7 million spent on it, the Hutton Inquiry had settled nothing. Its findings, one commentator concluded,[93] had probably 'demolished in the public mind any idea that a judicial inquiry can come to a dispassionate, impartial and, most importantly, fair report'.[94] A new inquiry ultimately had to be conceded.

But if not judges, then who? As Twining pertinently asks, 'Who beside a senior judge or lawyer could have designed and presided over an inquisitorial proceeding that involved public examination and cross-examination of witnesses in such an open and revealing manner'?[95] True, but this may be an expedient answer, as PASC has observed:

> Inquiries into issues at the centre of government are . . . by their nature, politically contentious, as well as requiring an understanding of how government works. Criticism of their reports in such cases may undermine the impact of the inquiry and the judiciary as an institution, as well as being detrimental to the reputation of the individual judge.[96]

Conceding that judicial appointments were probably appropriate where an inquiry was designed to establish facts, PASC thought judges less well qualified to deal with 'issues of social or economic policy with political implications'. They lacked appropriate experience. Few judges 'have managed a big workforce, managed a public agency, managed big budgets in competing priorities, dealt with the party-political machine, both locally and nationally, dealt with trade unions going about their perfectly legitimate business and dealt with the media day by day'.[97] As Sir Michael Bichard explained:

> In order to hold public servants to account, I think you need to understand a little of the context within which they are working, though you can get some of that from an assessor and an adviser, but it is second-hand. I do not think a judge is necessarily the best person for that. If you are talking about healing, whether you are talking about healing between some of the parties or actually healing the public confidence, which often this is about, I

[92] *R(Gentle) v The Prime Minister and Others* [2008] UKHL 20.
[93] R. Kaye, '"OfGov": A commissioner for government conduct?' (2005) 58 *Parl. Affairs* 171, 173.
[94] *Ibid*., p. 176.
[95] Twining, 'The Hutton Inquiry: Some wider legal aspects', p. 38.
[96] PASC, *Government by Inquiry*, HC 51 (2004/5) [48]. And see J. Beatson, 'Should judges conduct public inquiries?' (2005) 121 *LQR* 221.
[97] PASC, *ibid.* [44] and Question 278.

> am not sure a judge has particular qualities to enable him to do that. If you are talking about learning and improving for the future, I am not sure a judge is the best person to do that.[98]

Carefully weighing constitutional arguments based on separation of powers and the dangers to judicial impartiality, PASC concluded:

> With developments in public law, Human Rights Act considerations about impartiality, and the proposed establishment of a Supreme Court, which involves the institutional separation of the judges from the House of Lords, care needs to be exercised in the future use of judges for such work, particularly those from the highest court, and especially in relation to politically sensitive inquiries.[99]

All that it recommended was, however, that decisions about the appointment of judges to undertake inquiries should be taken co-equally by the Government and appropriate senior member of the judiciary. Perhaps more important was the recommendation that, where judges were chosen as the most appropriate Chair, 'they should usually be appointed as part of a panel or be assisted by expert assessors or wing members'. This would lend 'expertise, reassurance, support and protection to inquiry chairs' and also enhance 'the perception of fairness and impartiality in the inquiry process'.[100]

7. Towards reform

Reform of inquiry procedure was overdue. Rationalisation had several times been recommended. Accident inquiries were thought to be too slow. The big political inquiries such as Scott and Hutton had satisfied no one and raised serious questions over the fitness of inquiry procedure. 'Grand planning inquiries', such as Heathrow, had cost a great deal of money without noticeably clearing the way for consensus or appeasing so-called 'stakeholders'. And another mammoth 1921 Act tribunal of inquiry was causing concern.

(a) Bloody Sunday

The Saville Inquiry was set up by Tony Blair in 1998, around the time when a settlement in Northern Ireland seemed on the cards, to establish the truth about 'Bloody Sunday' (30 January 1972) when the British army opened fire on civil-rights protesters in Londonderry, killing fourteen people. This was not the first investigation into Bloody Sunday. A coroner's inquest, which had delivered an open verdict, was followed by a swift and immediate inquiry by Lord

[98] *Ibid*. [45] and Question 679. Sir Michael had chaired *The Bichard Inquiry*, HC 653 (2003/4) into child protection measures after the highly publicised 'Soham murders' of two young girls.
[99] PASC, *ibid.*
[100] *Ibid*. [73].

Widgery, then Lord Chief Justice, which exonerated the army but was widely rejected as a whitewash.[101] What was the object of a new inquiry so long after events that had already been twice investigated? Measured against the Howe objectives, the aim was predominantly catharsis (Howe, 3). The event had been described in *The Irish Times* as reaching 'to the core of the nationalist psyche' and an inquiry would serve both to reassure the public (Howe, 4) and at the same time to serve the political interests of the Blair government by demonstrating a clear break with the actions of previous governments (Howe, 6).

The importance attached to the Inquiry was underlined both by the use of the 1921 Act, endowing it with the powers of the High Court, and by the status of the tribunal members. The president, Lord Saville, was a Law Lord. He was flanked by two distinguished judges from the Commonwealth: the Hon. William Hoyt, Chief Justice of New Brunswick and a member of the Canadian Judicial Council; and the Hon. John Toohey, a retired justice of the High Court of Australia. From the start, however, the tribunal ran into difficulties, arising from the participants' lack of mutual trust and confidence in the proceedings. In four years, £180 million was spent on the Inquiry;[102] its procedures were twice judicially reviewed on the application of soldier witnesses asking for anonymity in reliance on assurances from the Widgery Inquiry and asking to give evidence in London.[103] Approximately 2,500 witness statements were received and there were some 160 volumes of evidence, 13 volumes of photographs, 121 audiotapes and 110 videotapes, all of which had to be sent to representatives of the 'interested parties'. The Inquiry has shown no sign of reporting and is not due to report until late 2009. Even if the Report proves to be the ultimate account of the events of Bloody Sunday, it has been an exercise in 'truth and reconciliation' that failed in this objective. By lasting into the period of reconstruction, it might even come to imperil it.

(b) Rationalisation?

A consultation paper from the DCA in 2004, to consider the need for a new statutory framework for ministerial inquiries, explored some of these problems:

> It can seem wasteful and inefficient for several different sets of proceedings to rake over the same set of events. However, these processes are all designed to perform different

[101] *Report of the Tribunal Appointed to Inquire into the Events on Sunday, 30 January 1972, which Led to Loss of Life in Connection with the Procession in Londonderry on that Day*, HC 220 (1972/3).

[102] HC Deb., col. 720 WA (11 June 2007).

[103] *R v Lord Saville of Newdigate, ex p. A* [2000] 1 WLR 1855; *R v Lord Saville of Newdigate, ex p. B (No. 2)* [2000] 1 WLR 1855; *Lord Saville of Newdigate and Others v Widgery Soldiers and Others* [2002] 1 WLR 1249. And see B. Hadfield, *'R v Lord Saville of Newdigate, ex p. Anonymous Soldiers*: What is the purpose of a tribunal of inquiry?' [1999] *PL* 663. The cases were considered and the issue settled by the House of Lords in a similar case involving the appearance of RUC officers before the Hammill inquiry: see *In re Officer L* [2007] UKHL 36.

functions. Legal proceedings, particularly criminal trials, have important safeguards built into them to protect the rights of all the individuals involved. An inquiry, which does not seek to apportion guilt, has far more flexibility to take the form that will best enable it to establish the facts of the case.

A criminal trial may, through establishing guilt and imposing punishment, be successful in preventing recurrence and may also help to restore public confidence. However, it approaches the case with the primary objective of bringing the guilty to account, whereas the primary purpose of an inquiry is to prevent recurrence. An inquiry identifies ways of preventing recurrence through a thorough exploration of the circumstances of the cases, which it can often do more efficiently and quickly than a criminal trial because it has far greater freedom – it can take an inquisitorial, non-adversarial form; lengthy cross-examinations can be avoided, because the evidence is being tested thoroughly by the chairman; it has discretion to admit a wide range of evidence. This freedom is justified precisely because an inquiry does not seek to determine guilt, and must never attempt to do so. An inquiry is not a court. Its findings have no legal effect.

The presence or absence of any other proceedings should not make any difference to the *aim* of the inquiry. However, if other proceedings have taken place, their outcome may affect the *remit* of the inquiry. If no other proceedings are planned, it is important that there is no attempt to expand the role of the inquiry to fill their place. There may be considerable pressure for this, since those affected by what has happened may well perceive the inquiry as having a wider purpose: to apportion guilt or to provide a basis for claims for compensation. The outcome of an inquiry can help those affected, by satisfying them that an effective investigation has been carried out and that the truth has been established. However, there is also a danger that they may expect more than is within the remit of the inquiry in terms of punishment or retribution, which can lead to a feeling that they have been cheated or disregarded. For the sakes of those involved, it is important to be clear from the outset about the role and remit of the inquiry, including its limitations.

In summary, the government believes that a single inquiry should be sufficient to fulfil the aims of establishing the facts and preventing recurrence. However, an inquiry should not attempt to establish civil liability, or to deal with allegations of professional misconduct or criminal activity. If needed, other mechanisms must be used to deal with these issues.[104]

A later paragraph hints at the Government's true concern with cost:

In recent inquiries there have been demands from numerous potential participants to be granted legal representation, generally at public expense . . . An automatic right to such representation for all participants could potentially lead to enormous expense, and could lengthen the procedure considerably. The inquiry needs to be able to exercise its discretion in controlling the grant of representation, whilst ensuring that all participants are treated

[104] DCA, *Effective Inquiries*, CP 12/04 (6 May 2004) [38] [39] [43] [44]. The paper was based on the *Beldam Review of Inquiries and Overlapping Proceedings*, conducted for the DCA in 2002 and published as Annex C. Annex B consists of a useful table of notable inquiries set up since 1990.

fairly. **The Government believes it is important that inquiries should be able to ensure the most efficient use of representation**, so that, for example:

- Participants with similar interests should have joint representation unless there are strong reasons why they should not do so; and
- Representation should generally be limited to those persons who need it in order to assist the inquiry, or whose conduct is likely to be the subject of criticism by the inquiry. [105]

Government policy had been to pay out of public funds the 'reasonable costs' of 'any necessary party to the inquiry who would be prejudiced in seeking representation were he in any doubt about funds being available.' This policy, which kept the issue of representation firmly within the hands of government, would continue.

Like PASC, the consultation paper tackled the key question of appointments and asked whether inquiries needed procedural rules.[106] It also addressed in cursory fashion two questions that deserved more prominence: (i) whether inquiries had made 'any discernible difference to the conduct of public life' and (ii) whether there should be a formal follow-up system – an idea promptly dismissed as inappropriate.[107]

The Inquiries Act 2005 was, according to the Government, a consolidation measure, which replaced the 1921 Act. Parliament must be informed if a minister sets up a public inquiry (s. 6) but loses its powers of approval under the 1921 Act. The circumstances where an inquiry can be set up are wide: where 'particular events have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred' (s. 1). Inquiries are to be conducted by a chairman appointed by the minister with or without a panel. The panel is appointed by the minister after consultation with the chairman but the minister may make further appointments or changes (ss. 3, 4 and 7). The terms of reference are settled after consultation with the chairman by the minister, who may change them after consultation with the chairman 'if he considers that the public interest so desires' (s. 5). The only restrictions on ministerial choice are: that no one with a direct interest in the inquiry or close associations with an interested party should be appointed to an inquiry; that the need for balance should be taken into consideration (see ss. 8 and 9); and, where a judge is chosen, there must be consultation with the appropriate head of the of the judiciary. Ministerial control is firmly re-established.

More controversial are ss. 13 and 14, which put into the minister's hands the power to suspend or wind up an inquiry, subject only to notification or consultation of the chairman and appropriate Parliament or Assembly. Although evidence and procedure remain in the chairman's hands (s. 17), the minister

[105] *Ibid.* [93].
[106] *Ibid.* [110].
[107] *Ibid.*, Questions 21–2 and [144].

gains the power to make procedural rules.[108] Access to, and publication of, the report may be the responsibility of the chairman (s. 17) but subject to important provisos: a minister can retain these powers in his own hands. And simply by serving a restriction order on the chairman, (s. 19) a minister can impose restrictions on

- attendance at an inquiry, or at any particular part of an inquiry
- disclosure or publication of any evidence or documents given.

For these purposes, the minister or chairman must take into account 'the public interest' and more specifically (s. 19(4)):

> (a) the extent to which any restriction on attendance, disclosure or publication might inhibit the allaying of public concern;
> (b) any risk of harm or damage that could be avoided or reduced by any such restriction;
> (c) any conditions as to confidentiality subject to which a person acquired information that he is to give, or has given, to the inquiry;
> (d) the extent to which not imposing any particular restriction would be likely—
>
> (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or
> (ii) otherwise to result in additional cost (whether to public funds or to witnesses or others).

Lord Saville himself wrote to the DCA expressing concern over this draconian power.

In other quarters too the Act was not well received, especially in Northern Ireland. Its provisions could be read as directed at the Saville Inquiry and fears were heightened by the decision to convert several existing inquiries into inquiries under the Act using new powers granted by s. 15.[109] Irish Rights Watch maintained that the Act had 'brought about a fundamental shift'; the powers of independent chairs to control inquiries had been 'usurped' and 'placed in the hands of government ministers'.[110] Amnesty International called on judges to refuse appointment to inquiries established under the Act and demanded its repeal; it dealt 'a fatal blow to any possibility of public scrutiny of and a remedy for state abuses', destroying the chance of 'an effective, independent, impartial or thorough inquiry in serious allegations of human rights violations'.[111]

In an attempt to allay mounting criticism, the DCA issued a press notice arguing that the Act merely filled gaps and codified best practice from past inquiries:

[108] The Inquiry Rules 2006, SI 2006/1838.
[109] See K. Parry, 'Investigatory inquiries and the Inquiries Act 2005' (House of Commons Library SN/PC/2599 (2007), pp. 7–8. The decision was challenged with partial success in *Re Wright's Application* [2006] NIQB 90.
[110] British Irish Rights Watch, 'Summary and critique of the Inquiries Act 2005' available online.
[111] AI press release, 20 April 2005, available online.

> For the first time in statute the Act lays down all key stages of the inquiry process – from setting up the inquiry, through appointment of the panel to publication of reports.
>
> The Act does not, as has been suggested, radically shift emphasis towards control of inquiries by Ministers. Instead, it makes it clear what the respective roles of the Minister and chairman are, thereby increasing transparency and accountability.
>
> It also stipulates that proceedings will be in public unless restrictions on access are imposed by either the Minister or the chairman. Unlike previous legislation, it specifies the ground on which access can be restricted . . . The Act says that inquiry final reports must be published in full unless there are clear reasons for withholding material and lays down what those reasons can be. Once an inquiry ends, any restrictions on public access to any material or evidence will be subject to the Freedom of Information Act.[112]

Read together with the Inquiry Rules, the Act can just be presented as adding to transparency. The Rules do mainly codify practice, though they also restrict third-party rights. Critics of the legislation were, however, right in saying that the main effect of the Bill is seriously to diminish the independence of inquiries by pulling back into ministerial hands many of the powers previously within the remit of the inquiry chairman. A comment in the *British Medical Journal* summarised fears. The 2005 Act, the authors concluded, gave government ministers 'unprecedented' new powers:

> Overall, these changes seem designed to reduce the independence of future public inquiries, and to provide the government with a host of mechanisms for controlling inquiries at every step. This is a considerable departure from past practice, in which the government took the decision to establish an inquiry and set its remit but then played absolutely no part in its subsequent development and progress, which were wholly in the hands of the inquiry chair.[113]

8. Inquiries and human rights

There is one particular situation when the ECHR bites on an inquiry: where it is the main forum for investigation of a death in state custody or at the hands of agents of the state. The state then comes under a positive obligation to set up an inquiry that must comply with criteria of independence, transparency and effectiveness. For this reason, the Joint Committee on Human Rights (JCHR) advised the Government that its draft Bill would be likely to violate ECHR Art. 2. The JCHR took particular exception to the powers now in ss. 13 and 14 for the minister to suspend or terminate an inquiry by notice to the chairman and to the ministerial powers to issue restriction notices and arrange for the publication of reports.[114]

[112] See Parry, 'Investigatory inquiries and the Inquiries Act 2005', p. 5.
[113] K. Walshe, 'Are public inquiries losing their independence?' (2005) 331 *BMJ* 117.
[114] See JCHR, *Scrutiny: First progress report*, HC 224 (2004/5) [2.5-2.28].

In *Jordan v United Kingdom*, considering a coroner's inquest into a police shooting in Northern Ireland, the ECtHR laid out the essentials of an Art. 2 inquiry in some detail:

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force . . . The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures . . .
>
> For an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation 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 . . .
>
> The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death . . . Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.
>
> A requirement of promptness and reasonable expedition is implicit in this context . . . It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. For the same reasons, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests . . . [115]

[115] *Jordan v UK* (2001) 37 EHHR 52 [105–9] omitting all references. See also *McCann v UK* (1995) 21 EHRR 97. In *R (AM) v SSHP* [2009] EWCA Civ 219, the Court of Appeal applied this case law to Art. 3.

These Art. 2 requirements form the basis of a consistent domestic case law consolidated in the case of Zahid Mubarek, a young man on remand at Feltham young offenders' institution. ZM was placed in a cell with a fellow offender who had 'an alarming and violent criminal record, both in and out of custody'. He was killed in the course of a racist attack by his cell mate.

It is to the credit of Martin Narey, Director-General of the prisons service, that he immediately apologised to the family and announced an internal inquiry (the Butt Inquiry) to investigate the circumstances surrounding the murder. The family did not participate. They had written immediately asking for an independent public inquiry into the circumstances of Zahid's death. The minister stalled on the ground that investigations were incomplete. A coroner's inquest was opened but, as is customary, adjourned pending a trial at which the murderer pleaded guilty and was convicted. Unusually, the coroner declined to reopen the inquest. She reasoned that inquests were 'an unsuitable vehicle for investigating publicly the issues raised by this case', that coroners had no investigatory staff at their disposal, that it would be inappropriate and inadequate to rely on an internal investigation by the prison service and, finally, that an inquest was not an appropriate forum in which to make recommendations as to good administrative practice. Clearly, the coroner shared the family's view that a public inquiry was necessary. It was not forthcoming, however. The Commission for Racial Equality (CRE) stepped in, using its powers under the Race Relations Acts to launch a formal investigation, which concluded with a published report.[116] Once again the family did not participate. Instead, they applied for an inquiry in terms of ECHR Art. 2.

At common law, a ministerial refusal to hold an inquiry would be hard to challenge; the applicant would have to show that the decision was '*Wednesbury* unreasonable', a hard standard to meet. Under Art. 2, the position was different. There was, as Hooper J asserted, a *positive* obligation to hold an effective and thorough investigation. On the facts of the case, this obligation could:

> only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses. Against the background of the material which I have set out at some length, the family and the public are entitled to such an investigation.[117]

But no inquiry followed. Instead, the judgment was reversed by the Court of Appeal, reaching the House of Lords only two years later, where the first instance judgment was reinstated. Mirroring the ECtHR jurisprudence, Lord Bingham's speech set out the requirements of an Art. 2 inquiry and summarised its objectives:

[116] CRE, *A Formal Investigation by the Commission for Racial Equality into HM Prison Service of England and Wales: Part 1: The murder of Zahid Mubarek* (July 2003).

[117] *R (Amin (Imtiaz)) v Home Secretary* [2001] EWHC Admin 719 [91].

- The investigation must be independent
- The investigation must be effective
- The investigation must be reasonably prompt
- There must be a sufficient element of public scrutiny
- The next of kin must be involved to an appropriate extent.

The state's duty to investigate is secondary to the duties not to take life unlawfully and to protect life, in the sense that it only arises where a death has occurred or life-threatening injuries have occurred . . . It can fairly be described as procedural. But in any case where a death has occurred in custody it is not a minor or unimportant duty. In this country . . . effect has been given to that duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: 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 relative may at least have the satisfaction of knowing that lessons learned from his death may save the lives of others.[118]

Firmly rejecting the government argument that any further inquiry would be unlikely to unearth new and significant facts, the House ruled that a full public inquiry was necessary. The Home Secretary obliged, laying down somewhat grudging terms of reference:

In the light of the House of Lords judgment in the case of . . . *ex parte Amin*, to investigate and report to the Home Secretary on the death of Zahid Mubarek, and the events leading up to the attack on him, and make recommendations about the prevention of such attacks in the future, taking into account the investigations that have already taken place – in particular, those by the Prison Service and the Commission for Racial Equality.

The Inquiry Report was to underline that 'this was no ordinary inquiry. It was initially resisted by the Home Office.'[119]

Appropriately, given the circumstances, the inquiry was chaired by a judge (Keith J). The panel of advisers was imaginatively chosen: Lutfur Ali was National Head of Equalities and Diversity for the Department of Health; Bobby Cummines was an ex-prisoner and Chief Executive of the charity *Unlock*; Alastair Papps had been governor of Durham and Frankland Prisons. The inquiry was non-statutory and worked largely from documentary evidence, although it also held oral hearings. The cost was £5.2 million. Calling the tragic death preventable, the inquiry ranged widely. It issued a five-volume report published as a House of Commons paper with eighty-eight detailed rec-

[118] *R v Home Secretary, ex p. Amin* [2003] UKHL 51 [31] [39] (omitting references) reversing *R (Amin (Imtiaz)) v Home Secretary* [2002] EWCA Civ 390.

[119] *The Zahid Mubarek Inquiry*, HC 1082 (2005/6) [1.1]; HC Deb., col. 1186 (24 July 2006).

ommendations for risk assessment and violence reduction in prisons. Many of the Howe objectives were fulfilled: the facts were authoritatively established, as was the willingness of the prison service to learn from events; all of this helped to reassure the public and to provide closure for ZM's family, which had fought so long and hard for justice.

What should we say about accountability, which in many ways had already been established? The murderer had been convicted, the Prisons Service had admitted responsibility, there had already been two inquiries and reforms were in hand. As the Final Report stated, 'many of the recommendations an inquiry of this kind would have made if it had been looking a few months after Zahid's death at what had happened to him have now been overtaken by events. Much of what would have been recommended is now in place – or at any rate plans are well advanced for them to be in place.' Nonetheless, this high-level public inquiry was of great symbolic importance. It was an opportunity for public apology and catharsis. It was a public recognition of commitment to the Franks values of 'openness, fairness and impartiality' and the Nolan standards of integrity in public life.[120] Finally, and perhaps most important, it was a public demonstration of the state's commitment to the rule of law.

This raises very pertinent questions. Why do government and public bodies so often resile from their frequently expressed commitment to the good governance principles of transparency? Why do they so often try to evade their Convention obligations, sheltering behind the ramshackle machinery of coroner's inquests, police investigations, possible prosecutions and a proliferation of inquiries, usually internal and often unpublished? Setting up an inquiry into the death of an innocent Iraqi civilian, Baha Mousa, while in the custody of British soldiers in Iraq, the Defence Secretary asserted that:

> A Public Inquiry into the death of Baha Mousa is the right thing to do. It will reassure the public that we are leaving no stone unturned in investigating his tragic death. The Army has nothing to hide in this respect and is keen to learn all the lessons it can from this terrible incident.[121]

Yet the Baha Mousa inquiry was forced on the Ministry of Defence by a fight lasting nearly five years, ending with a successful appeal to the House of Lords.[122] In ZM's case, it took three-and-a-half years, three fruitless inquiries, an expensive lawsuit and considerable persistence to achieve justice and closure. Similarly, disturbing deaths of young army cadets at Deepcut barracks were considered by four inquests, some seventeen inquiries, an investigative report from the Surrey Police and a wide-ranging report on army training from the

[120] See Lord Nolan, *First Report of the Committee on Standards in Public Life*, Cm. 2850 (1995).
[121] *Times Online*, 13 June 2007.
[122] *Al-Skeini and Others v Defence Secretary* [2007] UKHL 26. Following the judgment, the MoD agreed to pay up to £3m in compensation to those injured.

House of Commons Defence Committee before a 'review' by Nicholas Blake QC – noticeably *not* a public inquiry – was conceded.[123] Both the Defence Committee and the Blake Review criticised the lack of transparency in the army investigative process, commenting that its outcome had 'fuelled the disquiet surrounding incidents'. Blake, concerned at the lack of independence in the investigation and complaints procedures, recommended the appointment of an official with an 'independent ombudsman role'. An independent Service Complaints Commissioner was set in place by the Armed Forces Act 2006 with the aim of making the complaints system 'more independent and more transparent' but, as the Defence Committee had commented earlier, 'the role proposed for the Commissioner falls a long way short of the investigatory body proposed by our predecessor Committee'.[124] The Deepcut deaths clearly raise issues that are, at the very least, closely related to Art. 2, yet no public inquiry has been conceded.

9. Conclusion

This brief survey of public inquiries ends our study of 'alternative' administrative justice before we move on to courts. Whether inquiries really form part of the landscape of administrative justice remains an open question. Precise classification of inquiries defeated both the Donoughmore and Franks committees, set up so many years ago to consider their functions. Both had to classify them as hybrids, exercising both administrative and adjudicative functions. Some inquiries, such as minor accident inquiries or inquiries into regional and local development plans, still retain their original advisory functions. Some major inquiries, such as the Phillips Inquiry into BSE or the Bristol Royal Infirmary Inquiry have also managed, by avoiding the allocation of blame, successfully to hold this line.

Increasingly, however, the public inquiry is coming to be seen as part of the standard machinery for accountability, like freedom of information legislation. In this new context, the expectations of the general public are that inquiries will be fully independent, held in public and that their reports will be published and (as the court ruled in the case of the PCA) binding. In other words, inquiries are increasingly acquiring adjudicative characteristics. Such a classification is in fact fully consistent with Lord Howe's list of inquiry objectives. Civil and criminal courts, tribunals and other adjudicative machinery establish the facts, provide catharsis for 'stakeholders', reassure the public, and, as Mulgan emphasises, hold people and organisations accountable (see p. 47 above). Less directly than inquiries, they provide an opportunity to learn from events. This remains,

[123] Respectively, Surrey Police, *The Deepcut Investigation Final Report* (2004); Defence Committee, *Duty of Care*, HC 63 (2004/5); *The Deepcut Review: A review of the circumstances surrounding the deaths of four soldiers at Princess Royal Barracks, Deepcut between 1995 and 2002*, HC 795 (2005/6).

[124] *Armed Forces Bill: Proposal for a Service Complaints Commissioner*, HC 1711 (2005/6) [4].

however, perhaps the most important independent characteristic of the public inquiry, which it shares with the work of the Parliamentary Commissioner, to whom inquiries have recently been losing ground. The added expertise of the public inquiry, with an appropriate expert panel, must be weighed against the investigatory techniques, largely conducted in private, of the ombudsmen.

Recent years have seen hotly contested and adversarial inquiries, which raise serious questions about appropriate procedure. Inquiries bring individuals into the public eye and, especially when chaired by lawyers, may see it as their function to apportion blame. In a society with a strong tradition of adversarial procedure, the inquisitorial procedure of the public inquiry then becomes problematic. This may be one justification (or excuse) for holding inquiries in private – effectively prioritising the learning function (Howe, 2) over the accountability function (Howe, 5).

At the start of this chapter, we cited Sales's view that inquiries possess an important constitutional function of legitimation in contemporary society. In a governmental system not remarkable for its openness, the willingness of government by setting up an inquiry to 'accept public scrutiny of what it has done – to operate with "transparency"' has undoubtedly been important. The most fundamental and important characteristic of public inquiries in the UK has, however, been their independence. By owing no allegiance to any group of stakeholders – especially not to the Government that sets them up – by having the freedom to investigate openly and impartially and to report without government censorship, inquiries have been able to build consensus and command widespread support for their findings and recommendations. Where – as occurred for different reasons with the Scott and Widgery reports or the internal prisons investigation into the death of Zahid Mubarek – an inquiry has fallen short in this respect it has failed to command public confidence and failed also in its function of providing public reassurance (Howe, 4). It remains to be seen whether the new legislation, by taking so many new powers to control and direct public inquiries, will have stripped them of the independence and impartiality central to their purpose. If so, inquiries will be increasingly discounted. They may then come to be seen as performing Lord Howe's sixth objective of 'serving the political interests of government'.