AN ANALYSIS OF LEGAL AND POLITICAL INFLUENCE ON THE FORM AND NATURE OF POST-2005 PUBLIC INQUIRIES AND THEIR SIGNIFICANCE

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A thesis submitted in partial fulfilment of the
requirements of Nottingham Trent University
for the degree of Doctor of Philosophy

July 2020

Abstract

Public inquiries are major instruments of accountability, convened to address matters of public concern. Every time a new inquiry is convened, decisions are made by government ministers and inquiry chairs to determine their form and nature, which in turn affect their independence, powers, subject matter, and openness to public scrutiny. This research is a systematic, library-based analysis of: witness evidence to the 2013-14 House of Lords Select Committee on the Inquiries Act on the law and practice of public inquiries, legislation, case law and other documentary sources to observe, in practice, what political and legal influence is being exerted on the form and nature of public inquiries, by whom, and to what effect. The research uses a mixed-method approach of inductive analysis and critical examination of secondary data; doctrinal legal research; and broader desk-based research.

The research found that attempts by parliamentary committees to reform the decision-making process have been largely unsuccessful, with successive governments rejecting attempts to restrict the power of the minister. The courts' involvement has been restricted to clarifying the legal requirements for an effective inquiry. There is a statutory framework for public inquiries. However, the research found that the form and nature of public inquiries has been evolving within and outside that statutory framework, not through legislative change, nor directly because of action through the courts, but through political pressure exerted at the level of individual inquiries, often due to conflicting expectations about the role of an inquiry. The research concludes that: this provides an arbitrary and inconsistent source of scrutiny; the conflicting expectations must be addressed; and the recent move towards greater formal consultation is welcome. It recommends that future reviews of the public inquiry process be addressed not only to government but more widely and urges greater public education to enhance wider public scrutiny.

Acknowledgments

I would like to express my very sincere thanks to my supervisors, Professor Robert Lee and Professor Jonathan Doak for their extremely insightful guidance, valuable feedback and constant support throughout. I would also like to thank Professor Jane Ching, Professor Tom Lewis and Professor Jane Jarman for their comments, suggestions, positivity, and encouragement. Last, but certainly not least, I would like to express my gratitude to my husband, John, and my family, without whose patience and support this would not have been possible.

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Chapter One - Introduction

1.1. Introduction

"Public inquiry" is a term often used loosely to refer to a range of different types of inquiry held by public or private bodies or organisations. This thesis is concerned only with those public inquiries that are convened by a minister into matters of public concern. In recent years, inquiries such as the *Grenfell Tower Inquiry*, the *Undercover Policing Inquiry*, the *Independent Inquiry into Child Sexual Abuse* and the *Iraq Inquiry*, have become an increasingly prominent feature of administrative justice. They are a major instrument of accountability and an important component of our administrative justice system. As a part of the political process they sit alongside but are distinct from courts, inquests, tribunals,[1] ombudsmen and auditors. They are an integral feature of public governance[2] and play an important role in the way in which the executive, subject to oversight of Parliament and the courts, addresses matters of public concern (see 2.1).[3]

Public inquiries are unique ad hoc bodies that are set up solely to fulfil specific terms of reference; once those terms of reference have been fulfilled, they are closed down, their materials are archived and they then cease to exist. Each time a new public inquiry is convened, decisions must be made about the form it will take, ie whether it will be a statutory inquiry convened under the 2005 Act with the resultant statutory powers conferred by that Act or a non-statutory inquiry convened without such powers (see chapter 4, section 4.1). Other decisions must also be made which will determine the nature of the public inquiry: the details of its terms of reference; the appointment of a single chair or panel; and how open it will be to public scrutiny (see chapters 3, 5, 6 and 7).[4] These decisions are open to both legal and political challenges.

[1] In this context, reference to tribunals is to the tribunals system under the Tribunals Courts and Enforcement Act 2007, which are a component of the legal system (as opposed to public inquiry tribunals convened under the Tribunals of Inquiry (Evidence) Act 1921, referred to below).
[2] This research focuses on England, Wales and Northern Ireland, see 1.3 below.
[3] Referencing is by chapter so, for example, section 2.1 is chapter 2 section 1 and 5.4.2 is chapter 5, section 4, subsection 2.
[4] Throughout this thesis 'form and nature' are given the standard dictionary definitions of 'type or variety' and 'inherent features, qualities, or characteristics' respectively.

1.2. The choice of the research topic and the research questions

The aim of this research is to analyse and critically examine the influence of these challenges on the form and nature of post-2005 inquiries and their wider significance. My first involvement with public inquiries was as a solicitor in practice, working as a core member of the evidence gathering team for the *Bloody Sunday Inquiry*, the largest public inquiry to be held in the United Kingdom's legal history. On moving to academia, I chose the subject of public inquiries for my LLM dissertation, 'Public Inquiries and Public', which focused on the relationship between the public and the minister when a public inquiry is convened. It looked at the fact that, although public inquiries are seen by the public as being independent instruments of accountability to address public concern, for the benefit of the public, in fact the Government has a very high degree of control over how they are established and how they operate, undermining that independence. The research behind the dissertation formed the basis of a subsequent peer review article, *The ministerial power to set up a public inquiry: issues of transparency and accountability* which is cited later in this thesis.[5] That article examined concerns over the lack of an open and transparent decision-making process when an inquiry is convened and the extent to which those decision-making processes are open to public scrutiny and accountability.

That research enabled me subsequently to step back and think about public inquiries more broadly, in the wider context of administrative justice. The *Bloody Sunday Inquiry*[6] closely resembled a court process; it was chaired by a judge, witnesses were compelled to give evidence at oral hearings, they gave evidence on oath and were cross examined by counsel.[7] I had given little thought at that time, or during that earlier research, to the broader significance of the fact that public inquiries are part of the political rather than the legal process and the significance of that in respect of the expectations of the various categories of individuals and organisations who interact with an inquiry.

[5] Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67(2) NILQ 209.
[6] Convened under the Tribunals of Inquiry (Evidence) Act 1921, the predecessor to the 2005 Act (see 2.3).
[7] It was also criticised by many for adopting an over adversarial and legalistic approach to its investigation.

Further, whilst that earlier research noted some examples of challenges to decisions made when public inquiries have been convened, the scope of that earlier research was limited and did not extend to an analysis of the range of different forms of challenges that have been brought, by whom, and what effect, if any, those challenges are having not only on individual inquiries but on the public inquiry process as a whole.

It was evident that there was much further work to be done in this area. Questions raised included: how the form and nature of a public inquiry are determined; what influence is being brought to bear on the decision-making process and by whom; how public inquiries are evolving as a result; and the significance of the fact that those with an interest in the outcome of a public inquiry can also influence its form and nature?

The aim of this current research is to carry out a systematic analysis of the evidence, to observe, in practice, what political and legal influence is being exerted on the form and nature of public inquiries, by whom, and to what effect. In order to address that aim, this research seeks to answer the following research questions:

a. Who is served by post-2005 public inquiries?
b. Where does the power to determine the form and nature of those inquiries lie?
c. What political and legal influence is being exerted over the exercise of that power?
d. What are the constraints on those influences?
e. How fixed is the current form and nature of post-2005 Act Inquiries?
f. What overall conclusions may be drawn on the significance of legal and political influence on the form and nature of post-2005 public inquiries?

1.3. Focus of the thesis

Accountability is a principle at the heart of public inquiries and of this research: the role of a public inquiry itself is essentially to hold those in authority to account. In addition, the Government and the relevant minister are politically accountable to Parliament and the electorate and the minister and inquiry chair are legally accountable through the courts. Whilst public inquiries have no power to determine civil or criminal liability, they can bring about significant legislative, institutional and behavioural change through recommendations in the report that they deliver to the minister and, as a result of their process and findings being open to public scrutiny, by initiating public pressure

promulgated through the media (see chapter 2.1 and 2.2). They provide a form of political accountability "in a way that potentially contributes to political discourse, and to the evaluation of government, at a deep policy level".[8] They hold not only the executive to account, but also others in authority, including public bodies, public administration agencies, public corporations, and regulators.

In exploring accountability, this research focuses on issues of transparency and openness throughout. It examines principles of democratic accountability, ministerial accountability, political openness, and considerations underlying the principle of open justice (whereby proceedings are open to the public and may be freely reported by the press) see, in particular, section 7.2. The research is designed to analyse and critically examine the data and wider material in order to observe, in practice, what a public inquiry is, how it is evolving in response to political and legal influence and the significance of that, rather than what a public inquiry 'should' be. As such, although this area of research sits alongside debates such as such as participatory democracy[9] and legal and political constitutionalism,[10] these issues are not central to the thesis, to avoid being drawn into debates on proposed policy reform rather than focusing on the aim of research, ie observational research on the current and evolving state of post-2005 public inquiries.

In order to address the overarching aim, this thesis examines legal and political influence on the current form of public inquiries. In 2004, the public inquiry process was reviewed and the numerous pieces of statutory provisions relating to public inquiries were ultimately replaced with a single piece of legislation, the Inquiries Act 2005 ('the 2005 Act').[11] The thesis focuses on public inquiries convened since the introduction of the 2005 Act, both those convened under the provision the 2005 Act, 'statutory inquiries',

[8] See the discussion in Mark Elliott, 'Ombudsmen, tribunals, inquiries: re-fashioning accountability beyond the courts' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 17.

[9] Alexandra Kelso, John Boswell and Matthew Ryan 'Public participation in parliamentary policy Scrutiny : An interpretive analysis of select committee inquiries'(PSA Annual Conference, Brighton, March 2016) and Laurence Bherer, Pascale Dufour & Françoise Montambeault 'The participatory democracy turn: an introduction' (2016) J Civ Soc 12(3) 225-230.

[10] JAG Griffith, 'The Political Constitution' (1979) 42(1) MLR 1; Stephen Sedley, 'The sound of silence: constitutional law without a constitution' [1994] LQR 270; JAG Griffith, 'The common law and the political constitution' [2001] LQR 42.

[11] See 2.3.

and those convened outside the provisions of the Act under the prerogative powers of the executive, 'non-statutory inquiries', (see chapter 4, section 4.1).

There is slight variation in the literature between what is classified as a non-statutory public inquiry.[12] This research adopts the classification most commonly used, including by the 2013-14 House of Lords Select Committee in its report '*The Inquiries Act 2005: post legislative scrutiny*' ('the HL Select Committee'), the evidence given to which forms the data for this research (see 1.5 below). This classification does not include inquiries convened otherwise than by a minister, nor independent panel inquiries such as the Hillsborough Panel Inquiry, which tend to have more restricted remits and are intended to fulfil different outcomes to those of a public inquiry.

The Inquiries Act 2005 extends to the whole of the United Kingdom. Statutory and non-statutory inquiries have been convened throughout England, Wales, Scotland and Northern Ireland. This research focuses on public inquiries in England and Wales. References are also made to inquiries in Northern Ireland where these are valuable by way of comparison.[13]

1.4. Methodology

This is a library-based study utilising a mixed methodology. The findings of this thesis are based on an integrative approach of three research methods. The first, and primary, research method is an inductive analysis and critical examination of secondary data in the form of evidence given to the 2013-14 HL Select Committee'[14] on the law and practice of public inquiries ('the Data'). The second is legal doctrinal research; the third is desk-based research beyond the doctrinal study, including the study of documents such as

[12] See further discussion on this point in Parliament and Constitution Centre, 'Public Inquiries under the 2005 Act compared to the Hillsborough Independent Panel' House of Commons Library Briefing (14 July 2017) reproduced at <www.sibf.org.uk/appg/> accessed 28 May 2020. The Hillsborough Panel Inquiry was restricted, by the minister, to overseeing the disclosure of Government and other agency documents and consulting with the families in order to produce a report on how the information disclosed added to public understanding of the tragedy and its aftermath. Unlike a public inquiry, this panel inquiry could not determine its own procedure nor take written or oral evidence from witnesses.
[13] This focus was chosen as it reflects the focus of the evidence given to the HL Select Committee, which predominantly relates to details of inquiries in England and Wales, with reference to inquiries in Northern Ireland, but very limited reference to detail about Scottish inquiries.
[14] House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence' (2013) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 28 May 2020.

inquiry reports and rulings, government and NGO publications, Hansard reports, newspaper articles, press releases, and other library resources.

The Data consists of evidence provided to the HL Select Committee by witnesses with high levels of experience in public inquiries, on the current state of public inquiry law and practice and whether this may need amending. Material relevant to each of the research questions a to f above was extracted, collated and categorised using a software tool, NVivo, and was then critically examined (see 1.4.1). By adopting an inductive approach, this research method focused on the generation of explanations, theories and conclusions emerging from the Data (see 1.4.1).

Doctrinal analysis was then used to research, in greater detail, the legislation and case law relevant to the research questions, which was identified from the inductive analysis and critical examination of the Data (see 1.4.2 below). Desk-based research beyond the doctrinal research was also carried out to: provide a broader context to the earlier research; to address the fact that there was no opportunity to ask follow-up questions or seek clarification from the witnesses because of the use of secondary data; and to obtain supplemental up-to-date information on those inquiries that had continued, or had been convened, since the production of the Data (see 1.4.1 and 1.4.3).

1.4.1. Data collection and inductive analysis

The Data consists of 440 pages of written and oral evidence provided by 44 witnesses in response to the call for evidence, asking "whether the law and practice relating to inquiries generally is satisfactory, and whether the law, practice and procedure may need amending". It sought general views and answers to 18 more focused questions, its remit extending to both statutory and non-statutory inquiries (see Appendix 1). [15]

A key benefit of using the secondary data for this research relates to the level of expertise of the witnesses concerned and the quality of evidence collected. The witnesses who gave evidence to the HL Select Committee included highly experienced public inquiry chairs and panel members, counsel and solicitors to inquiries, assessors, members of inquiry secretariats, core participants, and interest groups (see Appendix

[15] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) Appendix 3.

2).[16] It would not have been possible for me, within the confines of an unfunded doctoral study, to access this number of distinguished experts, nor to scrutinise and question the witnesses on the evidence given, in the manner that was open to the HL Select Committee.[17] A number of members of the Select Committee itself also had significant personal experience of public inquiries, including experience of setting up, chairing and participating in inquiries.[18]

A second key benefit relates to the quantity of the evidence. The amount of evidence submitted in writing to the HL Select Committee in response to the call for evidence, and in oral evidence during the hearings before the 12 members of the HL Select Committee,[19] is considerably greater than that which could have been gathered within the practical constraints of research for a doctoral thesis.[20] The Data was easily accessible, which saved time and allowed for a significantly greater quantity of data to be analysed and evaluated than would otherwise have been the case.

The main disadvantage of using secondary data was the fact that the Data was not gathered with the current research questions in mind, but to provide post-legislative scrutiny of the 2005 Act and "to consider and report on the law and practice relating to inquiries into matters of public concern, in particular the Inquiries Act 2005".[21] In practice, that disadvantage was mitigated by the fact the questions in the call for evidence were broad, covering each of the key areas that determine the form and nature of a public inquiry and more, and the evidence given in response was very comprehensive. The main challenge that using secondary data posed was a practical one, namely how to effectively extract the relevant material, which was dispersed throughout the very large quantity of evidence. This was addressed using NVivo software as a project management tool (see below).

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[16] Lord Richard on the list of witnesses: "a number of people of distinguished lineage and great experience who have either set up inquiries, or participated in them, written about them, dealt with them, have been subject to them or have given evidence to them. It is an impressive list." HL Deb 19 March 2015, vol 760, col 1138.

[17] The role and workings of select committees is discussed in chapter 2.

[18] Lord Shutt of Greetland HL Deb 19 March 2015, vol 760, col 1134.

[19] Baroness Buscombe, Baroness Gould of Potternewton, Baroness Hamwee, Lord King of Bridgwater, Lord Morris of Aberavon, Lord Richard, Lord Shutt of Greetland (Chairman), Lord Soley, Baroness Stern, Lord Trefgarne, Lord Trimble and Lord Woolf.

[20] The evidence was gathered over a 7 month period between the setting up of the HL Select Committee on 16 May 2013 and the final session of oral evidence taking on 11 December 2013.

[21] HL Select Committee, The Inquiries Act 2005: post-legislative scrutiny 2.

A further disadvantage of using the secondary data was the lack of opportunity to ask follow-up questions or seek clarification from the witnesses. This aspect was addressed during the second and third stages of the research: the doctrinal research and the additional desk-based research (see 1.4.2 and 1.4.3), which provided the opportunity to identify additional details of the legal and political challenges to decisions on the form and nature of public inquiries, some of which could otherwise have been sought by questioning the witnesses directly. A related point was the fact that the witnesses gave evidence to the HL Select Committee in 2013-2014 and changes might have taken place since that date, with existing inquiries continuing and new inquiries being convened during that period. This too was addressed during the doctrinal research and the additional desk-based research stages. On balance, the advantages of using secondary data very significantly outweighed the disadvantages.

The written and oral evidence provided by the 44 witnesses was uploaded onto NVivo and was coded using NVivo 'nodes'. Whilst NVivo is a powerful tool for sophisticated analysis of qualitative and mixed-method data,[22] for the purposes of this research it was employed solely to extract, categorise and organise the relevant data, in order to create subsets of the much larger body of data, which were then critically examined in order to generate explanations, theories and conclusions.

The key decisions made by ministers and inquiry chairs, that determine the form and nature of a public inquiry, address five subjects: whether or not to convene an inquiry; whether it will be statutory or non-statutory; the identity of the chair and any panel members; the details of the terms of reference; and the extent to which the inquiry will be held in public.[23] Each of the five subjects forms the subject matter of one of the substantive chapters in the thesis which, in turn, define the parameters of the research. Each chapter subject was assigned to one of five main nodes: 'convening', 'statutory or non-statutory', 'the chair', terms of reference' and 'restrictions on public access'.[24]

[22] See <www.qsrinternational.com/nvivo/what-is-nvivo> accessed 28 May 2020.
[23] These five subjects were identified from the inductive analysis of the Data and were also consistent with the subjects relating to the form and nature of a public inquiry identified in the judgment *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin); [2013] EWHC 2941 (Admin) which also considered conduct as well as form and nature.
[24] NVivo's term for codes.

All of the Data was read and was coded by node and, as subtopics emerged in the evidence, by sub-node (for example 'the role of the minister', 'the role of Parliament', 'lack of transparency', 'criteria?', 'consultation', and 'legal challenges'). As this was an inductive analysis, there were no predetermined sub-nodes; the sub-nodes emerged from the analysis of the Data. The flexibility of the software enabled the sub-nodes to be refined and subdivided as the coding progressed. As a result, the Data was extracted, categorised and organised; it then formed the raw material for the evaluative analysis for each chapter.

1.4.2. Doctrinal analysis

Following the inductive analysis and critical examination of the Data, doctrinal analysis was used to research, in greater detail, the legislation relevant to, and the legal challenges brought against, decisions on the form and nature of public inquiries. Doctrinal analysis is a dominant legal method in legal research. In simple terms it "describes a body of law and how it applies" often also providing "an analysis of the law to demonstrate how it has developed in terms of judicial reasoning and legislative enactment";[25] an essential feature of which is broadly "critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation".[26]

As is normally the case, the doctrinal research was a two-stage process, first locating the sources of law and then interpreting and analysing the text.[27] Both primary and secondary sources were examined. The starting point for the doctrinal analysis was identifying the relevant case law and legislation from the inductive analysis of the Data. The doctrinal research was then extended, to ensure currency, by also examining relevant case law and legislation from the date of the original Data to the date of writing up the thesis, specifically where that legislation and case law related to the explanations, theories and conclusions that emerged from the earlier critical analysis of the Data. The search for case law included cases relating to the inquiries listed in Appendix 3. The

[25] Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2017) 19.
[26] Terry Hutchinson 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 Erasmus Law Review <www.erasmuslawreview.nl/tijdschrift/ELR/2015/3/ELR-D-15-003_006/fullscreen> accessed 28 May 2020.
[27] Terry Hutchinson and Nigel Duncan, 'Defining and describing what we do: doctrinal legal research' (2012) 17 Deakin Law Review 83.

legislation and case law, and relevant secondary sources, were then interpreted and analysed.

The doctrinal research in this mixed-methodology research provides an element of self-contained, focused analysis of the legislation and case law in order to produce a statement of the law as it is, rather than as it could be or should be. It therefore underpins and aligns with the approach of the inductive analysis of the Data, which itself focuses on observing the Data in order to allow explanations, theories and conclusions to emerge, rather than proposing and testing a hypothesis.

1.4.3. Desk-based research beyond the doctrinal analysis

The self-contained, focused nature of doctrinal research can be a weakness as well as a strength, in that it is disconnected with the reality of the wider context in which the law operates. This thesis examines the law and practice of public inquiries in the context of both legal and political challenges. In order to give context to both the primary inductive analysis and critical examination of the Data and the doctrinal research, broader desk-based research was also carried out.

This additional desk-based research also provided the opportunity to identify additional material to address the fact that the inductive research used secondary data, which meant that there was no opportunity to ask follow-up questions or seek clarification from the witnesses. It also provided the opportunity to obtain supplemental up-to-date information on inquiries that had continued, or had been convened, since the provision of the evidence that formed the Data (see 1.4.1).

The parameters of this third stage of research were set by the explanations, theories and conclusions that emerged from the Data during the earlier inductive analysis. Key document sources for the desk-based research beyond the doctrinal analysis were the report produced by the 2014 HL Select Committee on the Inquiries Act 2005,[28] the Government's written response,[29] and the earlier Public Administration Select Committee

[28] House of Lords Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative Scrutiny (HL 2013–2014 143).
[29] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014).

(PASC) report, *Government by Inquiry'*[30] (see 1.6). Other sources include: Hansard reports of debates and ministerial announcements, which were referred to in the evidence; inquiry websites and reports; government department advice, consultation documents and research publications; non-government research body publications; academic articles; newspaper articles and press releases.

1.5. Structure of the thesis

The thesis focuses on five key decisions that always have to be made regarding the form and nature of a public inquiry (see 1.4.1 above), with each of those decisions forming the subject matter of one of the five substantive chapters. Each chapter firstly examines legal and political influence over the public inquiry process as a whole and secondly over individual inquiries and the extent to which that in turn may set precedents for future inquiries.

Chapter 2 introduces the subject of public inquiries and the theoretical framework. It examines public inquiries as a part of the political process and the fact that aspects of their procedure and aims also resemble those of a legal process. It considers how conflicting expectations over the powers and role of public inquiries, and a multiplicity of interests in a public inquiry, can give rise to legal and political challenges that attempt to influence the form and nature of public inquiries. Finally, the chapter explores the forms that legal and political influence may take.

Chapter 3 examines influence on the minister's decision whether or not to convene a public inquiry. First it considers concerns and challenges over the role of the minister, the potential for conflicts of interest, the diminution of the role of Parliament and issues of transparency and openness in relation to the public inquiry process as a whole. It then analyses decisions on whether or not to convene specific individual inquiries and challenges from Parliament, participants and campaign groups. Finally, it investigates judicial review challenges, particularly those that relate to the state's obligations under the European Convention on Human Rights.

[30] Public Administration Select Committee, Government by Inquiry, First Report of Session 2004–05 (TSO, 2005) HC 51-I.

Chapter 4 examines the minister's decision whether to convene a statutory inquiry under the Inquiries Act 2005 or a non-statutory inquiry using the prerogative powers of the executive. It looks at the significance of the differences between the two forms of inquiry and at the decision-making process. It analyses attempts to influence the public inquiry process as a whole by those seeking a presumption in favour of inquiries being convened under the 2005 Act and an amendment to the Inquiry Rules 2006 regarding warning letters. The chapter then considers influence over specific individual inquiries, examining pressure brought to bear by campaign groups and requests from chairs and coroners, and the influence of judicial review challenges.

Chapter 5 examines the appointment of the chair and any panel members to an inquiry, their role, and the appointment process. Looking firstly at influence over the public inquiry process as a whole, it analyses influence over decisions to appoint judges or retired judges as chairs to an inquiry and arguments proffered for and against the appointment of panel members, assessors and expert witnesses. It considers conflicting views on the merits of a chair sitting alone as opposed to an inquiry panel and analyses attempts to restrict the minister's power over the appointment of panel members, assessors and the chair. Finally, the chapter examines political and legal challenges brought in respect of individual inquiries, seeking to influence the identity of the chair, the appointment of a panel and challenge decisions on the membership and diversity of panels.

Chapter 6 examines the setting of an inquiry's terms of reference by the minister. It analyses the merits of narrow and broad terms of reference; the role of the minister; and attempts made to restrict the power of the minister, to change the timing of announcements and increase consultation, for the public inquiry process as a whole. The chapter then considers political and legal influence over specific individual inquiries. It examines attempts to influence the interpretation and breadth of specific terms of reference, the range of approaches that have been taken on consultation with participants, the effect of political pressure outside a formal consultation process and recent developments in the approach to consultation.

Chapter 7 examines restrictions imposed on public access to public inquiries. It focuses on how the principle of political openness and open justice apply to public inquiries. Considering influence over the public inquiry process as a whole, it examines the

ministers' power to restrict public access to a public inquiry and the need to balance competing interests of witnesses and the fairness and transparency of an inquiry. It also analyses attempts to promote greater openness and to abrogate the ministers' power to restrict access. It then analyses political and legal challenges brought in respect of individual public inquiries seeking greater openness to hearings and publication of evidence and challenges to orders for anonymity.

Finally, chapter 8 revisits the research questions and draws conclusions from each of the five substantive chapters on the significance of legal and political influence on post-2005 public inquiries. It concludes with views and recommendations on lessons learnt from the implications of the research findings and on potential directions for future research.

1.6. Contribution to scholarship

Currently, there is no coherent body of literature in what could be called "the field of public inquiry legal scholarship".[31] There is limited literature, and even less evaluation, on where public inquiries are positioned in terms of the political and legal systems, public administration and administrative justice; the justification and philosophy of public inquiries; and conflicting expectations over, and the multiplicity of interest in, public inquiries, and challenges brought over decisions on the form and nature of public inquiries, which form the basis of this research.

Current literature is primarily practice-focused, on UK public inquiry procedure.[32] There is one practice-focused reference book, Beer, Dingemans and Lissack, on public procedure.[33] Sir Louis Blom-Cooper's[34] book, 'Public Inquiries', looks at the significance

[31] See also the discussion on this subject in the area of social sciences generally in Alastair Stark, *Public Inquiries, policy learning, and the threat of future crises* (OUP 2018) vii. This publication examines public inquiries from the perspective of politics, policy-making and crisis management.

[32] Such as: Mavis Maclean 'How does an inquiry inquire? A brief note on the working methods of the Bristol Royal Infirmary Inquiry' (2001) 28(4) Journal of Law and Society 590; Professor Sir Ian Kennedy, 'Public Inquiries: Experiences from the Bristol Public Inquiry' Lecture, 7 February 2002, in Lord Woolf et al (eds), *Law, Medicine and Ethics: Essays in Honour of Lord Jakobovits* (London: Cancerkin, 2007); Jack Beaton, 'Should Judges Chair Public Inquiries?' (2005) 121 LQR 221; Iain Steele 'Judging Judicial Inquiries' [2006] PL 738; Peter Jones and Nicholas Griffin, 'Public Inquiries: Getting at the Truth' [2015] LS Gaz <www.lawgazette.co.uk/practice-points/public-inquiries-getting-at-the-truth/5049449.article> accessed 28 May 2020; and The Right Hon. The Lord Thomas of Cwmgiedd 'The Future of Public Inquiries' [2015] Public Law 225.

[33] Jason Beer, James Dingemans, and Richard Lissack (eds), *Public Inquiries* (OUP 2011).

[34] Blom-Cooper also published a number of significant articles on public inquiry procedure and the rationale of inquiries, the majority of which relate to pre-2005 Act inquiries, for example 'Tribunals

of the move away from the legalism of pre-2005 Act public inquiries to an inquisitorial approach under the 2005 Act and focuses on the role of the public inquiry as a part of the Government's machinery for public administration (see chapter 2).[35] Within some public law books there are also sections examining public inquiries from a constitutional perspective, as a process by which government is held to account and in the context of the debate over legal and political constitutionalism and the role of members of the judiciary.[36]

There are also some research publications such as the Institute for Government report *How public inquiries can lead to change* and *The Inquiries Observation Project* which include recommendations for change.[37] However, these publications do not explore the potential mechanisms for change nor the extent to which change is, or has been, brought about.

The literature scrutinising the development of the form and nature of public inquiries is found in the form of select committee reports and other parliamentary documents such as the Public Administration Select Committee (PASC) report, *Government by Inquiry,*[38] on "the effectiveness of inquiries established by Ministers to investigate events that have caused public concern", published just prior to the introduction of the 2005 Act; the Department of Constitutional Affairs report *Effective Inquiries;*[39] the PASC report *Parliamentary Commissions of Inquiry;*[40] HL Select Committee report *The Inquiries Act*

under inquiry' [2000] PL 1 and 'Procedures in public inquiries' [2002] PL 391; 'Freedom of expression in public inquiry reports' [2014] PL 2.

[35] Sir Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing, 2017).

[36] For example Andrew Le Sueur, Maurice Sunkin, and Jo Eric Khushal Murkens *Public Law: Text, Cases, and Materials* (4th edn, OUP 2019) 552-557; Mark Elliott and Robert Thomas, *Public Law* (3rd edn, OUP 2017) ch 17 and Mark Elliott, "Ombudsmen, tribunals, inquiries: re-fashioning accountability beyond the courts" in Bamforth N and Leyland P (eds), Accountability in the Contemporary Constitution (OUP 2013).

[37] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020 and Committee on the Administration of Justice, Rights Watch UK and University of Ulster, 'Inquiries Observation Project 2008-2010 Report analysing the inquiries following the recommendation of Peter Cory' (July 2014).

[38] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.

[39] Department for Constitutional Affairs, 'Effective Inquiries A consultation paper produced by the Department for Constitutional Affairs' (2004) CP12/04.

[40] Public Administration Select Committee, Parliamentary Commissions of Inquiry, Ninth Report of Session 2007–08 (TSO, 2008) HC 473.

2005: *Post-legislative Scrutiny*[41] and various research briefings. This literature formed a key part of the desk-based research beyond the doctrinal analysis (see 1.4.3).

Based on the literature, we know much about perceived strengths and weaknesses of the law and practice of public inquiries; about constitutional and practical concerns about the way in which they are convened, and set up and operate, including concern about independence; and about calls for change. However, we do not know what influence, in practice, is being exerted over the power to determine the very form and nature of public inquiries, what the constraints are on those influences, to what extent as a result the current form and nature of public inquiries is fixed or changing, nor the conclusions that may be drawn from this.

This is significant because public inquiries are an important independent instrument of accountability, holding the Government, public bodies, public administration agencies, public corporations and regulators to account, in order to address public concern. Each of these bodies, other participants and the wider public have a multiplicity of competing and conflicting interests in form and nature of a public inquiry and its outcome. This is the first piece of work in this field to observe and analyse what influence is being exerted on these instruments of accountability, by whom, and to what effect, in order to draw conclusions on realistic expectations of the role of a public inquiry, its independence from the executive, participants and others with an interest in its outcome, and its ability to address matters of public concern.

1.7. Conclusion

This chapter sought to set out the background and context to the choice of research topic, how the research questions were determined, the methodology adopted and methods used, the structure of the thesis and the contribution to scholarship. It sets out the aim of the research, to carry out a systematic analysis and critically examination of political and legal influence on the form and nature of post-2005 Act public inquiries. It explains that the topic was chosen as an area in which reflections on my practice and

[41] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143).

academic experience had given rise to important questions about the expectations of those who interact with an inquiry and the range of challenges that have been brought to decisions on their form and nature, by whom, and to what effect.

The inductive analysis and critical evaluation of evidence given to the HL Select Committee has enabled this research to draw on a large dataset of evidence from very highly experienced public inquiry practitioners and participants on the law and practice of public inquiries, in order to observe and examine that legal and political influence and to allow explanations, theories and conclusions to emerge from the Data. This chapter explains how challenges arising from the volume of secondary data were overcome effectively by the use of NVivo software to extract, collate and categorised material relevant to the research questions.

Finally this chapter explains how doctrinal analysis was used to research, in greater detail, legislation and case law relevant to decisions on the form and nature of public inquiries, which had been identified by the inductive analysis. It was also used ensure currency by carrying out further research, relevant to the explanations, theories and conclusions that emerged from the inductive analysis but that post-dated the original Data. Additional desk-based research, beyond the doctrinal analysis, was used to give context to the inductive analysis and doctrinal analysis, to identify additional material to address the fact that the inductive research used secondary data, which meant that there was no opportunity to ask follow-up questions or seek clarification from the witnesses, and also to obtain supplemental up-to-date information on inquiries that had continued, or had been convened, since the provision of the Data.

It is now fifteen years since the introduction of the Inquiries Act 2005. There is an absence of a coherent body of literature in the field of public inquiry legal scholarship. This research seeks to begin to address the gap in the literature by drawing on knowledge and experience from participants, practice; government, parliament, and academia to observe, examine and analyse influence on the form and nature of post-2005 public inquiries.

Chapter Two - Context and Theoretical Framework[1]

2.1. What are public inquiries into matters of public concern?

This chapter introduces the subject of public inquiries and the broader theoretical framework that underpins this research. It examines the importance and distinctiveness of public inquiries as an instrument of accountability. It considers how conflicting tensions over the role of the convening-minister, conflicting expectations over the powers and role of public inquiries, and the multiplicity of interests in a public inquiry, can give rise to legal and political challenges that attempt to influence the form and nature of public inquiries. Finally, this chapter explores the forms that legal and political influence may take, which are then analysed in detail in each of the following substantive chapters.

As stated in chapter one, public inquiries form part of the political process rather than the legal process.[2] They have no power to determine civil or criminal liability, although inferences of legal liability may be drawn from its finding of facts.[3] Inquiries often secure an Attorney General's undertaking that evidence given or produced by a witness will not be used against them in any subsequent criminal proceedings. Evidence referred to in an inquiry, and its findings of fact, may be drawn upon in subsequent civil proceedings (however, the testing of evidence before an inquiry can be more limited than that during civil proceedings,[4] with the consequence that the inquiry is not in the same position as a court in relation to findings of fact).[5]

There is no system through which to appeal an inquiry's findings or recommendations; only the procedural decisions of the chair during the inquiry are subject to judicial

[1] Some of the material in this chapter was published in Emma Ireton, "How Public is a Public Inquiry?" [2018] PL 277 (an article which also incorporates material from chapter 7).
[2] That position being confirmed in the 2005 Act, s (1) "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability". See also the discussion in Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart 2017) 50.
[3] Inquiries Act 2005 (2005 Act), s 2.
[4] As there is not the same process of adversarial cross examination as there is during civil proceedings.
[5] See Herbert Smith Freehills, House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence' (2013) para 11 <*www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf*> accessed 28 May 2020.

review.[6] The report ultimately produced by a public inquiry is delivered to the minister who convened it. It is subsequently laid before Parliament and is published. Its recommendations are not legally binding.

Where a Government fails to implement the recommendations of a public inquiry, any influence or pressure brought to bear on that decision derives from political pressure from Parliament, the public, the media and others, such as non-governmental organisations (NGOs), survivors and their families. Holding a public inquiry in public, and placing its finding and recommendations in the public sphere, opens the process up to public scrutiny, enabling the public to form its own judgement on the subject matter of the inquiry and on the process itself, thereby holding the Government and other public bodies, public administration agencies, public corporations and regulators to account.[7]

On the other hand, public inquiries are also quasi-judicial bodies, analysing large quantities of evidence, establishing facts and determining accountability. The procedure and conduct of a public inquiry is not prescribed but is determined by the chair of the inquiry when an inquiry is convened.[8] In general terms, the rules of evidence in civil and criminal proceedings do not apply.[9] However, in many ways, the powers and procedures of public inquiries resemble those of a court process. Evidence may be taken during oral hearings; many public inquiries have the power to take evidence on oath and to compel witnesses to give evidence; [10] and principles such as public interest immunity and common law and statutory duties of fairness to witnesses are applied. Some public inquiries are held in court buildings.[11] The majority of public inquiries are chaired by a judge, retired judge or senior member of the legal profession, with counsel to the

[6] There has been no successful judicial review challenge to the final conclusions of a public inquiry in England, Wales and Northern Ireland. The general objection to the reviewability of an inquiry's conclusions is that they do not amount to a 'decision'. However, see the discussion in Jason Beer, James Dingemans, and Richard Lissack (eds), *Public Inquiries* (OUP 2011) paras 11.07-11.09 and 11.24-11.54 on the fact that, though extremely difficult, there are circumstances in which judicial review challenges of the final conclusions of an inquiry would be possible.

[7] This and points in the following paragraphs were discussed in Emma Ireton, '*How Public is a Public Inquiry*' [2018] PL 277.

[8] 2005 Act, s 17(1), subject to the small number of provisions in the Inquiries Act 2005 and the Inquiry Rules 2006, where the chair is presiding over a statutory inquiry.

[9] A few rules of evidence do apply to public inquiries, for example rules in relation to privilege (as stated expressly in the 2005 Act, s 22) as do common law principles relating to anonymity of witnesses (see chapter 7).

[10] 2005 Act, ss 21 and 17 respectively.

[11] Such as the *Leveson Inquiry.*

inquiry[12] and a solicitor to the inquiry[13] appointed, further reinforcing their resemblance to court processes.[14]

Public inquiries may be thought of therefore as a hybrid of a political and legal process, both procedurally and also in their aims "between the assumptions of law - that truth can be uncovered and justice delivered; and of politics - that social debate and audit will help society improve its workings."'[15] Within the political process, openness and transparency, one of the Seven Principles of Public Life devised by the Committee on Standards in Public Life, are essential in order to hold the Government and those in authority to account.[16] As a quasi-judicial process, if a public inquiry is to allay public concern, and if the public is to have confidence in its process, it must be open and be seen to be procedurally and substantively fair in the same way as for the civil and criminal court processes (see chapter 7).[17]

A public inquiry may be announced by a minister acting proactively or in response to a call. Calls for a public inquiry are frequently made following events where there have been failings in public systems and regulation and other matters causing national concern, such as institutional child abuse, the war in Iraq, undercover police operations, the culture, practices and ethics of the press and disasters with large scale loss of life.[18] A minister is responsible for matters of public concern and failings in public administration within the province of his or her department and it is for that minister to decide whether or not to convene a public inquiry (see 3.1.2).

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[12] A senior barrister, or barristers, appointed to provide legal advice to the chair and to question witnesses.

[13] A solicitor supported by a legal team, providing legal support to an inquiry, including assisting in drafting key protocols and document; gathering reviewing and analysing evidence; instructing experts and conducting research.

[14] Some are chaired by senior civil servants or experts from outside the legal profession, chosen for their expertise in the subject matter of the inquiry or the in the operation of the public body concerned.

[15] Centre for Effective Dispute Resolution 'Setting up and Running a Public Inquiry Guidance for Chairs and Commissioning Bodies' (CEDR 2015) <https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2019/10/CEDR_Setting_Up_and_Running_a_Public_Inquiry_-_Guidance_for_Chairs_and_Commissioning_Bodies.pdf> accessed 29 May 2020.

[16] Committee on Standards in Public Life, 'The Seven Principles of Public Life' (May 1995) <www.gov.uk/government/publications/the-7-principles-of-public-life> accessed 29 May 2020; also known as the Nolan Principles.

[17] Emma Ireton, '*How Public is a Public Inquiry*' [2018] PL 277.

[18] *The Independent Inquiry into Child Sexual Abuse Inquiry*, *North Wales Child Abuse Inquiry*, *Iraq Inquiry* (also known as the *Chilcot Inquiry*), the *Undercover Policing Inquiry*, the *Leveson Inquiry* and the *Grenfell Tower Inquiry* respectively.

2.2. The Importance and distinctiveness of public inquiries

Despite the fact a public inquiry has no power to determine civil or criminal liability, and its findings and recommendations are not enforceable, many public inquiries have had hugely significant and far-reaching consequences. The Institute for Government Report *How public inquiries can lead to change*[19] notes that many inquiries have delivered valuable legislative and institutional change, from more effective gun control,[20] industrial regulation[21] and CRB checks,[22] to the establishment of institutions such as the Rail Accident Investigation Branch.[23] Others have had "a profound effect on behaviours and attitudes", such as the *Macpherson Inquiry* into the death of Stephen Lawrence,[24] which helped to establish the concept of 'institutional racism' within the public consciousness.

Inquiries do not replicate but complement other accountability mechanisms, such as courts and tribunals.[25] Unlike these other systems, inquiries operate on a macro-level, looking at broad administrative systemic and regulatory failure and high level policy considerations, rather than at individual isolated incidents. The court and tribunal systems are permanent systems whose form and nature are fixed and which have a predetermined, fixed set of rules.[26] By contrast, public inquiries are ad hoc bodies and each time an inquiry is set up, the minister and chair will determine their form and nature; the chair has a very broad discretion to determine the inquiry's procedure.[27]

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[19] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020.

[20] The Firearms (Amendment) Act 1997 and the Firearms (Amendment) (No. 2) Act 1997 were introduced following recommendations in Lord Cullen's report on the killing of 18 people at Dunblane Primary School in 1996.

[21] Following the *Public Inquiry into the Piper Alpha Disaster.*

[22] Following the *Bichard Inquiry* into child protection following the Soham murders.

[23] The Rail Accident Investigation Branch was established following the Southall Rail Accident, the *Ladbroke Grove Rail Inquiries* and the *Joint Inquiry into Train Protection Systems*.

[24] Finding that "institutional racism … exists both in the Metropolitan Police Service and in other Police Services and other institutions countrywide."

[25] Mark Elliott, 'Ombudsmen, tribunals, inquiries: re-fashioning accountability beyond the courts' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (OUP 2013) 17

[26] Such as the Civil Procedure Rules 1998, the Criminal Procedure Rules 2015, The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2009.

[27] Section 17(1) of the 2005 Act provides that "the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct" subject to a small number of provisions of the 2005 Act and the Inquiry Rules 2006.

Unfortunately, the apparent resemblance of public inquiries to court proceedings in particular is often misleading. Participants, including survivors, victims and family members are not parties to proceedings that are designed to achieve justice on their behalf. They are participants in a wider political process, the findings of which are delivered to the minister and the Government will decide what action, if any, to take, subject to political scrutiny from Parliament, the public, and the media. It is the minister who determines the subject matter of an inquiry by setting the terms of reference in contrast, for example, to civil court proceedings where the parties determine the matters in dispute.

This raises two key issues, which are explored in some depth in the main body of the thesis. The first is that it can give rise to a serious clash in expectations between the hopes and expectations of survivors, bereaved family members and pressure groups, and indeed the wider public, about what an inquiry might deliver and the powers and role of an inquiry in practice. The second is that survivors and family members frequently find themselves feeling marginalised and excluded from the process. Both of these situations can result in those individuals or groups bringing legal and political challenges in an attempt to exert greater influence over the process.

2.3. The evolution of inquiries: select committees, royal commissions, tribunals and public inquiries

This thesis focuses on political and legal influences on the form and nature of post-2005 public inquiries,[28] inquiries that have been convened since the introduction of the Inquiries Act 2005. In order to give context to the political and legal influence that is currently affecting post-2005 inquiries, it is helpful to first look briefly at their origin and how they have evolved, with only limited deliberation and consultation, from parliamentary inquiries to independent inquiries convened by the executive, with powers of compulsion.

Since the seventeenth century there has been a long history of parliamentary committees, particularly select committees, holding inquiries into the alleged misconduct

[28] For the purposes of this thesis, 'form' and 'nature' are given their dictionary definition of 'type or variety' and 'inherent features, qualities or characteristics' respectively.

of government ministers, failures of government, private corporations and individuals.[29] Select committees, cross-party groups of members of parliament or Lords, have been given specific remits to investigate and report back to the House by which they were convened, on an incident or a series of incidents of public concern.[30] Royal commissions, ad hoc advisory committees, have also been appointed by the Government, in the name of the Crown, though they have tended to deal with broader policy issues rather than specific incidents.[31]

The defining moment that triggered parliamentary committees giving way to independent inquiries or tribunals[32] is frequently associated with the Marconi Scandal. The 1913 select committee into allegations of insider trading by a number of Government ministers in connection with the Marconi Wireless and Telegraph Company was widely criticised for lack of independence.[33] The membership of a Commons select committee reflects the party balance in the House as a whole. The findings of this select committee were divided strictly along party lines, resulting in the government ministers being exonerated and opposition ministers, the public and media voicing concerns about the motivation and lack of impartiality of committee members. [34]

Another political scandal followed in 1921, in connection with allegations that Ministry of Munitions officials had been ordered to destroy documents relating to contracts. Rather than convening a select committee to investigate the matter, the Government acceded to a request for an 'independent inquiry'. Further, in response to a member of parliament's suggestion that the inquiry be given the power to taken evidence on oath, the Tribunals of Inquiry (Evidence) Act 1921 was quickly enacted, over the period of only a few days. This short three section Act provided that, following a resolution of both

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[29] See Peter DG Thomas, *The House of Commons in the Eighteenth Century* (Oxford 1971) 14-15.
[30] House of Commons, 'Select Committees' (House of Commons Information Office 2011) <www.parliament.uk/documents/commons-information-office/brief-guides/select-committees.pdf> accessed 29 May 2020.
[31] With examples including issues such as the criminal justice system, legal services and care of the elderly.
[32] Note, in this context 'tribunals' refers to ad hoc independent inquiries rather than the current tribunals system under the Tribunals, Courts and Enforcement Act 2007, which form part of the legal system.
[33] The scandal centred around three Liberal ministers: Rufus Isaacs, Alexander Murray and David Lloyd George, who allegedly profited from an impending government tender for a contract between the Post Office and the British Marconi wireless company.
[34] See, for example, Public Administration Select Committee, Government by Inquiry, First Report of Session 2004–05 (TSO, 2005) HC 51-I and Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing 2017) 10.

Houses, a tribunal may be convened by a minister, with "all such powers, rights, and privileges as are vested in the High Court" to compel the production of documents, enforce the attendance of witnesses and take evidence on oath, making it a criminal offence not to comply.[35] It also provided that the tribunal "shall not refuse to allow the public or any portion of the public to be present at any of the proceedings of the tribunal unless in the opinion of the tribunal it is in the public interest expedient so to do…"[36]

As a result, after very little deliberation, a new public inquiry process was created that operated independently of government and was granted legal powers of compulsion that made it, in some respects, resemble the court system. These new inquiries, or tribunals, were convened by a Government minister rather than Parliament, though they required a resolution of both the Commons and Lords in order for the power to be exercised.

Over the next few decades, there was a move away from the use of investigative select committees and royal commissions, in favour of 1921 Act tribunals.[37] (Royal commissions have now fallen into disuse in the UK, in part due to them wielding limited influence and the time taken to report, though they are still used in Australia, Canada and New Zealand).[38] However, by the 1960s, there was increasing dissatisfaction about the form of the 1921 Act tribunals, in particular over the risk of damage posed to the reputations of individuals, often ministers and members of parliament, in a forum that was granted significant legal powers of compulsion, but did not offer the customary legal safeguards.[39]

Criticism of the 1921 Act was summarised during a House of Commons debate in 1965, when the Act was described as:

> "[A] bastard Bill, which provides a method of procedure never known in the law in England since we have our present system of justice"

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[35] Tribunals of Inquiry (Evidence) Act 1921, s 2.
[36] Ibid, s 3.
[37] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 22.
[38] The most recent being convened in 2000, on reform of the House of Lords. Pepita Barlow 'The lost world of royal commissions' (Institute for Government, 19 June 2013) <www.instituteforgovernment.org.uk/blog/lost-world-royal-commissions> accessed 29 May 2020 and Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 29 May 2020.
[39] See the discussion in Public Administration Select Committee, Government by Inquiry, First Report of Session 2004–05 (TSO, 2005) HC 51-I paras 21-22,

> "We set up by this method, virtually without any discussion at all, a tribunal which can sit in private or public, can hear evidence how it likes and where it likes, can summon witnesses without any preliminary investigation or procedure and can cover an inquiry which may spread over innumerable matters not cognisant to our law and involving the repute of people who have only a remote connection with the central incidents."[40]

In 1966, a Royal Commission on Tribunals of Inquiry was convened under Lord Justice Salmon, 'The Salmon Commission', to review the working of the 1921 Act.[41] The Salmon Commission concluded that:

> "history demonstrated that occasionally cases arose of alleged 'lapses in accepted standards of public administration and other matters causing public concern' that could not be dealt with by the ordinary civil and criminal processes but nonetheless required investigation."

It recommended that the Act should be retained, with amendments, and set out "six cardinal principles" to address the concerns about the lack of legal safeguards and to ensure justice for those involved. These became known as 'the Salmon Principles' and were adopted as guiding principles for later 1921 Act tribunals.

However, ongoing concern over procedure, cost and duration resulted in the use of 1921 Act tribunals dropping off by the 1970s and a predominance of ad hoc non-statutory inquiries, convened under the prerogative powers of the executive, and subject-specific statutory inquiries, convened under numerous other pieces of legislation.[42] The *Bloody Sunday Inquiry*, a 1921 Act tribunal and the longest running and most expensive public inquiry ever, costing £192 million and taking 12 years to complete, was a significant driving force behind the desire to update the 1921 legislation.

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[40] Leslie Hale MP, HC Deb 30 March 1965, vol 709, cols 1402-4.
[41] Royal Commission on Tribunals of Inquiry, Royal Commission on Tribunals of Inquiry, 1966: report of the Commission under the chairmanship of the Rt Hon Lord Justice Salmon (Cmnd 3121, 1966) para 21 (also known as 'The Salmon Report').
[42] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 22.

Commencing in 2004, reviews of the 1921 Act tribunals were conducted included the *Beldam Review*, [43] the 2005 Public Administration Select Committee (producing the report *Government by Inquiry*),[44] and the Department for Constitutional Affairs consultation paper *Effective Inquiries*[45] (see chapter 3). The Inquiries Act 2005, a lengthier and more detailed Act, was subsequently introduced to repeal the numerous pieces of statutory provisions relating to public inquiries and replace them with a single piece of legislation.[46] However, serious concerns were expressed about the manner in which the Act was introduced, at a time when parliamentary scrutiny of the public inquiry process was in progress and in the absence of pre-legislative scrutiny and consultation and discussion with interested or affected groups (see 3.3).

The 2005 Act transferred responsibility for convening a public inquiry from Parliament to the executive, thereby removing the requirement for a resolution of both Houses. It also granted ministers significantly greater power over public inquiries, a move which was severely criticised at the time the Act was introduced and continues to be a matter of significant concern (see below).

2.4. Conflicting tensions over the power of the minister and the role of Parliament

Despite the fact that the 2005 Act is generally recognised to be 'good legislation', in that it provides a suitable framework for public inquiry procedure,[47] ministers have continued to convene non-statutory inquiries, under the prerogative powers of the executive, alongside 2005 Act public inquiries (see chapter 4). Many, including members of parliament, participants to inquiries, and members of the public and media have argued that ministers have chosen to side-step the legislation when it suits them, because it is

[43] Beldam's Preliminary Report is Annexe C to Department for Constitutional Affairs, 'Effective Inquiries A consultation paper produced by the Department for Constitutional Affairs' (2004) CP12/04 see below.
[44] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[45] Department for Constitutional Affairs, 'Effective Inquiries A consultation paper produced by the Department for Constitutional Affairs' (2004) CP12/04.
[46] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 31 identifies arguably two statutory provisions, relating to Health and Safety at Work and Financial Services, that might continue to apply independently of the 2005 Act.
[47] See HL Select Committee, *The Inquiries Act 2005: post-legislative scrutiny* para 214.

felt the 2005 Act somehow 'ties their hands, is too complicated, [or] is too public" [48] As a result, numerous challenges have been brought against decisions to convene non-statutory inquiries.

Members of parliament, parliamentary select committees and inquiry participants have also expressed very different concerns over 2005 Act inquiries. A major criticism relates to the powers that the 2005 Act grants to ministers, including: the power over the appointment and termination of the chair and panel members, to decide an inquiry's terms of reference, to bring an inquiry to a conclusion at any stage before the publication of the report, to restrict public access and withhold material in the final report from publication (see chapters 5, 6 and 7). The predicted collapse in public confidence in public inquiries did not materialise,[49] however, these powers have given rise to concern over the independence of public inquiries and the clear conflict of interest that arises when it is the actions of the minister's department or the Government that are the subject matter of an inquiry. [50] There is also concern about the lack of transparency and consistency of the ministerial decision-making process.[51]

Further, members of parliament and parliamentary committees have expressed concern about the diminution of Parliament's role in the public inquiry process and therefore the weakening of the role of public inquiries in ensuring ministerial accountability. They have sought to reduce the powers of the minister (see chapters 3 to 7). Witnesses to the HL Select Committee, participants, pressure groups, the media and the wider public have also expressed concern about the lack of consultation with participants, particularly survivors and family members, and with the public more widely, over the form and nature of a public inquiry and its terms of reference and the failure to put survivors and family members at the heart of the process.[52]

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[48] Lord Richard, House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" Q323 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020.
[49] HL Select Committee, *The Inquiries Act 2005: post-legislative scrutiny* para 6.
[50] See, for example, Lord Kingsland HL Deb 9 December 2004, vol 667, col 1009.
[51] Which is addressed in detail in the substantive chapters 3 to 7.
[52] For example, Karl Mackie oral evidence to the HL Select Committee Q59 and Alun Evans oral evidence to the HL Select Committee Q131, 'Written and Corrected Oral Evidence'. See also chapter 6.

2.5. Conflicting tensions over the role of a public inquiry

This thesis examines how these conflicting tensions are exacerbated by differences in expectations over the role of a public inquiry. Neither the 1921 Act nor the 2005 Act provide a definition of the role of a public inquiry. There is "an astonishing absence of any case law defining the justification and philosophy of public inquiries generally".[53] In general terms, the role of an inquiry is to establish facts and address public concern, either by allaying it by showing that it is misplaced or, if justified, by for example pronouncing its view on culpability.[54] It can be inferred, by reference to the many inquiries that have been convened, that the role of an inquiry may be made up of a number of elements: learning lessons; providing catharsis; making recommendations to prevent recurrence; developing public policy; and discharging the Government's obligations to investigate alleged breaches of Articles 2 and 3 of the European Convention on Human Rights.[55] The role of a public inquiry may differ significantly between inquiries, depending on their subject matter and terms of reference. For example, not all public inquiries are required to make recommendations; not all inquiries have an element of catharsis.

Inquiries rarely satisfy everyone because of differences in expectation about their role or primary role.[56] There is often a multiplicity of interests in a public inquiry and what is considered to be, or should be, the primary role of an inquiry can differ depending on the capacity in which an individual or organisation has an interest in an inquiry. For the minister, a public inquiry provides an independent instrument for finding facts and producing recommendations on which to reflect and inform government policy, in order to address public concern. For members of parliament and select committees, public inquiries are an important instrument of administrative justice and one of a number of important means by which the executive is held to account. An inquiry needs to

[53] Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing 2017) 27.
[54] HL Select Committee, *The Inquiries Act 2005: post-legislative scrutiny* para 10 and Michael Collins, Judi Kemish and Ashley Underwood QC written evidence para 7 House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020.
[55] Beer et al, *Public Inquiries* (OUP 2011) paras 1.02- 1.10.
[56] See Peter Riddell 'The role of public inquiries' (*Institute for Government*, 26 July 2016) <www.instituteforgovernment.org.uk/blog/role-public-inquiries> accessed 29 May 2020.

effectively balance what, at times, will be tensions between a number of different aspects to the role of the inquiry.

2.6. Political and legal influence

As explained in chapter 1, there is no permanent public inquiry system. Public inquiries are ad hoc bodies, convened to fulfil their terms of reference and then they are closed down. Every time a public inquiry is convened, decisions are made that determine the basis upon which that inquiry is convened, the powers it will be granted, the identity of the chair, its terms of reference and the extent to which there are restrictions on public access. This thesis asserts that conflicting views over the appropriate extent of the role of ministers and Parliament in the public inquiry process as a whole and conflicting interests in, and expectations of the role of, individual public inquiries have given rise to political and legal challenges, where individuals, organisations, the media, parliamentary committees and others have sought to influence the form and nature of public inquiries to address their own concerns. This research analyses and critically examines those challenges.

2.6.1. Political influence

The inductive analysis of the data revealed two subcategories of forms of political influence. The first, referred to in this thesis as 'formal political influence' is that exerted by members of parliament and Lords during parliamentary debates and through scrutiny and the recommendations of select committees. Select committees are an important part of our democratic process and one of the key ways by which Parliament scrutinises government policy and administration.[57] Calling witnesses is a vital part of their role; it enables them to gather evidence and input from experts and stakeholders who are independent of government.

In 2004, the House of Commons Public Administration Select Committee (PASC) commenced a review of the effectiveness of public inquiries on the basis that it was nearly forty years since the Salmon Commission had considered the subject in depth, stating "it is right to keep this important instrument of accountability and learning in

[57] See discussion in Mark Elliott and Robert Thomas, *Public Law* (3rd edn, OUP 2017) ch 10, para 5.5.

public administration under review to ensure it is functioning well".[58] Its conclusions, particularly in relation to seeking greater parliamentary involvement, are discussed in chapters 3 to 7. By the time its report, *Government by Inquiry*, was published, the Inquiries Bill was already before the House of Lords.

Post-legislative scrutiny of Acts of Parliament is a relatively recent activity.[59] It was recommended by the House of Lords Constitution Committee in 2004 and the subsequent Government concluded in 2008 that it was not appropriate for all legislation and that there should be a selective approach.[60] In October 2010 the Ministry of Justice submitted a memorandum on post-legislative scrutiny of the Inquiries Act 2005 to the Commons Justice Select Committee, which decided not to carry out a scrutiny. There was no scrutiny of the Inquiries Act 2005 therefore until the ad hoc House of Lords Select Committee on the Inquiries Act 2005 (HL Select Committee) was set up in 2013 to consider "the law and practice relating to inquiries into matters of public concern, in particular the Inquiries Act 2005" (see chapter 3).[61] The HL Select Committee received evidence from 44 witnesses. Its call for evidence is at appendix 1 and list of witnesses at appendix 2. The oral and written evidence of these witnesses forms the data for this analysis of legal and political influence on the form and nature of post-2005 Public Inquiries and their significance (see chapter 1). The HL Select Committee produced a report to government, *The Inquiries Act 2005: post-legislative scrutiny* ('the HL Select Committee Report) setting out its findings and recommendations.[62]

A select committee cannot of itself amend legislation; it may make recommendations but there is no obligation on the Government to accept those recommendations. Usually, the Government will publish a response and the select committee report may be referred to or debated in Parliament. Whilst there are a number of benefits to the system of select committee scrutiny, including more detailed scrutiny than through Parliament

[58] PASC, *Government by Inquiry* HC 2004–5, 51-I paras 6 and 9.
[59] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 2.
[60] House of Lords Select Committee on the Constitution, *Parliament and the Legislative Process*, *14th Report of Session 2003–04*, (TSO 2004), HL Paper 173–I and Office of the Leader of the House of Commons, *Post-legislative scrutiny- The Government's approach* (Cm 7320, 2008).
[61] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) paras 2–6.
[62] Ibid.

alone and promoting increased openness and learning of lessons,[63] there are also limitations. These limitations include examples of uncooperative behaviour from ministerial departments during the taking of evidence and government responses that are late, defensive or fail to properly consider, or take account of, the finding and recommendations of the committee.[64] These limitations are examined in relation to the HL Select Committee scrutiny of the law and practice relating to post-2005 public inquiries into matters of public concern (see, in particular, 4.6.2 and 4.7).

The second subcategory of political influence that emerged from the inductive analysis of the data, is referred to in this thesis as 'informal political influence'. Ministers are accountable to the electorate as well as to Parliament and ministers are sensitive to public criticism. Public pressure, such as that from individuals and pressure groups and the wider public via the media, social media and the lobbying of members of parliament, has proved a significant form of informal political challenge to ministerial decisions (see chapters 3 to 7).

Whereas parliamentary and select committee pressure tends to focus on influencing the public inquiry process as a whole, pressure from individuals, pressure groups, the public and media tends to be focused on influencing decisions relating to individual public inquiries. The outcome of such pressure may then influence the public inquiry process more broadly, by setting a precedent or encouraging similar pressure to be brought in similar situations in relation to other inquiries

Whilst political pressure may be exerted in the hope of influencing the decision of the minister over the form and nature of a public inquiry, once an inquiry is underway it is an independent body and it is not appropriate for political pressure to be brought to bear in an attempt to influence the decisions of the chair. Participants may make representations to the chair regarding, for example, the interpretation of the terms of reference, the appointment of panel members and restrictions to public access, as part of the inquiry process. However, those representations, in the same way as representations

[63] See Hannah White, 'Select committees under scrutiny: The impact of parliamentary committee inquiries on government' (Institute for Government, 2015) <www.instituteforgovernment.org.uk/publications/select-committees-under-scrutiny> accessed 29 May 2020.

[64] House of Commons Liaison Committee, *Select committee effectiveness, resources and powers, Second Report of Session 2012–13,* (TSO 2012), HC 697 107.

made to the minister, are simply material consideration that will be taken into account as part of the decision-making process, alongside a broad range of other considerations (see chapters 5 to 7).

2.6.2. Legal influence

Both the decisions of the minister made when convening and determining the form and nature of a public inquiry, and procedural decisions made by the chair or inquiry panel during an inquiry affecting the form and nature of a public inquiry, are subject to legal challenge by way of judicial review.[65] For some time, there have been a significant number of cases challenging decisions by ministers not to convene a public inquiry.[66] However, judicial review of procedural decisions made by the chair during an inquiry is relatively recent; there were no judicial reviews of such decisions until the Bloody Sunday Inquiry in 1999.[67]

In a 2019 case in connection with the *Magnox Inquiry*, [68] the defendant sought to maintain that the non-statutory inquiry was not subject to judicial review on the basis that the chair was a private individual, with no powers of compulsion, tasked by the minister to prepare a report following an inquiry conducted privately, and that any judicial review claim should be brought against the minister to prevent publication. The court accepted the applicant's submission, citing the *Datafin* case,[69] which concluded that that the key test of justiciability in this context was whether the decision-maker was exercising a public function. It found that the inquiry was subject to judicial review, but with the caveat that "[t]his is a fact-specific conclusion, and it is not my view that the work of a non-statutory inquiry is necessarily always amenable to judicial review." It may be, therefore, that the decisions of some non-statutory inquiries are not subject to judicial review, depending on the specific facts of the case.

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[65] *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 ('Saville *1').* The position regarding procedural decisions made during the course of a statutory inquiry being subject to judicial review challenge is clear from this case. See 2.1 above on the absence of a system through which to appeal.
[66] Particularly, more recently, in areas engaging Articles 2 and 3 of the European Convention on Human Rights.
[67] See the discussion in Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing 2017) 31.
[68] *R (Clarke) v Holliday* [2019] EWHC 3596 (Admin)[2019] EWHC 3596 (Admin).
[69] *R v Panel on Take-overs and Mergers ex parte Datafin Plc* [1987] QB 815 (CA).

There are also limitations generally on the use of judicial review as a form of challenge to influence the form and nature of public inquiries. Permission of the court is required in order to bring judicial review proceedings. Permission is not granted unless the court considers the applicant has 'sufficient interest' in the matter to which the application relates.[70] 'Sufficient interest' is not defined; the decision is left to the court. The court will consider, *inter alia*, the merits of the challenge and whether or not personal rights or interests are involved.[71] Where judicial review is sought by survivor support groups, NGOs and pressure groups, the court may take into account the reputation of the body, whether a significant number of members are affected by a decision, and whether it is reasonable for the group or organisation to claim on behalf of its members.[72] Few ordinary members of the public with 'sufficient interest' will be familiar with the judicial review process, or have the resources to bring proceedings, which can be costly, time consuming and distressing. [73] Time limits for applying for judicial review of decisions made by a minister, chair or panel in relation to a statutory inquiry are particularly tight; for statutory inquiries they must be brought within 14 days of the applicant becoming aware of the decision, unless that time limit is extended by the court.[74] Further, changes introduced by the Criminal Justice and Courts Act 2015, including tightening the criteria for granting judicial review and changes to the rules on the legal costs of interveners in judicial review proceedings,[75] make the task of bringing proceedings more difficult.[76]

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[70] See Senior Courts Act 1981, s 31(3).

[71] See *IRC v National Federation of the Self Employed and Small Businesses* [1982] AC 617.

[72] See *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* [1994] 4 All ER 329 and *R v Secretary of State for Foreign Affairs, ex p World Development Movement* [1995] 1WLR 386. See also the summary in Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67(2) NILQ 209.

[73] Disaster Action written evidence to the House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" para 4.4 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020.

[74] 2005 Act, s 38(1) compared with the time limit generally, which is promptly and, in any event, not later than 3 months after the grounds to make the claim first arose under CPR 54.5. A decision not to convene a public inquiry would not be "a decision by the Minister in relation to an inquiry" as no inquiry is convened, so the latter time limit would apply.

[75] A person other than a party to the judicial review proceedings given permission by the court to apply to file evidence or make representations in the proceedings.

[76] See, for example, Rachel Robinson oral evidence to the House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" Q243 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020 Q243. See also the discussion in Ireton E, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67(2) NILQ 209.

2.7. Conclusion

Public inquiries have evolved over the centuries, from parliamentary investigations into alleged misconduct, to inquiries, independent of government, with significant legal powers of compulsion. Each step along the way, the public inquiry process as a whole has evolved in response to pressure arising from competing and conflicting interests.

Governments have sought to protect and preserve the power of the executive to decide when to convene a public inquiry and to determine a public inquiry's form and nature, as part of their executive function to address matters of public concern. Parliament has sought to restrict those powers, to increase the independence of public inquiries and to strengthen their role in holding the executive to account. Participants, pressure groups, the media and wider public have sought increased consultation over the form and nature of public inquiries and to safeguard the interests of participants. Different expectations over the role of public inquiries, and whose interests should be at the heart of the process, have brought about attempts to influence the form and nature of individual public inquiries through political and legal challenges. Those challenges in turn have the potential to influence not only those individual inquiries but the public inquiry process as a whole.

The Inquiries Act 2005, which created a new form of statutory public inquiry, was introduced after a review of the public inquiry process. Attempts to influence the form and nature of public inquiries, both at the level of individual inquiries and the process as a whole, however, have continued since the introduction of the Act. The following chapters examine five key areas of decisions that always have to be made to determine the form and nature of a public inquiry: whether or not to convene a public inquiry, whether a public inquiry should be statutory or non-statutory, the appointment of the chair and any panel members, the setting of the inquiry's terms of reference and restrictions imposed on public access. They examine political and legal influence brought to bear, the constraints on that influence, how fixed the current form and nature of public inquiries are, whether they are continuing to evolve and, finally, the conclusions that can be drawn.

Chapter Three - Convening a Public Inquiry

3.1. Introduction

This chapter examines political and legal influence on the minister's decision whether or not to convene a public inquiry. First it considers the public inquiry process as a whole and concern over the role of the minister including: the potential for conflicts of interest, the diminution of the role of Parliament, and issues of transparency and openness.[1] Second, it examines decisions on whether or not to convene specific individual inquiries and political challenges from Parliament, participants and campaign groups. Finally, it examines judicial review challenges in relation to individual inquiries, particularly more recent cases that relate to the state's obligations under the European Convention on Human Rights (ECHR).

3.1.1. Pressure for a public inquiry

A public inquiry may be convened by a minister acting proactively or in response to a call for a public inquiry. Such calls often occur immediately after an event causing public concern. However, there may be a long delay, such as in the case of *the Independent Inquiry into Child Sexual Abuse* (the *IICSA*)[2], where calls for a public inquiry into wide-scale child sexual abuse came years after the events, triggered by press reports on Jimmy Savile's behaviour, following his death in 2012.[3] Some inquiries are convened very quickly after the call, for example the *Hutton Inquiry* and *Grenfell Tower Inquiry*[4] were convened the day after the events causing public concern; others have been convened after protracted periods of campaigning.

By the time a minister makes the decision whether or not to convene a public inquiry, a momentum of public pressure has often built up, for example from survivors and their

[1] Three of the key areas of concern identified from the inductive analysis of the Data.
[2] The *Independent Inquiry into Child Sexual Abuse* www.iicsa.org.uk/ accessed 29 May 2020.
[3] 'Jimmy Savile accused of sexual abuse' *BBC News* (London, 1 October 2012) <www.bbc.co.uk/news/entertainment-arts-19776872> accessed 29 May 2020.
[4] An investigation into the circumstances surrounding the death of Dr Kelly, former UN weapons inspector in Iraq and to examine the circumstances surrounding the fire at Grenfell Tower on 14 June 2017 respectively.

families, the bereaved, non-governmental organisations (NGOs) and from the lobbying of Parliament by individuals and pressure groups. Many groups express frustration, stating that they feel that, without a public inquiry, their voice will not be heard.[5] Sometimes such public pressure will be successful, but often the Government will refuse to convene a public inquiry.

Matters of public concern that many believe should have been the subject of a public inquiry, but were not,[6] include Deepcut,[7] the murder of Patrick Finucane, [8] the Hillsborough disaster,[9] the financial crisis of 2007-8, and the Omagh and Lockerbie bombings.[10] Critical of the apparently arbitrary and inconsistent approach to decision-making by ministers, in a letter to Jack Straw, the then Foreign Minister, Disaster Action[11] wrote:

> "One of the greatest causes of dissatisfaction concerning Lockerbie has been the fact that the onus has fallen on the families to ensure that all aspects of the disaster are fully investigated. As you are aware, this has necessitated years of lobbying successive governments, involving liaison with the Scottish Office, the Crown Office, the Home Office, the Foreign & Commonwealth Office and the Department of Transport."[12]

The decision-making process generally has come under a great deal of criticism and pressure for change, including from participants, practitioners, and select committees. In

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[5] For example see 'Bishop calls for Buncefield inquiry' *Evening Standard* (London, 11 January 2006) <www.standard.co.uk/newsheadlines/bishop-calls-for-buncefield-inquiry-7084716.html> accessed 29 May 2020 and David Conn 'Theresa May to heed campaigners' call for inquiry into battle of Orgreave' *The Guardian* (London, 15 December 2015) <www.theguardian.com/politics/2015/dec/15/theresa-may-to-heed-campaigners-call-for-inquiry-into-battle-of-orgreave> accessed 29 May 2020.

[6] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 97.

[7] Inquiry Into the death of recruits at the Deepcut army barracks. The reason given by the Secretary of State for Defence not to convene an inquiry was that the deaths had been "subject to thorough examination" by Surrey Police.

[8] A Belfast solicitor murdered by paramilitaries with collusion by the state.

[9] The death and injury of football supporters during a match at the Hillsborough Stadium in 1989.

[10] The Republican bombing in the town of Omagh, resulting in the death of 29 people and the bombing of Pan Am Flight 103 over Scotland in December 1988 which killed 270 people.

[11] A charity providing support for those directly affected by disaster.

[12] Disaster Action written evidence to the House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence' paras 4.1, 4.5 and appendix 1 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020; Letter from Disaster Action to Jack Straw (19 July 2002).

particular, concern is expressed about: the conflict of interest that arises where the actions of the minister's own department,[13] or those of the Government itself,[14] are the subject matter of a proposed inquiry; the limited role of Parliament; and the lack of published criteria and transparency.

It is frequently the case that the onus to press for a public inquiry falls on survivors, families, and support groups. Where reasons are given for not convening a public inquiry, they frequently include concerns about cost and time. A lesser form of investigation or review may be suggested as an alternative to a public inquiry. On occasions refusals to convene an inquiry have been reversed following ongoing political pressure or as a result of legal challenges from campaigners and those most closely affected by the matter of public concern.[15] The decisions in those individual cases often have implications for the public inquiry process as a whole, which are considered below.

3.1.2. The power of the minister

Public inquiries are convened by a government minister, to carry out an independent and detailed inquiry into a matter of public concern. The inquiry's findings and recommendations are delivered to the minister, who is then responsible for deciding what action is needed in the public interest as part of the function of the executive.[16] In making a decision whether not to convene a public inquiry, the minister is both accountable through the courts by way of judicial review and politically accountable to Parliament and the electorate.

There is no process by which those demanding a public inquiry can make an application. The decision whether or not to convene a public inquiry rests with the minister.[17] As considered in more detail in chapter 4, inquiries may be statutory or non-statutory. Most statutory inquiries are now convened under section 1 of the 2005 Act, which states that a minister 'may cause an inquiry to be held' under the Act. The power to convene a non-

[13] For example the *Mid Staffordshire NHS Foundation Trust Public Inquiry.*
[14] For example the *Bloody Sunday Inquiry* and *Iraq Inquiry.*
[15] For example the *Mid Staffordshire NHS Foundation Trust Public Inquiry* and the *Litvinenko Inquiry* (see below).
[16] See discussion at 2.1 of this thesis.
[17] The introductory explanation in this and the following paragraphs is drawn from Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.

statutory public inquiry falls under the prerogative powers of the executive.[18] In both cases, ministerial discretion is extremely broad and issues arising from the absence of any formal formula or criteria are considered below.

The court cannot mandate a minister to convene a public inquiry. Whilst Articles 2 and 3 ECHR[19] impose on governments an obligation to conduct an effective official investigation where one or more of the substantive obligations in those Articles have or may have been violated, and it appears that an agent of state is or may be implicated in some way,[20] that procedural obligation need not be discharged by the holding of a public inquiry. It may be discharged by some other form of official investigation (see, for example, the discussion on the Hillsborough Independent Panel at 3.4.1 below).

Parliament does not itself have power to convene a public inquiry. It can hold a minister to account for not holding a public inquiry, as a matter of constitutional law, but it cannot force the minister to convene a public inquiry.[21] Members of the public seeking a public inquiry may apply pressure on Parliament and the minister in question, by lobbying both Houses through letters, presentations, briefings and meetings and through the media, in an attempt to influence the decision.

Influence over the Process as a Whole:

3.2. Conflicts of interest

A primary concern over the role of the minister in determining whether or not a public inquiry should be convened is the issue of conflict of interests. The decision to convene an inquiry is one for the minister whose department is most relevant to the matter of public concern potentially necessitating an inquiry; precisely which minister that falls to is an administrative or political decision, rather than a legal one. The minister making the

[18] See discussion on the ministerial prerogative power to initiate an inquiry, and the argument that it be put onto a statutory footing in Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I paras 5,175 and 215 and Ministry of Justice *'The Governance of Britain Review of the Executive Royal Prerogative Powers: Final Report'* (2009) <www.peerage.org/genealogy/royal-prerogative.pdf> accessed 29 May 2020.

[19] The Right to Life and Prohibition from Torture.

[20] See *Osman v United Kingdom* (1998) 29 EHRR 245; *McCann v United Kingdom* (1995) 21 EHRR 97.

[21] Though "in practice a minister would be unlikely to decline to comply with a motion carried out in either House calling for an inquiry to be set up" House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 103 and see discussion below.

decision may well therefore be the minister for the department that is, or may find itself, under the scrutiny of the inquiry and indeed may ultimately be criticised in the inquiry's report. Concerns over the clear conflict of interests that arises as a result have long been raised.

In the media, it is an often-quoted belief that a minister will concede a public inquiry to appease immediate pressure from the public and media and in order to "kick the issues into the long grass",[22] hoping that public interest and political criticism will fade by the time the inquiry publishes its report.[23] The question "Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?" was included in the call for evidence of the House of Lords Select Committee on the Inquiries Act 2005 ('the HL Select Committee') [24] and concern over conflicts of interest were raised a number of times in the written and oral evidence provided to the HL Select Committee.

In its written evidence to the HL Select Committee the Committee on the Administration of Justice[25] stated:

> "In general the decision to hold or not hold an inquiry, currently vested in the Minister, is a matter of significant controversy, as recently demonstrated by the Secretary of State for Northern Ireland's decision not to hold an inquiry into the Omagh bomb. It is the view of CAJ that rather than leaving the matter to political decision by the department which has the greatest interest in the matter, clearer guidelines to the circumstances requiring the establishment of inquiries should be compiled by a group of international legal experts and consideration given to options about the decision being taken elsewhere." [26]

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[22] See, for example, Steve Richards, 'The real purpose of public inquiries' *Independent* (London, 16 June 2010) <www.independent.co.uk/voices/commentators/steve-richards/steve-richards-the-real-purpose-of-public-inquiries-2002390.html> accessed 29 May 2020 and 'Government accused of shunting Orgreave inquiry "into the long grass"' *ITV News* (London 20 July 2016) <www.itv.com/news/calendar/2016-07-20/government-accused-of-shunting-orgreave-inquiry-into-the-long-grass/> accessed 29 May 2020.

[23] The 2014 Select Committee Report noted that it had received no evidence of this for statutory inquiries, though it did receive evidence from Liberty to the effect that this was the purpose of the Detainee Inquiry see HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 98.

[24] Appendix 1 of this thesis.

[25] An independent non-governmental human rights organisation in Northern Ireland.

[26] Written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 5.

Julie Bailey, founder of Cure the NHS, who campaigned intensively for over two years for the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, felt the decision should not be taken by the minister of the relevant department, but an independent party, due to the conflict of interest arising from the fact the minister's own department could ultimately be criticised in the inquiry report.[27] Eversheds stated "There is undoubtedly a conflict of interest that exists in such circumstances, given the power to set up an inquiry rests solely with a Minister." [28]

In oral evidence to the HL Select Committee, Susan Bryant, of Rights Watch UK,[29] noted an apparent difference between when the actions of the Government are 'in the frame' and when they are not, stating:

> "The examples where there has been a public inquiry ordered—looking at Leveson or Mid Staffordshire—are very different situations where the wrongdoing of the Government is not essentially in the frame. That is not the central issue. From our experience and perspective, that perhaps is not a coincidence. When you look at the examples of the Baha Mousa inquiry and the Al-Sweady inquiry, another feature that they have in common is that they were forced upon the Government as a result of judicial ruling."[30]

Conversely, the HL Select Committee, while recognising, the fact that some witnesses were unconvinced about the impartiality of ministerial decision-making, stated: "we received no evidence of a minister failing to establish an inquiry under the Act into his or

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[27] Oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs 153, 179, 162, and 163.

[28] An international law firm and solicitors to the *Bloody Sunday*, *Shipman*, *Rosemary Nelson* and *Mid Staffordshire NHS Foundation Trust Public Inquiry* and who acted for the Metropolitan Police Authority in the *Leveson Inquiry* and others. Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' paras 16.

[29] Charity working "to promote just and accountable security... by ensuring that the measures taken by the UK Government in pursuit of national security are compliant with human rights and international law." <www.rwuk.org/about-us/> .

[30] Oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q239, referring to *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153 and *R (on the application of Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) respectively. The former case addressed the territorial application of the ECHR. In the latter case, following issues over disclosure, the Secretary of State for Defence conceded the claimants' claim for an inquiry under Articles 2 and 3, notwithstanding his continuing position that there had been no violation of either of those Articles.

her department in order to avoid criticism; or of a minister establishing a statutory inquiry to ‘‘kick an issue into the long grass’’”[31]

However, it is essential that the decision-making is not only impartial but is seen to be impartial. The public and participants must have confidence and trust in the independence and integrity of a public inquiry if they are to have confidence in its process and ultimately its findings. Concerns are frequently expressed about the motivation behind decisions. One of the key roles of a public inquiry is to hold those in authority to account. Concern over conflicts of interest will inevitably arise where the actions of the minister's department or the Government itself are under scrutiny by the inquiry. Irrespective of the extent to which concerns of this nature may be unjustified, they can undermine public confidence in the public inquiry process.

Some witnesses who were not convinced about the impartiality of the minister's decision-making process suggested alternatives.[32] Rights Watch UK suggested the decision whether to establish a statutory inquiry could be taken by:

- “A decision of an appellant judge; there might also be a role for the Attorney-General
- A decision of a Parliamentary Committee on Inquires (which could be *ad hoc*)
- A statutory authority such a Permanent Commission of Inquiry
- A quasi statutory authority such as a Public Truth Commission”[33]

The HL Select Committee Report also quoted the families of the Lockerbie victims who suggested the creation of an independent ‘‘disasters ombudsman’’ in a letter in 2002 to the then Foreign Secretary.[34]

However, addressing matters of public concern is a function of the executive, subject to parliamentary scrutiny and oversight of the court, in line with the principle of the distribution of power between the three principle branches of government that comprise

[31] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para 98.
[32] For example Julie Bailey Oral evidence to the HL Select Committee, ‘Written and Corrected Oral Evidence’ Q163 and Stephen Jones written evidence to the HL Select Committee, ‘Written and Corrected Oral Evidence’ para 6.
[33] Rights Watch written evidence to the HL Select Committee, ‘Written and Corrected Oral Evidence’ para 5.
[34] Disaster Action written evidence, ibid, Appendix 1 ‘Extract from UK Families Flight 103 19 July 2002 Letter to Foreign Secretary Jack Straw’. (See also 8.8 of the thesis.)

the UK constitution: the executive, legislative and judicial branches (see 2.1, 2.4, and 3.3).[35] The suggestion that the decision on whether or not a public inquiry will be convened should sit with the judiciary, parliamentary committee or unelected body, rather than an elected member of the executive, thereby raises clear constitutional issues.

3.3. The role of Parliament

A second concern over the role of the minister in determining whether or not a public inquiry should be convened, which has given rise to challenges, is the diminution of the role of Parliament in the decision-making process. When the Tribunals of Inquiry (Evidence) Act 1921 was repealed by the Inquiries Act 2005, the requirement for a resolution from both Houses of Parliament in order to convene a public inquiry, and thereby formal parliamentary involvement in the decision-making process, was removed (see 2.3). This shift in emphasis has been the subject of much criticism, which is examined below.

It is Parliament's role to scrutinise new legislative proposals, which increasingly includes pre-legislative scrutiny by a parliamentary committee.[36] Serious concerns were raised about the timing of the publication and consideration of the Inquiries Bill, when the 2005 Public Administration Select Committee examining the effectiveness of minister-convened public inquiries and the Inquiries Bill (PASC)[37] was still considering evidence and had not yet reported, with no white paper as a precursor, no pre-legislative scrutiny[38] and no consultation and discussion with interested or affected groups. During the December 2004 House of Lords debate on the Bill, Lord Howe concluded:

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[35] See also Michael Collins, Judi Kemish, and Ashley Underwood QC written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 11 and see HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para 103 and 106.

[36] The Commons Political and Constitutional Reform Committee subsequently concluded "We consider pre-legislative scrutiny to be one of the best ways of improving legislation and ensuring that it meets the quality standards that Parliament and the public are entitled to expect", see House of Commons Political and Constitutional Reform Committee, Ensuring standards in the quality of legislation, First Report of Session 2013–14, (TSO 2013), HC 85 para 115.

[37] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.

[38] See for example the House of Lords Debate on the Bill, HL Deb 9 December 2004, vol 667, cols 980 and 1008.

> "it seems premature in the extreme… without awaiting the arrival of those conclusions. They are of enormous importance… The matter is very serious and casts a shadow over the whole of the Bill."[39]

Some amendments were made during the Bill's passage through the House of Lords, including ensuring Parliament is informed when an inquiry is convened,[40] although no amendments were made to give Parliament a direct role in the decision-making process. (There was ultimately no post-legislative scrutiny of the 2005 Act until the 2013-14 HL Select Committee (see below)).[41]

When the PASC did ultimately publish its report, *Government by Inquiry*, it expressed concern about the diminution of Parliament's role in the public inquiry process in the Inquiries Bill.[42] The Government's position was that responsibility for setting up inquiries should lie with the minister because ministers have "ultimate responsibility for investigation and are responsible for deciding what is needed in the public interest, as a result of their accountability to Parliament and the electorate."[43] However, as PASC noted, that "may result in a failure to set up an inquiry when there is a strong, but perhaps politically inconvenient, case for doing so", quoting Lord Heseltine, who told PASC that government ministers "will only concede the inquiry if they are forced, or it suits them".[44] Whilst the Government's view was that ministers "can be, and often are, called to justify such decisions to Parliament… This is Ministers' basic constitutional accountability",[45] a refusal to convene an inquiry may also lead to legal challenges.

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[39] *Ibid* para 990.
[40] See discussion at Beer et al, *Public Inquiries* (OUP 2011) para 1.60.
[41] The *Ministry* of Justice did produce a *Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005* (Cm 7943, 2010), which was a very short "preliminary assessment of the Inquiries Act", concluding "we believe that overall the Act has been successful in meeting its objectives of enabling inquiries to conduct thorough and wide ranging investigations, as well as making satisfactory recommendations… The overwhelming evidence, however, is that the Inquiries Rules as currently drafted are unduly restrictive and do not always enable the most effective operation of the Act."
[42] Public Administration Select Committee, *Government by Inquiry* (HC 2004–2005, 51-I) para 184.
[43] Department for Constitutional Affairs 'Memorandum by the Department for Constitutional Affairs', (2004) HC 606-ii GBI 09, Ev 22.
[44] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[45] Ibid.

PASC proposed an amendment to Parliamentary Standing Order 145, the procedural rules regulating the Liaison Committee,[46] to expand its remit to enable it to consider a proposal to convene a public inquiry and report a Resolution to the House for its consideration and a final decision, thereby enabling Parliament to convene an inquiry where a minister might be reluctant to do so.[47] The proposed amendment was not incorporated into the Act, though an amendment was made during the Bill's passage in the House of Lords to ensure that Parliament is informed when an inquiry is convened.[48]

PASC subsequently published a 2007 report *Parliamentary Commissions of Inquiry*[49] taking up the recommendation from its predecessor committee, that there should be a parliamentary mechanism for initiating inquiries into serious and significant matters of public concern,[50] citing an inquiry into the Iraq war as an example of when this might be appropriate stating:

> "We conclude that it is crucial, in a constitutional sense, that Parliament has the necessary powers and abilities to scrutinise the Executive and hold it to account. Proper parliamentary scrutiny should include the ability to establish and undertake inquiries into significant matters of public concern. Parliament has, in the past, conducted investigations of this kind—and, as the great forum of the nation, should be expected to do so."[51]

The Government rejected this suggestion, stating:

> "[the Government] wishes to make clear that it does not share the Committee's view that it is more legitimate and serves the interests of accountability more

[46] Which, as it explained, includes the chairs of all the select committees and, among other tasks, oversees the scrutiny role exercised by parliamentary select committees in respect of ministers and their Departments.
[47] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 222. It also recommended, at para 178, an amendment to the Bill to the effect that "where the public concern relates to the conduct, actions or inactions of government—ministers or officials, the Minister will cause an inquiry to be called on the basis of a Resolution of both Houses of Parliament" and that there be a presumption that inquiry take the form of a parliamentary commission, which was not accepted.
[48] 2005 Act, s 6 and see Beer et al, *Public Inquiries* (OUP 2011) para 1.60.
[49] Public Administration Select Committee, *Parliamentary Commissions of Inquiry, Ninth Report of Session 2007–08* (TSO, 2008) HC 473.
[50] In the form of a parliamentary commission of inquiry.
[51] Public Administration Select Committee, *Parliamentary Commissions of Inquiry*, Ninth Report of Session 2007–08 (TSO, 2008) HC 473 3.

effectively for Parliament, rather than the Executive, to inquire into the actions of executive Government."[52]

Witnesses giving evidence to the 2013 HL Select Committee offered differing views on the current effectiveness of parliamentary oversight of the ministerial decision-making process and the preferred level of involvement of Parliament. A number of witnesses suggested, once again, that the power to set up a public inquiry under the 2005 Act be transferred to Parliament; [53] a motion in either House would provide the opportunity for Parliament to debate the decision whether or not to convene a public inquiry and also other issues, such as the form the inquiry would take and its terms of reference (see chapters 5 and 6). Another suggestion seeking to link the decision-making more closely to Parliament than to the executive was the use of parliamentary committees.[54] Conversely, a number of other witnesses believed that the power to convene inquiries should rest with the minister, on the basis that response to matters of public concern are a matter for the executive, subject to oversight by Parliament and the courts.[55]

In practice, despite the minister being responsible for the decision of whether or not to convene a public inquiry, as part of the democratic system a minister does not act in isolation but through consultation with the Prime Minister, other government departments, ministers and, where relevant, other stakeholders.[56] The decision has been described as being more of an iterative process, thus preventing one minister or department alone from refusing a public inquiry on the basis of 'self-preservation'. [57] A

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[52] Public Administration Select Committee, *Parliamentary Commissions of Inquiry: Government Response to the Committee's Ninth Report of Session 2007–08,* (TSO, 2008) HC 1060.

[53] For example Helen Shaw, Co-director of INQUEST, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q240, Peter Riddell Q63.

[54] Rachel Robinson, Policy Officer of Liberty (an advocacy group that campaigns to "protect basic rights and freedoms through the courts, in Parliament and in the wider community" <www.libertyhumanrights.org.uk/who-we-are> accessed 29 May2020) oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q241. See also the opposing view on parliamentary committees, expressed by Lord King of Bridgwater on the effectiveness of parliamentary committees compared with ministerial accountability to Parliament also at Q241.

[55] Collins, Kemish, Underwood written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 11, Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q62 and Professor Adam Tomkins Q42.

[56] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 16 and Cabinet Office, Draft Inquiries Guidance: Guidance for Inquiry Chairs, Secretaries and Sponsor Departments (undated) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf> accessed 29 May 2020.

[57] Judith Bernstein and Shalesh Vara oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q323.

minister is appointed as part of the Government and the Government is answerable to Parliament.[58] Parliament scrutinises government by parliamentary questions and debates, and scrutiny by select committee inquiries. Moreover, the public itself may put pressure on Parliament by, for example, the lobbying of MPs. Where there has been a widespread call for a public inquiry, it is likely there will questions in both Houses of Parliament.[59]

The HL Select Committee Report concluded

> "We believe it is right that the power to establish a public inquiry should be held by a minister of the relevant department. The fact that ministers are accountable to Parliament, and that Parliament can always call for an inquiry to be set up, allows sufficient Parliamentary involvement in the process."[60]

The Report supported the argument that the issue was not whether or not a minister convened a public inquiry, but that concerns about independence could be dealt with "by the way the inquiry is established, in ensuring openness, transparency and fairness" (see 3.4 below).[61] It referred to *Edwards v United Kingdom*,[62] which found that there was sufficient independence to a public inquiry even where the body under investigation was responsible for setting up the public inquiry.[63]

However, despite political and legal assurances, in practice, lack of trust and confidence in the independence of an inquiry, where the department under investigation is responsible for setting up and sponsoring the inquiry, can be sufficient to derail an inquiry. Four years after these conclusions of the HL Select Committee, the *Infected Blood Inquiry* stalled within days when the key campaigners boycotted the inquiry until the sponsoring department, the Department of Health (which was also under investigation), was replaced by the Cabinet Office (see 3.5.1 below).

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[58] See Lord Morris of Aberavon HL Select Committee, 'Written and Corrected Oral Evidence' and the discussion at Q240.
[59] Shalesh Vara oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q323.
[60] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para 106.
[61] Ibid para 104, including reference to Eversheds' written evidence.
[62] *Edwards v United Kingdom* (2002) 35 EHRR 19.
[63] In this case being the Prison Service, Essex County Council and the North Essex Health Authority, who had statutory responsibilities to both Christopher Edwards and Richard Linford; the former was killed by the latter in a shared cell.

In addition to concerns over openness and transparency, the HL Select Committee was also critical of the current decision-making process, stating that:

> "[t]here is no consistency in ministerial decisions on setting up inquiries. Ministers tend to do so only when there is irresistible public or parliamentary pressure; and when they decline to set an inquiry up, adequate reasons are not always given…"[64]

Recommendations were made about circumstances in which reasons should be given to Parliament for a decision not to hold a public inquiry, which were subsequently accepted in the Government's response to the Report (see 3.4.2 below).[65]

The analysis of the research material shows a clear tension between competing and conflicting interests. On the one hand, by restricting parliamentary scrutiny of the legislation that increased the power of the minister over the decision whether or not to convene a public inquiry, and resisting calls to restrict those powers, the Government has sought to maintain the power of the minister, and thereby the power of the Government, over convening public inquiries as part of the executive function. On the other hand, many critics have sought, unsuccessfully, to restrict those powers and to increase parliamentary oversight of the decision-making process, as part of Parliament's role to scrutinise the Government and hold it to account and in order to maintain the independence of public inquiries and strengthen their role in holding the executive to account.

3.4. Focus on openness and transparency

A third concern over the role of the minister in determining whether or not a public inquiry should be convened relates to issues of transparency and openness. Transparency is essential for public scrutiny and legal and political accountability. *The*

[64] HL Select Committee Report*, The Inquiries Act 2005: post-legislative scrutiny* 6.
[65] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* paras 110-112 and Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) paras 33-36.

Seven Principles of Public Life,[66] devised by the Committee on Standards in Public Life,[67] set out the basis of the ethical standards expected of holders of public office. The principles include the requirement for openness:

> "Holders of public office should act and take decisions in an open and transparent manner. Information should not be withheld from the public unless there are clear and lawful reasons for so doing."

and for accountability:

> "Holders of public office are accountable to the public for their decisions and actions and must submit themselves to the scrutiny necessary to ensure this."[68]

Whilst not being legally binding, these principles have come to inform public life and other codes of conduct, such as the Ministerial Code.[69] The Ministerial Code outlines the standards of conduct expected of ministers and expressly states than ministers are expected to observe the Seven Principles.[70]

However, there is no openness and transparency to the minister's decision-making process when determining whether or not to convene a public inquiry, which restricts the scope for public scrutiny and accountability. It can give rise to concerns over the motivation behind decisions to refuse to convene a public inquiry and over a lack of independence of the inquiry process from the executive.

3.4.1. Criteria- is there a need?

In order to address the issue of lack of openness and transparency, many have argued in favour of adopting criteria against which the decision should be made. In written evidence to the HL Select Committee, Eversheds' argued:

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[66] Committee on Standards in Public Life, 'The Seven Principles of Public Life' (May 1995) <www.gov.uk/government/publications/the-7-principles-of-public-life> accessed 29 May 2020 (also known as the Nolan Principles).
[67] A public body that advises the UK Government on ethical standards across public life in the UK.
[68] 'The Seven Principles of Public Life' principles 5 and 4 respectively.
[69] The most recent version of which is the Cabinet Office, 'Ministerial Code' (August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf> accessed 29 May 2020.
[70] See further discussion on this in Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.

> "we believe the issue is not about whether or not Ministers should have the power or discretion to set up, or not set up, an inquiry, but rather ensuring that there is transparency in the way that an inquiry is created and conducted."

As the firm noted in their evidence:

> "a) there is no transparency in the decision-making process conducted by Ministers / Government when deciding to set up, or not set up, an inquiry and the public is often not fully appraised of the reasons behind a particular decision being made; and b) there is no prescribed set of criteria for setting up an inquiry against which this can be tested."[71]

There is no formula or criteria in the Act for convening a statutory inquiry beyond those stated in section 1 of the 2005 Act:

> "where it appears to him that—
>
> (a) particular events have caused, or are capable of causing, public concern, or
>
> (b) there is public concern that particular events may have occurred."

"Causing public concern" is very broad, is open to interpretation and inconsistent outcomes, and leaves a minister with a very wide discretion. For a non-statutory inquiry into matters of public concern, there are no criteria at all.

There have long been differing opinions as to whether the decision should be justified by reference to published criteria. Evidence given to the 2005 PASC[72] was mixed over whether or not is was possible, or even desirable, for the decision to convene an inquiry to be made by reference to more detailed published criteria. In its report, however, the PASC ultimately recommended that ministers should justify their decision based on a published set of criteria (and proposed some criteria that might form a basis for this).[73]

> "We recommend the development of clear criteria for calling inquiries and a simple categorisation establishing a distinction between those which are politically sensitive and those which are not, on the basis of our exemplars, to

[71] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' paras 12 and 13.
[72] Public Administration Select Committee, *Government by Inquiry* (HC 2004–2005, 51-I).
[73] Ibid para 184.

ensure that calls for judicial public inquiries and the appropriate involvement of Parliament can be properly assessed and decisions on form can be taken on that basis." [74]

The Government rejected the recommendation, stating it did not believe it possible to draft suitable objective criteria. It concluded that it was sufficient that the Inquiries Bill required ministers to make a statement to Parliament about a proposal to establish an inquiry.[75]

After consideration of possible formulae, although without reference to the earlier PASC recommendations, the later 2014 Select Committee Report rejected similar suggestions made by witnesses before it.[76] It concluded "there is a danger fixed criteria might fetter discretion, and so limit the circumstances when an inquiry may be set up" and concluded that "there neither can nor should be fixed criteria regulating the setting up of inquiries"'.[77] It did indicate some factors that it thought should be taken into account, including regulatory failure and recommendations of a public inquiry from various statutory bodies.[78] These conclusions and factors did not form part of the formal recommendations of the Report and the Government's written response made no reference to this proposal, so they have not been adopted as part of the decision-making process.

The challenge is articulating clear, objective criteria that are appropriate for the very wide range of subject matter and surrounding circumstances of any potential public inquiry. In the absence of such criteria, the approach to the decision-making can be seen to be arbitrary and inconsistent and, as Disaster Action stated in its written evidence to the Select Committee, the "statutory trigger for setting up inquiries is vague and, in our view, leaves too wide a discretion to the minister concerned."[79] Other witnesses appearing before the HL Select Committee, who had been participants in a public inquiry and

[74] Ibid para 193.
[75] *Government Response to the Public Administration Select Committee's First Report of the 2004-5 session: Government by Inquiry* (Cm 6481, 2005) response 19.
[76] See, for example, Robert Francis QC written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 14.
[77] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 51.
[78] Ibid paras 56 and 58.
[79] Disaster Action written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 2.1.

represented the 'victim's view',[80] spoke of the need for certainty for victims and victims' families.

An often-quoted example of where a clear and consistent decision-making process should have resulted in a public inquiry being convened, but was not convened in the absence of such criteria, is the 1989 Hillsborough football stadium disaster, when 96 football fans died.[81] There were a number of investigations into the disaster, but not a full public inquiry. As a result of 27 years of campaigning by families of the victims, over the years the disaster has been the subject of two inquiries led by judges,[82] followed by inquests. The *Hillsborough Independent Panel*, a narrower and more limited process than a public inquiry, was announced in 2009[83] to work in partnership with government and other public agencies to oversee full disclosure of all the public documents relating to the tragedy and its aftermath, and to consult those most affected by the disaster; it reported in 2012. In 2012, new inquests[84] were ordered into the deaths, running alongside two other investigations (being conducted separately by the Independent Police Complaints Commission and a police team headed by Assistant Commissioner). [85] Whilst acknowledging the success of the Independent Panel Inquiry, it is frequently suggested that it would have been quicker and more economical, and the families and survivors better served, had a public inquiry been convened at the outset.[86]

Whilst over-prescriptive fixed criteria may fetter discretion, and so limit the circumstances when an inquiry may be set up,[87] the introduction of broad criteria or guidance, as well as engaging more openly with those campaigning for a public inquiry and the wider public at an early stage, would go a long way towards addressing concerns

[80] See <www.parliament.uk/business/committees/committees-a-z/lords-select/inquiries-act-2005/news/7th-evidence-session-core-participants/> accessed 30 May 2020.
[81] For example Disaster Action written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 4.1 and see the summary of events set out in Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 25.
[82] Which were not full public inquiries: the *Taylor Inquiry* and the *Stuart-Smith Review.*
[83] HL Deb 15 December 2009, vol 715, col 240WS.
[84] Conducted by Lord Justice Goldring.
[85] Jon Stoddart.
[86] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 14 and Michael Collins, Judi Kemish and Ashley Underwood QC written evidence para 27.
[87] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 51.

and managing expectations. Providing a broad set of criteria, or list of factors[88] on which decisions would be based, would make the process more transparent and more readily accountable, both politically and legally.[89]

3.4.2. The giving of reasons

In addition to arguments in favour of adopting criteria, there have been frequent calls for clearer reasons to be given for a refusal to convene a public inquiry to those campaigning for public inquiries, to Parliament, and to the public;[90] giving reasons also makes the process more open, transparent and accountable. Reasons provide clarity to those, such as survivors, victims' families and pressure groups, who have been campaigning for a public inquiry and for debate on the merits of the decision. They also increase the potential for parliamentary and judicial scrutiny.[91] The HL Select Committee stated that there was no reason to conclude that the giving of reasons would lead to an escalation in applications for judicial review;[92] a decision to refuse a public inquiry can be judicially reviewed even if reasons are not given.

Currently, there is no requirement for a minister to give reasons. Ministerial statements to Parliament are often, but not always, given. Reasons that have been given include the thoroughness of earlier investigations,[93] cost, time and money, and international relations.[94] Although not given as a formal reason, a minister may be concerned that convening a particular inquiry might set a precedent, and thereby increasing future calls for public inquiries, or might be concerned about sensitive timing issues, for example

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[88] See Robert Francis written evidence to Public Administration Select Committee published written evidence Government by Inquiry GBI 01 to 26 <https://publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/cmpubadm.htm#evid> accessed 30 May 2020.

[89] See also Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.

[90] See, for example, Christopher Jefferies oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs 162 and 179 Robert Francis oral evidence Q218.

[91] For example successful challenges were made against the decision not to hold a public inquiry in the case of the death of Zahid Mubarek, in Feltham Young Offenders Institute *R v (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653 and Alexander Litvinenko, *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin) and see discussion below.

[92] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para109. See also para 3.10 for discussion on judicial review case law.

[93] For example the death of Daniel Morgan, the death of four soldiers at Deepcut Barracks, and the Mid Staffordshire NHS Foundation Trust (in this case, the decision was later reversed).

[94] The death of Alexander Litvenenko.

proximity to an election, which would raise questions over the motivation for convening an inquiry.[95]

Concluding that calls for a public inquiry are so frequent and numerous that it would be impractical to record and respond to every call,[96] HL Select Committee recommended that ministers retain a general discretion as to when to give reasons for their decisions, but added that reasons not to hold an inquiry should always be given to Parliament where there has been a "failure in regulation" and following a request by a coroner to convert an inquest into an inquiry.[97] The Government accepted there should be "some explanation" of a decision not to convene a statutory inquiry, but only in the circumstances identified by the HL Select Committee for domestic bodies and following a request to convert an inquest,[98] (but no suggestion of legislative change was made.)[99] This may result in some greater openness and transparency going forward.

Influence over Individual Inquiries:

3.5. Political influence

The following section examines political influence over the minister's decision whether or not to convene a specific individual inquiry. Whilst setting up an inquiry should not be a matter for politics, political considerations frequently influence the decision and public inquiries are usually set up in the context of political controversy.[100] The *Litvinenko Inquiry*[101] is an example of wider political considerations influencing the decision-making process at the level of a specific individual inquiry. The request for a public inquiry was initially refused because of concerns about damaging UK relations with Russia. The Home

[95] Cabinet Secretary, 'Advice Note on the Establishment of a Judicial Inquiry into Phone Hacking' (19 March 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60808/cabinet-secretary-advice-judicial.pdf> accessed 30 May 2020.
[96] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para 110.
[97] Ibid paras 111- 112.
[98] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) paras 33-36.
[99] See also Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.
[100] Sir Ian Kennedy oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q203.
[101] Into the death of Alexander Litvinenko by radiation poisoning, with possible culpability of the Russian state.

Secretary acknowledged that avoiding damaging 'international relations' was a factor in the decision.[102] Whilst, in this case, public pressure and political campaigning were not sufficient to influence the decision to convene a public inquiry, after judicial review proceedings were brought a public inquiry was convened (see below).

Public pressure and political campaigning have been used on other occasions, sometimes successfully, to seek to influence the minister's decision whether or not to convene a specific individual inquiry. Examples of different forms of political influence engaged, identified in the analysis of the evidence from witnesses to the HL Select Committee and from the desk-based research, are examined below.

3.5.1. The Contaminated Blood Scandal – an example of successful Parliamentary influence on an individual inquiry

Despite Parliament no longer having a direct role in the decision-making process, Parliament can nevertheless be seen to influence decisions to convene public inquiries in individual cases. Following the announcement in 2017 of a non-statutory inquiry' into the contaminated blood scandal,[103] which later became the statutory *Infected Blood Inquiry* (see chapter 4),[104] acknowledgements were made in the subsequent House of Commons debate to all the people involved in helping bring about the inquiry, including: individuals and pressure groups who had lobbied MPs and campaigned over a number of years, investigative print journalists, television documentary researchers and journalists, members of the all-party parliamentary group on haemophilia and contaminated blood and individual MPs. Whilst illustrating the range of pressures influencing MPs and Parliament, it was also described as an example of "how Parliament can work well", with a constituent raising an issue, an MP taking on the campaign and subsequently being joined by an all-party group of MPs.[105]

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[102] Terri Judd, 'Alexander Litvinenko death: Theresa May admits 'international relations' affected ruling' *The Independent* (London, 19 July 2013) <www.independent.co.uk/news/uk/politics/alexander-litvinenko-death-theresa-may-admits-international-relations-affected-ruling-8720405.html> accessed 30 May 2020.

[103] HC Deb 11 July 2017, vol 627, col 174.

[104] Investigation into how patients were given infected blood or blood products <www.infectedbloodinquiry.org.uk/> accessed 30 May 2020.

[105] Ian Austin and Sir Oliver Heald HC Deb 11 July 2017, vol 627, col 174.

3.5.2. The importance of the cooperation of participants

Although the announcement of the *Infected Blood Inquiry* was welcomed, the inquiry ran into difficulty within days when the key campaigning groups boycotted the first consultation meeting over concerns about the independence of the inquiry. An inquiry needs the support and cooperation of participants. Whilst *Edwards v United Kingdom*[106] (see 3.3) concluded there was sufficient independence even where the body under investigation was responsible for setting up the public inquiry, in practice, participants in this inquiry were not prepared to participate in an inquiry where the Department of Health had a leading role in establishing the inquiry and was also under investigation.

When an inquiry is established, a government department is usually appointed to be the main point of contact or 'lead' for that inquiry and is known as the sponsoring department. The sponsoring department's role includes working with the relevant minister to set up the inquiry, appoint the chair, allocate the budget, and support the inquiry throughout its work. Typically this will be the department with the closest links to the subject matter of the inquiry and is often the department of the minister who convened the inquiry. However, the decision to appoint the Department of Health as the sponsoring department for the *Infected Blood Inquiry* was widely condemned because of the Department's own involvement in the events under investigation and, in response to the widespread objections, it was announced that the sponsoring department would be the Cabinet Office.

This is a notable departure from previous practice, where it had been usual for the sponsoring department to have close links to the subject matter of a public inquiry. The 2018 National Audit Office Report on Public Inquiries[107] looked at the issue of sponsorship of inquiries and safeguarding the independence of the inquiry. It noted that it is essential, where a sponsoring department is also a participant in the inquiry, that the functions are separated and the potential for conflict recognised by the inquiry. It also noted that:

> "Managing potential conflicts may also be further complicated where staff from the sponsor department are seconded to work directly on the inquiry team. Seven of the 10 inquiries in our sample included staff from the sponsor

[106] *Edwards v United Kingdom* (2002) 35 EHRR 19.
[107] National Audit Office*, Investigation into government-funded inquiries* (23 May 2018) HC 836.

department, typically representing between a fifth and a third of the inquiry team."[108]

Various means have been adopted during other inquiries to address this concern. During the subsequent *Baha Mousa Inquiry*, the Ministry of Defence's core participant role was headed up by the Directorate of Judicial Engagement Policy and separated from its sponsorship role, which was led by Finance.[109] The Home Office used memoranda of understanding, setting out duties as a sponsoring department and as a participant responding to requests for evidence. However, in the case the *Infected Blood Inquiry*, assurances about procedures and protocol that separated functions were not sufficient to convince participants about the independence of the inquiry.

This is an interesting example of where case law had determined that there was sufficient independence to a public inquiry, even where the body under investigation was responsible for setting up the public inquiry, and the Government was satisfied that the use of procedures and protocols to separate conflicting functions of the sponsoring department could safeguard the independence of an inquiry, but the objections of the participants were sufficient to bring about a change in sponsoring department, in order to address their concerns.

Further, a minister's decision to convene a public inquiry, supported by the Government, does not necessarily guarantee an inquiry will take place. Investigation into the killing of Patrick Finucane is currently the single example of the Government being unsuccessful at establishing an inquiry. The family of the murdered Belfast solicitor initially opposed and refused to cooperate with a proposed 2005 Act inquiry into his murder, by paramilitaries with collusion by the state, arguing that the power of ministers under the 2005 Act, particularly the section 19 power to impose restrictions on the disclosure and publication of evidence, could not guarantee a genuinely independent inquiry and an impasse developed (see chapter 6). The family subsequently changed its position, having seen the 2005 Act in practice. However, the Government ultimately decided to hold an independent review rather than a public inquiry. The family brought judicial review

[108] Ibid para 3.8.
[109] Ibid.

proceedings, but has not been successful in bringing about a statutory public inquiry (see 4.10.1).

3.5.3. The Influence of Campaign Groups

In addition to lobbying MPs and Parliament's influence on decisions to convene a public inquiry in individual cases, and the effect of boycotting by participants, other forms of political pressure from individuals, pressure groups and the media are playing a significant role. The *Detainee Inquiry* was a manifesto commitment before the 2010 election. A non-statutory inquiry was ultimately convened after the coalition Government came to power, in response to pressure from campaigners and the electorate.[110]

The *Mid Staffordshire NHS Foundation Trust Public Inquiry* also provides a key example of how pressure from campaign groups can influence a decision to convene an inquiry. Following the 2009 Healthcare Commission Report into the failings at Mid Staffordshire Hospital, there was mounting public pressure, led by Cure the NHS, a small and committed group of relatives, patients and community members, demanding a statutory inquiry to look beyond the failings of the hospital, to the actions of the regulatory bodies.[111] The Government[112] refused a full public inquiry and offered a narrow non-statutory inquiry into the actions of the hospital alone.[113] In this case, and in contrast to some of the examples below, the judicial review proceedings were brought by campaigners without success but ongoing political pressure ultimately resulted in the outcome they sought.[114] In practice, it took two years of extensive campaigning and a change of government before a statutory public inquiry was convened. During that two-year period, the Opposition made a manifesto pledge to convene a statutory inquiry and,

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[110] A manifesto commitment from the Conservatives, the Liberal Democrats having also demanded a public inquiry prior to the election. See also Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q50.

[111] www.curethenhs.co.uk/ accessed 30 May 2020.

[112] The Labour Government under Gordon Brown.

[113] *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust between January 2005 – March 2009*, chaired by Robert Francis QC <https://webarchive.nationalarchives.gov.uk/20130104234315/http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_113018> accessed 30 May 2020.

[114] See Julie Bailey, founder of Cure the NHS, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs 175 and 181.

on coming to power, convened a full statutory inquiry that included an investigation into the conduct of the regulators. [115]

Whilst campaigning and political lobbying can be effective in some instances, it cannot be relied upon as a fair, transparent and consistent approach by which to seek a public inquiry. As the HL Select Committee noted of the Mid Staffordshire Inquiry:

> "It should not have taken 'a small group of mostly elderly people [who] had to stand out in the wind, snow and rain for nearly two years following ministers round' before ministers agreed to set up the Mid Staffordshire Inquiry."[116]

Many of those seeking a public inquiry do not have the skills, time, means, or perhaps health to persistently pursue a campaign in this way and there is neither available body of knowledge about how public inquiries operate, nor information about who a campaigner should contact to seek an inquiry. [117]

This thesis asserts that the resources and resilience of a group of survivors, bereaved family members and support groups should not be a key factor in determining whether or not there is a public inquiry into a matter of public concern, the findings of which will play a crucial role in informing government policy and preventing recurrence. If there was an open, transparent and consistent decision-making process in place to determine the issue, as discussed above, it would ease the burden that is currently falling on this group and provide a less arbitrary and a more consistent outcome.

3.6. Legal influence

3.6.1. Judicial review generally

In addition to political influence over the minister's decision whether or not to convene a specific individual inquiry, there is also legal influence. Whilst there is no legal obligation to hold a public inquiry, in reaching a decision on whether or not to convene an inquiry, the minister is exercising a public law function; the decision may be challenged by way of judicial review. The discretionary power to convene a public inquiry rests with the

[115] The subsequent Conservative Government.
[116] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny*, para 299.
[117] On the challenges for those seeking a public inquiry, see Helen Shaw oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q234.

minister: for statutory inquiries through Parliament having conferred powers under the 2005 Act and for non-statutory inquiries through the prerogative powers of the executive. The courts' traditional approach to reviewing executive decisions through judicial review is one of deliberate restraint, consistent with the principle of the separation of powers and the court's exercise of its supervisory jurisdiction (see below). There have been many judicial review challenges to ministers' decisions not to convene a public inquiry, on the basis that the decision was unreasonable, bearing in mind the nature of the issue or the level of concern, or that the minister had taken into account irrelevant considerations in deciding not to hold an inquiry. A small number of challenges have been successful (see below).

As discussed in chapter 2, judicial review is not necessarily readily available to those seeking a public inquiry. The procedure can be costly and time-consuming, time limits are tight, and leave of the court is required (see 2.6.2). Judicial review therefore provides particular challenges for those unfamiliar with, or unprepared for, issuing a legal challenge, as is often the case with those campaigning for a public inquiry.

3.6.2. Alternatives forms of Inquiry - the three core cases

The starting point for looking at judicial review challenges of decision not to convene a public inquiry are three core cases: *Crampton*, *Wagstaff* and *Persey*.[118] In each case, the court considered the minister's decision to convene alternative forms of inquiry, in private.

The pre-2005 decision to convene a private non-statutory inquiry into deaths and injuries on the children's ward at Grantham and Kesteven General Hospital,[119] despite the fact the minister had the power to convene a statutory public inquiry under section 83 National Health Services Act 1997 with powers to compel the giving of evidence and to take evidence under oath (see chapter 4), was unsuccessfully challenged in the case of

[118] *R v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993) in connection with the *Allitt Inquiry*; *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, in connection with the *Shipman Inquiry*; and R (Persey) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 371 (Admin) [2003] QB 794, in connection with the *Foot and Mouth Inquiry.*

[119] During the period February to April 1991, with the inquiry report ultimately to be made public.

Crampton in 1993.[120] In the judgment for the Court of Appeal, Sir Thomas Bingham MR stated:

> "To argue that because the statute gives the Secretary of State power to establish an inquiry of this kind she lacks authority to establish an inquiry of any other kind is, in my view, little short of absurd. Parliament cannot in my opinion have overlooked the virtues in many situations of voluntary co-operation and cannot have intended to insist that the Secretary of State should use a sledge-hammer if she believed that she only had to crack a nut."[121]

A second argument related to matters the minister took into account in reaching the decision. It was held "The Secretary of State was fully entitled to take the view that a statutory inquiry, particularly if held in public, was bound to cause strain and stress for the staff". On a third irrationality challenge, where it was argued that the minister gave undue weight to the question of costs, the court held the minister was entitled to have regard to costs in determining whether or not to convene and inquiry and, if so, what form.

The subsequent decision of the Divisional Court of *Wagstaff*,[122] briefly encouraged the view that, where an inquiry was to be held, courts might compel the inquiry to be held in public. In this case, the court concluded that the decision to hold the *Shipman Inquiry*[123] in private infringed the applicant's rights to freedom of expression under Article 10 ECHR, including the right to receive and impart information and ideas. It took the view that Article 10 gave a witness to an inquiry the right to receive information given to the inquiry by another witness and that a ban on reporting would therefore be an interference with Article 10. It stated "there is now in law what really amounts to a presumption that [any inquiry, save for an internal domestic one] will proceed in public unless there are persuasive reasons for taking some other course". The decision to convene a private inquiry was quashed and returned to the minister for redetermination.

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[120] *R v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993), pre-dating the Inquiries Act 2005.
[121] Ibid 18.
[122] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.
[123] Inquiry into issues arising from the case of Dr Harold Shipman following his conviction for murdering 15 of his patients.

The inquiry was ultimately convened as a statutory inquiry under the Tribunals of Inquiry (Evidence) Act 1921.

However, the following year, the court in *Persey*[124] fundamentally disagreed with the decision in *Wagstaff*. Simon Brown LJ, who gave the leading judgment, found no jurisdictional basis for the presumption and argued that Article 10 only prevented restrictions on the giving and receiving of information and did not give a right of access to information or require a particular forum to be set up for the transmission of information (see further discussion in chapter 4).[125] The court concluded that the minister's decision to convene three independent inquiries heard mostly in private, rather than a public inquiry, "was a lawful one with which we cannot interfere."

As a result, it is now clear that the fact a minister has the power to convene a public inquiry does not prevent the minister from convening an alternative form of inquiry. The analysis below shows that a number of challenges have continued to be brought, sometimes successfully, where applicants have challenged decisions to refuse to convene a public inquiry or have submitted that the alternative form of inquiry proposed by a minister is inadequate in the specific circumstances (see also 4.10). More recent challenges have clarified the minimum standards of Article 2 and 3 investigations under Articles 2 and 3 of the ECHR.

3.6.3. The Mid Staffordshire NHS Foundation Trust Public Inquiry and July 2005 bombings – discontinued judicial review

The *Mid Staffordshire NHS Foundation Trust Public Inquiry* and July 2005 bombings are examples of where a judicial review challenge of a decision to refuse a public inquiry appears to have been frustrated by a decision to convene an alternative form of inquiry. For those campaigning for the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, bringing a judicial review challenge did not achieve the outcome of a full statutory public inquiry that they were seeking[126] (though persistent ongoing campaigning did ultimately result in a statutory public inquiry being convened, see 4.9). After an earlier Healthcare

[124] *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794.
[125] See also David Feldman (ed), *English Public Law* (2nd edn, OUP 2009) 958.
[126] Julie Bailey and Christine Dalziel, supported by Cure the NHS.

Commission report on failings at the hospital,[127] a campaign began for a public inquiry, not only into the actions of the hospital but also the role of the commissioning, supervisory and regulatory bodies in the monitoring of Mid Staffordshire NHS Foundation Trust.[128] The Government initially refused to convene a public inquiry and judicial review proceedings were commenced. After 18 months, the Health Secretary[129] announced a non-statutory public inquiry into the actions of the hospital. [130] The campaigners concluded that, though the decision fell short of the outcome they sought, it would be sufficient to prevent a quashing order being made by the court and the judicial review challenge was accordingly withdrawn. It was the view of the campaigners that the offer of the non-statutory inquiry was a political decision intended to stifle a full public inquiry and defeat the judicial review challenge.[131]

Following the conclusion of the inquest into the 7 July 2005 London bombings, a number of bereaved families sought judicial review challenge of the Government's decision not to hold a public inquiry. The Home Secretary had argued "Not least among the reasons is that such an inquiry would involve diverting very precious resources needed for the security and protection of everyone, at a critical time."[132] The challenge was withdrawn when it was understood that it was likely to fail on the basis that an inquest had addressed some of the key issues and the relevant authorities continued to look into the matter further. Although the families believed this still left a number of important questions unanswered, they withdrew the challenge in the interests of not causing further unnecessary distress to all concerned.[133] Disaster Action argued that "In our view the bereaved should not be put in a position where they have to mount such a legal

[127] Chaired by Sir Ian Kennedy, published in March 2009.
[128] *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009* (February 2010) HC375-I para 15.
[129] Andy Burnham.
[130] Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust between January 2005 – March 2009, chaired by Robert Francis QC.
[131] Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs173-174, 180 and 182.
[132] HC Deb 11 May 2006, vol 446, col 524.
[133] Esther Addley, '7/7 survivors end battle for public inquiry into bombings' *The Guardian* (London, 1 August 2011) <www.theguardian.com/uk/2011/aug/01/7-july-bombings-public-inquiry> accessed 30 May 2020.

challenge."[134] In this case there was no ongoing public campaign and no public inquiry has been held.

3.6.4. Challenges brought under the ECHR

Whilst many judicial review challenges to a refusal to convene a public inquiry have been unsuccessful,[135] there have been a number of cases, in contrast to the Mid Staffordshire case, where political pressure from the public, media and from Parliament has been unsuccessful, but an inquiry has been convened following legal proceedings.

Most recent decisions on challenges to decisions refusing to convene a public inquiry relate to the state's obligations under Articles 2 and 3 of the ECHR, which are given effect in UK law pursuant to the Human Rights Act 1998. The 2002 case of *Edwards*[136] summarises the position regarding inquiries and Article 2 investigations:

> "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.[137] 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…"[138]

Similarly, where it is arguable that there has been a breach of Article 3 (the prohibition of torture, and inhuman and degrading treatment) the State comes under a duty to convene

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[134] Disaster Action written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 4.4.
[135] Such as *R v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993) (the *Allitt Inquiry*); *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794 (the *Foot and Mouth Inquiry*).
[136] *Edwards v United Kingdom* (2002) 35 EHRR 19.
[137] See *McCann v United Kingdom* [1996] 21 EHRR 97 [161]; Kaya v Turkey *[1999] 28 EHRR 1* [86].
[138] *Edwards v United Kingdom* (2002) 35 EHRR 19 [69].

an effective and independent investigation; the nature, scope and rigour of the investigative exercise required by Articles 2 and 3 are essentially the same.[139] There is no single model of investigation that must be applied. Flexibility is retained to recognise the fact that the subject matter and nature of such inquiries can vary significantly. A public inquiry may be used to discharge a state's investigative obligations, but also other forms of investigation, such as inquests, may also be used.[140]

Most of the recent cases challenging a decision not to convene a public inquiry relate to the circumstances in which those ECHR investigative obligations apply and to the minimum standards such investigations must satisfy.

3.6.5. Amin: Mubarek- the requirements of the investigative duty

The case of *Amin,*[141] in connection with the *Mubarek Inquiry*, concerned the nature of the investigation into a death in custody. For four years after the murder of Zahib Mubarek in Feltham Young Offender Institution, successive Home Secretaries refused the call from the deceased's family and others for a public inquiry. The court has laid down minimum standards that an Article 2 investigation must meet, whatever form the investigation takes (see *Jordan* and *Edwards*[142] and further discussion at 4.8). A judicial review challenge brought by the deceased's uncle, with reference to those minimum standards, resulted in the landmark judgment of Lord Bingham in the House of Lords[143] concluding that, whether assessed singly or cumulatively, the investigations that had already been conducted into Mubarek's death did not satisfy the UK's obligations under Article 2, because they lacked independence, having been held in private with the families unable to play an effective part. It was held that, in order to satisfy Article 2, a full public investigation was required with Mubarek's family legally represented, provided with the relevant material and given the opportunity to cross examine witnesses. As a result, a

[139] *Commissioner of the Police for the Metropolis v DSD* [2015] EWCA Civ 646.
[140] *McCann v United Kingdom* [1996] 21 EHRR 97. See also discussion in Adam Straw QC, ' The legal basis of the duty to investigate (2): the duties to investigate within the European convention on human rights' (Doughty Street Chambers, April 2016) <https://publiclawproject.org.uk/wp-content/uploads/data/resources/227/The-legal-basis-for-the-duty-to-investigate-2_AS.pdf> accessed 30 May 2020.
[141] *R v (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653.
[142] *Jordan v United Kingdom* (2001) 37 EHRR 52 and *Edwards v United Kingdom* (2002) 35 EHRR 19.
[143] Allowing the appeal and restoring the first instance decision.

non-statutory public inquiry was convened; its findings were highly critical of the prison system.

3.6.6. Al-Skeini: the Baha Mousa Inquiry – the territorial application of the ECHR

In the area of national security and the armed forces, there appears to be a particularly reluctance to set up public inquiries. Most agree the statutory *Baha Mousa Inquiry*, into the circumstances surrounding the death of the Iraqi citizen in the custody of British soldiers in Iraq, was necessary[144] (when the report was published it was damning of the conduct of the British soldiers and made 73 recommendations for improvements to the handling of detainees). However, it was only after lengthy legal proceedings that an inquiry was convened.

The case of *Al-Skeini*[145] was brought by the relatives of five Iraqi civilians killed by British troops during military operations and a sixth, Baha Mousa, who was killed in a British military detention base. The claimants sought judicial review of the Secretary of State's failure to conduct independent inquiries into the deaths and the torture. The challenge centred on the extent to which the ECHR applied outside the state's physical territory. The case was heard by the Divisional Court, Court of Appeal and House of Lords.

Only in exceptional cases does the state owe any Convention duties outside its physical territory. All three courts dismissed the claim of the first five applicants on the basis of lack of extraterritorial application of the ECHR. However, in the case of the sixth applicant, they found Baha Mousa was within the UK's jurisdiction, although the Divisional Court and Court of Appeal each did so on different grounds.[146] The Secretary of State ultimately accepted the sixth applicant's case fell within the UK's jurisdiction under Article 1 ECHR, and the case was remitted by the House of Lords to the Divisional Court. The House of Lords did not therefore need to examine the jurisdictional issues. However, Lord Brown, with whom the majority agreed, concurred with the reasoning of the Divisional Court in recognising the UK's jurisdiction over Mr Mousa, on the narrow basis

[144] See Professor Tomkins oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q34.
[145] *R (Al-Skeini and others) v Secretary of State for Defence* [2007] UKHL 26; [2008] 1 AC 153.
[146] The Division Court decision based on the concept of exercising control over the military base and the Court of Appeal decision based on control over the individual.

of drawing an analogy between the military base and the extra-territorial exception made for embassies.

The House of Lords' decision proved controversial.[147] The case was pursued at the European Court of Human Rights ('ECtHR'), [148] which found that all of the deaths fell within the territorial scope of the ECHR and an investigative duty arose. (It also held that the sixth applicant could no longer claim to be a victim of a violation of the procedural obligation under Article 2 of the Convention, in light of the *Baha Mousa Inquiry* being underway).[149] The ECtHR judgment has also been highly contentious. Whilst some have welcomed the radical expansion of the reach of the ECtHR, others have been highly critical of what they see as a prominent example of judicial overreach and a failure to respect the proper bounds of the judicial role.[150]

3.6.7. Al-Sweady – concern about the motivation behind calls for an inquiry

In one case, where a successful judicial review challenge resulted in a statutory public inquiry being convened, there were concerns expressed about the motivation behind the pressure for a public inquiry. A further investigation under Articles 2 and 3 was sought by the relatives of Al-Sweady and others, into allegations of deaths and mistreatment of Iraqi nationals, during detention by British soldiers in Iraq.[151] During the course of proceedings before the Divisional Court,[152] the Secretary of State conceded the need for such an investigation, initially wanting the Metropolitan Police to conduct the investigation, but they declined to do so. The statutory *Al-Sweady Inquiry* was convened. Its report ultimately largely exonerated British troops and found the allegations of

[147] See the discussion in Marko Milanovic, '*Al-Skeini and Al-Jedda in Strasbourg*' (2012) 23 No 1 EJIL 121 and Richard Ekins and Graham Gee,' Judicial Power: 50 Problematic Cases' (Judicial Power Project, 9 May 2016) <http://judicialpowerproject.org.uk/judicial-power-50-problematic-cases/> accessed 30 May 2020.
[148] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.
[149] It had, by that stage, completed its oral hearings and its report was delivered two months after this judgment.
[150] Richard Ekins and Graham Gee,' Judicial Power: 50 Problematic Cases' (Judicial Power Project, 9 May 2016) <http://judicialpowerproject.org.uk/judicial-power-50-problematic-cases/> accessed 30 May 2020.
[151] In 2004.
[152] *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin).

murder and torture were wholly without foundation and "the product of deliberate lies, reckless speculation and ingrained hostility".[153]

The Inquiry raised concerns about the conduct of two law firms involved, including the late disclosure of critical documents and delay in withdrawing allegations of murder and torture, as well concerns about how the firms got their clients, actions taken to "drum up business" and improperly holding a press conference to demand a public inquiry.[154] A partner from one of the firms was struck off for paying an agent to find clients and for dishonesty over false witness accounts; the firm subsequently closed when legal aid funding was withdrawn. The other firm was cleared of all allegations of misconduct.[155] This is currently an isolated case, but one that has raised concern that demands for a public inquiry might be fuelled by spurious claims and the pursuit of financial or political gain.

3.6.8. Ali Zaki Mousa - discharging Investigative obligations by other means

The court adopted a strongly interventionist approach in the subsequent case of *Ali Zaki Mousa,*[156] which has been seen as "an attempt by the Divisional Court to redefine the way in which the state discharges its investigative obligation and marks a shift away from expensive and time-consuming public inquiries".[157]

In *Ali Zaki Mousa* (*No 1*)[158] over 140 Iraqi civilians sought judicial review of the Secretary of State's refusal to order an immediate public inquiry into allegations of ill treatment of Iraqi citizens in detention in Iraq by members of the British Armed Forces, in breach or Article 3 ECHR.[159] The Court of Appeal held that the Iraq Historic Allegations Team[160] (IHAT), which had been set up to investigate the allegations, was not sufficiently

[153] Thayne Forbes, *Report of the Al-Sweady Inquiry* (December 2014) HC 818-I.
[154] Statement from the Solicitors' Regulatory Authority (12 January 2015) https://sra.org.uk/sra/news/press/al-sweady-inquiry-statement.page accessed 10 May 2019.
[155] A decision upheld on appeal: *Solicitors Regulation Authority v Martyn Jeremy Day, Sapna Malik, Anna Jennifer Crowther, Leigh Day (a firm)* [2018] EWHC 2726 (Admin).
[156] *R (Ali Zaki Mousa) v Secretary of State for Defence* [2010] EWHC 3304 (Admin).
[157] Jenni Richards, 'Mousa: the scope of the investigative obligation' (Lexology, 21 January 2014) <www.lexology.com/library/detail.aspx?g=3b82f246-0938-4cc8-9efa-f0a71df45818> accessed 30 May 2020.
[158] *R (Ali Zaki Mousa) v Secretary of State for Defence (No 1)* [2011] EWCA Civ 1334.
[159] Between 2003 and 2008.
[160] A form of judicial inquiry chaired by Sir George Newman, a retired High Court judge, given the task of investigating the circumstances surrounding Iraqi deaths involving British forces, on a case by case basis.

independent because of the involvement of members of the Royal Military Police (RMP) in the investigation of matters in which the RMP had been involved. In response, the Secretary of State removed members of the RMP from IHAT and replaced them with other investigators.

In *Ali Zaki Mousa (No 2),*[161] in judgments given on 24 May 2013 and 2 October 2013, the Divisional Court found that IHAT, as re-constituted, was sufficiently independent but that it was not effectively discharging the UK's investigative obligations under Articles 2 and 3 for a number of reasons, including delay and accessibility to the public and the families of the deceased. It concluded that there were two realistic alternative ways in which the Secretary of State could fulfil the UK's investigative obligations. The first was by public inquiry, which the Secretary of State opposed, particularly for reasons of proportionality. The court concurred, refusing to order a public inquiry on the basis it would be unmanageable in terms of time, cost and delay, quoting Longmore LJ in *R (on the application of K) v Secretary of State for the Home Department,*[162] "There must also be a margin of appreciation for the Secretary of State to decide when to hold and when not to hold a public inquiry. The resource implications can be considerable."[163]

The second was by developing a more streamlined and less expensive inquisitorial procedure based on coroners' inquests (the existing inquests system not applying to deaths overseas).[164] The court gave detailed suggestions on how that process might be approached and invited submissions on those proposals. The Ministry of Justice subsequently confirmed that it would be setting up non-statutory inquiries, consistent with the principles set out in the court judgments.[165] This has been seen as being "an interesting development in the case law which has the potential to affect not merely the

[161] *R (Ali Zaki Mousa) v Secretary of State for Defence (No 2)* [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin).
[162] *R (on the application of K) v Secretary of State for the Home Department* [2009] EWCA Civ 219 [2009] 3 WLUK 413.
[163] Ibid 83.
[164] The rationale behind this suggestion was that the investigation dealt with a very high number of individual complaints, rather than an investigation into a consolidated matter of public concern and, as such, a model based on the inquest process rather than a public inquiry would be appropriate.
[165] Ministry of Defence written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.

State's response to the Iraq legacy, but also wider contexts where the investigative obligation arises."[166]

3.6.9. Litvinenko- the legitimacy of the courts' intervention in the political decision-making process

Whilst the court's pro-active suggestion for the development of a new form of investigative process in the *Ali Zaki Mousa case* has been described as "an interesting development", in the case of the *Al-Skeini* (see 3.6.6) and *Litvinenko*, concerns have been raised about judicial overreach.

Following the death of Alexander Litvinenko from radiation poisoning, where possible culpability of the Russian state had been identified, the coroner investigating the death wrote to the Lord Chancellor to request a statutory inquiry. The coroner did not believe that a proper investigation could be conducted without consideration of material from numerous British Government departments and agencies. The Foreign Secretary claimed public interest immunity over that material and it was therefore excluded from the inquest, as there is no provision for closed hearings in an inquest (a public inquiry may be held wholly or partly in private). The Home Secretary replied that the Government had decided not to convene a statutory inquiry at that time but would keep the decision under review.[167]

Judicial review proceedings were brought by Litvinenko's widow.[168] The applicant argued that "there was a strong and overwhelming public interest in establishing whether the murder of Mr Litvinenko was (a) an ordinary crime committed for private criminal purposes… or (b) a state-sponsored assassination of a British citizen carried out on British territory..."[169] The Divisional Court quashed the decision on the basis that the Home Secretary's reasons, while comprehensive, were found "not [to] provide a rational basis for the decision not to set up a statutory inquiry",[170] requiring the Secretary of State to

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[166] Jenni Richards, 'Mousa: the scope of the investigative obligation' (*Lexology*, 21 January 2014) <www.lexology.com/library/detail.aspx?g=3b82f246-0938-4cc8-9efa-f0a71df45818> accessed 30 May 2020.

[167] Letter from The Rt Hon Theresa May to Sir Robert Owen (17 July 2013) <www.litvinenkoinquiry.org/wp-content/uploads/2013/07/130717-HS-to-Coroner-redux.pdf> accessed 30 May 2020.

[168] *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin).

[169] Ibid 25.

[170] Ibid 74.

give fresh consideration to the exercise of the discretion under s 1(1) of the 2005 Act. A statutory inquiry was subsequently convened. [171]

In examining the judgment, Varuhas is highly critical of this case and what could be seen as "judicial overreach into the very heart of governmental decision-making." [172] The court's jurisdiction is supervisory, however, Varuhas regards the court in this case as improperly scrutinising the reasoning of the minister and imposing its own views where it disagreed with that reasoning, referring to sections in the judgment such as : "The proposition … is … in my view a bad one"; "I have found the Secretary of State's reasoning difficult to accept"; "[the Minister] will need better reasons" and "I have upheld the claimant's challenge to the adequacy or correctness of the … reasons given by the Secretary".

However, it must be noted that, when quashing the decision and requiring the Secretary of State to give fresh consideration to the exercise of her discretion, the court specifically stressed that "the judgment did not of itself mandate any particular outcome."[173] The minister was free to reach the same conclusion again and refuse to convene an inquiry. What happened in practice was that, in the intervening months since the first decision was made, the political climate had changed and the UK's relationship with Russia had cooled, particularly following Russia's annexation of Crimea. There is a strong argument therefore that, in this case, it was more the change in the political climate that ultimately brought about the change of decision, than judicial intervention.

3.7. Conclusion

This chapter examined political and legal influence over the minister's decision on whether or not to convene a public inquiry. It looked at influence on the public inquiry process as a whole and showed that attempts to bring about changes to the decision-making process have been largely unsuccessful. Successive governments have reiterated that addressing matters of public concern is a function of the executive and have

[171] HC Deb 22 July 2014, vol 584, col 121 WS.
[172] Jason Varuhas, 'Public Inquiries – Who Decides? The Legal Background to the Litvinenko Inquiry' (*Judicial Power Project*, 2 February 2016) <http://judicialpowerproject.org.uk/public-inquiries-who-decides-the-legal-background-to-the-litvinenko-inquiry/> accessed 30 May 2020.
[173] *R (Litvinenko) v Secretary of State for the Home Department* [2014] EWHC 194 (Admin) 76.

adamantly sought to maintain the power of the minister, and thereby the power of the Government, over convening public inquiries, as part of the executive function.

Pressure for change in this respect has come predominantly from select committee recommendations, based on evidence from highly experienced chairs, panel members, practitioners, academics, participants, and interest groups, and from parliamentary debates. The research showed that those who gave evidence to the select committees were divided in their views as to where the power to convene a public inquiry should sit. It was interesting that the HL Select Committee, without reference to the earlier PASC reports (which concluded that power to convene should sit, at least in part, with Parliament) concluded that the power to establish a public inquiry should be held by the minister, citing *Edwards*[174] as reassurance of the independence of the process, though the HL Select Committee also pressed for changes to the current system.

Three key areas of concern were identified as being behind the pressure for change from the select committees and Parliament: the potential for conflicts of interest, the diminution of the role of Parliament and issues of transparency and openness. It is clear that concern about conflicts of interest arise where actions of the minister's own department, or those of the Government itself, are the subject matter of a proposed inquiry. Whilst constitutional issues were identified in relation to suggestions that the decision should be taken by a judge or an unelected body, the executive is accountable to Parliament and there are arguments that, in order to scrutinise the actions of ministers and the Government effectively, Parliament should have a role in the process.

However, the 2005 Act brought with it a move away from formal parliamentary involvement and a move to inquiries being established solely by ministers. Parliament's opportunity to scrutinise the Bill before it was published was restricted. The Bill was published without pre-legislative scrutiny and consultation with interested or affected groups, before the relevant 2005 Public Administration Select Committee (PASC) had had chance to report. The recommendations of the 2005 report for greater involvement of Parliament were dismissed, as was the conclusion of the subsequent 2007 report, that Parliament should be able to initiate and conduct inquiries of its own.

[174] *Edwards v United Kingdom* (2002) 35 EHRR 19.

With many finding the current process arbitrary and inconsistent, there have been calls for greater clarity and transparency, with mixed but limited success. Calls to introduce criteria by which decisions whether or not to convene a public inquiry are determined were supported by PASC, rejected by the Government and then rejected by the HL Select Committee. The latter did recommend, however, that reasons be given when refusing a public inquiry, albeit in limited circumstances, with the minister retaining a general discretion, but recommending reasons always be given where there has been a failure in regulation or a request by a coroner to convert an inquest to a public inquiry. This recommendation was accepted by the Government.

When examining political influence in respect of individual inquiries, despite the Government's clear resistance to any external involvement in the minister's decision-making process, the research shows that sustained political campaigning can, on occasions, influence a decision to convene a specific inquiry and may result in an initial refusal being reversed, secure a manifesto pledge that an inquiry will be convened, or may bring about a change to the sponsoring department appointed to convene an inquiry.

However, political campaigning is an inconsistent and unreliable means to bring about a public inquiry. The onus falls on survivors, families and support groups, who may well not have the means or resources to pursue a sustained campaign and, in the absence of transparent criteria or published reasons for decisions, the outcome of any campaign is uncertain. In the case of the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, political campaigning succeeded where a legal challenge failed. However, the case of *Litvinenko*, political consideration and the political climate at the time initially influenced the decision negatively, providing reasons not to convene an inquiry, but subsequent legal proceedings resulted in the decision being reconsidered and an inquiry ultimately being convened.

Looking finally at legal challenges in respect of individual inquiries, the research shows that some legal challenges to decisions not to convene a public inquiry have successfully resulted in a public inquiry being convened but, again, the onus has fallen on survivors, families and support groups to pursue them. Bringing a judicial review application is restricted in terms of who may bring a challenge, is costly, time consuming and can be distressing for survivors and their families. Many judicial review applications are brought

challenging a minister's refusal to convene a public inquiry and only a few are successful. The court's traditional approach is one of deliberate restraint in line with the principle of the separation of powers. The minister may provide an alternative form of inquiry than that sought and frustrate an application for judicial review, as in the case of the Mid Staffordshire NHS Foundation Trust Inquiry.

There are examples where political campaigning proved unsuccessful, but a public inquiry was convened as a result of bringing a judicial review application, particularly in the areas of national security and the armed forces, where there has appeared to be particular reluctance on the part of government to convene a public inquiry. Earlier judicial review challenges established core principles, such as: having the power to convene a public inquiry does not prevent alternative forms being adopted; when making the decision the minister is entitled to take into account factors such as likely stress to participants and cost; and weighing the advantages of a closed rather than an open inquiry are a matter for the minister.[175] More recent cases have tended to centre on the state's obligations under Articles 2 and 3 ECHR, laying down the minimum standards of Article 2 and 3 investigations and the territorial application of the ECHR. The *Al Zaki Mousa*[176] case was an interesting departure in that it attempted to redefine the way in which a state might discharge its investigative obligations in a quicker and more cost-effective manner than by full public inquiry. The cases that have been brought have provided some clarity to the decision-making process as a whole and have set some key principles for future inquiries.

Legal challenges influencing decisions on whether or not to convene a public inquiry have not been without their critics. The *Al-Skeini*[177] case raised concerns of judicial overreach and *Al Sweady* about the potential for inappropriate motivation behind demands for a public inquiry, such as financial and political gain. However, generally, where a public inquiry has been convened following judicial review, most commentators agree the inquiry was necessary from the political perspective of addressing matters of public concern.

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[175] *R v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993*)* and *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794.
[176] *R (Ali Zaki Mousa) v Secretary of State for Defence* (No 2) [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin).
[177] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.

From these findings, it can be concluded that the power to convene a public inquiry lies firmly with the minister. Political pressure exerted by select committees and Parliament, seeking to address potential conflicts of interest, reverse the diminution of the role of Parliament and increase openness and transparency, have been resisted by the executive. Despite this, at the level of individual inquiries, some political and legal challenges have influenced decisions. However, the onus and burden of bringing such challenges falls predominantly to survivors, family members and support groups, and carries a number of practical constraints, resulting in these political and legal challenges being an inconsistent and unreliable check on the power of the minister.

Chapter Four - Statutory or Non-Statutory?

4.1. Introduction

The previous chapter focused on the ministerial decision whether or not to convene a public inquiry and explained that inquiries convened by ministers may be statutory or non-statutory. The term 'statutory inquiry' in this context is used for an inquiry convened under the Inquiries Act 2005. One of the main objectives of the Inquiries Act 2005 when it was introduced was to consolidate the numerous pieces of subject-specific legislation that were in force at that time, to provide a single comprehensive statutory framework for inquiries convened by ministers into matters of public concern.[1] However, the 2005 Act does not expressly exclude the possibility of a minister convening a public inquiry outside the legislation under the prerogative powers of the executive, a 'non-statutory inquiry'.

Despite the fact that the 2005 Act is generally recognised to be 'good legislation', and provides a suitable framework for public inquiry procedure,[2] ministers have frequently chosen to set up alternative forms of non-statutory inquiry or investigation, such as a Parliamentary Inquiry, Counsel of Privy Councillors, Royal Commission[3] or independent review with elements of a public hearing. These non-statutory inquiries include high profile inquiries such as the *Iraq Inquiry* into the Iraq conflict, the *Butler Inquiry* into intelligence on weapons of mass destruction, and the *Bichard Inquiry* into child protection procedures following the Soham murders.

The powers and nature of statutory and non-statutory inquiries differ in a number of significant respects. Serious concerns have been raised in some instances about the motivation behind ministerial decisions to convene a non-statutory as opposed to a

[1] There are very few examples of alternate, subject-specific legislation continuing to apply. The House of Lords Select Committee identified only two: Health and Safety at Work etc Act 1974 s 14 and Financial Services Act 2012, ss 68-72. See House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 39 and chapter 2 of this thesis.

[2] Ibid para 214.

[3] An ad hoc advisory committee appointed by the Government (in the name of the Crown) for a specific investigatory or advisory purpose (although they now appear to have fallen into disuse see 2.3).

statutory inquiry, particularly where the actions of the minister's own department or the Government itself may be under scrutiny.

This chapter examines the minister's decision whether to convene a statutory or a non-statutory inquiry. It looks at the significance of the differences between the two forms of inquiry, arguments put forwards for and against the use of statutory inquiries, and at the decision-making process itself. It analyses attempts to influence the decision-making process at the level of public inquiry process as a whole, in particular by those seeking a presumption in favour of inquiries being convened under the 2005 Act. The chapter then considers attempts to influence the decision whether to convene a statutory or non-statutory inquiry at the level of a specific individual inquiry, examining pressure brought to bear by campaign groups, requests from chairs and coroners, and the influence of judicial review challenges.

4.2. The significance of statutory powers

There are three key differences between statutory and non-statutory inquiries.[4] The first is that the 2005 Act confers on statutory inquiries the power to compel the giving of evidence, including compelling witnesses to attend to give oral evidence, produce documents and provide a written statement,[5] whereas non-statutory inquiries have to rely on the voluntary compliance of witnesses or on the coercive power of the press and public (see below).[6] The second is that the 2005 Act permits the chair to take evidence on oath,[7] ensuring that anyone who gives false evidence could face criminal sanctions.[8] The third key difference is that there is a presumption that inquiries convened under the 2005 Act will be heard in public (see chapter 7). [9]

As discussed previously, both statutory and non-statutory public inquiries form part of the political rather than the legal process. They have no power to determine civil or criminal liability; their findings and recommendations are not legally binding (see 2.1).

[4] See HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 66.
[5] Inquiries Act 2005 (2005 Act), s 21.
[6] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 66.
[7] Ibid, s 17.
[8] Ibid, s 35.
[9] Ibid, s 18.

However, statutory inquiries have greater legal powers than non-statutory inquiries, conferred on them by the 2005 Act (see below). Further, it is a summary offence to fail to comply with a notice served by the chair of a statutory inquiry requiring the production of evidence,[10] or to distort, alter, suppress or conceal evidence from a statutory inquiry.[11] Failure to comply with a restriction notice issued by the minister, or restriction order issued by the chair,[12] can also be enforced by contempt proceedings in the High Court.[13]

This has resulted in many arguing that statutory inquiries are generally more effective than non-statutory inquiries and that there should be a presumption in favour of convening inquiries under the 2005 Act. The following section examines arguments put forward for and against convening inquiries with statutory powers.

4.3. Argument put forward for and against the use of statutory and non-statutory inquiries

4.3.1. Powers of compulsion and the taking of evidence on oath

The HL Select Committee's call for written evidence asked "Is it right that ministers can and do continue to set up inquiries otherwise than under the Act? Is there any justification for this?" (Appendix 1).[14] Those appearing before the HL Select Committee to give oral evidence were asked about their own personal experience of statutory and non-statutory inquiries.

Many of those witnesses gave evidence about the benefits of the statutory powers of compulsion within the 2005 Act.[15] On occasions, merely the existence of those powers

[10] Ibid, s 21.
[11] Ibid, s 35. A person who is guilty of an offence under this section is liable on summary conviction to a fine, imprisonment or both.
[12] See chapter 7.
[13] 2005 Act, s 36.
[14] The House of Lords Select Committee on the Inquiries Act 2005, 'Call for Evidence' (2013) Q12 www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/Call%20for%20Evidence_2_final_version.pdf> accessed 30 May 2020 and see Q13 "Is there a role for independent reviews to be established otherwise than under the Act (like the Hillsborough Independent Panel)?"
[15] See HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 67.

has been sufficient to make a difference to the effectiveness of an inquiry, without the need for them to be exercised.[16]

This was demonstrated during the *Robert Hamill Inquiry*, into the actions of the Royal Ulster Constabulary following the death of Robert Hamill in 1997. The Inquiry was originally convened under the Police (Northern Ireland) Act 1998 Act. The chair concluded that

> "the limitations on the Inquiry's powers of compulsion… coupled with the clear indications that important witnesses are unwilling to give evidence, point[ed] powerfully to a decision to convert the Inquiry to one that should be constituted under the Inquiries Act 2005."[17]

A request was made to the minister[18] and the Inquiry was subsequently converted, under section 15, to a 2005 Act inquiry.

Counsel to the *Robert Hamill Inquiry* explained:

> "We were told unequivocally that the Protestant witnesses who were on the street and were vital to it would not give evidence. We were able to convert… to get powers under the 2005 Act, and as soon as we had the powers we had the witnesses… There was one particularly recalcitrant witness who just would not come and we took her to the High Court and obtained a suspended order for contempt… As far as we are concerned, the real distinction between a non-statutory inquiry and a statutory inquiry is those teeth."[19]

Robert Francis chaired the first *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust*,[20] which was non-statutory private inquiry. At the time, the Secretary of State made it clear that, should he consider he needed statutory powers, he could ask for them. In evidence to the HL Select Committee, Robert Francis

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[16] See, for example, evidence of Judi Kemish in connection with the *Azelle Rodney Inquiry*, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' QQ250 and Professor Sir Ian Kennedy oral evidence in connection with the Bristol Royal Infirmary Inquiry Q211

[17] *Robert Hamill Inquiry*, Application to Convert (9 December 2005) <www.roberthamillinquiry.org/content/application-to-convert/> accessed 30 May 2020.

[18] The Permanent Secretary at the Northern Ireland Office.

[19] Ashley Underwood oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q250.

[20] Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009.

stated that he thought that that background assurance was sufficient in itself to persuade those who were asked to attend to give evidence or disclose documents to do so. Had they not done so, obtaining the necessary powers and enforcing them would have attracted greater negative publicity to the witnesses in questions.[21] Lord Bichard, in evidence, stated the situation was the same for the non-statutory *Bichard Inquiry* into child protection procedures in Humberside Police and Cambridgeshire Constabulary following the Soham murders.[22]

That being said, some witnesses, including Robert Francis and Lord Bichard, thought the option of non-statutory inquiries should be retained. Some chairs and panel members have commended their own non-statutory inquiries, asserting that the absence of powers enabled them to adopt a more flexible approach[23] or encouraged people to come forward and speak, fostering a collegiate atmosphere among witnesses, encouraging them to open up.[24] Sir John Chilcot, the chair of the non-statutory *Iraq inquiry*,[25] felt that "powers of compulsion contribute to an overly formal or court-like adversarial process" in what is an inquisitorial procedure (see further discussion on the *Iraq Inquiry* below). [26]

However, Professor Sir Ian Kennedy, chair of the *Bristol Royal Infirmary Inquiry*,[27] who was strongly in favour of having powers of compulsion, even though ultimately his inquiry did not have to exercise them, did not agree that an inquiry being statutory or non-statutory in any way affected the way tone of an inquiry, but attributed that to the approach and vision of the chair and panel.[28] Similarly Eversheds pointed out that the powers of compulsion do not need to be exercised as a matter of course. During the *Leveson Inquiry*, witnesses were summoned to provide evidence under the section 21

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[21] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q211.

[22] Following the murder of Jessica Chapman and Holly Wells in Soham.

[23] See Robert Francis and Lord Bichard oral evidence to the HL Select Committee, "Written and Corrected Oral Evidence Q217.

[24] Jason Beer oral evidence to the HL Select Committee, "Written and Corrected Oral Evidence Q106.

[25] To identify lessons that could be learned from the Iraq conflict from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, the military action and its aftermath.

[26] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 68.

[27] The Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995.

[28] Professor Sir Ian Kennedy oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q211, having also stated earlier in the Inquiry report: "We found these powers, particularly the former [power to compel witnesses], essential (if only to be held in reserve). Their existence assured us of compliance, without our having to use them.") Professor Kennedy, *The Report of the Public Inquiry into children's heart surgery at the Bristol Royal Infirmary 1984–1995*, (Cm 5207(I), 2001) ch 2.

procedure of the 2005 Act whether they were willing to give evidence voluntarily or not. The firm argued that very selective use of the powers could avoid creating an adversarial environment from the outset.[29]

Some witnesses argued that there might be specific circumstances where reliance on the cooperation of witnesses or organisations may not be key, for example where the information that an inquiry needs for its investigation is already available in documentary form.[30] In those circumstances, public concern may be met by a largely paper exercise and it is arguable that a non-statutory inquiry may be more appropriate.[31] However, the key question would be whether a non-statutory inquiry would satisfy the relevant public concern. If not, there is an argument that such an inquiry would not achieve its purpose.[32]

Some witnesses appearing before the HL Select Committee thought that taking evidence on oath need not ultimately make a practical difference, largely because, with the mass of documents and other evidence before the inquiry, anyone lying risked being caught out and anyone minded to lie would do so on oath or otherwise.[33] Other witnesses, however, felt strongly that the taking of evidence on oath for a particular inquiry was essential for getting to the truth.[34]

There was therefore a range of opinions over the significance of powers of compulsion and the taking of evidence on oath, between: those who argued that the mere existence of those powers made a significant positive difference to the effectiveness of an inquiry; those who felt that the absence of those powers was a benefit to a particular inquiry; and those who felt other factors, such as the approach of the chair or panel, had more effect

[29] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 34. Sir Brian Leveson himself, in evidence to the 2013-14 HLSC, concluded that the power of compulsion was very important for his inquiry: oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q91.
[30] Including Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 36.
[31] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 36 and Michael Collins, Judi Kemish and Ashley Underwood QC written evidence para 25.
[32] Eversheds written evidence to the HL Select Committee, "Written and Corrected Oral Evidence para 36.
[33] See Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 113 and, for example, Professor Tomkins and Sir Stephen Sedley oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q36.
[34] See, for example, Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q153 on the second Mid Staffordshire NHS Foundation Trust Inquiry.

on the tone and effectiveness on an inquiry. The split in opinion appears to be much influenced by personal experience of individual inquiries and, often, the specific circumstances of those inquiries.

4.3.2. Where witnesses can be otherwise required to attend to give evidence

Other arguments that have been used to justify the use of non-statutory inquiries have related to circumstances where witnesses may be required to give evidence as a result of obligations arising elsewhere, such as from their terms of their employment. For example, inquiries into incidents involving military action may require serving members of the armed forces to attend to give evidence or disclose documents. However, members of the armed forces retire and move to other professions, and other key witnesses to military action may be civilians, so powers of compulsion may well still be extremely advantageous for such inquiries.[35]

A 2010 Cabinet Secretary Advice Note suggested that powers of compulsion may not be required where the actions in question are mainly those of public officials, who can be expected to cooperate:

> "Non-statutory inquiries (e.g. Chilcot) are normally used where the actions in question are mainly those of public officials, who can be expected (or to an extent required by government) to cooperate without the need for the inquiry to have powers of compulsion. If such cooperation is not forthcoming a non-statutory inquiry can be turned into a statutory one, with the relevant powers."[36]

This was not the case in practice, however, for the non-statutory *Contaminated Blood and Blood Products Inquiry*, which was hampered by refusals to give evidence and accusations of the withholding and destruction of key documents by the Government (see 4.9.2).

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[35] See Jonathan Duke-Evans oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q279.

[36] Cabinet Secretary, 'Advice Note on the Establishment of a Judicial Inquiry into Phone Hacking' (19 March 2010) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/60808/cabinet-secretary-advice-judicial.pdf> accessed 30 May 2020.

The stance taken by the Cabinet Secretary Advice Note also raises additional issues regarding the principles of public perception and trust. If the public and participants are to have confidence in the findings and recommendations of a public inquiry, they must have confidence in its process. A major role of public inquiries is to hold the executive to account. Where the actions that are the subject matter of an inquiry are mainly those of public officials, it is just as important, if not more so, that the inquiry is seen to have all potentially available powers to investigate rigorously and thoroughly.[37]

Statutory powers of compulsion, together with the presumption that a statutory inquiry will be heard in public, ensure that statutory inquiries are accountable to the public in a way that a non-statutory inquiries are not,[38] as does the taking of evidence on oath. One of the roles of a public inquiry into matters of public concern is to allay public concern (see 2.1). There is a strong argument that if a non-statutory inquiry will not satisfy the relevant public concern, it undermines the very purpose of the public inquiry.[39]

4.4. Inquiries dealing with security issues and sensitive material

Whilst concluding that inquiries should normally be held under the 2005 Act, the HL Select Committee did, however, recognise that there might be overriding security or sensitivity issues for doing otherwise.[40] A number of witnesses before the HL Select Committee gave examples of circumstances in which convening a non-statutory rather than a statutory inquiry may be appropriate.[41] The most frequent example given concerned the possible need for evidence to be heard in secret for the protection of matters of national security. Further, powers of compulsion over witnesses may not be appropriate where evidence is being sought from citizens of foreign jurisdictions.[42] In

[37] Some of the issues in this and the following paragraphs are also discussed in Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.
[38] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 35.
[39] Ibid para 36.
[40] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* paras 81 and 300.
[41] Ibid para 82.
[42] See, for example, Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q59.

such cases, there is a balance to be found that maximizes the public nature of an inquiry and also enables an effective investigation to take place.

Many witnesses felt that concern about not exposing intelligence issues might be preventing the Government from convening a statutory inquiry unjustifiably, with three witnesses stating "In our experience fears of that sort are exaggerated, as intelligence is capable of being managed under the 2005 Act (eg pragmatic solutions used in the *Azelle Rodney Inquiry)*" (see 7.6).[43] In some cases, acceptance of a non-statutory inquiry in such circumstances was reluctant, where a non-statutory inquiry was seen as being preferable to the alternative of no inquiry at all.

In evidence to the HL Select Committee, Professor Tomkins noted that:

> "[P]erhaps there would never have been an Iraq inquiry and there would never have been a *Detainees inquiry*[44] at all if the only machinery available was machinery under the Inquiries Act, because the Government simply would not accede to giving a judge, in the case of the Detainees inquiry or a panel in the case of the Iraq inquiry, the powers that are contained in Section 21 of the Inquiries Act, given the sensitive subject matter of the issues that those inquiries were asked to investigate… Then the question becomes, I suppose: is it better to have a flawed inquiry if you think that an inquiry without powers of compulsion is a flawed inquiry, or is it better to have no inquiry at all? That is a judgment call. That is a political judgment." [45]

Disaster Action[46] was also of the view that non-statutory inquiries "should be preserved on the basis that often it is better to have an inquiry than no inquiry. The non-statutory

[43] Michael Collins, Judi Kemish and Ashley Underwood QC written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12. See also, for example, Rights Watch UK, Inquest and Liberty oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.
[44] A non-statutory inquiry conducted by a committee of Privy Counsellors to look at whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11.
[45] Professor Tomkins oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q36.
[46] A charity founded by survivors and bereaved people from UK and overseas disasters, founded on the principles of accountability, support and prevention.

inquiry can be converted into a statutory inquiry, if appropriate. This allows for a minister who is hesitant to err on the side of having an inquiry."[47]

4.5. The decision – statutory or non-statutory

The decision on whether a public inquiry will be a statutory or non-statutory inquiry is made by the minister convening the inquiry, though in discussion with others, for example from the Cabinet Office or Ministry of Justice.[48] As seen in the last chapter in relation to the decision whether or not to convene a public inquiry, there is neither a formal process nor criteria by which the decision is made, nor any openness or transparency to this decision-making process.[49] In making the decision, the minister is accountable to Parliament and it is for members of parliament to hold the minister to account for any decision to convene a non-statutory rather than a statutory inquiry.

Again, serious questions have been raised about the motivation behind decisions to convene a non-statutory inquiry rather than a statutory inquiry and the effect on public perception and trust. There is a concern that ministers are appearing to be choosing to side-step the legislation when it suits them because it is felt the 2005 Act somehow "ties their hands, is too complicated, [or] is too public".[50] During the HL Select Committee, Baroness Buscombe posed the question:

> "Why should the public have any trust in a non-statutory inquiry when, the very people who were behind that legislation instantly chose to avoid it when, for example, setting up the Iraq inquiry?[51] …Can we not read from that, being cynical, that this means that some of the truth can be avoided where the inquiry is non-statutory?"[52]

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[47] Disaster Action written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12.1.
[48] Shailesh Vara MP oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q323.
[49] It would appear that informal discussions take place at ministerial level and the Prime Minister has the final say, Ibid Qs327-328.
[50] Lord Richard oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q323
[51] Also known as the *Chilcot Inquiry.*
[52] See the question of Baroness Buscombe during oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q36.

In its written evidence to the HL Select Committee, Liberty stated:

> "[I]t is difficult to avoid the conclusion that, in practice, Ministers are choosing to establish inquiries into controversial events outside the Act in order to ensure that the inquiries will not benefit from these strong investigatory powers granted by the Act, thereby reducing the risk that evidence will emerge which is damaging, or at least embarrassing, to Government. For example, the Iraq inquiry (2009), the Detainee inquiry (2010) and the Mid-Staffordshire Hospital inquiry (2009) have all been established outside the 2005 Act. "[53]

The decision to convene a non-statutory into the Iraq conflict was particularly controversial. The families of the soldiers who lost their lives called, unsuccessfully, for a full statutory inquiry. There was intense pressure from Parliament for the *Iraq Inquiry* to be granted powers of compulsion, the power to take evidence on oath and, in particular, for it to be heard predominantly in public, with accusations that a non-statutory inquiry had been convened to protect the reputation of the Government at the time.[54] Notably, powers of compulsion and the power to take evidence on oath were, in fact, resisted by the chair of the Inquiry, Sir John Chilcot (see 4.9 below). However, he did subsequently announce the Inquiry's commitment that hearings would be held in public wherever possible (see chapter 7).[55]

Influence over the Public Inquiry Process as a Whole

4.6. The HL Select Committee recommendations on a presumption

The above sections examined the differences between statutory and non-statutory inquiries, arguments put forward for and against their use and concerns raised over the minister's decision-making process. The following sections examine political influence over the decision-making process at the level of the public inquiry process as a whole and attempts by those seeking a presumption in favour of inquiries being convened under the 2005 Act to bring about changes to that process.

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[53] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 16.
[54] HC Deb 15 June 2009, vol 494, col 28.
[55] Sir John Chilcot already having written to Gordon Brown on 21 June 2009 stating his belief that "it would be essential to hold as much of the proceedings of the Inquiry as possible in public".

There is no express presumption in favour of using the 2005 Act, either within the Act itself or elsewhere. Convening a non-statutory inquiry under the prerogative powers of the executive is a well-established practice. As discussed at 3.6.2, in the pre-2005 Court of Appeal case of *Crampton*, Sir Thomas Bingham MR stated that, simply because a statute gives a minister power to establish an inquiry, it does not mean the minister lacks authority to establish an inquiry of any other kind, nor that the minister must establish all inquiries under the statute that provides compulsory powers. [56]

The 2005 PASC report, *Government by Inquiry*,[57] when examining the effectiveness of public inquiries and the Inquiries Bill, welcomed the introduction of powers of compulsion and the power to take evidence on oath. The 2013-14 HL Select Committee Report did likewise and its conclusions were clearly in favour of the use of statutory inquiries:

> "Recommendation 1: We recommend that inquiries into issues of public concern should normally be held under the Act. This is essential where Article 2 of the ECHR is engaged. No inquiry should be set up without the power to compel the attendance of witnesses unless ministers are confident that all potential witnesses will attend.
>
> We would not however remove the possibility of an inquiry being held otherwise than under the Act, for example where security issues are involved, or other sensitive issues which require evidence to be heard in secret. Ministers should give reasons for any decision to hold an inquiry otherwise than under the Act."[58]
>
> "Recommendation 33: Ministers have at their disposal on the statute book an Act and Rules which, subject to the reservations we have set out, in our view constitute a good framework for such inquiries. Ministers should be ready to make better use of these powers, and should set up inquiries under the Inquiries Act unless there are overriding reasons of security or sensitivity for doing otherwise."[59]

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[56] *R v Secretary of State for Health, ex p Crampton*, CA, 9 Jul 1993.
[57] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[58] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* paras 81 and 82.
[59] Ibid para 300.

Whilst not recommending removing the option of convening non-statutory inquiries, the HL Select Committee recommended a presumption in favour of using the Act, with reasons being given to Parliament for not doing so.

4.6.1. The Government's rejection of the recommendations

As seen in the previous chapter, successive governments' responses to recommendations for change have been to resist calls for change that would restrict the discretion and powers of the executive. The HL Select Committee's recommendations were rejected by the Government, which stated that, whilst the Act represents an important starting point, "Ministers should not feel constrained from considering other options which may be better suited to the circumstances". Noting that the power to convene a public inquiry under the 2005 Act is discretionary and does not expressly exclude the possibility of "other approaches", the Government also highlighted the fact that section 15 of the 2005 Act allows for conversion into a 2005 Act inquiry if organisations or individuals refuse to co-operate with a non-statutory inquiry.[60]

The Government accepted that there should be some explanation of why ministers have decided against using a statutory inquiry, but only in limited circumstances: when invited to hold an inquiry by IPCC, Ofsted, the Information Commissioner, Parliamentary Commissioners for Administration and Health, the Commission for Local Administration, or a domestic body of similar standing; when an investigation by a regulatory body has been widely criticised; or following a request from a coroner for an inquest to be converted into an inquiry.[61]

In response to the earlier 2005 PASC report, *Government by Inquiry*,[62] the then Government,[63] showed a similarly restrained approach to convening statutory inquiries,[64] having pointed out:

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[60] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 31.
[61] Ibid para 35, in response to Recommendation 2 of HLSC Report para 111, and para 36.
[62] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[63] Labour, as opposed to the later Conservative Government in 2014, which maintained an approach of tight control of public inquiries by the executive.
[64] Whilst also rejecting the recommendation that inquiries into the conduct and actions of government should exercise their authority through Parliament rather than by the exercise of the prerogative power of the Executive.

> "The Inquiries Bill is designed to provide a comprehensive statutory framework for inquiries into events that have caused, or have the potential to cause, public concern. It is not intended that every future inquiry will be conducted under the Bill; there are inquiries which operate very effectively on a non-statutory basis, or on the basis of general statutory powers in the health field, for example. However, the Bill provides a suitable basis that can be used, when needed, for the most substantive inquiries."[65]

4.6.2. House of Lords Debate

During the subsequent House of Lords debate on the HL Select Committee Report, members of the HL Select Committee took strong issue with the Government's rejection of the recommended presumption in favour of convening inquiries under the 2005 Act.[66]

A key objection was to the Government's apparent treatment of the 2005 Act as 'optional', which was seen as being contrary to the intentions of the 2005 Act. Lord Trimble noted that the explanatory notes to the 2005 Bill described one of the main intentions behind the Act as being "to consolidate numerous pieces of subject-specific legislation" and "to provide a comprehensive statutory framework for inquiries set by Ministers to look into matters of public concern"[67] stating that:

> "That language points to the Act being used for inquiries generally. It does not say that the Act is optional... That would be a rather novel proposition for legislation. I know that the practice has developed of non-statutory inquiries and it is perhaps late in the day to challenge that now. However, I suggest that it is not really within the original intention of the Act, which is why we made the recommendations we did…"[68]

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[65] Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005) 5.

[66] HL Deb 19 March 2015, vol 760, col 1140-1174.

[67] Explanatory Notes to the Inquiries [HL] Bill (2004-05) para 3. There are only a very few examples of alternate legislation continue to apply, such as the Financial Services Act 2012 or the Merchant Shipping Act 1995.

[68] HL Deb 19 March 2015, vol 760, col 1143. See also *R v Secretary of State for the Home Department ex p Fire Brigades Union* [1995] 2 AC 513 where the House of Lords ruled the Home Secretary had acted unlawfully in failing to implement, by statutory instrument, a statutory scheme for criminal injuries compensation under Criminal Justice Act 1998, choosing instead to amend an existing non-statutory scheme under the Royal Prerogative.

A further criticism related to the Government's lack of engagement with the HL Select Committee post-legislative scrutiny process itself, which Lord Richard described as "contemptuous and peremptory".[69] Lord Richard was also critical of the Government's response to the report, describing it as "extraordinarily negative and unhelpful." He stated that:

> "The fact is that the powers of compulsion under the Act are always helpful. Even if rarely used, they act as a useful weapon to persuade witnesses to attend and give truthful evidence. I can see no reason why that presumption should not be accepted by the Government. Of course there are the exceptions [such as where security or other sensitive issues require evidence to be heard in secret]… but, prima facie, if a public inquiry is to be set up, then it ought to be set up under the Act that Parliament passed dealing with the issue of public inquiries and which we have now inquired into."[70]

The existing decision-making process, and the fact that it led to a lack of consistency in decisions on different inquiries, was also severely criticised. Lord Beecham noted that the then recently convened *Harris Review* into self-inflicted deaths of young adults in custody was non-statutory, despite the fact there had been a number of deaths in prisons and hospitals that were the subject of 2005 Act inquiries. He stated that it was difficult to understand the decision-making process that led to the protracted series of inquests and the *Hillsborough Independent Panel*, which was a narrower and more limited process than a public inquiry, and the initial refusal of the *Litvinenko Inquiry* (see 3.4.1 and 3.5).

The Government's rejection of the recommendation that reasons should be given for a decision to hold an inquiry otherwise that under the Act was also severely criticised. Lord Soley asked:

> "Why is another of our recommendations—that a Minister should be expected to come before Parliament and say why they are not going to use the Act—rejected? In most cases, they would be able to do that. In cases which are difficult for

[69] HL Deb 19 March 2015, vol 760, col 1139.
[70] HL Deb 19 March 2015, vol 760, col 1140.

> security reasons, I have never generally found Ministers or MPs so shy or bashful that they cannot find a way of dealing with that.[71]

The Government's response during the debate was given by Lord Faulks,[72] who reiterated the Government's position that the Act does not contain any mandatory obligation on the part of a minister to use the Act, stating that "Ministers will in fact always consider the suitability of the 2005 Act when deciding to establish a public inquiry—it will always be the starting point" but adding:

> "Across government there was consensus that Ministers must retain the option of deciding whether or not to use the Act. It is essential to adopt what is the right approach under all circumstances."[73]

The ongoing tension between the Government and Parliament over the executive's power to determine the form of a public inquiry is clear. Successive Governments have protected the power of the minister to determine the form, and therefore the powers, of a public inquiry including the ability to 'side-step' the stronger investigatory powers of a statutory inquiry when the minister's own department or the Government itself is under scrutiny which is a cause for concern. Parliament has sought, unsuccessfully, to restrict the power of the minister to convene a non-statutory inquiry, in an attempt to strengthen the role of public inquiries in ensuring ministerial accountability.

4.7. The HL Select Committee recommendations on time, cost and warning letters

Having looked at the response to the recommendation that there should be a presumption in favour of convening public inquires under the 2005 Act, the following section looks at how the minister's decision on whether or not to convene an inquiry under the 2005 Act can be influenced by time and cost considerations linked to the statutory warning letter process. An argument put forward in favour of retaining the option of non-statutory inquiries is cost, based on the belief that non-statutory inquiries

[71] Ibid, col 1160.
[72] The Minister of State, Ministry of Justice.
[73] HL Deb 19 March 2015, vol 760, col 1174.

are shorter and therefore cheaper. [74] It was clear from evidence given on behalf of the Ministry of Justice that cost is one of the key factors taken into account when deciding whether an inquiry will be statutory or non-statutory.[75] Whilst recognising that non-statutory inquiries have indeed tended to be shorter and less costly, the HL Select Committee noted that this is not always the case. (The cost of the *Iraq Inquiry* was in fact similar to that of the statutory *Mid Staffordshire NHS Foundation Trust* and *Baha Mousa* Inquiries,[76] and greater than the statutory *Leveson*, *Azelle Rodney* and *Litvinenko Inquiries*.)[77]

The 2018 National Audit Office *Investigation into government-funded inquiries*[78] looked at a sample of statutory and non-statutory inquiries convened since 2005. The breakdown of costs of individual inquiries varied significantly, for example with some inquiries incurring significant costs for investigative and other expert services and legal representation, with others incurring minimal costs in these areas.[79] The subject matter and breadth of public inquiries varies hugely, which also affects the cost of an inquiry. The issue here is therefore not a comparison between the cost of a statutory and a non-statutory inquiry, but how the cost of a particular inquiry would compare if it was convened as a statutory or a non-statutory inquiry.

As the HL Select Committee noted:

> "[A] statutory inquiry should cost more than one without a statutory basis only if and to the extent that the statute imposes on the inquiry obligations which involve expenditure which is not incurred by a similar non-statutory inquiry. We

[74] HL Select Committee Report*, The Inquiries Act 2005: post-legislative scrutiny* 192, quoting oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' of Robert Francis QC, chair of the non-statutory and statutory Mid Staffordshire Inquiries and Lord Bichard, chair of the non-statutory *Soham Inquiry* Q217; Jonathan Duke Evans, Head of Claims, Judicial Reviews and Public Inquiries, Ministry of Defence Q275; and Alun Evans, Secretary of the non-statutory *Detainee Inquiry* Q132.
[75] Shailesh Vara MP oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q324.
[76] At £13.1 million, £13.7 million and £13.5 million respectively; figures from the National Audit Office, *Investigation into government-funded inquiries* (23 May 2018) HC 836 Figure 5.
[77] Ibid, at £5.4 million, £2.6 million and £2.4 million respectively.
[78]The National Audit Office, *Investigation into government-funded inquiries* (23 May 2018) HC 836
[79] *Ibid* 2.2 to 2.4.

know of only one such obligation, the detailed procedure for warning letter under rules 13–15 of the Inquiry Rules 2006."[80]

Rule 13 of the Inquiry Rules 2006 states that an inquiry chair must send a warning letter to a person if the report, or any interim report, is to include any "explicit or significant criticism" of the person.[81] Details of associated duties of confidentiality, and the required content of those letters, are set out in rules 14 and 15. In practice, these requirements are incredibly onerous. During the *Leveson Inquiry*, it took "literally thousands of hours of work to comply with these requirements."[82] The *Mid Staffordshire NHS Foundation Trust Inquiry* was extended by at least six months by having to undertake the warning letter process.[83] In evidence to the HL Select Committee, Ashley Underwood, QC, Leading Counsel to the *Robert Hamill Inquiry*, stated that the Inquiry would have been cheaper had it been non-statutory because of the rule 13 process, which he described as "a huge waste of money and effort."[84]

Although they are not bound by this procedure, many non-statutory inquiries choose to adopt an analogous warning letter process. (The length of the *Iraq Inquiry*, for example, was significantly extended as a result of implementing a lengthy warning letter process.) The difference is that a non-statutory inquiry has a choice but, for a statutory inquiry, the detailed and prescriptive process is compulsory, irrespective of the specific needs and requirements of that inquiry.

The HL Select Committee concluded that the circumstances surrounding individual inquiries are so varied that fixed rules are unnecessary and it determined that the warning letters procedure in the 2006 Rules goes far beyond what is necessary. The Report recommended that rules 13–15 be revoked and be replaced with a chair's discretion as to the circumstances in which a warning letter should be sent, [85] stating

[80] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 193.
[81] Inquiry Rules 2006, r 13(3).
[82] Sir Robert Jay oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q125.
[83] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q216.
[84] Ashley Underwood QC oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs 248-271.
[85] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 251, recommendation.

> "…revocation of rules 13–15 should alone cut months off the length of inquiries, and reduce their cost proportionately. We see no reason why, if our recommendations are accepted and implemented, an inquiry set up under the Act should be longer or more costly than one with another statutory basis, or no statutory basis."[86]

The Government rejected the recommendation, stating "The Treasury Solicitor's Department has advised that the drafting of rule 13 is not defective" and failed to address rule 15 at all, in what is arguably the most controversial response to the report. That response came in for very severe criticism during the subsequent House of Lords' debate,[87] where the Government was said to have failed to take on board the damning criticism given by experienced practitioners on the operation of the rules in practice. At the end of that debate, the Minister of State for Justice[88] conceded that the Government was

> "much impressed by strength of argument today and consider that it may well be necessary to reconsider these particular rules to give greater clarity to chairmen so as to avoid some of those undesirable features"[89]

It is hoped that this will result in this subject being revisited but, to date, this has not occurred, with other political priorities taking precedence. As this is an instance of change that does not directly restrict the power of the minister, and would arguably have such a beneficial impact on public inquiry procedure and costs, a more receptive and proactive response might have been expected. However, when bearing in mind that the role of an inquiry can include scrutiny of the actions of the minister's department and those of the Government itself, which may subsequently be the subject of criticism in the inquiry's report, the reluctance of successive governments to make the warning letter process discretionary may be seen as just an another form of the Government safeguarding the interests of the executive.

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[86] Ibid para 297.
[87] See, for example, HL Deb 19 March 2015, vol 760: Lord Woolf at col 1142, Lord Cullen of Whitekirk at col 1146 and Lord Pannick at col 1152.
[88] Lord Faulks.
[89] The Minister of State, Ministry of Justice (Lord Faulks) HL Deb 19 March 2015, vol 760, col 1176.

4.8. Legal influence - Art 2 and 3 ECHR

Having considered political influence over the decision-making process, this section proceeds to analyse legal influence over the public inquiry process. It is clear that although there is no general legal right to a statutory as opposed to a non-statutory inquiry, as discussed (see 3.6.2), Articles 2 and 3 ECHR impose on governments an obligation to conduct an effective official investigation where one or more of the substantive obligations in those Articles have, or may have, been violated and it appears agents of state are or may be implicated in some way.

The judgment of the European Court of Human Rights in *Jordan*[90] summarised the requirements of an effective Article 2 investigation:

> "1. The investigation must be independent.
>
> 2. The investigation must be effective.
>
> 3. The investigation must be reasonably prompt.
>
> 4. There must be a sufficient element of public scrutiny.
>
> 5. The next of kin must be involved to the appropriate extent."[91]

The summary was restated by Lord Bingham in the case of *Amin,* in connection with the *Mubarek Inquiry.*[92] The nature, scope and rigour of the investigative exercise required by Articles 2 and 3 is essentially the same[93] (see 3.6.4 and 3.6.5).

Non-statutory inquiries are more likely to be non-compliant with Article 2 and Article 3 obligations than statutory inquiries, due both to the absence of powers of compulsion and the practice of holding all or part of non-statutory inquiries in private.

In the case of *Edwards v United Kingdom*[94] the European Court of Human Rights concluded that the lack of power to compel witnesses, and the private character of the

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[90] *Jordan v United Kingdom* (2001) 37 EHRR 52.
[91] As summarise by Jackson J in *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520 | [2001] 6 WLUK 408 [41].
[92] *R v (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653; the Inquiry concerned a death in custody in Feltham Young Offender Institution (see chapter 3 of the thesis).
[93] Commissioner of the Police for the Metropolis v DSD [2015] EWCA Civ 646.
[94] *Edwards v United Kingdom* (2002) 35 EHRR 19.

investigation in question, failed to comply with the requirements of Article 2 to hold an effective investigation (see also 7.10.1). The case was brought by the parents of a prisoner killed in his cell by another prisoner with a history of violence and mental illness. His killer pleaded guilty to manslaughter by reason of diminished responsibility and the coroner's inquest was closed following the conviction. The only investigation into the details of the death therefore was the subsequent private, non-statutory inquiry,[95] which did not have the power to compel witnesses to attend (two prison officers declined to attend, one of whom had walked past the cell shortly before the death was discovered). The Court stated:

> "the lack of compulsion of witnesses who are either eye-witnesses or have material evidence related to the circumstances of a death must be regarded as diminishing the effectiveness of the Inquiry as an investigate mechanism. In this case… it detracted from its capacity to establish the facts relevant to the death, and thereby to achieve one of the purposes required by Article 2 of the Convention."[96]

This led to the HL Select Committee statement that it is essential that inquiries into issues of public concern be held under the Act when Article 2 of the ECHR is engaged (see below).[97] The Government simply responded that the inquest process is the primary way in which the Government fulfils its responsibilities under Article 2 of the ECHR, and where an inquest is converted into a 2005 Act inquiry the powers available to inquiry chairs will also ensure that the inquiry meets its Article 2 responsibilities.[98] However, this does not cover all possible circumstances. There have been individual legal challenges addressing this issue, and when alternative forms of investigation might suffice (see *Finucane* at 4.10.1 and *Edwards, Amin and Ali Zaki Mousa* at 3.6.4, 3.6.5 and 3.6.8).

[95] Commissioned by the North Essex Health Authority, Essex County Council and HM Prison Service in association with Essex Police.
[96] *Edwards v United Kingdom* (2002) 35 EHRR 19 [79].
[97] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 4, recommendation 1.
[98] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 32.

Influence over individual inquiries

4.9. Political influence

Having examined political and legal influence in relation to the public inquiry process as a whole, the following section examines political influence over ministers' decisions whether to convene a statutory or non-statutory inquiry in respect of specific individual inquiries.

4.9.1. Concern over a lack of public understanding about the difference between statutory and non-statutory inquiries

Whether or not a challenge is brought over a decision to convene a specific non-statutory inquiry or statutory inquiry is dependent on the understanding of the difference between the two, of those affected by the decision. The comparative level of knowledge and understanding between the average member of the general public and that of participants involved in a public inquiry, many of whom may have legal representation or other sources of advice available to them, was raised during the HL Select Committee evidence sessions. Baroness Buscombe noted that members of the public

> "do not necessarily know that [an] inquiry is non-statutory and therefore are being asked to trust that the inquiry has been set up in a way that might demand an oath, and evidence is produced. Therefore, the truth could be masked in that sense because the public are totally unaware in large part, I suggest, as to whether it is statutory".[99]

Julie Bailey, who had no prior knowledge of public inquiries before starting to campaign for an inquiry into the events at Stafford Hospital and then specifically for a statutory inquiry (see below), stated that "[T]he public really do not know what a public inquiry is. I think we need to be educated of the benefits of a public inquiry as opposed to a non-statutory inquiry."[100]

[99] HL Select Committee, 'Written and Corrected Oral Evidence' Q36; see also the discussion at Q295.
[100] Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q170 and 188, in connection with the Mid Staffordshire NHS Foundation Trust inquiry.

Professor Tomkins noted that

> "I know of no evidence that suggests that there is a problem with public confidence in the context of Inquiries Act inquiries. Indeed, it would seem to me that if and insofar as there is a problem of public confidence in inquiries it is in non-statutory inquiries that have been established since 2005 rather than in statutory inquiries, the obvious examples being the Iraq inquiry and the Detainees inquiry"[101]

But he recognised that it is unlikely that the public would specifically know if they were statutory or non-statutory inquiries. As a result, when pressure is applied on a minister to convene a statutory inquiry, in contrast to the call for a public inquiry generally, it comes in the main solely from campaign groups, survivors, family members and participants rather than from the general public.

4.9.2. Influence of campaign groups

As seen in more detail in 3.5.3, the *Mid Staffordshire NHS Foundation Trust Public Inquiry* is a key example of how pressure from campaign groups can influence a minister's decision when convening a public inquiry. The Government initially refused to convene an inquiry at all, then offered a narrow, private non-statutory inquiry.[102] When speaking of that first inquiry, Julie Bailey, of Cure the NHS,[103] stated "we do not know who provided the evidence. It was all given in secret... The non-statutory inquiry report… refers to witness A, witness B. We have no idea who gave that evidence. We know that something like 3% of the staff gave evidence" explaining:

> "What we wanted was for evidence to be given on oath and for that evidence to be given in public. Until then we felt that lessons would never be learnt in the NHS because we would never know what was going on."[104]

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[101] Professor Tomkins oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q29.
[102] *The Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005-March 2009.*
[103] A small and committed group of relatives, patients and community members <www.curethenhs.co.uk/> accessed 30 May 2020.
[104] Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q173 and Q153 respectively.

Ongoing campaigning for a statutory inquiry led by Cure the NHS, together with a change of government, ultimately led to a statutory inquiry, the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, being convened.

The *Independent Panel Inquiry into Child Sexual Abuse* (*IICSA*) arguably marks a turning point in the effect that public campaigning can have on the form and nature of a public inquiry. Intense and effective campaigning resulted in the conversion of the inquiry to a statutory inquiry (as well as changes to its chair and terms of reference, see chapters 5 and 6) and appears to have prompted a greater willingness for Government to consult with participants over the form of a public inquiry from that point onwards.

When announcing the establishment of the *IICSA* in 2014, the Home Secretary justified convening it as a non-statutory inquiry on the basis that

> "it can begin its work sooner and, because the basis of its early work will be a review of documentary evidence rather than interviews with witnesses who might themselves still be subject to criminal investigations, it will be less likely to prejudice those investigations."[105]

The statement added that the Panel would have access to Government papers, and would be free to call witnesses from organisations in the public and private sectors, and the wider public and, should the chair deem it necessary, the Government would convert it into a statutory public inquiry.[106]

Five months later, following representations from survivors and their legal representatives that they would not participate unless the Inquiry was convened under the 2005 Act, and following widespread media criticism,[107] the Home Secretary, announced in a statement before the Home Affairs Committee,[108] that the Inquiry would have the powers of a statutory inquiry. After further intense pressure, the Home

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[105] HC Deb 7 July 2014, vol 584, col 25.
[106] Position restated in HC Deb 3 November 2014, vol 587, col 543.
[107] See for example Jamie Doward and Daniel Boffey, 'Child abuse survivors tell Theresa May: inquiry must have full force of law' *The Guardian* (London, 1 November 2014) <www.theguardian.com/society/2014/nov/01/child-abuse-theresa-may-inquiry-fiona-woolf> accessed 30 May 2020; 'Victims call for full force of law in child abuse inquiry' *Channel 4 News* (London, 5 Dec 2014) <www.channel4.com/news/home-office-theresa-may-child-abuse-inquiry> accessed 30 May 2020.
[108] <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/the-work-of-the-home-secretary/oral/16895.html> 30 May 2020.

Secretary subsequently announced that the original Independent Inquiry Panel would be disbanded and a new 2005 Act Inquiry, the *Independent Inquiry into Child Sexual Abuse,* would be convened, because of the "robustness in law" of a statutory inquiry and its power to compel witnesses to give evidence.[109]

In 2007, the non-statutory *Independent Inquiry into Contaminated Blood and Blood Products* was convened, to investigate the circumstances surrounding the supply of contaminated NHS blood and blood products to patients. It had no powers of compulsion. Government Ministers were strongly criticised for refusing to give evidence, key documents were destroyed (see 4.3.2 above),[110] and the Government was accused of withholding documents that could be vital to the Inquiry.[111] In 2017, after years of campaigning by victims and their families, a new inquiry, the *Infected Blood Inquiry* was convened.[112] The new inquiry was initially announced as a non-statutory inquiry led by the Department of Health. Within days it ran into trouble when key campaigners boycotted the inquiry over concerns about independence, particularly as the Department of Health was itself under investigation (see also chapter 3). Victims and families were asked about the form of inquiry they sought and, after public consultation, with 800 responses, it was announced that the inquiry would be a statutory inquiry with the Cabinet Office as the sponsoring department.[113]

Relying on this form of public pressure as a process of accountability itself raises concerns. The failure to get the model right from the outset, and ministers being seen to backtrack on previous decisions, risks giving the appearance of mistakes having been made, thereby damaging confidence in the public inquiry process itself. A further concern is the way in which this can lead to inconsistencies between inquiries. Calls for a statutory inquiry in the cases of the *IICSA* and *Infected Blood Inquiry* caught widespread

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[109] HC Deb 4 February 2015, vol 592, cols 276- 277. Some of the issues discussed in this and the following paragraphs were also discussed in Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.

[110] Gavin Colthart, 'HIV and Hepatitis C infection from contaminated blood and blood products', House of Commons Library Research Paper (13 July 2011) SN/SC/5698.

[111] Sarah Bosely, 'Government withholding blood scandal evidence' *The Guardian* (London, 26 January 2009) <www.theguardian.com/society/2009/jan/26/government-scandal-haemophiliacs-blood> accessed 30 May 2020.

[112] https://www.infectedbloodinquiry.org.uk/

[113] 'Contaminated blood scandal to have full statutory inquiry' *BBC News* (London, 3 November 2017) <www.bbc.co.uk/news/health-41860182> accessed 30 May 2020.

national media attention, increasing the pressure on the minister. Concerns expressed by victims about the lack of powers of compulsion of the non-statutory *Paterson Inquiry*, announced in December 2017,[114] and the risk of it being "toothless",[115] did not to the same extent. The *Paterson Inquiry* remained a non-statutory inquiry.

Most members of the wider general public are unlikely to know if an inquiry is statutory or non-statutory, and are unlikely appreciate the significance of the difference between the two. Many might simply assume that, where a public inquiry has been set up to investigate serious issues of public concern, they will have been given the power to enable it to take evidence on oath and require documents to be produced, in a way they are familiar with in the court system. Limited public understanding of the implications of the decision reduces the potential for public scrutiny and the potential for wider public pressure to be brought to bear.[116] As a result, the onus for challenging such decisions falls more heavily on survivors, family members and support groups.

4.9.3. Request from chairs and coroners

Requests for a statutory inquiry have also come from chairs of non-statutory inquiries and coroners. There do not appear to be any examples of a request from a chair to convert a non-statutory inquiry to a statutory inquiry being refused.[117] The *Billy Wright Inquiry* was converted from an inquiry convened under the Prison Act (Northern Ireland) 1953, to broaden the scope of the inquiry and to equip the inquiry "with the maximum available powers"[118] (see 4.10.2). *The Hamill Inquiry* was

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[114] Inquiry into the circumstances and practices surrounding the former breast surgeon Ian Paterson, who was convicted in April 2017 of wounding with intent and unlawful wounding, announced HC Deb 7 December 2017, vol 632, col 61WS.

[115] Alexandra Topping, 'Inquiry announced into case of rogue surgeon Ian Paterson' *The Guardian* (London, 7 December 2017) < www.theguardian.com/society/2017/dec/07/inquiry-announced-into-case-of-rogue-surgeon-ian-paterson> accessed 30 May 2020.

[116] An independent study commissioned by the Centre for Effective Dispute Resolution (CEDR) found that of more than 2,000 Britons polled, 77% of respondents expressed little or no understanding of public Inquiries. CEDR 'It's time for reform of the UK Public Inquiries System, says CEDR' (*CEDR*, 28 May 2012) <https://pressreleases.responsesource.com/news/72171/it-s-time-for-reform-of-the-uk-public-inquiries-system/> accessed 30 May 2020. See also the discussion in Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.

[117] See Lord Woolf and Professor Tomkins oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q40.

[118] Lord Maclean, *The Billy Wright Inquiry – Report* (TSO, 14 September 2010) HC 431.

originally convened under the under the Police (Northern Ireland) Act 1998 Act and was converted to an inquiry under the 2005 Act following a request from the chair, seeking powers of compulsion to secure the participation of recalcitrant witnesses (see 4.3.1). In 2009, an ad hoc, non-statutory inquiry was convened into the suicide of Bernard Lodge in HMP Manchester. The inquiry was converted into a statutory inquiry in order to secure the evidence of a retired prison officer who had refused to cooperate with the original inquiry.

Sir John Chilcot, the chair of the *Iraq inquiry*,[119] notably took a very different approach towards statutory powers. When the non-statutory inquiry was convened, correspondence shows that the Prime Minister wanted evidence to be taken on oath and had asked Sir John to consider it carefully.[120] The HL Select Committee later stated it found it "extraordinary that the Prime Minister should have been advised to set up a non-statutory inquiry and at the same time to ask the chairman to devise a means for evidence to be given on oath."[121]

Chilcot chose not to do so. He reasoned that taking evidence on oath raised the risk of possible charges of perjury, which in turn would then require the granting of legal representation to witnesses. He feared this would lead to an escalation of the time and cost of the inquiry and he was keen to avoid the risk of a repetition of the situation faced by the *Bloody Sunday Inquiry*,[122] which lasted 12 years at a cost of £192 million.[123]

In evidence to the HL Select Committee, Chilcot justified the position not to take evidence on oath, by explaining:

> "nobody is on trial, and that remains the case. In practice, no witness approached by the Inquiry has refused to provide evidence. Although we are

[119] To identify lessons that could be learned from the Iraq conflict from the summer of 2001 to the end of July 2009, embracing the run-up to the conflict in Iraq, the military action and its aftermath.
[120] Correspondence between the Prime Minister, Gordon Brown, and Sir John Chilcot (17, 21, 22 June 2009) reproduced at HC Deb, 13 July 2009, vol 496, col 106W- 108W.
[121] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 114.
[122] See 'Iraq Inquiry: Full transcript of Sir John Chilcot's BBC interview' *BBC News* (London, 6 July 2017) <www.bbc.co.uk/news/uk-politics-40510539> accessed 30 May 2020.
[123] HC Deb 3 November 2010, vol 517, col 952. See below on the issue of the cost of statutory and non-statutory inquiries.

not able to administer a legally enforceable oath, as would be the case under the Inquires Act, we nevertheless invited witnesses to give an undertaking that the evidence they provided was truthful, fair and accurate, and to sign the transcript of their oral evidence on that basis. Witnesses were also reminded, immediately before they gave evidence, that the Inquiry would be checking their statements against the papers to which it has access from the time in question. Those procedures served, in my view, to emphasise the Committee's expectations and remind those giving evidence of the severe reputational damage they would suffer if their evidence was perceived to fall short of those expectations."[124]

More recently, requests have also been made by coroners seeking to convert an inquest into a public inquiry. (The HL Select Committee recommended that reasons should be given to Parliament for a decision not to convene a statutory inquiry following a request by a coroner. That recommendation was accepted by the Government).[125] The coroner for the Litvinenko inquest requested the inquest be converted to an inquiry under the 2005 Act on the basis he did not believe that a proper investigation could be conducted without consideration of material over which the Foreign Secretary claimed public interest immunity. That material was excluded from the inquest as there is no provision for closed hearings in an inquest. The request was initially refused by the Government, which prompted a judicial review challenge. Ultimately the statutory *Litvinenko inquiry* was convened (see chapter 3).

The inquest of Anthony Grainger, who was shot by a Greater Manchester police marksman, was converted to a statutory inquiry to enable secret material, which would not otherwise have been available, to be heard by the chair. [126] Inquests into the deaths of the victims of the 2017 Manchester Arena terror attack were converted

[124] Sir John Chilcot written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' 2.
[125] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 112, recommendation 3 para 112 and Government response Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 36.
[126] HC Deb 17 March 2016, vol 607, col 53WS.

to the statutory *Manchester Arena Inquiry* in response to a request by the coroner following public interest immunity applications being made by the Home Secretary and the counter-terrorism police, who stated "such an investigation cannot now be achieved through the inquests and must be done by establishing a statutory public inquiry".[127] The inquest into the death of Jermaine Baker during a Metropolitan Police Service operation in 2015 was converted to the statutory *Jermaine Baker Inquiry* "to ensure that all of the relevant evidence can be properly considered as part of an effective investigation".[128]

With the exception of the *Litvinenko Inquiry*, requests from a coroner for the conversion of an inquest to a statutory public inquiry, and requests from a chair to convert a non-statutory inquiry to a statutory inquiry, is one area where there has not been Government resistance to requests to grant statutory powers. Whether that represents a clear Government policy, or whether the decisions have each been made on a specific case-by-case, and subject-specific basis, has not been addressed by Government and is therefore unclear.

4.10. Legal influence

Finally, turning to legal influence over ministers' decisions whether to convene a statutory or non-statutory inquiry in respect of specific individual inquiries, as stated above, there is no legal right to a statutory as opposed to a non-statutory inquiry (4.8). The scope for legal challenge is limited, but judicial review challenges have been brought. The *Baha Mousa*, *Al Sweady* and *Litvinenko Inquiries* were all convened as statutory inquiries following successful judicial review challenges in respect of Articles 2 and 3 ECHR (see 3.6.6, 3.6.7 and 3.6.9).

[127] 'Manchester Arena attack: Coroner asks for bomb deaths public inquiry' *BBC News* (London, 30 September 2019) <www.bbc.co.uk/news/uk-england-manchester-49881247> accessed 30 May 2020.
[128] HC Deb 12 February 2020, vol 671, col 31WS.

4.10.1. Finucane- challenge seeking a full statutory inquiry

Not all challenges, however, have been in favour of a statutory rather than a non-statutory inquiry, because of concerns over the extent of ministerial powers, particularly shortly after the inquiries Act 2005 was introduced (see 2.4). A number of investigations short of a public inquiry had been carried out into the murder of Patrick Finucane, a Belfast solicitor,[129] either directly or indirectly as part of investigations into collusion between security services and paramilitary organisations before a statutory inquiry was announced in 2004. [130] The statutory inquiry would have been one of the first inquiries convened under the 2005 Act.[131] However, the Finucane family initially opposed an inquiry under the 2005 Act, arguing that the power of ministers under the Act could not guarantee a genuinely independent inquiry (see 3.5.2).[132]

The family subsequently changed its position, having seen the 2005 Act in practice, including having seen the approach to disclosure of sensitive information during the *Baha Mousa Inquiry*, which introduced protocols to establish its independence and transparency (see 7.9.2). [133] The General Election in May 2010 led to a change in Government[134] followed by a change in approach to public inquires, with the Prime Minister,[135] on the day the *Bloody Sunday Inquiry Report* was published (an inquiry that cost £192 million), assuring the House of Commons that "there will be no more open-ended and costly inquiries into the past."[136] Accepting there had been collusion and that

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[129] Murdered by paramilitaries with collusion by the state (see chapter 3).
[130] *The Stephens investigations*: one (1990), two (1992) and three (1999), the *Langdon Report* (1999) and the *Cory Inquiry* (2002) the *De Silva Review* (2011). HC 802 2012-13. Details summarised in *Finucane (Geraldine) v The Secretary of State for Northern Ireland* 2017 NICA 7.
[131] http://news.bbc.co.uk/1/hi/northern_ireland/3684302.stm - Northern Ireland Secretary announcing the statutory inquiry.
[132] The family was not alone in its views at that time. In June 2008, Amnesty International submitted a UK briefing to Human Rights Committee expressing concern over the significant and wide-ranging powers of a minister convening an inquiry to impose restrictions such as "setting and amending the terms of reference for the inquiry; appointing the chair and, in consultation with the chair, the members of the inquiry panel; to bring the inquiry to an end at any point; to impose restrictions on public access to the inquiry hearings, and public disclosure of the evidence considered in the inquiry; and to withhold any material from the final published report of the inquiry." It called for the UK Government to honour its repeated public commitments to instigate a genuinely independent and effective inquiry into the death Patrick Finucane.
<www2.ohchr.org/english/bodies/hrc/docs/ngos/AI_UK93.pdf> accessed 30 May 2020.
[133] See the discussion in 'Full statement on Finucane inquiry' *BBC News* (London, 23 September 2004) <www.bbc.co.uk/news/uk-northern-ireland-20705511> accessed 30 May 2020.
[134] The conservative-Liberal coalition.
[135] David Cameron.
[136] HC Deb 15 June 2010, vol 511, col 742.

the public needed to know the nature of that collusion,[137] the Government ultimately decided to hold a time-limited, paper-based non-statutory independent review into the question of State involvement in the murder, rather than the statutory public inquiry that had been promised. The review produced its report at the end of 2012.[138]

Judicial review proceedings challenging that decision, and seeking a full statutory public inquiry were unsuccessful. During the subsequent appeal to the Court of Appeal,[139] the deceased's widow argued unsuccessfully, inter *alia,* that the Government's assurance to hold a public inquiry gave rise to a substantive legitimate expectation. The Court of Appeal held that the Government made a promise to hold a public inquiry "not only to the appellant but also to the Government of the Republic of Ireland, the political parties of the Weston Park Conference[140] and to the general public of both Northern Ireland and the Republic of Ireland as an integral part of the peace process" that was clear and unambiguous and devoid of relevant condition.[141] However, it held that the Government could depart from that promise where it had identified any overriding public interest to justify the frustration of the expectation and had satisfied the requirements of fairness. The Court of Appeal found the Government had done so; the length and cost of a public inquiry being significant considerations. [142]

The Supreme Court subsequently made a declaration that there had not been an Article 2 ECHR compliant inquiry into the death of Patrick Finucane. However, it found that:

> "It does not follow that a public inquiry of the type which the appellant seeks must be ordered. It is for the state to decide, in light of the incapacity of Sir Desmond de Silva's review and the inquiries which preceded it to meet the procedural requirement of art 2, what form of investigation, if indeed any is now feasible, is required in order to meet that requirement." [143]

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[137] HC Deb 12 Oct 2011, vol 533, col 336.
[138] The Rt Hon Sir Desmond de Silva QC*; The Report of the Patrick Finucane Review* 12 December 2012 HC 802-I.
[139] *Finucane (Geraldine) v The Secretary of State for Northern Ireland* 2017 NICA 7.
[140] Political talks aimed at saving the peace process and the Good Friday Agreement held during the summer of 2001.
[141] "Subject only to the qualification that it required to be recommended by Judge Cory", and it was so recommended *Finucane (Geraldine) v The Secretary of State for Northern Ireland* 2017 NICA 7 [76-80].
[142] Ibid [87-108.]
[143] *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7 [153].

No new Article 2-compliant inquiry has yet been convened.

4.10.2. Billy Wright – challenge seeking to convert to a 2005 Act Inquiry

Concern over the powers of the minister and the independence of the inquiry also led to a challenge to the decision to convert the *Billy Wright Inquiry* to a 2005 Act inquiry. Following the murder of Billy Wright[144] at HMP Maze in Northern Ireland by members of the Irish National Liberation Army, a non-statutory public inquiry was convened under the Prison (Northern Ireland) Act 1953, to inquire into the death, to determine any involvement of state agencies and to make recommendations. As the inquiry commenced, the panel became concerned that its powers under the Prison Act were limited and that the list of issues required examination of matters that went beyond the provisions of the Prison Act.[145] In its report it added:

> "Furthermore, it became apparent… that some of the material the Inquiry would have to examine was likely to be of an extremely sensitive nature in that it involved intelligence and the operation of intelligence systems across a number of agencies… the Panel were concerned that they should be equipped with the maximum available powers appropriate to their work"[146]

The panel requested that the inquiry be converted to a 2005 Act Inquiry. This was challenged by Billy Wright's father, who argued, *inter alia*, that section 14 of the 2005 Act (which permits the minister to bring an inquiry to an end) compromises the independence of a statutory inquiry. The Administrative Court ruled in favour of the applicant, but the Court of Appeal concluded that the independence of the inquiry could not be said to have been compromised by section 14 of the 2005 Act and this was not a consideration that the Secretary of State was required to take into account.[147]

Both the Finucane family's initial objections to a statutory inquiry and the *Wright* case were brought relatively soon after the introduction of the 2005 Act, when there was particular concern about the new powers of the minister and potential interference by the minister compromising the independence of public inquiries (2.4). More recent cases

[144] A loyalist paramilitary and the leader the Loyalist Volunteer Force.
[145] To inquire into the conduct, not only of the prison authorities, but also of other State agencies which did not normally have any jurisdiction in respect of prison matters.
[146] Lord Maclean, *The Billy Wright Inquiry – Report* (TSO, 14 September 2010) HC 431 1.40.
[147] *Re Wright's Application for Judicial Review [2007] NICA 24.*

have focused on compliance with Article2 and 3 ECHR and applicants seeking to challenge decision not to convene a statutory inquiry, with some challenges successfully resulting in a statutory inquiry being convened (see 3.6.6, 3.6.7 and 3.6.9).

4.11. Conclusion

This chapter examined the minister's decision whether to convene a statutory or a non-statutory inquiry and attempts to influence the decision-making process at the level of public inquiry process as a whole and at the level of a specific individual inquiry. It looked at the concerns that those challenges were seeking to address and the response from the Government and the courts.

Although public inquiries form part of the political rather than the legal process, the Inquiries Act 2005 confers powers, enforceable in the High Court, that enable statutory inquiries to wield considerably greater power than non-statutory inquiries, providing additional tools to deliver a rigorous and thorough investigation. This, combined with the presumption that a statutory inquiry will be held in public, enables statutory inquiries to address public concern in a way that non-statutory inquiries cannot.

There is evidence that statutory powers of compulsion make a significant difference to the effectiveness of an inquiry, even when those powers are not exercised, and that the public and inquiry participants have greater confidence in public inquiries where there is a presumption that an inquiry will be held in public. Nevertheless, successive governments have resisted attempts to temper the minister's and Government's discretion to choose to convene an inquiry outside the legislation, under the prerogative powers of the executive.

The key concern identified was about the motivation behind decisions to convene a non-statutory inquiry where the actions of the minister's own department, or the Government itself, are under scrutiny and over alleged attempts to hide the truth or avoid political embarrassment, thereby undermining public confidence in a public inquiry and undermining its ability to address public concern. It is generally agreed that there are circumstances in which sensitive or secret evidence needs to be heard in private, but there is concern that non-statutory inquiries have been overused in such circumstances.

Concern has also been expressed about the lack openness, transparency and consistency to the decision-making process.

Such concerns led to attempts by the PASC and HL Select Committee to bring about changes to the decision-making process at the level of public inquiry process as a whole, which have been largely ineffective. The HL Select Committee recommendation that public inquiries should normally be convened under the 2005 Act was rejected by the Government. The recommendation that reasons be given to Parliament for a decision to convene a non-statutory inquiry, to increase transparency and parliamentary scrutiny, was largely rejected. So too was the recommendation for changes to the warning letter procedure under the Inquiry Rules 2006, which sought to address the damning criticism of the process in practice expressed by chairs, counsel and solicitors to public inquiries, as well as the Government's own concerns regarding the length and cost of statutory inquiries, which had been an apparent deterrent to the convening of statutory inquiries (although it is possible that this recommendation will be revisited).[148] The Government has been accused of failing to properly engage with the HL Select Committee post-legislative scrutiny of the 2005 Act and its report and failing to take on board the evidence of the experienced practitioners who gave evidence.

At the time the HL Select Committee Report was published in March 2014, no inquiry had been set up under the Act since the *Leveson Inquiry* in July 2011, despite the fact the Act had the support of all the main parties when it was passed in 2005, whilst five non-statutory inquiries were convened within that same period. [149] The Government's rejection of the HL Select Committee's recommendations was explicit and there has been no statement or direct indication from the Government that that position has changed.

As this analysis showed, notably, of the 12 inquiries convened since the publication of the HL Select Committee Report 10 were either convened as, or have been converted into, statutory inquiries (four of those inquiries were converted from an inquest, one following a judicial review challenge, and two were converted from an inquest following pressure and threats of a boycott from participants). Only two of the 12 public inquiries convened since the HL Select Committee report was published have been non-statutory (see table

[148] HL Deb 19 March 2015, vol 760, col 1176.

[149] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 292.

3).[150] In the absence of any express statement from the Government on this point, the reason for the apparent change in approach is unclear

When looking at specific individual inquiries, requests from chairs of non-statutory inquiries have resulted in the conversion of non-statutory inquiries to statutory inquiries (and in one instance, the resistance of statutory powers being adopted during a non-statutory inquiry).[151] Political pressure and legal challenges in some instances have resulted in a reversal of decisions to convene non-statutory inquiries. Numbers are small but, as referred to above, the relative prominence of public inquiries convened as statutory inquiries from the outset appears currently to be increasing. It may be that successful campaigning for a statutory inquiry in the past, such as in the case of the *IICSA*, has created a greater expectation of a statutory inquiry and has increased motivation for subsequent campaign groups to press for a statutory inquiry. It might also be that successful challenges have increased the perceived likelihood of a minister being subjected to severe public and political criticism for not convening a statutory inquiry, which might be influencing the minister's decision. Whatever the reason, it appears that political and legal pressure exerted in respect of individual inquiries may have achieved a change of approach to the ministers' decision-making process in a way that the formal political process of select committee scrutiny could not.

However, that stance raises its own question: is it appropriate that the onus should fall on campaign groups and individuals to influence the outcome of decisions? Public understanding of the difference between a statutory and non-statutory inquiry is generally not high. Calls for a statutory rather than a non-statutory inquiry therefore originate from campaign groups, victims, survivors and their families. Where the onus falls on these groups and individuals to influence decisions by bringing legal challenges, the outcome will depend on their time, resources and ability to pursue such challenges. Where decisions are influenced by political pressure brought to bear by these groups and individuals, the outcome is also likely to be influenced by the extent to which a campaign captures media attention.

[150] *The Litvinenko Inquiry, the IICSA and Infected Blood Inquiries, the Anthony Grainger Inquiry, the Undercover Policing, Renewable Heat Incentive, Grenfell Tower Inquiries.*
[151] The *Iraq Inquiry.*

Relying on pressure from campaign groups and individuals produces outcomes that are arbitrary and lack consistency. Further, public inquiries are a key component of the administrative justice system. An interesting question arises about the appropriateness of a public inquiry process that might be influenced most significantly, not by Parliament and parliamentary committees, nor the wider electorate, but by the actions of the participants themselves. In some instances, inquiry participants are not only participating in a public inquiry process by contributing to its findings and recommendations, but are also, for example by threats of boycotts, influencing the form and nature of the very process itself (see 8.7).

Chapter Five - The Chair and Panel

5.1. Introduction

Once a decision has been taken to hold a public inquiry, and on whether that inquiry is to be statutory or non-statutory, examined in chapters 3 and 4, the next important decision is determining the identity of the chair. The choice of chair is core to the success of a public inquiry. The public often identifies the inquiry with the chair; some inquiries have become known by the name of the chair, for example the *Leveson* and *Chilcot Inquiries*[1] Public confidence in a chair is likely to build confidence in the inquiry process and its recommendations.

An Inquiry may be conducted by a chair sitting alone or with one or more additional panel members, appointed by the minister who convened the public inquiry. Many inquiries are chaired by a judge,[2] retired judge, or senior member of the legal profession,[3] appointed for their stature, reputation and skills in analysing large quantities of evidence.[4] Others are chaired by senior civil servants[5] or others outside the legal professions, chosen for their standing and expertise in the subject matter of the inquiry.[6]

When conducting the inquiry, the chair acts independently; independently from the minister who appointed them, from the Government, Parliament and from participants. That independence is subject only to the right of a person affected by a decision of the chair to challenge that decision in the courts.[7] In order to maintain that independence,

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[1] The *Inquiry into the Culture, Practices and Ethics of the Press* and the *Iraq Inquiry* respectively.
[2] Which requires consultation with the Lord Chief Justice Inquiries Act 2005 (the 2005 Act), s 10(1). (This is due to be changed to requiring consent rather than consultation, see Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 40.
[3] Such as the *Bloody Sunday*, *Hamill*, *Al Sweady*, *Azelle Rodney* and *Leveson Inquiries.*
[4] See House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 127.
[5] For example the *Butler* and *Chilcot* Inquiries.
[6] For example the *Foot and Mouth* and *Climbié Inquiries.*
[7] *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 (*'Saville 1).* See also oral evidence of Sir Brian Leveson to the House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence (2013) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 28 May 2020 Q81.

the chair has a very broad discretion to conduct the inquiry as he or she thinks fit.[8] The chair sets the tone and direction of an inquiry, has a broad discretion to determine the inquiry's procedure,[9] oversees the conduct of the inquiry, is responsible for discharging the inquiry's terms of reference and, at the end of the inquiry, delivering the inquiry report to the minister.

Concern has been expressed about the lack of transparency and independence of the appointment process and the haste in which the appointment of the chair is made (see 5.2.1 and 5.3). There has been much debate, in both political circles, and between politicians and very senior members of the legal profession, concerning the appointment of members of the judiciary as a chair and the impact both on public inquiries and the perceptions of independence of the judiciary. Issues of impartiality and diversity are central to challenges to the appointment of chairs and panel members in individual cases.

This chapter examines the appointment of the chair and any panel members to an inquiry, their role, and the appointment process. Looking firstly at influence over the public inquiry process as a whole, it analyses influence over decisions to appoint judges or retired judges as chairs to an inquiry and arguments proffered for and against the appointment of panel members, assessors and expert witnesses. It considers conflicting views on the merits of a chair sitting alone as opposed to an inquiry panel and analyses attempts to restrict the minister's power to terminate the appointment of panel members, assessors and the chair. Looking secondly at influence over individual inquiries, this chapter examines political and legal challenges seeking to influence the identity of the chair, the appointment of a panel and challenge decisions on the membership and diversity of panels.

Influence over the Public Inquiry Process as a Whole

5.2. Appointment of the Chair

The chair is appointed by the minister convening the public inquiry. When the draft Inquiries Bill was being considered, the Government gave reasons for why it believed the

[8] Subject to monitoring and oversight of progressions and a duty to avoid any unnecessary costs, see National Audit Office, Investigation into government-funded inquiries (23 May 2018) HC 836 para 3.11.
[9] Subject to a small number of provisions of the 2005 Act for statutory inquiries: 2005 Act, ss 17, 18 and 21.

minister was best placed to do so. It rejected the suggestion that the function could be delegated to an alternative non-government body on the basis that very few would have a sufficiently wide remit to appoint, or ratify, the appointment of judicial and non-judicial chairs in the wide range of possible subject areas of a public inquiry. Any that did exist in a subject area, the Government argued, were likely to have a significant interest in the outcome of an inquiry in that area. It also rejected the suggestion that the function should fall to Parliament, as that would introduce political and partisan elements into the inquiry process, which the draft Bill was designed to avoid.[10] However, as discussed below, appointment by the minister convening the inquiry, who is usually the minister of the department to which the subject matter of the inquiry is most relevant and most closely associated, brings its own concerns about independence.

For statutory inquiries, the 2005 Act expressly mandates only two factors that a minister must take into account when appointing the chair: suitability and impartiality.[11] For non-statutory inquiries, there are no express requirements. The chair's impartiality, suitability and independence must be beyond doubt in order to command the trust of participants and the public in the chair, the inquiry proceedings, its findings and recommendations and also to encourage participation in the inquiry (see further discussion below).

There is a difficult balance to be struck when appointing a chair, between identifying an individual with sufficient knowledge, expertise and interest in the subject matter of the inquiry, and that individual being so close to the subject matter as to give rise to a conflict of interest.[12] Further, concerns are frequently raised about the potential conflict of interest created by the minister appointing the chair, which can lead to perceptions that the minister will appoint individuals who are unduly sympathetic to the executive.[13]

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[10] Department for Constitutional Affairs, 'Effective Inquiries: A consultation paper produced by the Department for Constitutional Affairs' (2004) CP12/04 para 28-31. This consultation paper sets out the Government's response to the "Issues and Questions Paper" published by the 2005 PASC as part "Government by Inquiry", in addition to the Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005).

[11] 2005 Act, ss 8 and 9 respectively.

[12] See Sarah Garner, Peter Jones and Isabelle Mitchell, 'Public Inquiries: Appointments' (*Insight,* 18 June 2013) <Westlaw> accessed 30 May 2019.

[13] See, for example, Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 8.

5.2.1. Lack of criteria, independence and transparency to the appointment process

When decisions are made on the appointment of the chair and any panel members to an inquiry, neither the details of the decision-making process nor any criteria applied in any given case are in the public domain and there is no transparency to the decision-making process (as was also seen in chapters 3 and 4 for decisions on the convening of an inquiry and whether it will be statutory or non-statutory). Draft Cabinet Office Guidance,[14] which is non-binding, states only that, when making an appointment:

> 'the Minister may seek advice from professional, regulatory or other bodies in the appropriate field… the department should not approach any individual until the Minister has been consulted… The Lord Chancellor and Secretary of State should be consulted where there is a proposal to appoint a judge or legal officer.'[15]

In contrast, for example, to judicial appointments, there is no application process and no independent assessment of the merits of any potential chair. Subject to the requirement for the chair and any panel members, considered as a whole, to have the necessary expertise,[16] there is no minimum qualification required, no training and no independent element to the selection process.[17]

Lord Solely, a member of the HL Select Committee described the selection process as "a slightly mythical smoke and mirrors activity"[18] when seeking details of the selection process from the Parliamentary Under-Secretary of State giving evidence on behalf of the Ministry of Justice, who added little detail to that given in the draft Cabinet Guidance, beyond the fact that, in politically contentious matters, the Prime Minister would also be consulted.[19]

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[14] Cabinet Office, 'Draft Inquiries Guidance: Guidance for Inquiry Chairs, Secretaries and Sponsor Departments' (undated) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf> accessed 29 May 2020.

[15] With reference to the Cabinet Office, 'Ministerial Code' (August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf> accessed 29 May 2020 para 4.11.

[16] 2005 Act, s 8 for statutory inquiries.

[17] Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 25.

[18] Lord Solely, the HL Select Committee, 'Written and Corrected Oral Evidence' Q332.

[19] Shailesh Vara MP oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q332.

The involvement of government ministers in the decision lies in sharp contrast to the process for the appointment of members of the judiciary where the Judicial Appointments Commission (JAC), an independent public body, is responsible for selecting candidates to recommend for judicial appointment.[20] The JAC includes lay members, who provide an independent voice and ensure a public input into the appointment, distancing the process from political influence. The Lord Chancellor's role in the appointment of individual members of the judiciary is deliberately limited, to avoid the risk of "politicising the appointments process" and "undermining the independence of the judiciary."[21]

The lack of independence to the current process, coupled with its lack of transparency, makes it vulnerable to allegations of politically motivated appointments and raises concern that those appointed lack sufficient independence from the executive and political establishment.[22] Although concern over the lack of independence of the appointment process was raised in the evidence before the HL Select Committee,[23] it did not form the subject of a recommendation and so was not addressed in the Government response.

5.3. Timing

A further concern that has been raised is that, despite the choice of chair being core to the success of an inquiry, the appointment process and announcement of the chair has

[20] The following explanation of the judicial appointment process is based on the explanation in Emma Ireton, '*The ministerial power to set up a public inquiry: issues of transparency and accountability*' (2016) 67(2) NILQ 209.
[21] See Select Committee on the Constitution*, Judicial appointments* (TSO, 2012) HL 272 paras 26 and 139.
[22] See discussion on this point in Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209.
[23] See Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q205; Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 7; and Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 8.
[23] Cabinet Office, 'Draft Inquiries Guidance: Guidance for Inquiry Chairs, Secretaries and Sponsor Departments' (undated) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf> accessed 29 May 2020 Lord Solely, the HL Select Committee, 'Written and Corrected Oral Evidence' Q332.

often been carried out in alarming haste.[24] There is often strong public and political pressure to announce an inquiry and its terms of reference very quickly, for example from participants and the media, keen to know the identity of the chair and to avoid any further delay to the commencement of an inquiry. Further, for statutory inquiries, when a minister convenes a public inquiry, he or she must make a statement to Parliament to that effect, 'as soon as is reasonably practicable.'[25] That statement must also specify who has been appointed as chair and whether the minister has, or proposes to appoint, any other members to the panel.[26]

Mounting public pressure to announce the establishment of a public inquiry and, in the case of statutory inquiries, the fact that both statements must be made at the same time, means the selection process has often taken place over a very short period of time with very little time for deliberations. This leaves an astonishingly short amount of time for discussions with the proposed chair in advance of the announcement. Sir Robert Francis, the chair of the *Mid Staffordshire NHS Foundation Trust* Public *Inquiry*, in his evidence to the HL Select Committee, stated that he was phoned up without warning and asked to decide within an hour whether to accept the appointment 'because the Minister was in a hurry to make an announcement'.[27] Sir John Chilcot had 10 minutes in which to accept the invitation to chair the Inquiry into the Iraq conflict.[28]

The HL Select Committee Report, recognising the importance the choice of chair, noted that it is not something to be done in haste, stating:

> 'We are not saying that ministerial haste has ever resulted in the appointment of a chairman whose appointment might subsequently have been regretted, but there is much to be said for a process which is less hurried and more

[24] Some of the issues in this and the following paragraphs are also discussed in Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209.
[25] 2005 Act, s 6(1).
[26] Ibid, s 6(2) and the statement must also announce the inquiry's terms of reference (see chapter 6 of this thesis).
[27] Robert Francis QC oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q205.
[28] Foreign Affairs Select Committee, 'Oral evidence taken before the Foreign Affairs Select Committee' (4 February 2015) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html> accessed 31 May 2020Oral evidence taken before the Foreign Affairs Select Committee (4 February 2015).

transparent…We believe the fact of the inquiry and the name of the chairman should not necessarily be the subject of the same statement, and we recommend that section 6(2) should be amended accordingly.'[29]

This recommendation was accepted by the Government.[30] Since then, although the legislation has yet to be amended, there have been examples of the announcement of the chair being made after the announcement of the inquiry.[31] In the recent case of the *Infected Blood Inquiry*,[32] delay in the announcement of the chair was, in fact, greeted with dismay by campaigners who had been waiting many years for a public inquiry. [33] This demonstrates how there will continue to be a tension between allowing sufficient time for deliberations and a thorough appointment process on the one hand and political pressure to announce the chair of an inquiry quickly on the other.

5.4. Appointment of a judge or retired judge

Over the years, judges or retired judges have been a frequent choice to chair public inquiries.[34] Often, when there is a call for a public inquiry it is a call for a 'judicial inquiry', because of the attraction of judges' clear independence from the executive, though without those making the call necessarily understanding all the potential implications.[35] There are arguments both for and against the appointment of a judge as the chair to an inquiry, based on both practical and constitutional considerations.

In its report 'How Public Inquiries Can Lead to Change', in addition to political independence, the Institute for Government summarised the commonly cited strengths of a judge as an inquiry chair as including: "experience of running hearings, the ability to

[29] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 114.
[30] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 39.
[31] The chair of the *Renewable Heat Incentive Inquiry* was announced five days later, the chair of the *Grenfell Tower Inquiry* two weeks later and the chair of the *Infected Blood Inquiry* three months after the announcement of the statutory inquiry.
[32] Inquiry investigating how patients were given infected blood or blood products. https://www.infectedbloodinquiry.org.uk/ investigating how patients were given infected blood or blood products.
[33] HC Deb 3 November 2017, vol 630, col 35WS.
[34] 43% of inquiries since the introduction of the2005 Act, see 5.4.5.
[35] Judith Bernstein and Richard Mason oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q295.

analyse information and uncover facts, the benefit of legal experience in instances when an inquiry is running concurrently with criminal proceedings and an understanding of legal and procedural complexity."[36] Two main disadvantages were identified. The first was that it would be inappropriate for a judge to be involved in any follow up on an inquiry's recommendations or implementation, which is a political matter; a judge's involvement will end at the point the report is delivered to the minister and published. The second disadvantage identified was that commonly a judge lacks specialist knowledge and expertise in the subject matter of the inquiry and in policy making.[37]

One of the questions included in the call for evidence of the HL Select Committee was "Is the degree of involvement of the judiciary in inquiries appropriate?"[38] This was addressed in the evidence of many of the witnesses. The following sections examine the five areas, identified from the analysis of the data, where changes have been sought regarding the decision whether or not to appoint a member of the judiciary as the chair of an inquiry.

5.4.1. Arguments for and against the appointment of a judge - independence and skills

Many witnesses put forward arguments in favour of appointing a judge or a retired judge as chair of an inquiry, based on practical considerations. In evidence to the HL Select Committee, Robert Francis QC stated "there will always be inquiries where the demand for unimpeachable authority, independence and integrity is such that only a judicial appointment is appropriate",[39] adding that that would probably also be the case for those inquiries that involve very contested facts.[40] Sir Brian Leveson noted that judges are "absolutely independent and publicly recognised as independent" and also offer

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[36] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) 16 <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020 citing Department for Constitutional Affairs 'Memorandum by the Department for Constitutional Affairs', (2004) HC 606-ii https://publications.parliament.uk/pa/cm200304/cmselect/cmpubadm/606/4052502.htm accessed 31 May 2020.

[37] Ibid 17-18.

[38] See appendix 1 of the thesis.

[39] Chair of the Mid Staffordshire NHS Foundation Trust Public Inquiry. Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 23.

[40] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q203.

additional qualities, which are very valuable in what has become a quasi-judicial forum, including:

> "…experience of fact finding about past events … [judges] are very used to listening to witnesses speak about past events and making up their mind about what happened … they have the ability to deal with legal and procedural complexity … they are very used to running trials, running hearings, and avoiding unnecessary diversions and keeping focus … they are very used to analysing large amounts of data and making recommendations"[41]

However, some very successful inquiries have been chaired by non-lawyers, chosen for their standing and expertise in the subject matter of the inquiry or in the operation of public sector bodies, or where the subject matter of the inquiry is of a highly politically sensitive nature.[42] Examples of post-2005 inquiries chaired by non-lawyers include: the *E coli Inquiry* chaired by a Professor of Bacteriology; the *C difficile Inquiry* chaired by the Former Chief Medical Officer for Wales, and the *Bernard (Sonny) Lodge Inquiry* chaired by the Former Assistant Prisons and Probation Ombudsman (see Appendix 3). Sir John Chilcot, a retired civil servant and chair of the *Iraq Inquiry*, specifically stated "I have not… felt at any point the absence of judicial leadership has been a disadvantage for the Inquiry."[43]

A few witnesses stated that appointing a judge or retired judge "may tend to judicialise a process that is not a judicial process."[44] Concern about the dangers of legalism in public inquiries more broadly has also been raised in academic literature.[45] Further, the terms

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[41] Sir Brian Leveson oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q81 as summarised in HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 117. See also Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 41-42. In the case of the *Leveson Inquiry*, allegations of criminal behaviour provided legal complexity and the need to avoid prejudicing any future criminal investigation or prosecution. Sir Brian Leveson concluded a judge with experience of criminal law was therefore best placed to chair the inquiry.

[42] Lord Woolf cited in Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 187.

[43] Sir John Chilcot written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' 2.

[44] Sir Stephen Sedley oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q43. See also Professor Sir Ian Kennedy Q203.

[45] Nigel Parton and Norma Martin, 'Public inquiries, legalism and child care in England and Wales' (1989) 3(1) International Journal of Law, Policy and the Family 21, although these concerns are often raised more specifically in the context of arguments relating to inquisitorial rather than adversarial proceedings.

of reference of many inquiries include the making of recommendations. Judges are not necessarily familiar with, for example, the workings of public sector bodies which may be central to the subject matter of an inquiry and, as Robert Francis pointed out, a judge or retired judge is not necessarily best placed to make policy recommendations.[46]

There are a few examples of inquiries where chairs who are not members of the judiciary have been involved in the review or implementation of the inquiry's recommendations.[47] Witnesses were divided on whether the role of an inquiry chair should extend to implementation of its recommendations. However, those who gave evidence on the issue all agreed that once a chair who is a member of the judiciary has delivered the inquiry report to the minister, they would not wish to be, and indeed should not be, involved in any follow up or implementation, as that would risk politicising their role.[48]

The HL Select Committee Report acknowledged that there were often significant advantages to the appointment of a serving or retired judge chairing an inquiry, but concluded that ministers in the past have been too ready to assume that a serving judge would be the most suitable chair (see also 5.4.2 below).[49]

However, when looking at the data, it is notable that the number of serving judges appointed has, in fact, been low. (Since the introduction of the 2005 Act, 4 out of 30 inquiries, see 5.4.5 and Appendix 3). As is discussed in more detail at 5.4 below, the combined proportion of serving and retired judges appointed to chair an inquiry, as opposed to QCs and non-lawyers, has in fact decreased over time. The Government made no express response to the HL Select Committee Report on this point that would indicate a change in approach or view on the advantages and disadvantages of appointing a judge, whether serving or retired, nor has there been any statement made since. It is possible that the apparent change may simply reflect the subject matter of the inquiries that have been convened during this period, which have made the choice of a non-lawyer the most appropriate for the inquiry.

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[46] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q205.

[47] For example Lord Bichard and the *Bichard Inquiry* into child protection procedures in Humberside Police and Cambridgeshire Constabulary following the murder of Jessica Chapman and Holly Wells.

[48] Lord Gill oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q200. See also Lord Cullen of Whitekirk Q200 and Sir Brian Leveson Q21. See also Lord Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.

[49] HL Select Committee Report*, The Inquiries Act 2005: post-legislative scrutiny* para 121.

5.4.2. Risks to the perceived independence and impartiality of the judiciary

Concern was expressed by many witnesses that appointing a judge as a chair to an inquiry risked undermining the perception of their independence. Very senior members of the judiciary,[50] including the then Lord Chief Justice,[51] made particularly strong representations to the HL Select Committee regarding constitutional issues arising from the appointment of members of the judiciary.

Lord Justice Beatson gave detailed written evidence to the HL Select Committee, based on an article published in 2005 and updated evidence given previously to the 2005 House of Commons Public Administration Select Committee *Government by Inquiry* (PASC).[52] Beatson LJ presented a number of reasons why the perceived impartiality of a judge, and potentially the reputation of the judiciary itself, may become compromised if judges chair inquiries with a political element:

> "(i) the appointment of a judge does not depoliticise an inherently political issue;
>
> (ii) (a) those disagreeing with a report which is non-binding, unenforceable and not subject to appeal will have a strong incentive to seek to discredit its findings by criticising the judge;
>
> (ii) (b) those disagreeing with limitations in a report that result from its terms of reference and the practice of not making findings as to civil or criminal responsibility will also have some incentive to seek to discredit it by criticising the judge;
>
> (iii) Risks to independence from the fact that it is the government which sets up an inquiry, determines its terms of reference, and chooses the person or persons to conduct it;

[50] Lord Justice Beatson, a Lord Justice of Appeal; Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales; Sir Brian Leveson, President of the Queen's Bench Division; Lord Cullen of Whitekirk, a former Lord President of the Court of Session and Lord Gill the current Lord President of the Court of Session.

[51] Lord Thomas of Cwmgiedd.

[52] Jack Beatson, 'Should Judges Chair Public Inquiries?' (2005) 121 LQR 221 based on his 2004 Lionel Cohen Lecture 'Should Judges Conduct Public Inquiries?'

(iv) Risks of perceived partiality because of the discretion as to the procedure to be adopted by an inquiry;

(v) Risks arising from increasing recourse to judicial review during an inquiry."[53]

In a later article, Elliot too urges caution about relying on judges to lead public inquiries referring to Beatson LJ's reasoning and also noting that, in order to make findings, the chair will need to apply criteria which may be political as well as legal in nature. Elliot argues that the attraction of appointing judges included the conferring of "borrowed authority" from the judiciary, which was a symptom of "underlying constitutional deficiencies that make judicial inquiries so attractive in the first place", ie the weakening of ministerial accountability that has occurred over time (see 8.6).[54]

The Constitutional Reform Act 2005 came into force two weeks before the Inquiries Act 2005 and enshrined the independence of the judiciary in statute. The greater formal separation of powers made the appointment of a serving judge as a chair to an inquiry with a political element even more anomalous.[55]

As explained above, the HL Select Committee concluded that "The dangers of involving a serving judge in matters of political controversy are all too apparent", but concluded that ministers have in the past been too ready to assume that a serving judge would be the most suitable chair.[56] The Government did not directly address this point in its response to the Report. However, in practice, of the 12 inquiries convened since the HL Select Committee Report, there have been only been two serving judges appointed as a chair to an inquiry, the first chair of the *Undercover Policing Inquiry*[57] and the second the chair of

[53] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 17. On this latter point, the concern was that a challenge based on bias, procedural unfairness or irrationality may be seen as damaging the perception that the judge conducting an inquiry so challenged is impartial or that the process is fair.

[54] Mark Elliot M, "Should judges lead public inquiries?" (*Public Law for Everyone*, 10 July 2014) <https://publiclawforeveryone.com/2014/07/10/should-judges-lead-public-inquiries/> accessed 31 May 2020 see also Mark Elliott, 'Ombudsmen, tribunals, inquiries: re-fashioning accountability beyond the courts' in Bamforth N and Leyland P (eds), *Accountability in the Contemporary Constitution* (OUP 2013).

[55] See Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 7.

[56] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 121.

[57] Sir Christopher Pitchford, who subsequently resigned due to ill-health.

the *Anthony Grainger Inquiry,*[58] who was already the coroner of the inquest before it was converted to a 2005 Act inquiry (see 5.4.5).

5.4.3. Exposure of members of the judiciary to criticism

Where the subject matter of an inquiry is controversial, the inquiry's findings and report may well attract criticism from the media and Parliament. During a House of Lords debate in 1996, prior to the constitutional reforms which disqualified Law Lords from sitting and voting in the House of Lords,[59] Lord Woolf, then Master of the Rolls, made observations about the consequence of judges accepting invitations from government to conduct inquiries on the government's behalf and urged those in the executive and the legislature who might wish to criticise the judge to exercise restraint.[60] Lord Irvine, during the same debate, noted:

> "The separation of powers represents a delicate balance. Its success requires continued public confidence in the political impartiality of the judiciary... To attack their reports for party political reasons is to undermine the very purpose of entrusting these inquiries to senior judges."[61]

Beatson LJ warned that, since then, appropriate restraint had been exercised less frequently. He noted that Sir Brian Leveson had been exposed to questioning from Parliament[62] and "unrestrained criticism from many, in particular elements of the media and politicians who wished to discredit the findings" of the *Leveson Inquiry*[63] and Sir Peter Gibson, chair of the *Detainee Inquiry,* had been criticised in the media.[64] (See also the discussion regarding the *Grenfell Tower* and *Undercover Policing Inquires* below at 5.7.2 and 5.7.3).

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[58] HH Judge Teague.
[59] Under the Constitutional Reform Act 2005.
[60] HL Deb 5 June 1996, vol 572, col 1272.
[61] Ibid col 1255. Shadow Lord Chancellor.
[62] Sir Brian Leveson oral evidence to the Culture, Media and Sport Committee, 'Uncorrected transcript of oral evidence' (10 October 2013) HC 143-iv <https://publications.parliament.uk/pa/cm201314/cmselect/cmcumeds/uc143-iv/uc14301.htm> accessed 31 May 2021.
[63] *Inquiry into the Culture, Practice and Ethics Of The Press.*
[64] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 19.

Beatson LJ's assessment of this risk was endorsed by Lord Thomas of Cwmgiedd, The Lord Chief Justice of England and Wales, in written evidence to the HL Select Committee, who added

> "it is not right as a matter of constitutional principle that a judge who conducts an inquiry should be subject to questioning by Parliament in relation to the inquiry's recommendations. As a Minister makes the appointment, the Minister cannot constrain Parliament. However, it would be highly desirable that there be a convention that Parliament would not question a judge in relation to any recommendations that they might have made in an inquiry."

This concern was not addressed in the HL Select Committee recommendations nor addressed by the Government. However, the constitutional reforms of 2005, and resulting greater formal separation of powers, have highlighted the need to maintain judicial independence. Where judges are drawn in to matters of controversy by being appointed as a chair to a public inquiry, they may well need to be protected from personal criticism, particularly from members of the Government and Parliament.[65]

5.4.4. Consent of the Lord Chief Justice

In addition to raising constitutional concerns, and urging restraint on the part of those who might wish to criticise a judicial chair or their findings, those witnesses representing the senior members of the judiciary also stressed the importance of amending section 10 of the 2005 Act to require a minister wishing to appoint a serving judge as a chair to an inquiry not only to consult with, but also to obtain the consent of, the appropriate senior member of the judiciary. In the case of England and Wales and Northern Ireland it is the respective Lord Chief Justice. (The same considerations regarding the appointment of members of the judiciary and the responsibility of the Lord Chief Justice apply to non-statutory inquiries.[66])

[65] See Andrew Le Sueur, Maurice Sunkin, and Jo Murkens *Public Law: Text, Cases, and Materials* (4th edn, OUP 2019) 552-557 and Mark Elliott and Robert Thomas, Public Law (3rd edn, OUP 2017) 557.
[66] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 24.

Beatson LJ noted:

> "section 10 appears to be the only example in the statute book of a government minister being empowered to deploy a serving judge … it should not be for government alone to decide that a serving judge is to be used and to choose the judge who is to chair or conduct the inquiry."[67]

Lord Thomas of Cwmgiedd, the Lord Chief Justice of England and Wales, also gave evidence on judicial deployment and the responsibility of the Lord Chief Justice:

> "it is an imperative that the consent of the Lord Chief Justice should be required before a Minister can appoint a judge to chair an inquiry… concurrence, not merely consultation, is required for the Lord Chief Justice properly to fulfil his responsibility for judicial deployment and to protect against judicial involvement in areas of political controversy. Furthermore, the direct appointment of a judge by a Minister runs contrary to the normal system of judicial appointments, in which, for reasons of constitutional propriety, the role of the executive is limited."[68]

At the time the Constitutional Reform Act 2005 and the Inquiries Act 2005 were introduced, the Government rejected arguments, including those from Lord Woolf, as Master of the Rolls with the full support of the Judges' Council,[69] that it be a legal requirement that the consent of the Lord Chief Justice be required before a judge is appointed as a chair to a public inquiry.[70] There was wide all-party support in the House of Lords for an amendment to the Inquiries Bill, to replace the requirement for consultation with a requirement for consent.[71] However, when the Bill returned to the House of Commons, the original wording of 'consult' was reinstated.

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[67] Ibid para 7. See also evidence of Sir Brian Leveson and Lord Cullen of Whitekirk oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.

[68] Lord Thomas of Cwmgiedd written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.

[69] See Public Administration Select Committee, *Parliamentary Commissions of Inquiry*, Ninth Report of Session 2007–08 (TSO, 2008) HC 473 para 55. The Judges' Council is an independent body that meets to discuss issues of concern to the senior judiciary and to represent the views of the senior judiciary to the Lord Chief Justice.

[70] See the comments of Lord Woolf at Q43 of the oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.

[71] HL Deb, 28 February 2005, vol 670, col 22. See also HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 123.

The 2005 PASC subsequently examined, in detail, the political, constitutional and practical implications of the frequent use of judges to chair inquiries, "including the impact on judges' independence and reputation for political neutrality". It too concluded:

> "We recognise the value of using senior judges to chair some inquiries. Their training and experience give them important transferable skills, and they provide reassurance that an inquiry will be independent and fair. Their use is most appropriate in fact-finding inquiries which are at a distance from government. Inquiries into issues at the centre of government are however, 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."

It recommended that decisions about the appointment of judges as chair to an inquiry should be taken co-equally by the Government and the Lord Chief Justice or senior law lord.[72]

The Government rejected this recommendation, introducing a new argument about the independence of judges stating: "in order to remain truly independent a judge must be free to decide whether to accept an appointment for himself or herself. Judicial independence should mean independence from Government and from everybody else, including other judges" though it also concluded that "the Government was highly unlikely to appoint a judge against the wishes of the Lord Chief Justice."[73]

The HL Select Committee shared the view of witnesses who appeared before it, such as the Lord Chief Justice and Lord Justice Beatson, regarding consent of the Lord Chief Justice being needed to properly fulfil the responsibility for judicial deployment and to

[72] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.

[73] Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005) 9-10.

protect against judicial involvement in areas of political controversy[74] and the many who had argued the same point for a number of years beforehand. It recommended

> "section 10(1) of the Act should be amended so that a minister who wishes to appoint a serving judge as a chairman or panel member of an inquiry should first obtain the consent of the appropriate senior member of the judiciary."[75]

In response, the Government finally accepted this recommendation stating: "the consent of the Lord Chief Justice is always sought for the nomination of a judge to conduct an inquiry so this would merely put current practice onto a statutory footing. The Lord Chief Justice thinks this would be helpful."[76] The Act has yet to be amended.

5.4.5. Serving or retired judges

As stated above, both serving and retired judges have been appointed as the chair to an inquiry. In terms of perception, it seems unlikely that the public and participants view retired judges differently to serving judges. In the media, there is often no distinction made.[77] As a result, some of the issues identified above relating to risks to perceived independence and impartiality of the judiciary will apply to both serving and retired judges. The distinction does, however, make a difference both for the constitutional reasons identified above and also for the court system, in that appointing serving judges to public inquiries puts resourcing pressure on the ongoing work of the courts and reduces flexibility of deployment of the remaining judges.[78]

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[74] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 125.
[75] Ibid para 126, recommendation 5.
[76] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 40.
[77] See for example media reference to Sir Martin Moore-Bick: 'Grenfell Tower fire: Judge 'doubt' over inquiry scope' *BBC News* (London, 29 June 2017) <www.bbc.co.uk/news/uk-40446579> accessed 31 May 2020 and Robert Booth, 'Grenfell survivors fear inquiry judge will side with establishment' *The Guardian* (London, 26 October 2019) <www.theguardian.com/uk-news/2019/oct/26/grenfell-survivors-fear-inquiry-judge-will-side-with-establishment> accessed 31 May 2020 and Danny Boyle 'Who is Sir Martin Moore-Bick, the Grenfell Tower inquiry judge?' *The Telegraph* (London, 30 June 2017) < https://www.telegraph.co.uk/news/0/sir-martin-moore-bick-grenfell-tower-inquiry-judge/> accessed 31 May 2020.
[78] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 14 and 15.

Beatson LJ noted in his 2005 article that:

> "Of the 31 notable inquiries set up since 1990, 58 per cent were chaired by a serving judge. If one includes those chaired by a retired judge the percentage goes up to 64.5 per cent."[79]

However, of the 30 inquiries convened since the introduction of the 2005 Act,[80] only four inquiries were chaired by a serving judge: *the Baha Mousa*, *Undercover Policing, Leveson* and *Anthony Grainger Inquiries*.[81] In comparison with the above figures therefore, only 13% of inquiries convened since the introduction of the 2005 Act were chaired by a serving judge (dropping to only 7% when taking into account the fact that the chairs of the two former inquiries retired from their judicial position during the course of their inquiry). If one also includes those inquiries chaired by a retired judge, the percentage goes up to 43% (see Appendix 3).[82]

The appointment process is not transparent and details of the selection process are not publicly available. The HL Select Committee did not specifically address the drop in the proportion of inquiries being chaired by a serving judge since the introduction of the 2005 Act. That drop has become increasing apparent since the HL Select Committee published its report in 2014, with only one serving judge appointed as a chair since then. That chair was already the coroner of the inquest that was converted into the *Anthony Grainger Inquiry.* The drop in the number of serving judges appointed as a chair to an inquiry may, to a large extent, be explained by concerns about the extent of ministerial powers over the public inquiry process and conflicts with the constitutional independence of the judiciary.[83] It might also: indicate a change in approach on the part

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[79] Beatson J, 'Should Judges Chair Public Inquiries?' (2005) 121 LQR 221 based on his 2004 Lionel Cohen Lecture 'Should Judges Conduct Public Inquiries?'

[80] Starting with the *E Coli Inquiry*, since the chairs of the *Billy Wright Inquiry and the Robert Hamill Inquiry* were appointed prior to the introduction of the Act, albeit the inquiries were subsequently converted to 2005 Act inquiries.

[81] 18 of the 30 were statutory inquiries, including all those chaired by a serving judge.

[82] Nine inquiries were chaired by retired judges from the outset, of which seven were statutory inquiries. (The Independent Panel Inquiry into Child Sexual Abuse was chaired by a retired judge for only one week, before her resignation and the appointment of a senior lawyer chair, so is not included here).

[83] Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005 (Cm 7943, 2010). See also letter Lord Saville of Newdigate to Baroness Ashton (26 January 2005) "As a judge I must tell you that I would not be prepared to be appointed as a member of and inquiry that was subject to provisions of this kind [the power to restrict attendance at the inquiry, or on the disclosure or publication or any evidence or documents given to the inquiry]… To allow a minister to impose restrictions on the conduct of an inquiry is to my mind to interfere

of ministers, favouring the appointment of retired judges; be the result of discussions with, and reluctance on the part of, the Lord Chief Justice for the appointment of serving judges; be due to a shortage of resources and pressures on serving judges; or a combination of all these factors.

5.5. Panel or Single chair

Moving on from the appointment process and the minister's decision on who will chair an inquiry, the minister must also decide whether or not to appoint panel members. The subject matter of most inquiries is complex and highly specialised and many inquiry chairs obtain additional expert advice and assistance from panel members, assessors, expert witnesses or through seminars.[84] Many functions remain the responsibility of a chair alone, for example determining the procedure and conduct of an inquiry,[85] designating core participants,[86] making orders restricting public access and determining cost orders. However, where a panel is appointed, panel members will be consulted and will play a full part in the conduct of the inquiry and in drafting the report.[87] The criteria of suitability and impartiality referred to above apply equally to the appointment of panel members as they do to the appointment of the chair.[88]

5.5.1. Panels

Arguments are put forward both for and against a chair conducting an inquiry with panel members.[89] Where appointed, panel members are appointed by the minister. For statutory inquiries, section 8 of the 2005 Act states that the minister must have regard to the need to ensure that the panel, whether it be a chair sitting alone or with panel members, has the necessary expertise to undertake the inquiry (when considered as a

unjustifiably with the ability of a judge conducting the inquiry to act impartially and independently of Government, as his judicial oath requires him to do."

[84] Increasingly inquiries are also holding seminars to assist the inquiry, bringing together key stakeholders and experts to discuss and examine key issues and themes, for example the *Mid Staffordshire NHS Foundation Trust* and *Leveson Inquiries*.

[85] 2005 Act, s 17 for statutory inquiries.

[86] Inquiry Rules 2006, r 5 or appointing 'interested parties' in the case of non-statutory inquiries.

[87] See HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 128.

[88] Including 2005 Act, ss 8 and 9.

[89] For statutory inquiries, under the 2005 Act, s 4 following consultation with the chair.

whole) and, where there are panel members, to the need for balance in the composition of the panel, considered against the background of the terms of reference. [90]

Panel members provide a wider range of specialist expertise throughout an inquiry, its deliberations and the production of its report. Some argue that appointing a panel is also a way of underpinning an inquiry's independence (see 5.5.3 and 5.7.1 below).[91] However, inquiries may last a number of months or indeed years. It can be difficult to find people of distinction, with the required levels of specialist expertise, who are able to commit such a significant amount of time to an inquiry panel.[92] Further, the practicalities of a panel conducting an inquiry and producing a report, as opposed to a single chair, can prolong the inquiry process.

5.5.2. Assessors and expert witnesses – issues of efficiency and transparency

It has been argued that having a single chair assisted by assessors and expert witnesses can be much quicker and more efficient than the appointment of a panel, which may influence the decision on whether or not to appoint panel members (see also 5.5.3 below).[93] One or more assessors may be appointed to assist a chair (and, where appointed, a panel). Assessors, known as 'advisers' in non-statutory inquiries, may be appointed by the minister before the inquiry setting up date or later by the chair.[94] The role of an assessor is neither defined in statute, nor elsewhere, and varies between inquiries. Assessors are experts in their particular field who may be called upon to provide advice and assistance to the chair, however, it is the chair or panel alone who determine what goes into an inquiry report. Examples of inquiries that have appointed assessors include the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, the Leveson Inquiry and the *Grenfell Tower Inquiry*.

In addition to assessors, chairs and panels may also draw on the expertise of expert witnesses. The use of expert witnesses is common. Their role is to give evidence of

[90] 2005 Act, s 8 in the case of statutory inquiries.
[91] See, for example, evidence given to the Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I noted at para 71.
[92] See Dr Judith Smith oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q295.
[93] Alun Evans oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q130.
[94] For statutory inquiries, 2005 Act, s11.

opinion and fact before the inquiry.[95] In contrast to the role of an assessor, an expert witness is entirely independent from the chair and panel.

One factor that influenced the HL Select Committee witnesses' views on increasing transparency and the perceived independence of the process related to the use of expert witnesses and assessors to assist a chair or panel members. Lord Gill stated that any expert assistance received by a chair should be heard openly by all participants and the public, stating:[96]

> "[A]dvice should not come through the medium of an assessor or a member of the panel. It should come through the use of an expert as a witness to the inquiry. There are two reasons for that. The first is that if you have an expert witness to the inquiry, he is seen to be detached from the decision-maker and that instils confidence in the core participants. The second reason is that if an expert is seen to be an assessor at an inquiry, the parties always wonder what evidence he is giving to the chairman when they retire into closed session to discuss things, whereas if he is a witness everyone knows exactly where they stand."

Lord Cullen of Whitekirk did not share Lord Gill's misgivings on the use of assessors. His view was that it could be made perfectly clear that assessors are not a source of evidence but a form of assistance to the chair in going about his work, concluding that good assessors are invaluable.[97]

The HL Select Committee ultimately recommended that, where a chair "requires expert assistance during the course of the inquiry hearings, consideration should be given to receiving this openly from expert witnesses rather than privately from assessors. However the [chair] should continue to be able to rely on the confidential advice of assessors when drafting the report."[98] The Government did not engage with or respond to this recommendation, so there is no current proposed change in this respect to the public inquiry process generally.

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[95] The role of an expert witness is not defined in the 2005 Act.
[96] Chairman of the inquiry into the ICL disaster in Glasgow, a Scottish inquiry that reported in 2009.
[97] Lord Cullen oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q192.
[98] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 139, recommendation 8.

5.5.3. The PASC and the HL Select Committee on Panels

Both the 2005 PASC and the HL Select Committee heard evidence, and made recommendations, on the minister's decision whether or not to appoint panel members. The PASC concluded that the use of 'wing members,' or panel members, brings "expertise, reassurance, support and protection to inquiry chairs." It particularly recommended the use of panels in politically sensitive cases "as a non-statutory means of enhancing the perception of fairness and impartiality in the inquiry process." It also recommended that, where judges are seen as the most appropriate chair, "they should usually be appointed as part of a panel or be assisted by expert assessors or wing members."[99]

The Government agreed that panel members can often bring real benefits to an inquiry and that, when an inquiry is being set up, careful consideration should be given to the use of a panel. However, it also pointed out that whether a single chair or an inquiry panel would be appropriate would depend on the circumstances of a particular inquiry.[100] It did not believe that it would be appropriate to set out any presumptions in legislation about panel membership, whilst noting that the PASC had not made such a suggestion.

Many witnesses before the HL Select Committee expressed a preference for a single chair on the basis that an inquiry is easier to run and less protracted without multi-member involvement in the deliberations and drafting the inquiry report.[101] As Sir Brian Leveson stated:

> "The trouble with appointing members of a panel is that they are just as much conducting the inquiry as the chairman… If my six assessors had been members of the panel, they would have had to attend every single day. They would have had to have read every single piece of paper. They would have had to have played

[99] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.

[100] *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government by Inquiry"* (Cm 6481, 2005) response 2.

[101] For example Lee Hughes, Secretary to the *Hutton*, *Baha Mousa* and *Al Sweady Inquiries* (all with a chair alone) and Alun Evans, Secretary to the *Foot and Mouth* and *Detainee Inquiries* (the former with a chair alone and the latter with a panel) oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q130; and Robert Francis, chair of the *Mid Staffordshire NHS Foundation Trust Inquiry* (sitting alone).

> a full part in every single decision, including the decisions of law… the consequence would have been a massive extension of the time everything took."

Other witnesses put forward arguments against the appointment of a single chair, particularly in the context of the formulation of recommendations. Often one of the key functions of a public inquiry is to make recommendations. In particular, where a chair is a judge or other senior lawyer, he or she may bring great forensic analysis skills to an inquiry, but they may lack the knowhow and experience to develop and formulate policy. Panel members with those capabilities can make an inquiry a more effective and richer process. [102]

In contrast to the PASC, the subsequent HL Select Committee came to a different conclusion on the appointment of panel members, based on the evidence before it. It recommended that "an inquiry panel should consist of a single member unless there are strong arguments to the contrary" [103] on the basis that "facility of organisation, clarity of drafting and avoiding lengthening the reporting process" are all persuasive arguments in favour of having a chair sitting alone.[104]

In contrast to its response to the PASC, the Government accepted the HL Select Committee recommendation, stating "this is invariably the case and an important consideration in controlling the overall costs of inquiries."[105] Thus, for reasons of cost and efficiency there is currently a presumption in favour of a single chair, though the circumstances of a particular inquiry, including a particular need to address perception of fairness and impartiality or impart additional knowhow and experience, may justify the appointment of a panel.

However, the Government once again resisted all recommendations seeking to limit the minister's power. Before the setting up date of a statutory inquiry, under s4(3) of the 2005 Act, a minister must inform the chair whether or not he or she proposes to appoint panel members and must consult with the chair before appointing. The HL Select

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[102] Dr Karl Mackie oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q72.
[103] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 136 recommendation 7.
[104] Para 136.
[105] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 45.

Committee, seeking to curtail the minister's power, concluded that 'consult' did not go far enough and that the minister should be required to obtain the consent of the chair.[106] This was rejected by the Government. The HL Select Committee also recommended that "section 11(3) of the 2005 Act be amended so that the minister can appoint assessors only with the consent of the chairman."[107] That too was rejected by the Government, protecting the power of the minister and stating "ministers will wish to retain the flexibility of the current position."

5.6. The minister's power to terminate appointments

Finally, as part of examining political influence over the public inquiry process as a whole, this section examines attempts to restrict the minister's power to terminate the appointment of panel members, assessors and the chair.

The HL Select Committee recommended limiting the minister's power to terminate the appointment of a member of the inquiry panel. Section 12(3) of the Inquiries Act 2005 allows the minister, at any time, to terminate the appointment of a panel member. Recognising that it is a necessary power of last resort, and noting that that power did not attract criticism during the progress of the Bill or from the Select Committee witnesses, the HL Select Committee nevertheless concluded that "a power as radical as this should not be exercisable without further conditions".[108]

The only condition in the 2005 Act is that, in the case of panel members other than the chair, the chair must be consulted. The HL Select Committee recommended that:

> "where the minister wishes to terminate the appointment of a panel member other than the chairman, section 12(6) should be amended to require the chairman's consent."[109]

The Government rejected the recommendation, stating "ministers would wish to retain the flexibility the current position gives."[110] Taking issue with the rejection of this and

[106] Ibid para 130, recommendation 6.
[107] Ibid para 137 recommendation 8.
[108] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 208.
[109] Ibid para 209, recommendation 21.
[110] See Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 72.

other recommendations seeking to limit the minister's power, during the subsequent House of Lords Debate on the HL Select Committee Report, Lord Trimble took exception to this wording stating "I think that "flexibility" is not the right word. The word that should have been used is "power" and the power should not be utilised in the way that the existing legislation permits."[111]

In the case of the chair, the only condition is that, where there are additional panel members, if the chair so requests, the panel members must be consulted. The HL Select Committee recommended that:

> "We recommend that section 12 should be amended to provide that where the minister wishes to terminate the appointment of the chairman of an inquiry, he should be required to lay before Parliament a notice of his intention, with the reasons."[112]

This recommendation was accepted by the Government, without elaboration. The response simply stated "This recommendation is accepted but will require primary legislation."[113] No changes to the primary legislation have yet been made.

Influence over individual inquiries:

5.7. Political Influence over Individual Inquiries

Having examined political influence at the level of the public inquiry process as a whole, the following section examines political influence in respect of the minister's decisions on the appointment of the chair and any panel members of individual inquiries. In particular, it considers challenges arising from concerns over independence, impartiality and diversity.

5.7.1. Independence

It is apparent from the evidence that the lack of openness and transparency to the decision-making process has given rise to wider concerns over the independence of

[111] HL Deb 19 March 2015, vol 760, col 1144.
[112] HL Select Committee Report*, The Inquiries Act 2005: post-legislative scrutiny* para 210, recommendation 22.
[113] See Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 74.

chairs, prompting pressure being brought to bear (see 5.2.1). Shortly after Sir Brian Leveson was appointed as the chair of the *Inquiry into the Culture, Practice and Ethics of the Press*, reports emerged of Leveson having recently attended two parties at the home of Rupert Murdoch's son-in-law.[114] Concern was raised about the fact, as chair, he must not only be independent but must be seen to be independent. Chris Bryant, a Labour MP, who campaigned for an investigation into phone hacking said "If this had been known from the start it might be fine – as with every step, transparency has come by dragging it out of them."[115]

There have been a number of challenges brought by survivors, family members, campaign groups and members of parliament over concerns about the identity of the appointed chair, associated with issues of independence from the establishment, suitability and diversity; calls for a panel rather than a single chair; and, where a panel has been appointed, concern about the membership and diversity of the panel as a whole.[116]

Links with the establishment was a major cause for concern when the *Independent Panel Inquiry into Child Sexual Abuse* was convened in 2014.[117] The Home Secretary announced that the panel chair would be Baroness Butler-Sloss,[118] the first female Lord Justice of Appeal and, until 2004, the highest-ranking female judge in the United Kingdom, and an expert in the field of child protection and the chair of the *Cleveland Child Abuse Inquiry*. From the time of the announcement,[119] however, many expressed concerns over Baroness Butler-Sloss' links to the establishment, as the sister of the former Lord Chancellor Michael Havers, Attorney General in the 1980s, and over his role in previous investigations.[120] Whilst not questioning Baroness Butler-Sloss' integrity, there was

[114] Rupert Murdoch controls a media empire that includes cable channel Fox News, The Times of London and The Wall Street Journal.
[115] Christopher Hope C, 'Phone hacking inquiry judge attended parties at home of Rupert Murdoch's son-in-law' *The Telegraph* (London, 22 July 2011) www.telegraph.co.uk/news/uknews/phone-hacking/8656131/Phone-hacking-inquiry-judge-attended-parties-at-home-of-Rupert-Murdochs-son-in-law.html accessed 31 May 2020.
[116] In the case of the latter see the debate on the *Iraq Inquiry* panel HC Deb 15 June 2009, vol 494, col 25.
[117] This following chronology of events is taken from Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209.
[118] HC Deb 9 July 2014, vol 584, col 20WS.
[119] On 7 July 2014.
[120] Such as Mary Dejevsky, 'Elizabeth Butler-Sloss is too close to the establishment to lead this abuse inquiry' *The Guardian* (London, 10 July 2014)

concern that she would be seen as part of the establishment, which would undermine public confidence. Following intense pressure from victims' groups, MPs and the media, within a week Baroness Butler-Sloss had stepped down.

Two months later it was announced that Fiona Woolf, a solicitor who had held a number of senior positions including President of the Law Society and Lord Mayor of London, had been appointed as the new chair.[121] Fiona Woolf soon faced calls to resign, from survivors' groups and MPs[122] and there was widespread media coverage over claims of a lack of relevant experience and personal links with the former Home Secretary, Lord Brittan, who was Home Secretary in the 1980s and who was likely to be called to give evidence over his handling of allegations of abuse during his time in office.[123]

The Government stood by the appointment. However, after mounting pressure, and survivors' pledges to boycott an inquiry with her in the chair,[124] Fiona Woolf resigned, recognising she did not command the survivors' confidence. It was subsequently announced[125] that the original panel would be disbanded and Justice Lowell Goddard, a New Zealand High Court Judge with no ties to the UK establishment nor persons likely to be investigated, would chair a new 2005 Act inquiry, the *Independent Inquiry into Child Sexual Abuse* (*IICSA*), assisted by panel members.[126] As the Home Secretary stated when first announcing the Inquiry "[w]ith allegations as serious as these, the public needs to have complete confidence in the integrity of the investigation's findings…"[127] Lowell

<www.theguardian.com/commentisfree/2014/jul/10/elizabeth-butler-sloss-establishment-child-abuse-inquiry> accessed 31 May 2020.

[121] HC Deb 5 Sep 2014, vol 585, col 28WS.

[122] Such as Matthew Weaver and Fiona Mason, 'Child abuse inquiry: Woolf pressed to quit over 'dinner parties with Brittan' *The Guardian* (London, 22 October 2014) <www.theguardian.com/society/2014/oct/22/child-abuse-inquiry-fiona-woolf-dinner-parties-lord-brittan> accessed 31 May 2020.

[123] Lord Brittan died on 21 January 2015, prior to being called to give evidence before the Inquiry.

[124] David Barrett, 'Abuse victims pledge to boycott Fiona Woolf inquiry' *The Telegraph* (London, 31 October 2014) <www.telegraph.co.uk/news/uknews/law-and-order/11200795/Abuse-victims-pledge-to-boycott-Fiona-Woolf-inquiry.html> accessed 31 May 2020.

[125] HC Deb 12 March 2015, vol 594, col 40WS.

[126] Prof Malcolm Evans OBE; Ivor Frank; Prof Alexis Jay OBE; and Drusilla Sharpling CBE. The new panel, unlike its predecessor, does not include victims of child sexual abuse but is supported by a consultative panel including victims and survivors, thus strengthening its perceived independence.

[127] HC Deb 7 July 2014, vol 584, col 54.

Goddard herself resigned, 17 months later, although citing personal reasons and a breakdown of the working relationship with panel members.[128]

The *IICSA* illustrates that pressure from participants, campaign groups, the media and through the lobbying of MPs can clearly influence the identity of the chair to an inquiry. However, this form of 'informal political pressure' must be viewed with caution. These groups do not represent all participants; a very wide range of participants with diverse and conflicting interests may participate in an inquiry. Sharon Evans, one of the original panel members of the *Independent Panel Inquiry into Child Sexual Abuse*, subsequently warned against listening to the vocal minority "engaging in personal attacks against panel members" instead of the majority of abuse survivors.[129] Baroness Butler-Sloss cautioned against giving victims too much influence over who chairs an inquiry or face the risk of having a chair without the necessary experience for the role.[130]

There are a limited number of people who are both qualified, available and willing to chair a public inquiry. On the resignation of Lowell Goddard, Lord MacDonald, a former director of public prosecutions, described the position of chair of the IICSA, particularly in the light of the growing scale of the inquiry, "not so much a poisoned chalice but a lethal injection" adding "finding someone to take this on, this is going to be extraordinarily difficult".[131] Professor Alexis Jay, previously a member of the panel, was subsequently appointed as chair.[132]

Political pressure from campaign groups and politicians was also brought to bear, though unsuccessfully, in connection with the choice of chair of the *Grenfell Tower Inquiry*, which was set up to examine the circumstances leading up to and surrounding the fire at Grenfell Tower on 14 June 2017, in which 71 people died.

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[128] Letter from Dame Lowell Goddard QC to the Home Secretary, Amber Rudd (4 August 2016). See also Robert Mendick, 'Dame Lowell-Goddard accuses former colleagues of forcing her to quit child abuse inquiry' *The Telegraph* (London, 2 November 2016) <www.telegraph.co.uk/news/2016/11/02/dame-lowell-goddard-accuses-former-colleagues-of-forcing-her-to/> accessed 31 May.

[129] Mark Watts, 'Theresa May to scrap panel for inquiry into child sex abuse' *ExaroNews* (London, 20 December 2014) < https://www.exaronews.com/> accessed 31 May 2020.

[130] 'Butler-Sloss cautions over victims' role in abuse inquiry' *BBC News* (London, 31 December 2014) <www.bbc.co.uk/news/uk-30640879> accessed 31 May 2020. See also Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209.

[131] 'Abuse inquiry: Lord Macdonald on Dame Lowell Goddard resignation' *BBC, The World at One* (London, 5 August 2016) <www.bbc.co.uk/news/av/uk-politics-36988842/abuse-inquiry-lord-macdonald-on-dame-lowell-goddard-resignation> accessed 31 May 2020.

[132] Letter from the Home Secretary, Amber Rudd, to the Chair of the Committee (11 August 2016).

Sir Martin Moore-Bick, "a highly respected and hugely experienced former Court of Appeal judge" [133] was appointed as the chair, on the recommendation of the Lord Chief Justice. The appointment, however, was met with criticism from a number of campaign groups, survivors and members of parliament on the basis that a *"*white, upper-middle class man*"* was not a suitable choice, the fire having disproportionately affected working class and particularly BME communities.[134] Justice4Grenfell, a campaign group set up in the immediate aftermath of the fire, wrote to the Prime Minister stating that it would withdraw its support for the inquiry until Moore-Bick was removed from the inquiry.

In response, many accused the MPs and others seeking to remove Moore-Bick of doing so in an attempt to make political gain. It was pointed out, for example, that the MP who joined the calls for resignation, describing Sir Martin as a 'technocrat' who would not have "empathy" or "understand human beings"[135] had never met him and that none of the key organisers of Justice4Grenfell was a survivor or resident of Grenfell Tower (although the group did stress it had widespread backing in the community).[136] The Prime Minister continued to support the chair's appointment.[137] Dominic Grieve QC, the former Attorney General, said he was dismayed by the attacks, stating "[t]here is overwhelming evidence of his competence in the course of his career and if someone of his standing is rejected it raises the question who in fact exists who could do the job." The Lord Chancellor[138] issued a statement:

> "Our judiciary is respected the world over as fair, free from improper influence, and truly independent from government and Parliament. As Lord Chancellor, I am

[133] HC Deb 29 June 2017, vol 626, col21WS.
[134] See for example Hughes L, 'Grenfell row as Labour MP suggests 'white, upper-middle class man' should not have been hired to lead inquiry' *The Telegraph* (London, 2 July 2017) <https://www.telegraph.co.uk/news/2017/07/02/labour-mp-suggests-white-upper-middle-class-grenfell-judge-has/> accessed 31 May 2020 and 'Grenfell fire: MP calls for inquiry chairman to quit' *BBC News* (London, 4 July 2017) <https://www.bbc.co.uk/news/uk-40491449> accessed 31 May 2020.
[135] Emma Dent Coad, the Labour MP for Kensington. Ibid and Boyle D and Horton H, 'Grenfell Tower: Kensington MP calls for inquiry head to be replaced with 'someone who can understand humans'' *The Telegraph* (London, 4 July 2017) <https://www.telegraph.co.uk/news/2017/07/04/grenfell-tower-inquiry-head-widen-probes-scope-survivors-threaten/> accessed 31 May 2020.
[136] Robert Mendick, 'The Justice4Grenfell agitators: campaign group tries to push Tower inquiry judge to resign' *The Telegraph* (London, 4 July 2017) <https://www.telegraph.co.uk/news/2017/07/04/justice4grenfell-agitators-campaign-group-tries-push-tower-enquiry/> accessed 31 May 2020.
[137] See, for example, Alan McGuinness McGuinness, 'Grenfell Tower fire inquiry head backed by Government' *Sky News* (London, 4 July 2017) < https://news.sky.com/story/grenfell-tower-fire-inquiry-head-backed-by-government-10936453> accessed 31 May 2020.
[138] David Lidington.

clear that their motives and integrity should always be respected and not impugned by politicians. I have complete confidence that Sir Martin Moore-Bick will lead the inquiry into this tragedy with impartiality and with a determination to get to the truth and see justice done."[139]

The fact remains, however, despite support from Government and the Lord Chancellor, the difference in experience and background between the chair and many of the participants undermined their confidence in Moore-Bick as chair and consequently in the Inquiry itself.

5.7.2. The Grenfell Tower inquiry - diversity and panel members

During the *Grenfell Tower Inquiry*, pressure was also brought to bear in connection with the appointment of panel members. The Leader of the Opposition called for the Prime Minister to appoint panel members, including representation from those from minority backgrounds, in order to "improve confidence in the process and improve representation".[140] Similarly, Michael Mansfield QC[141] wrote to the Prime Minister and Moore-Bick urging the appointment of at least two panel members "one of whom represents the interests of the community and diversity, and another the impact of privatisation and fragmentation" in order to "restore public confidence, trust and commitment and to encourage participation, all of which are currently in jeopardy".[142] Moore-Bick indicated he was already giving thought to the need to involve assessors or panel members and that a decision would be made after the terms of reference were set.[143]

The Inquiry was divided into two phases, the first focussing on the factual narrative of the events of the night of 14 June 2017 and the second on the construction and refurbishment of the building and the decisions made leading up to, during and in the

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[139] 'Grenfell Tower disaster: David Lidington statement' (4 July 2017 available) at <https://www.gov.uk/government/speeches/grenfell-tower-disaster-david-lidington-statement> accessed 31 May 2020.

[140] Letter from Jeremy Corbyn to Theresa May (17 July 2017) at < https://labour.org.uk/press/jeremy-corbyn-asks-prime-minister-to-broaden/> accessed 31 May 2020.

[141] Who subsequently represented a number of survivors and bereaved.

[142] Letter from Sir Michael Mansfield QC to Theresa May and Sir Martin Moore-Bick (26th July 2017) quoted in *R (Daniels) v Rt Hon May, the Prime Minister v Sir Martin Moore-Bick* [2018] EWHC 1090 (Admin) [2018] 5 WLUK 97.

[143] Letter from Sir Martin Moore-Bick to Sir Michael Mansfield QC (8 August 2017) and Letter from Sir Michael Moore-Bick to Theresa May (10 August 2017).

immediate aftermath of the fire. During phase 1 of the inquiry, despite ongoing calls for panel members to be appointed, Moore-Bick ultimately recommended it would be better to sit alone, drawing on the advice of assessors and expert witnesses rather than panel members, as it would enable the inquiry to move quickly. Moore-Bick also refused a request to appoint a survivor or Grenfell Tower resident as an assessor, following pressure from survivors. He stressed that the assessors themselves must be independent or it would "risk undermining his impartiality in the eyes of others who are also deeply involved in the inquiry".[144]

The Prime Minister's announcement of the terms of reference noted Moore-Bick's recommendation and stated "I have not appointed any other members to the Inquiry Panel at this stage. However, the Inquiries Act 2005 allows for appointments to be made, with the consent of Sir Martin, during the course of the Inquiry. This enables the composition of the Inquiry Panel to be kept under review."[145]

Ongoing calls for the appointment of panel members, from survivors, the bereaved and campaign groups, were also backed by an e-petition signed by over 156,000 people. The petition stated that, to avoid a collapse in the participants' confidence in the Inquiry, the Prime Minister should appoint panel members "with relevant background, expertise, experience, & a real understanding of the issues facing those affected" [146]

The Government responded, concluding that, as the Prime Minister was of the view that Moore-Bick had the necessary expertise, there was a need for the Inquiry to complete its initial report as quickly as was reasonably possible, and section 149 of the Equality Act 2010 had been taken into account.[147] As such, additional panel members should not be appointed at that stage. [148]

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[144] Harriet Agerholm, 'Grenfell Tower inquiry chairman refuses to let residents who survived fire help assess evidence' *Independent* (London, 14 September 2017) <https://www.independent.co.uk/news/uk/home-news/grenfell-tower-inquiry-chairman-fire-survivors-victims-help-sir-martin-moore-bick-a7946286.html> accessed 31 May 2020.

[145] HC Deb 14 September 2017 vol 628, col 30 WS.

[146] <https://petition.parliament.uk/petitions/206722?reveal_response=yes> accessed 31 May 2020.

[147] 'The public sector equality duty', requiring a public authority to have due regard to how their policies or decisions affect people who are protected under the Equality Act 2010.

[148] 5 January 2018 <https://petition.parliament.uk/petitions/206722?reveal_response=yes> accessed 31 May 2020.

Eight months later, when the work for phase one was well underway, the Prime Minister announced that panel members would be appointed for phase 2.[149] The reasoning behind the decision was not given and it is not clear if it was influenced by political or legal pressure, or if it was a decision that would have been made in any event. Notably, four days earlier, judgment had been given on a request for permission for judicial review of the decision not to appoint panel members. Although permission was refused, the court noted the decision was not to appoint "at that stage" and, without expressing a view, concluded that different considerations might arguably apply regarding the appropriateness of appointing a panel for phase 2 (see 5.8.1).

The Prime Minister's appointment of Benita Mehra as a panel member, in late 2019, was also met with controversy due to concerns over lack of independence. Mehra's former role was chair of an organisation that accepted funding from the charitable arm of the organisation that made the cladding that was blamed for accelerating the spread of the fire and was a core participant to the Inquiry. The perceived conflict and concern, and wide-spread media scrutiny, ultimately led to her resignation.

5.7.3. The Undercover Policing Inquiry – Impartiality and Diversity

Similar issues also arose as part of the Undercover Policing Inquiry, which was convened in March 2015. Sir Christopher Pitchford was appointed as chair but later resigned due to ill health and Sir John Mitting, a retired judge, was then appointed.[150] Concern was expressed over Mitting's appointment by some, including a number of 'non-police non-state core participants' ('NPNSCPs'), due to decisions having been made repeatedly in favour of secrecy for the police, at the expense of truth for the victims and public, which was attributed to the approach taken by the Investigatory Powers Tribunal,[151] of which

[149] Letter from the Prime Minister, Theresa May to Sir Martin Moore-Bick (10 May 2018) and announcement by the Prime Minister HC Deb 5 June 2009 vol 661, col 14WS.
[150] Undercover Policing Inquiry, 'Press Notice' (26 July 2017) <www.ucpi.org.uk/wp-content/uploads/2017/07/20170726-press-release-change-of-chairman.pdf> accessed 31 May 2020.
[151] "A judicial body which operates independently of government to provide a right of redress for anyone who believes they have been a victim of unlawful action by a public authority using covert investigative techniques. The Tribunal is also the appropriate forum to consider complaints about any conduct by or on behalf of the UK Intelligence Community, MI5, SIS and GCHQ, as well as claims alleging the infringement of human rights by those agencies" <www.ipt-uk.com/Default.asp> accessed 31 May 2020.

Mitting was Vice President.[152] Concern was also expressed by core participants about his personal suitability, with some referring to him as "naive and old fashioned", and with a "very narrow" experience of life, and not therefore suited to make judgments on evidence of institutional sexism within the police and wider legal system. [153]

The Secretary of State consistently defended the appointment, stating:

> "After consulting the Chair I am satisfied that the Inquiry has the resources and expertise necessary to deliver its current programme of work. Sir John Mitting is an extremely experienced High Court Judge, has demonstrated his fairness and independence throughout his career, and he has my full support. I am confident in the Chair's suitability and impartiality for continuing his predecessor's approach and discovering the truth in the most open manner possible."[154]

Calls for Mitting to resign or a diverse panel to be appointed continued, with counsel to one of the core participants, unusually, criticising a High Court Judge, stated "I'm sorry to say this, we have the usual white middle class elderly gentleman whose life experiences are a million miles away from those who were spied upon" and calling for "a panel representing a proper cross-section of our society and in particular including individuals who have "a proper understanding" of racial and sexual discrimination to sit with Mitting".[155]

During the Inquiry's Strategic Review, Mitting stated that the appointment of additional panel members at that fact finding stage, "would impose a heavy cost in both time and money - the plans set out in the strategic review could not be achieved within the already lengthy timeframe envisaged" adding that, once the facts had been found, "it would be

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[152] See letter from a number of core participants to Amber Rudd (19 September 2017) reproduced at <https://policespiesoutoflives.org.uk/women-call-on-home-secretary-to-recognise-institutional-sexism-in-the-police/> accessed 31 May 2020.

[153] Rob Evans, 'Campaigners stage walkout of 'secretive' police spying inquiry' *The Guardian* (London, 21 March 2018) <https://www.theguardian.com/uk-news/2018/mar/21/campaigners-stage-walkout-of-secretive-police-spying-inquiry> accessed 31 May 2020.

[154] Letter from Amber Rudd to Ms Jane Deighton, representative of a core participant (2 March 2018) quoted in *R (Da Silva) v Secretary of State for the Home Department* [2018] EWHC 3001 (Admin) [2018] 11 WLUK 82.

[155] Phillippa Kaufmann QC, representing more than 200 people who were spied on by undercover police officers see Rob Evans, 'Campaigners stage walkout of 'secretive' police spying inquiry' *The Guardian* (London, 21 March 2018) <https://www.theguardian.com/uk-news/2018/mar/21/campaigners-stage-walkout-of-secretive-police-spying-inquiry> accessed 31 May 2020 and 'Undercover policing inquiry: Chairman urged to quit' *BBC News* (London, 21 March 2018) <https://www.bbc.co.uk/news/uk-43487941> accessed 31 May 2020.

both practicable and desirable for a wider panel to be recruited to investigate and consider the current state of undercover policing and to make recommendations to the Home Secretary for the future".[156] The Secretary of State had also stated that the position would be kept under review.[157] The criticism and calls for the appointment of panel members continued, unsuccessfully, and a legal challenge was commenced (see 5.8.2).

Both the *Grenfell Tower Inquiry* and the *UCPI* are stark illustrations of the issues caused by conflicting expectations over the role of a public inquiry (see 2.5). For many survivors, family members and campaign groups, the primary role of a public inquiry is to offer an opportunity for their voice to be heard, for them to receive long sought-after answers, for those in authority to be held to account and for justice to be obtained. As such, it is essential that their interests are at the heart of the process and that the chair has a background, expertise, experience and understanding that reflects those of the participants most deeply affected by the subject matter of an inquiry. For the Government and the minister concerned, the primary role of a public inquiry is to find facts and produce recommendations to inform government policy, in order for the Government to address public concern and prevent recurrence. Whilst the wishes of the survivors and family members are a material consideration, so too is the need for the inquiry's report to be produced as quickly as possible in order to address the public concern, the management of cost, and for the inquiry to be independent from participants as well as from the Government and the establishment. Ultimately decision-making power lies with the minister (see 8.7.1). This tension can also be seen in the legal challenges brought.

5.8. Legal Influence over Individual Inquiries

In addition to political challenges to the appointment of chairs to specific individual public inquiries, a small number of legal challenges have been brought. An application for permission to apply for judicial review of the decision to appoint Fiona Woolf as the chair

[156] Undercover Policing Inquiry, 'The Inquiry into Undercover Policing Strategic Review May 2018' <https://www.ucpi.org.uk/wp-content/uploads/2018/06/20180510-strategic_review.pdf> accessed 31 May 2020 paras ii and iii.
[157] Letter of 2 march 2018.

of the *IICSA* was commenced, but then withdrawn when Woolf resigned 8 weeks after her appointment. Applications to apply for permission for judicial review in relation to refusals to appoint panel members were also brought in relation to the *Grenfell Tower* and *Undercover Policing Inquiries.* As stated in chapter 3 (see 3.6.1), the court's traditional approach to reviewing executive decisions through judicial review is one of deliberate restraint and a reluctance to interfere.

5.8.1. Grenfell Inquiry – Panel Members and Diversity

When the terms of reference of the *Grenfell Tower Inquiry* were announced, it was also announced that a decision had been made that panel members would not be appointed at that stage (see above).[158] Many of the survivors and bereaved wanted a diverse panel appointed.

An application for permission to apply for judicial review of that decision, which was ultimately unsuccessful, was brought by the son of one of the Grenfell residents who lost their life in the fire, *R (Daniels) v May*.[159] The grounds of challenge included that the Prime Minister had misdirected herself in considering that public confidence was not a key or prime factor; by considering that the procedural duty under Article 2 of the ECHR was irrelevant to her decision; and that the Prime Minister failed to comply with the public sector equality duty under Section 149 of the Equality Act 2010. Each of these challenges is considered below.

The central submission was that the Prime Minister misdirected herself by failing to accept that the maintenance of public confidence is a "key or prime factor", which the applicant argued arose from the fact the "object of the 2005 Act is plainly to ensure that there is public confidence in the outcome of an investigation into matters of public concern."[160] Bean LJ, however, noted that the 2005 Act only expressly mandates two factors to be taken into account in the appointment of an inquiry panel, suitability and impartiality, under sections 8 and 9 of the 2005 Act respectively. Whilst section 8 states the minister may have regard to assistance that may be provided by any assessor appointed, there is no preference in favour of appointing panel members over a chair

[158] HC Deb 14 September 2017, vol 628, col 30 WS.
[159] *R (Daniels) v Rt Hon May, the Prime Minister v Sir Martin Moore-Bick* [2018] EWHC 1090 (Admin) [2018] 5 WLUK 97.
[160] Ibid [28].

sitting alone. The court made it clear that the weight to be attached to public confidence is a matter for the minister, stating:

> "I am prepared to assume for the purposes of this application that the wishes of the survivors and of the families of those who died in the fire were a material consideration for her to have taken into account, in the legal as well as the political sense. But it is well established in public law that the weight to be attached to a material factor or consideration is one for the decision-maker."[161]

The court concluded that "The wishes of the survivors and the bereaved, however tragic the case, as to who should constitute a tribunal to investigate how the tragedy occurred cannot be conclusive" and that the appointment of Moore-Bick without a panel was not outside the range of rational decisions.

Article 2 ECHR 'the Right to Life' gives rise to the state's duty to not to take a life and to protect life. The court noted that, where Article 2 is engaged, there is a need for an independent, impartial and effective official investigation, which is essential for maintaining public confidence and ensuring adherence to the rule of law and preventing any appearance of tolerance of, or collusion in, unlawful acts.[162] (See also *Jordan* and *Edwards*[163] and further discussion at 4.8.) The court concluded that "[t]he establishment of the Inquiry, with a retired senior judge conducting it, satisfies the requirements laid down"[164] and that Article 2 did not require any particular composition of the investigating body other than that it should be independent and impartial.

The court found the Prime Minister had complied with the public sector equality duty to have due regard to the relevant matters in Section 149 of the Equality Act 2010[165] when making her decision not to appoint panel members. The court noted that:

> "Provided the court is satisfied that there has been rigorous consideration of the duty, so that there is a proper appreciation of the potential impact of the decision on equality objectives and the desirability of promoting them, it is for the decision-maker to decide how much weight should be given to the various factors

[161] Ibid [33] with reference to Lord Brown of Eaton-under-Heywood *R Secretary of State for the Home Department v AP (No 1)* [2011] 1 AC 1.
[162] Ibid [37].
[163] *Jordan v United Kingdom* (2001) 37 EHRR 52 and *Edwards v United Kingdom (2002) 35 EHRR 19.*
[164] [2018] EWHC 1090 (Admin) [37].
[165] The public sector equality duty.

informing the decision. The court cannot interfere with the decision simply because it would have given greater weight to the equality implications of the decision than did the decision-maker."

The Prime Minister had taken into account that Moore-Bick is a highly respected and experienced former Court of Appeal judge and former Vice President of the Civil Division of the Court of Appeal and that that position was strengthened with the appointment of assessors and expert witnesses. [166] As a result, she was not satisfied that it was necessary to appoint additional panel members in order to eliminate discrimination, harassment, victimisation, or any other conduct prohibited under the Equality Act 2010. The court found that the weight to be attached to the equality implications of the decision was a matter for her and it did not consider that the decision was arguably unlawful by reference to the 2010 Act[167]

Whilst noting that it was not the role of the court to review the decision itself, but to review the lawfulness of the decision, the court did state that there were arguments both for and against the appointment of a diverse panel. The judgment referred to the report "*The importance of social/cultural diversity in the Grenfell Tower Inquiry Panel*",[168] which argued that there are parallels between the *Grenfell Tower Inquiry* and the *Stephen Lawrence Inquiry*, which did have a diverse panel and that "confidence in the process was increased by the explicit attention to diversity and race inequality, in particular in the composition and processes of the inquiry". However, Bean LJ also noted other inquiries with very sensitive subject matter, such as the *Baha Mousa Inquiry*, has been convened with a chair sitting alone.

The court found that the Prime Minister was entitled to take into account, as an important consideration, the need for the Inquiry to complete its initial report (for phase 1) as quickly as reasonably practicable.[169] It noted that the decision was that "additional panel members should not be appointed *at this stage*", and that different considerations might apply during phase 2.

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[166] See the Government Legal Department letter on behalf of the Prime Minister (12 January 2018) an extract from which was reproduced *at R (Daniels) v Rt Hon May, the Prime Minister v Sir Martin Moore-Bick* [2018] EWHC 1090 (Admin) [2018] 5 WLUK 97 [22].
[167] Ibid [44].
[168] Dr Marie Stewart MBE, 28 September 2017 referred to at Ibid [46].
[169] Ibid [47].

In fact, two panel members were subsequently appointed for phase 2, the larger phase in terms of the number of issues to be considered:

> "To ensure that the inquiry panel itself also has the necessary breadth of skills and diversity of expertise relevant to the broad range of issues to be considered in phase 2, and to best serve the increasing scale and complexity of the inquiry, I have decided to appoint an additional two panel members to support Sir Martin's chairmanship for phase 2 of the inquiry's work onwards." [170]

The deliberations behind the Prime Minister's decision are not available, therefore it is not clear to what extent the legal challenge, and the political pressure discussed above, influenced this decision. One of the panel members subsequently resigned following political pressure over concerns about her independence (see 5.7.2).

5.8.2. The Undercover Policing Inquiry – Panel Members and Diversity

Similarly, an application for permission for judicial review of the refusal to reconsider the decision not to appoint panel members to the *Undercover Policing Inquiry* was brought, unsuccessfully, six months after the *Daniels,* case by three non-police non-state core participants ('NPNSCPs').[171] In the *Da Silva* case, the applicants argued that a diverse panel would bring perspective to the inquiry, speed it up and make it more efficient. Two grounds of challenge were advanced. The first was that the Prime Minister failed to have regard to relevant considerations: the importance of ensuring public confidence in the conduct and outcome of the Inquiry; the importance of the meaningful participation of the non-police non-state NPNSCPs in the Inquiry; and lack of confidence in the chair on their part; and that the issue of discrimination, whether by an individual or at an institutional level, is an issue at the heart of the Inquiry and an area of expertise. The second was that the Prime Minister failed to have regard to section 149 of the Equality Act 2010.

As in *Daniels*, a key contention was that the failure to appoint additional panel members would frustrate the purpose of the Inquiry by undermining public confidence in its process and conclusions. Section 1 (1) of the 2005 Act provides that a minister may

[170] HC Deb 12 May 2018, vol 640, col 26WS.
[171] *R (Da Silva) v Secretary of State for the Home Department* [2018] EWHC 3001 (Admin) [2018] 11 WLUK 82 (being out of time to challenge the original decision).

convene an inquiry to address matters of public concern. It was argued that public confidence in an inquiry convened under the Act therefore is an important factor in any decision concerning the functioning of the inquiry, including the composition of the panel, and that it was irrational not to give weight to the need to maintain public confidence in the Inquiry when considering whether to appoint additional panel members.[172] The court dismissed this argument, referring to the statement in *Daniels*, that only two factors are mandated by the Act to be taken into account in the appointment of a panel, namely suitability and impartiality.[173] The Act does not require regard to be had to public confidence. It is for the Secretary of State to identify the matters he or she regards as relevant to the decision[174] and the weight to be attached to those matters,[175] subject only to a challenge on *Wednesbury* grounds.[176]

The applicants argued that failing to secure confidence in the Inquiry's ability to arrive at the truth on the part of the NPNSCPs, among whom were the victims of wrongdoing by undercover policing, was failing those who, in particular, the inquiry was intended to serve. Further it was argued that the NPNSCPs participation was essential to the Inquiry's ability to get to the truth.[177] However, the court stressed the need to address the full range of interests affected by a public inquiry, as well as wider considerations, such as delay to the publication of the inquiry's recommendations, stating:

> "The breadth of the terms of the Inquiry and the multiplicity of interests represented in it requires the Secretary of State to treat with caution opinions or representations submitted by any one core participant or group of core participants about the Inquiry or its Chair… That being so, if additional panel members were to be appointed, the Secretary of State would need to ensure that the appointments reflect the range of interests in the Inquiry and not just those identified by the NSNPCPs. I agree… that when considering "public confidence" in an inquiry the Secretary of State cannot consider it solely through the perspective of certain core participants. Regard must be had to all of the interests at stake

[172] Ibid [53].
[173] 2005 Act, ss 8 and 9.
[174] *R (Khatun) v Newham LBC* [2005] QB 37 [35].
[175] *Secretary of State for the Home Department v AP (No 1) [2011] 1 AC 1.*
[176] *R (Da Silva) v Secretary of State for the Home Department* [2018] EWHC 3001 (Admin) [2018] 11 WLUK 82 [48].
[177] Ibid [49].

> and to wider considerations material to public confidence, such as the delay in making final recommendations that bear upon future practice. This inquiry is distinct in the very wide range of interests represented by some 200 or so Core Participants involved in it."[178]

The court also rejected the suggestion that the appointment of panel members would speed up the inquiry process, pointing out that "[e]ach member of the panel would have to read and consider "tens of thousands of documents" and "the evidence of at least 250 police witnesses"" and that it was "the practical ramifications of the need for a panel to act as an entity in undertaking the Inquiry and producing a report that informed the House of Lords recommendations that a panel should consist of a single member unless there are strong reasons to the contrary."[179] It also found no merit in the contention that the Secretary of State failed to have proper regard to section 149 Equality Act 2010.

The *Daniels* and *Da Silva* cases identify key principles regarding influence over public inquiries that apply to the public inquiry process as a whole. There is no preference in favour of panel members over a chair sitting alone. Further Article 2 does not require any particular composition of investigating body other than it should be independent and impartial. The wishes of survivors and the bereaved may be a material consideration in the minister's decision-making process on the identity of the chair and whether or not to appoint panel members, but cannot be conclusive. Further, a minister must treat with caution opinions or representations from one participant or group of participants, as regard must be had to the multiplicity of interests represented at a public inquiry. In terms of participants and the public more widely, public confidence is not a key or prime factor in that decision-making process, the only express requirements for a chair are suitability and impartiality. The minister must have regard to the Equality Act 2010 when determining the appointment of the chair and any panel members; the court will review the lawfulness of that decision-making process but not review the decision itself.

[178] Ibid [53].
[179] Ibid [56].

5.9. Conclusion

This chapter examined the minister's decision on the identity of the chair to an inquiry and on whether or not to appoint panel members, as well as the decision-making process itself. In doing so it evaluated the arguments made for and against the appointment of a judge as the chair and on the appointment of panel members. It analysed attempts made to influence the public inquiry process as a whole by increasing the independence and transparency of the appointment process, addressing issues arising from the appointment of a member of the judiciary, and attempting to restrict the minister's power over the appointment process. The chapter then examined political and legal influence over individual inquiries, attempts to influence the identity of the chair and decisions on the membership and diversity of panels. Finally it examined the impact of political and legal influence over individual inquiries on the public inquiry process as a whole.

The research identified that the choice of chair is core to the success of a public inquiry. It is crucial that the chair is suitable, impartial and independent. In order to command the confidence of the public and the participants in the public inquiry, it must also be seen to be so. However, the lack of transparency and independence of the appointment process has made it vulnerable to allegations of insufficient independence from the executive and the political establishment. Although concerns in this respect were raised in the evidence before the HL Select Committee,[180] the transparency and independence of the appointment process was not addressed in the recommendations of the HL Select Committee and no changes to the current process are proposed, so this remains an issue.

The HL Select Committee did stress, however, the importance of the choice of the chair and the need for a carefully considered appointment process. The Government's acceptance of this recommendation, and that the announcement of the chair should not necessarily be made at the time of the announcement, will mean that the appointment of the chair need not be made in in the alarming haste that has been seen in the past.

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[180] See Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q205, Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para and Committee on the Administration of Justice written evidence to the HLSC para 8.

[180] Cabinet Office, 'Draft Inquiries Guidance: Guidance for Inquiry Chairs, Secretaries and Sponsor Departments' (undated) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/caboffguide.pdf> accessed 29 May 2020 and the comments of Lord Solely, HL Select Committee, 'Written and Corrected Oral Evidence' Q332.

There remains a tension, however, between the minister allowing sufficient time for deliberations and simultaneous pressure from the public and campaigners seeking a quick announcement in order to avoid delaying the commencement of an inquiry.

Arguments have been put forward both for and against the appointment of a judge as chair to an inquiry. It has been argued that the Government has benefitted from 'borrowed authority' from the judiciary when choosing to appoint a member of the judiciary as a chair to an inquiry. Conversely, a major call for change, particularly from very senior members of the judiciary, relates to the risk that appointing serving judges, and in particular serving judges, as chairs of a public inquiry may undermine that very perception of independence of the judiciary. Their calls for judges not to be appointed to public inquiries with a political element; that those wishing to criticise a judge and inquiry report for party political reasons should exercise constraint and there should be a convention that a judge who chairs an inquiry should not be questioned by Parliament in relation to the inquiry's recommendations were not directly addressed in a HL Select Committee recommendation nor in the Government's response to the Report. However, the HL Select Committee did recognise the dangers of involving a serving judge in matters of political controversy and urged a more cautious approach be adopted towards the appointment of serving judges. Whilst this was not specifically addressed in the Government response, the research showed that, in practice, the proportion of chairs who are serving members of the judiciary had, in any event, dropped since the introduction of the 2005 Act and has dropped further since the publication of the HL Select Committee Report.

Further, persistent calls over a number of years, including from members of parliament, from very senior members of the judiciary and from the 2005 PASC, for the 2005 Act to be amended to require the consent of the Lord Chief Justice or other appropriate senior member of the judiciary, to the appointment of a judge as a chair have now finally been accepted by the Government. That acceptance, however, did not represent a recent change in policy but was recognition that current practice had evolved and that the recommendation put that current practice onto a statutory footing. No express explanation was given for that change in practice, but it is likely that the introduction of the Constitutional Reform Act 2005 and greater formal separation of powers was influential.

Arguments have also been put forward both for and against the appointment of panel members to sit with the chair. The HL Select Committee's recommendation that there should be a single chair, rather than a panel, unless there are strong arguments to the contrary was accepted by the Government. However, once again, as seen in other areas,[181] the Government rejected recommendations that sought to limit the power of the minister, namely that a minister should obtain the consent of the chair before appointing a panel member or assessor and before terminating the appointment of a panel member. The HL Select Committee's recommendation that a notice of intention to terminate the appointment of a chair be laid before Parliament was, however, accepted.

A further recommendation made by the HL Select Committee to increase transparency and the perceived independence of the public inquiry process was that, where a chair requires expert assistance during the course of inquiry hearings, consideration be given to receiving it openly from an expert witness, rather than privately from an assessor. The Government did not engage with, nor respond to, this recommendation and no change generally to public inquiry procedure in this respect has been proposed.

There have been a number of high profile attempts by campaigners and participants to influence decisions on the appointment of the chair to specific individual inquiries. Concern has been raised about the openness and transparency of appointments and about the appointment of chairs with apparent close links with a part of the establishment that is itself under scrutiny or with a lack of relevant experience. Most notably, pressure brought in relation to the *IICSA* resulted in the resignation of the first two chairs to the inquiry. This was arguably a concerning development. Those bringing pressure to bear did not represent all participants; a very wide range of participants, with diverse and conflicting interests, participate in an inquiry. Further, participants are not necessarily best placed to identify a chair with the best experience, skills and impartiality to chair an inquiry.

However, at the same time, as can also be seen from other inquiries, there are also serious issues arising where significant numbers of participants are losing confidence in public inquiries where they feel that the chair does not have the necessary background and experience to understand many of the social issues underpinning the matter of

[181] See chapters 3, 4, 6 and 7.

public concern. Criticism from some survivors, campaign groups and politicians about the suitability of the chair to the *Grenfell Tower Inquiry,* based on diversity and equality issues, were resisted by the Prime Minister and met with dismay by others, including senior members of the legal profession, concerned that much of the criticism was politically motivated and asserting that the integrity and independence of the judiciary from government and Parliament should be respected and not impugned by politicians. Calls from politicians and survivors for the appointment of panel members, to represent the interests of diversity and restore public confidence, were initially resisted to enable the quick completion of the first phase of the inquiry. Calls to appoint a survivor to the position of assessor were rejected to avoid the risk of undermining perceptions of independence and impartiality. Similar, unsuccessful, calls were made in relation to the *Undercover Policing Inquiry*.

No legal challenge to a decision to appoint a specific chair has been successful. The legal challenges to the decision not to appoint a diverse panel for the *Grenfell Tower* and *Undercover Policing* Inquiries, though unsuccessful, resulted in judicial decisions on a number of key points for the public inquiry process as a whole. In particular these include: the fact that there is no preference for a panel rather than a chair sitting alone, Article 2 does not require any particular composition of an investigating body other than that it should be independent and impartial, and that the wishes of survivors and the bereaved are not conclusive. It is crucial that the chair and any panel members are, and are seen to be, impartial and independent in all respects: independent from the Government and the political establishment, but also independent from survivors, campaign groups and participants.

Further, despite the fact that political arguments have been put forward that relied heavily on the assertion that public confidence be a core consideration in determining the identity of the chair and any panel members, the court has found that there are only two factors that the 2005 Act mandates a minister to take into account when appointing a chair: suitability and impartiality.[182] There is no legal requirement to have regard to public confidence and the weight attached to public confidence is a matter for the minister.

[182] There are none for non-statutory inquiries.

Finally, the research in this chapter demonstrates two key underlying themes. The first, as seen in previous chapters, is the presence of numerous instances of the Government failing to engage with recommendations made by select committees, and highly respected and experienced practitioners, on the need for change and the Government's resistance to attempts to restrict the power of the minister. The second is the tensions arising from conflicting expectations about the role of a public inquiry and the different capacity in which a party engages with an inquiry. Examples include conflicting tensions between participants and the minister, and between different groups of participants, where one group is seeking a chair or panel members who represent their particular background and interests, or between the wider issue of public confidence, which might be increased by the appointment of an inquiry panel, and those with an interest in a cost-effective inquiry with timely recommendations to prevent recurrence (see 2.5). These themes are addressed further in the following chapters.

Chapter Six - Terms of Reference[1]

6.1. Introduction

An inquiry's terms of reference are a crucial factor in determining its ambit, length, complexity, cost and ultimately its success.[2] They define the subject matter of the inquiry, any particular matters on which the inquiry is to determine the facts, whether the inquiry is to make recommendations, and any other matters relating to the scope of the inquiry that the minister may specify.[3] The terms of reference are set by the minister convening the inquiry and the inquiry may only investigate those matters that are within its terms of reference.[4]

The terms of reference may also play a significant part in managing the expectations of participants and the public in terms of the range of possible outcomes of an inquiry.[5] However, as discussed in chapter 2, a public inquiry can have a number of roles, such as finding facts, pronouncing a view on culpability, providing catharsis and making recommendations. Different groups of participants and the minister convening a public inquiry may each hold very different ideas about what should be the purpose, scale and subject matter of that inquiry. Misplaced, unrealistic or simply differing expectations of what a particular inquiry may achieve can seriously undermine participants' and the public's confidence in an inquiry and lead to disappointment and dissatisfaction.

This chapter examines the setting of an inquiry's terms of reference by the minister. First it analyses the merits of narrow and broad terms of reference, the role of the minister in setting the terms of reference and concerns over independence from government. It then examines attempts that have been made to restrict the power of the minister, to change the timing of announcements and to increase consultation, for the public inquiry

[1] Some of the introductory information in this chapter is based on material from Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209, setting out the statutory position and some of the recommendations of the HL Select Committee.
[2] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[3] See <www.ucpi.org.uk> accessed 30 May 2020.
[4] Inquiries Act 2005 (2005 Act), s 5(5) for statutory inquiries.
[5] Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 41.

process as a whole. The chapter then considers political and legal influence over specific individual inquiries. It examines attempts to influence the interpretation and breadth of specific terms of reference, the range of different approaches that ministers have taken to consultation with participants, the effect of political pressure outside a formal consultation process, and recent developments in the approach to consultation.

Influence over the Public Inquiry Process as a Whole

6.2. Broad or Narrow Terms of Reference

One of the most common sources of disagreement over inquiry terms of reference relates to their breadth.[6] Where terms of reference are too wide, it can result in unnecessary cost and delay, and may introduce extraneous questions that merely confuse the essential issues.[7] Where terms of reference are too narrow, it may appear that the Government is attempting to restrict the scope of the inquiry in order to deflect criticism or avoid difficult political issues.

The witnesses before the HL Select Committee, including former chairs and counsel to public inquiries, varied in their views but were generally in favour of narrow terms of reference. Lord Gill, the chair of the public inquiry into the fatal explosion in 2004 at the ICL factory in Glasgow, felt that terms of reference "should be as tightly drawn as is reasonable in the circumstances"[8] in order to control the scope, cost and length of an inquiry. He noted that it is open to the chair to subsequently apply to the minister to extend the terms of reference if necessary.[9] Robert Francis, chair of the *Mid Staffordshire Inquiry NHS Foundation Trust Inquiry*, agreed that terms of reference set too widely may allow "a disproportionate and over costly inquiry", but also warned that terms of reference set too narrowly "may not achieve the desired aims and may not

[6] Institute for Government, 'Public Inquiries' (*Institute for Government*, 21 May 2018) <https://www.instituteforgovernment.org.uk/explainers/public-inquiries> accessed 31 May 2020.
[7] See Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 74.
[8] Lord Gill oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q194.
[9] For statutory inquiries, the minister may amend an Inquiry's terms of reference under the 2005 Act, s 5(3).

engender public confidence."[10] Lord Bichard, chair of the *Bichard Inquiry*,[11] concluded that it is important to have terms of reference that are not unduly narrow but allow an inquiry sufficient scope to inquire into the subject matter of the inquiry, whilst not being so wide as to lose necessary clarity.[12] Sir Robert Jay, Counsel to the *Leveson Inquiry*, asserted that it was the sensible interpretation of the terms of reference by the chair, rather than the breadth, that was most important.[13]

By way of contrast, it is common for those directly affected by the subject matter of an inquiry, including victims, survivors and their families, to demand broad terms of reference, as occurred at the outset of the *Independent Inquiry into Child Sexual Abuse* (*the IICSA)* and the *Grenfell Tower Inquiry* (see 6.6.3 and 6.6.4 below). This is often driven by a desire for the inquiry to produce as full an account as possible of the events being investigated and the broader circumstances in which it those events took place. However, that gives rise to two key concerns. Firstly, it can raise high expectations of 'truth and reconciliation' objectives that are difficult, if not impossible, to fulfil.[14] Secondly, where there are lessons to be learnt, and changes to be implemented to prevent recurrence, they will be delayed by a lengthy inquiry, possibly to the point where the window of opportunity for change may have closed, with systems and institutions having moved on the intervening years.[15]

In its report, the HL Select Committee recognised the pressure brought by many to expand the scope of an inquiry and the need to avoid terms of reference being too broad, in order to control the cost and length of an inquiry, noting that:

> "The precise terms of reference of an inquiry are crucially important. Not only will they define the breadth of the inquiry's remit, and hence its powers, but they will

[10] Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 36.
[11] Into child protection issues linked to the Soham murders in 2001.
[12] Lord Bichard oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q215.
[13] Sir Robert Jay oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q124.
[14] Peter Riddell, 'The role of public inquiries' (*Institute for Government*, 26 July 2016) <www.instituteforgovernment.org.uk/blog/role-public-inquiries> accessed 29 May 2020.
[15] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020.

often be the chairman's only defence against arguments, all too frequent, that the scope of the inquiry should be widened."[16]

The 2017 Institute for Government Report, *How public inquiries can lead to change*, found that in practice the length of terms of reference, by word count, increased significantly between 1988 and 2017. It concluded that the shift reflects a "growing focus on detailed and specific questions within terms of reference", instead of the more vague instructions to investigate an event, which had been more common previously.[17] This may be to assist with resisting anticipated pressure to expand the terms of reference.

6.3. The Role of the Minister

In addition to the breath of the terms of reference, a further area of concern relates to the decision-making power of the minister, as also seen in earlier chapters. The analysis of the data identified four key areas in which there have been attempts to bring about changes to the role of the minister in setting the terms of reference. They are addressed in turn under the following headings: concern over a lack of independence; the restricted role of Parliament and the chair; constitutional concerns that arise where the chair is a member of the judiciary; and the restricted nature of consultation with the chair in practice.

6.3.1. Concern over lack of independence

The first of these areas of concern is the lack of independence of the decision-making process. The terms of reference are set by the minister convening the inquiry. [18] Whilst the chair sets the tone and direction of an inquiry, oversees its conduct and is responsible for interpreting and discharging the inquiry's terms of reference, the terms of reference are the minister's, not the chair's. The chair must act within the terms of reference set by

[16] Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005*: *Post-legislative Scrutiny* (HL 2013-14, 143) para 141.
[17] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) 14 <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020.
[18] 2005 Act, s 5(1)(b) for inquiries convened under the 2005 Act.

the minister, who may amend them at any time if he or she considers the public interest so requires.[19]

In contrast to those decisions examined in chapters 3 to 5,[20] when setting the terms of reference of a statutory inquiry there is a legal requirement for the minister to consult, though this is restricted to consultation with the chair only. Section 5(4) of the 2005 Act provides

> "Before setting out or amending the terms of reference of a statutory inquiry, the minister must consult the person he proposes to appoint, or has appointed, as chairman."

Similarly, good practice requires that the chair and, if appointed, the panel of a non-statutory inquiry be consulted before the terms of reference are finalised. [21]

Just as other powers of the minister over the form and nature of public inquiries have been challenged (over concerns over conflicts of interest and lack of independence as discussed in chapters 3 and 5), so too has the power of the minister to set the terms of reference.[22] Parliament must be informed of the terms of reference of a statutory inquiry,[23] but it has little involvement in determining the terms of reference of either statutory or non-statutory inquiries.

In its written evidence before the HL Select Committee, the Committee on the Administration of Justice ('CAJ') [24] noted that a number of significant issues over independence from government have arisen in relation to the exercise of the ministers' powers to set the terms of reference of inquiries in Northern Ireland.[25] During the *Robert*

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[19] 2005 Act, s5 (3) for statutory inquiries.
[20] The minister's decisions on whether or not to convene an inquiry, whether it will be statutory or non-statutory, and the choice of the chair and panel members.
[21] See Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para oral evidence" para 35.
[22] See, for example, Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 17.
[23] 2005 Act, s 6(1).
[24] An independent NGO, with cross-community membership, affiliated to the International Federation for Human Rights, seeking "to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law" <https://caj.org.uk/> accessed 31 May 2020 .
[25] Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 10.

Hamill Inquiry,[26] the Secretary of State rejected requests from family members, and the inquiry itself, to broaden the terms of reference to include analysis of the role the Director of Public Prosecutions. That decision was also the subject of a judicial review challenge (see 6.8.2). Further, in relation to each of the Cory Collusion Inquiries[27] (the *Robert Hamill Inquiry*, the *Rosemary Nelson Inquiry*, *Billy Wright Inquiry* and the recommended inquiry into the death of Patrick Finucane), the Secretary of State's decision not to include 'collusion' of security forces in any of the terms of reference, despite the findings of the Cory Report, was criticised by the CAJ.[28] The CAJ also concluded that the *Billy Wright Inquiry* report revealed the Secretary for Northern Ireland's influence over the inquiry panels' interpretation of 'collusion', which resulted in it adopting a much narrower definition of collusion than that of the Cory definition (see further discussion at 1.7.1). Concerns over lack of independence have led to calls to restrict the power of the minister and to increase consultation, which is discussed below.

6.3.2. The restricted role of Parliament and the chair

The 2005 Public Administration Select Committee (PASC) Report, *Government by Inquiry,*[29] sought to address concern about lack of independence and the power of the minister by recommending an increased role for Parliament, in line with its recommendations on the decision whether or not to convene an inquiry and the appointment of the chair (see chapters 3 and 5). It recommended that there be "appropriate Parliamentary involvement" before the announcement of the final terms of reference.[30] In its response, the Government noted that the Committee did not specify what "Parliamentary involvement" there should be, but asserted that the existing

[26] A statutory inquiry into the circumstances surrounding the death of Robert Hamill, who died from injuries he sustained during an affray in Portadown, Co Armagh in 1997 see <www.roberthamillinquiry.org/the-public-hearings/procedure/> accessed 30 May 2020.
[27] Peter Cory, a retired Supreme Court of Canada Judge was asked by the UK Government to investigate allegations of collusion by members of the security forces in the context of the deaths of Patrick Finucane, Robert Hamill, Rosemary Nelson and Billy Wright and to report with recommendations for any further action. His report concluded that, in each of the four cases, the documentary evidence indicates that there are matters of concern which would warrant further and more detailed inquiry see <https://cain.ulster.ac.uk/issues/collusion/cory/cory03finucane.pdf> accessed 30 May 2020.
[28] Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 11.
[29] Which considered the effectiveness of inquiries and the Inquiries Bill. Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I 116.
[30] Ibid para 85, recommendation 3.

involvement of Parliament was sufficient. Stating that the minister who is convening the inquiry should have final responsibility for the terms of reference, it noted that that minister is already accountable to Parliament and can be questioned on any aspect of the inquiry through Parliament's usual processes (such as parliamentary questions). Further, clause 6 of the revised Bill (ultimately section 6 of the 2005 Act) required the minister to make a statement to Parliament[31] about the inquiry's terms of reference.[32]

Similarly, in line with its response to concerns raised over the powers of the minister and independence, examined in previous chapters, the HL Select Committee recommended that section 5(4) of the 2005 Act be amended so that the consent of the chair, rather than consultation with the chair, is needed before the minister can set or amend the terms of reference.[33] Once again, the Government demonstrated its resistance to restrictions to the power of the minister stating:

> "terms of reference, and any amendments to them, are invariably discussed and agreed with the chair, but ministers will wish to retain control of the details, in particular those that relate to the budget and length of the inquiry."[34]

6.3.3. Constitutional concerns where the chair is a member of the judiciary

Constitutional concerns have also arisen where the chair of an inquiry is a member of the judiciary. As discussed in detail at 5.4.2, the impartiality of the judiciary may become compromised if judges chair inquiries with a political element. In evidence to the HL Select Committee, whilst noting that, in practice, judges would act in accordance with the Lord Chief Justice's views, Beatson LJ was also concerned that the 2005 Act does not expressly require the consent of the Lord Chief Justice to the terms of reference of an inquiry chaired by a member of the judiciary, nor to any change in those terms of reference during the course of an inquiry. He noted that requiring consent would ensure

[31] Or the relevant Assembly.
[32] Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005) 12.
[33] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 145, recommendation 9.
[34] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 52.

that the terms of reference do not require a judge to conduct an inquiry of a sort that would be inappropriate for him or her to conduct.[35]

Lord Thomas of Cwmgiedd, then Lord Chief Justice of England and Wales, was also of the view that Lord Chief Justice's consent must be required to the terms of reference of an inquiry that is chaired by a judge. He too recognised that, in practice, "the Lord Chief Justice's concurrence to terms of reference is likely to be sought", but added "the lack of formal obligation in this regard is inappropriate and anomalous as there is no other context in which a Minister can direct a judge how to act."[36] In its report, the HL Select Committee recognised these concerns; however, it concluded that its recommendation 9, that section 5(4) of the 2005 Act be amended to require consent of the chair of an inquiry to the terms of reference and to any amendment should suffice.[37] There was, therefore, no specific recommendation regarding consent of the Lord Chief Justice. As a result, when the Government's subsequently rejected recommendation 9, it meant also that the issue of a minister having the power to direct a judge how to act remained unaddressed.

6.3.4. The restricted nature of consultation with the chair in practice

Having examined the subject of consent, the following sections examine consultation. The Inquiries Bill[38] introduced to the House of Lords in November 2005 did not contain a requirement for the minister to consult with the chair of the inquiry. This was controversial and met with opposition during the subsequent House of Lords debate. Lord Laming stated:

> "[T]he Bill enables the Minister to settle the terms of reference without even consulting the person who will chair the inquiry, despite the fact that experience shows that it is not unusual for the terms of reference of an inquiry to attract critical comment. Often the chair has to explain or even to defend the terms of reference. In my view, it is essential that there is a clear understanding and a meeting of minds between the Minister and the chair on this vitally important

[35] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 10.
[36] Lord Thomas of Cwmgiedd written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' 2.
[37] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 152.
[38] Inquiries HC Bill (2004-05) para 7.

matter, which goes beyond the form of words, but embraces an understanding of their interpretation."[39]

At the time the Inquiries Bill was under consideration, witnesses before the 2005 PASC[40] also emphasised the value of the chair being involved in agreeing the terms of reference.[41] Whilst recognising that it was the role of the minister to identify the subject matter of a public inquiry, a number of witnesses stressed the importance of the chair being able to agree the wording of terms of reference and be satisfied that they would permit the inquiry to explore the matters and make recommendations that the chair thought necessary. [42] The terms of reference are "not something just to be nodded through."[43]

The PASC agreed stating:

> "It is essential that the terms of reference enjoy broad consensus and are drawn up in a way which allows full and proper examination of the facts and do not fetter the inquiry in its task. We recommend that the chair of an inquiry should have the ability to negotiate the precise terms of reference before agreeing to undertake the inquiry…"[44]

The Government accepted the general principles lying behind the recommendation and concluded that much of this was effectively met in the revised Bill. [45]

However despite this, in practice, the extent of the consultation for both non-statutory and statutory inquiries has frequently been extremely limited. There is often strong public and political pressure to announce the convening of a new inquiry and its terms of reference very quickly. Witnesses before the HL Select Committee warned that consultation has often taken place before the chair has had opportunity to undertake more than a very cursory consideration of the very limited material that is available at

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[39] HL Deb 9 December 2004, vol 667, col 1004.
[40] Which considered the effectiveness of inquiries and the Inquiries Bill. Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I 116.
[41] Ibid paras 76.
[42] See for example the evidence of Sir Ian Kennedy and Lord Butler Ibid para 76 to 84.
[43] Ibid Sir Michael Bichard.
[44] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 85.
[45] Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005) 11 to 12.

that stage and before the chair is well placed to provide meaningful input.[46] In evidence to the HL Select Committee, Sir Robert Francis explained that:

> "A chairman is found at an hour's or even less notice and given some terms of reference, which of course he is "consulted on" at a point where he has no more information than he has read in the newspapers about the subject."[47]

It is very important to ensure that an inquiry's terms of reference are right. However, it is questionable whether this can be done satisfactorily, in consultation with the chair, under that time pressure.[48] In those circumstances, the consultation is likely to be effectively limited to mostly procedural issues.[49]

The minister may subsequently rely on the power to amend terms of reference under section 5(3) of the 2005 Act, but risks undermining work that has already been undertaken or creating a lack of clarity that then exposes the inquiry to judicial review challenges.

6.4. Introducing a cooling off period for Consultation?

Many have argued that consultation amounts to little more than lip-service where insufficient time is allowed for meaningful engagement. The following section deals with three areas, identified from the analysis of the data, in which there have been attempts to bring about changes to the process for setting an inquiry's terms of reference to allow for more meaningful consultation: allowing sufficient time for consultation and consideration; the avoidance of repeatedly revisiting the form of terms of reference; and separating the announcement of an inquiry from the announcement of the terms of reference.

[46] Jason Beer QC oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q121; Robert Francis QC written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 42.
[47] Ibid Robert Francis QC oral evidence Q215.
[48] Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 45.
[49] Ibid Robert Francis written evidence para 45.

6.4.1. Providing time for consultation with the chair and major stakeholders

When an inquiry is announced, there must be some indication of the terms of reference that define its breadth of remit and hence its powers.[50] However, a number of the HL Select Committee witnesses were of the view that there is benefit to delaying the announcement of the final terms of reference to allow time both for consultation with the chair and for further consideration. Jason Beer suggested that an inquiry should be allowed to proceed for a short 'cooling-off period', before the full and final terms of reference are determined, because the chair is not necessarily well-placed to provide meaningful input into the terms of reference when first appointed. CEDR[51] went further, including reference to key stakeholders, suggesting:

> "a one-month period of consultation, particularly with key potential stakeholders in the inquiry subject matter, to consider how to draft terms of reference that match the needs of the parties and create legitimate expectations of what the inquiry process could deliver rather than have a problem of expectations at the end of the process."[52]

Alun Evans, secretary to the *Foot and Mouth Inquiry*[53] and *the Detainee Inquiry*[54] agreed with this approach, noting that both these non-statutory inquiries had a period of three months before the formal start of the inquiry, during which there were discussions between the chair and the secretary to the inquiry and the Government representatives. There was also informal consultation with groups of relevant stakeholders. These inquiries were only launched once "a near agreed set of terms of reference" were reached. Evans concluded that, as a result, the terms of reference were much more robust, much less open to challenge and much more helpful to completion of the inquiries, in these instances.[55]

Nevertheless, in the case of the *Detainee Inquiry* problems still arose notwithstanding consultation took place with major stakeholders. The Inquiry was, in fact, never

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[50] See HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* paras 141 and 143.
[51] The Centre for Effective Dispute Resolution.
[52] Karl Mackie oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q59.
[53] Inquiry into the lessons to be learned from the foot and mouth disease outbreak of 2001.
[54] "To examine whether the UK government and its intelligence agencies were involved in improper treatment of detainees held by other countries in counter-terrorism operations overseas, or were aware of improper treatment of detainees in operations in which the UK was involved" HC Deb 18 January 2012, vol 538, col 752.
[55] Alun Evans oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q131.

completed because of delays caused by lengthy ongoing police investigations.[56] (An interim report was published, summarising the preparatory work of the Inquiry and highlighting particular themes and issues that the Inquiry believed might be the subject of further examination.[57] It was subsequently announced that these issues would instead be investigated by the Intelligence and Security Committee of Parliament (ISC)).[58] However, even before its discontinuance, there were serious issues arising from a clash of expectations between many of the participants and the inquiry over the interpretation of the terms of reference and the focus and purpose of the Inquiry. Engagement with core participants was not effective and there were threats of boycott from many of the participants (see 6.6.1).

As discussed earlier, tensions arising from differences in expectations over the role, or primary role, of a public inquiry are common (see 2.5). Consultation over the terms of reference of a public inquiry offers an opportunity to set and manage expectations over the breadth, scope and purpose of a public inquiry, but it must be carefully managed. Because of differences in expectations, the terms of reference of a public inquiry will rarely satisfy everyone and, on occasions, consultation with major stakeholders may not be enough to secure their support and participation in an inquiry.

6.4.2. Revising the terms of reference

Lee Hughes, Secretary to the *Hutton Inquiry*, a non-statutory inquiry pre-2005 Act Inquiry and the statutory *Baha Mousa* and *Al-Sweady inquiries*, agreed that discussing the proposed terms of reference with major stakeholders before they are announced is good practice, and noted that consultation took place with stakeholders during both the *Baha Mousa* and *Al-Sweady Inquiries.*[59] He added words of caution about starting an inquiry

[56] It could not carry out its full investigation until any criminal proceedings had ended, to avoid prejudicing those proceedings.
[57] The Inquiry produced an interim report of themes and concerns based on its analysis of 20,000 pre-existing documents from the intelligence agencies and from Whitehall. Further allegations were then made about renditions in Libya.
[58] Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q51 and Intelligence and Security Committee of Parliament, 'News Item' (11 September 2014) <http://isc.independent.gov.uk/news-archive/11september2014> accessed 31 May 2020.
[59] An unsuccessful attempt was made to expand the Al-Sweady terms of reference as a result of a subsequent decision of the European Court of Human Rights (see discussion below). However, Lee Hughes concluded that the situation was exceptional and that "in normal circumstances, I think if you had, say, provisional terms of reference and you wanted to change them, you ought to do that within

with no framework or no terms of reference at all; an inquiry must operate within its terms of reference, which define its parameters. He argued that those parameters need to be set early on, with the potential to adjust them, but for a limited period only.[60] Lord Bichard, chair of the *Bichard Inquiry*,[61] whilst supporting some form of preliminary input into the terms of reference, warned against any process that repeatedly revisited the form of the terms of reference because of the need for clarity.[62]

Sir Ian Kennedy, chair of the *Bristol Royal Infirmary Inquiry*, stressed the importance of the chair initially talking through the terms of reference at some length with the minister. However, once the terms of reference are then agreed, he cautioned against revisiting those discussions, since repeatedly revisiting the matter with the minister might give the appearance of being swayed by whatever might be the political sentiment of the moment, which would undermine trust in the independence of the inquiry.[63] Sir Brian Leveson was also against the idea of revisiting an inquiry's terms of reference after a month or so, particularly for inquiries where time limits are very tight and work needs to start very quickly. Amending the terms of reference at that stage, for those types of inquiry, could undermine work that has already taken place.[64]

6.4.3. Separating the announcement of the inquiry from the announcement of the final terms of reference

The *Leveson Inquiry* was identified in the HL Select Committee Report as an example of a flexible approach being adopted to determine an inquiry's terms of reference. Draft terms of reference were announced prior to the final version and the inquiry commencing its work.[65] Albeit over a tight two week period, there was detailed consideration, with the proposed terms of terms of reference growing 'very substantially'

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the first six months." Lee Hughes oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q131.

[60] Ibid Q131.

[61] Into child protection issues linked to the Soham murders in 2001.

[62] Lord Bichard oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'Q215.

[63] Sir Ian Kennedy oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'Q215.

[64] Sir Brian Leveson oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q92.

[65] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 143 and 144 and Sir Brian Leveson oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q92.

from the initial statement by the Prime Minister. The HL Select Committee concluded that this illustrated the importance of allowing flexibility and latitude in the announcement of the fact of the inquiry, the identity of the chair, and the final terms of reference.[66]

In addition to recommending that the chair of an inquiry should have the ability to negotiate precise terms of reference before agreeing to undertake an inquiry (see 6.3.4) the 2005 PASC also recommended that the Inquiries Bill "should provide specifically for a short period of consultation after any announcement to ensure that the final terms of reference meet the expectations of a particular inquiry", including appropriate parliamentary involvement.[67]

When rejecting this recommendation, the Government noted in its response that clause 5 of the Bill (now section 5 of the 2005 Act) requires the minister convening an inquiry to specify the setting-up date of the inquiry in the instrument appointing the chair and, before that date, set out the terms of reference of the inquiry. The Government reasoned that it therefore followed that the setting-up date could be adjusted to allow for a longer consultation period when required, or a shorter period when wider consultation is not needed or an inquiry needs to get underway more urgently.

However, this did not take into account the fact that clause 6 of the Bill (now section 6 of the Act) requires the minister to make a statement to Parliament "as soon as is reasonably practicable" announcing the inquiry and also simultaneously stating the name of the chair and the terms of reference. It also did not take into account the frequent strong public and political pressure to announce an inquiry and its terms of reference very quickly.

As discussed in chapter 5, the HL Select Committee concluded that the identity of the chair should not be decided in haste and the name of the chair should not necessarily be the subject of the same statement as the announcement of the inquiry itself (see 5.3). It recommended that section 6(2) should be amended accordingly[68] and that

[66] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 144.
[67] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 85, recommendation 3 and with reference to evidence given by Sir Louis Blom-Cooper on the involvement of Parliament, para 84.
[68] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 114.

recommendation was accepted by the Government.[69] The HL Select Committee concluded that that argument applied *a fortiori* to the terms of reference, noting that the requirement that the minister must also consult the chair on the terms of reference means that the time for formulating and agreeing the terms of reference prior to that announcement is still further reduced.[70] It recommended that section 6(2) should be further amended:

> "to allow a minister, in announcing an inquiry, to set out only draft terms of reference, and that the final terms of reference should, when agreed with the chairman, be the subject of a further statement. This, we anticipate, would normally be a written statement, as permitted by section 6(4)."[71]

This would therefore allow a short 'cooling off period' after the announcement of an inquiry and draft terms of reference, while the chair familiarises him or herself with the material and consultation takes place.[72]

The Government rejected this suggestion, stating:

> "it is neither practical nor sensible for there to be two sets of terms of reference in the public domain. On announcing an inquiry, ministers will invariably set out the broad scope of the inquiry which will then be finessed for the formal announcement of the terms of reference"[73]

However, it is not clear to what extent the Government's approach of announcing broad terms of reference, which are later finessed, would differ in practice from the recommendations of the HL Select Committee that 'draft' terms of reference followed by a later announcement of the final terms of reference. (The Government did, in fact, actually use the terms 'draft' and 'final' terms of reference when announcing the details of the *Leveson Inquiry.*)

In practice, this issue has become less of a concern. Since this initial response, the Government has, in practice, announced consultation periods in relation to a number of

[69] The legislation has yet to be amended.
[70] Ibid para 142.
[71] Ibid para 146, recommendation 10.
[72] Ibid paras 144 – 146.
[73] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 53.

recent inquiries, which have provided the time recommended by the HL Select Committee for the chair to familiarise him or herself with the material and for consultation to take place (see 6.6.4). Had the HL Select Committee perhaps used the term 'framework', 'outline' or 'indicative' terms of reference, rather than 'draft', the recommendation may not have been met with the same degree of resistance.

6.5. Broader Consultation

Many have argued strongly in favour of consultation not only with the chair and with major stakeholders, but also potentially with the wider public (see below). Consultation provides an opportunity for further consideration and improvement of an inquiry's terms of reference and to achieve broader consensus and support. When the Inquiries Bill was considered, there was considerable debate about whether it should contain a specific requirement for wider consultation. Whilst recognising that ministers often consult more widely on terms of reference, and that guidance should make it clear that consultation is desirable, the Government rejected the 2005 PASC recommendation that consultation should be a requirement,[74] another example of the Government rejecting recommendations that would restrict the discretion and power of the minister. Further, the Government was also concerned about how to define exactly how wide that consultation should be and was concerned that such a requirement would be likely to lead to judicial review challenges from any groups who felt that they ought to have been consulted.[75]

This matter was addressed again in evidence before the HL Select Committee. Many witnesses gave evidence to the HL Select Committee in favour of consultation with a broader group of persons with a particular interest in the inquiry, particularly survivors, victims and their families. As discussed above, the secretaries to the non-statutory *Foot and Mouth* and *Detainee Inquiries*, and the statutory *Baha Mousa* and *Al-Sweady Inquiries*, supported arguments in favour of broader consultation with potential stakeholders, based on their experience during those inquiries (6.4.1 and 6.4.2).

[74] Ibid 12.
[75] Ibid.

Ashley Underwood, counsel to the *Robert Hamill Inquiry* and the *Azelle Rodney Inquiry* stated he and colleagues had come across extremely fraught situations leading to inquiries "and yet we have found it entirely straightforward to deal with people who have extremely reasonable expectations." Whilst not excluding the possibility that it might be unrealistic in some cases, he said their experience was that "if you have consultation you will get a decent result about terms of reference."[76] Eversheds[77] also supported consultation "with relevant victims who may have valuable input on the formulation of the terms of reference."[78] Peter Riddell, a panel member of the *Detainee Inquiry*, on the other hand spoke of problems dealing with particular groups during that inquiry (see 6.6.1), which sometimes had broader concerns and agendas that did not align with the focus of the inquiry (nor indeed align with the views of other participants or groups of participants).[79]

Evidence given on behalf of the Ministry of Justice suggested that, where a public campaign group had been vocal and prominent, it would be highly unlikely that a Minister would be unaware of what they would wish to see in the terms of reference, thus making consultation less necessary.[80] However, Julie Bailey,[81] who campaigned intensively for the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, felt it was an omission that those who had campaigned for the public inquiry had not been consulted over the terms of reference, and felt that matters had been missed from the terms of reference as a result (see 6.6.2).[82]

Robert Francis QC, chair of the *Mid Staffordshire NHS Foundation Trust Public Inquiry* went further and suggested that there should be consultation with the public (not just potential stakeholders), to which the minister should be required to have regard, though

[76] Ashley Underwood QC oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q264.
[77] An international law firm and solicitors to the *Bloody Sunday*, *Shipman*, *Rosemary Nelson* and *Mid Staffordshire Inquiries*, and who acted for the Metropolitan Police Authority in the *Leveson Inquiry* and others
[78] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12.
[79] Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q66.
[80] Shailesh Vara oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q334.
[81] Founder of Cure the NHS.
[82] Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q162 and Q183.

not be bound to follow.[83] However, he also recognised that, for some inquiries, time pressure may prevent consultation, and a pragmatic approach may have to be taken, as was the case for his own inquiry.

Sir Ian Kennedy supported Robert Francis' suggestion of consultation with the public or wider community.[84] Dr Judith Smith, expert witness and assessor to the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, suggested that, given the huge complexity of some of these inquiries, within the scoping exercise suggested by Robert Francis there could also be engagement with assessors and experts, as well as core participants and others. This would provide an opportunity to refine the terms, make sure that the inquiry is appropriately focused, and assist others in understanding the limits to the inquiry's remit.[85]

Questions have been raised about whether broader consultation might raise expectations that can never be satisfied.[86] As discussed above, inquiries rarely satisfy everyone because of differences in expectation about the purpose of an inquiry and what it might achieve (see also 2.5). Engaging in consultation and inviting debate might increase the sense of frustration and dissatisfaction when the outcome of the consultation is not the one sought. Further, concern has been raised about consultation simply enhancing the public concern.[87] However, as is discussed below, recently there has been a move towards increased public consultation. For those inquiries, there has been no apparent enhanced public concern as a result of the consultation (see 6.6.4).

The PASC concluded that there was merit in a short period of broader consultation before announcing the final terms of reference;[88] as did the subsequent HL Select Committee, which, whilst not going so far as including 'the wider public', did recommend that:

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[83]Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q215.
[84] Sir Ian Kennedy oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q215.
[85] Judith Smith oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q313.
[86] For example, Baroness Hamwee at HL Select Committee, 'Written and Corrected Oral Evidence' Q264.
[87] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 83.
[88] Ibid para 84.

> "interested parties, particularly victims and victims' families, should be given an opportunity to make representations about the final terms of reference"[89]

This might have the additional benefit of reducing judicial review challenges (see 6.7). The Government accepted the HL Select Committee's recommendation in part, however, with the caveat:

> "…this proposal would not be helpful in cases where the Government wished to respond swiftly to an issue or issues of public concern and it would be potentially problematic in cases where there are multiple victims."[90]

This left the position open to diverse interpretation and created a lack of clarity and certainty regarding the position on consultation and the potential for terms of reference to be decided in undue haste, without the benefit of wider consultation, remains. In practice, however, this has been mitigated by an apparent change in approach from the Government, which appears to be more willing to announce formal consultation periods when announcing new inquiries (see 6.6.4).

Influence over individual inquiries:

6.6. Political Influence

As seen above, attempts have been made by select committees, and those giving evidence to select committees, to influence the process by which terms of reference are set by recommending: legislative change to allow for increased involvement of Parliament, the chair, those most closely affected by the inquiry and the public; and to lengthen the period during which consultation and consideration of the terms of reference takes place. These attempts have been largely ineffective. This section now examines political influence over specific individual inquiries. Attempts have been made to influence the terms of reference of individual inquiries and, in doing so, have brought about changes to the public inquiry process as a whole despite the formal political influence of the select committees having failed to do so.

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[89]Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 151, recommendation 11.
[90] Ibid para 55.

Many of those most closely affected by a public inquiry, such as survivors, victims, family members and NGOs, including those who may have campaigned for many years for an inquiry, have very strong view about the form its terms of reference should take. Those views may differ significantly from the views of other participants, such as police forces, prison services, and the armed forces and from the minister convening the inquiry. This has given rise to many challenges to decisions over the terms of reference of individual public inquiries.

Frequent attempts have been made to influence the terms of reference of specific individual inquiries, both at the level of the minister who sets the terms of reference and has the power subsequently to vary the terms of reference under section 5(3) of the 2005 Act and also at the level of the chair and panel who interpret the terms of reference. In the former case, political pressure has been exerted by participants, Parliament, the media and public. Requests for the minister to amend the terms of reference may also come from the inquiry itself. In the latter case, it is inappropriate for political pressure to be exerted on a chair and panel of a public inquiry, who operate entirely independently. However, those most closely connected to a public inquiry often seek to influence the chair's interpretation of the inquiry's terms of reference whether through representations to the inquiry or, as is increasingly common, through a formal process of consultation with participants, interest groups and the wider public, before the form of the terms of reference are published.

The following sections examine examples of political influence in relation to individual inquiries that fall into four categories identified from the analysis of the data: an earlier approach to consultation; challenges to the breadth and interpretation of terms of reference; broader political pressure outside a formal consultation process; and an apparent new approach to consultation.

6.6.1. An earlier approach to consultation with participants

Practice has differed between inquiries in terms of whether or not there is a formal consultation process with participants and the wider public. The *Foot and Mouth* and *Detainee* Inquiries,[91] both non-statutory inquiries, had a period of consultation for three

[91] Convened 2001 and 2010 respectively.

months before the Inquiry started, during which there were discussions between the chair and government representatives, as well as informal consultation with relevant stakeholders.[92] The *Iraq Inquiry*, also non-statutory, had no consultation at all.[93] The core participants to the *Al Sweady* Inquiry, a statutory inquiry, were given the opportunity to comment on the terms of reference at the outset of the Inquiry.[94] By way of contrast, there was no consultation exercise on the *Mid Staffordshire NHS Foundation Trust Public Inquiry*, a statutory inquiry, because of the time pressure under which the Inquiry was operating.[95]

Consultation can itself give rise to issues. The *Detainee Inquiry* had a three month period of consultation with relevant stakeholders. However, in evidence to the HL Select Committee, Peter Riddell, a member of the inquiry panel, spoke of frustrations over the Inquiry's terms of reference persisting after the consultation process. Throughout the Inquiry, there was a clash of expectations between the panel's focus on the British Government's and the intelligence agencies' awareness of alleged mistreatment of British detainees, and the opposing expectation of the detainees and NGOs that there would also be an investigation into the allegations of torture themselves.[96] This, and other concerns over a perceived lack of independence and a lack of transparency, led ultimately to a boycott by the detainees, their lawyers and NGOs.

The Inquiry was, in fact, never completed, although not as a direct result of the boycott (see 6.4.1). Although, technically, the inquiry could have continued without the participation of the detainees and the NGOs who objected to the interpretation of the terms of reference, since the inquiry was focused on the agencies and their actions and behaviour, it would have significantly undermined public confidence in its findings.

The *Detainee Inquiry* once again illustrates how conflicting tensions and pressure arise from different expectations from a public inquiry, based on the capacity in which a party engages with a public inquiry (see 2.5). It is also important to note again that one group

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[92] Alun Evans oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q131.
[93] Convened 2009. Foreign Affairs Select Committee, 'Oral evidence taken before the Foreign Affairs Select Committee' (4 February 2015) Q3 <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html> accessed 31 May 2020.
[94] Susan Bryant oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q238.
[95] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q215.
[96] Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q59.

of participants does not represent all participants (see 5.7.1). Although accessible information about the *Detainee Inquiry* was made available on the website, it was only a small group of people who were engaged in consultation with the inquiry at that stage, not the public as a whole. Peter Riddell identified three main groups of people with whom the Inquiry met: the detainees and their lawyers, NGOs, and journalists including those linked with NGOs. Engagement with each group presented its own challenges.

With regard to the detainees and their lawyers, Peter Riddell noted it was:

> "extremely useful for our understanding and we tried to offer reassurance; though many of them changed their minds about participation. But there is such a climate of suspicion on their lawyers' part and, to some extent, on their part."[97]

Interaction with the NGOs was seen by the Inquiry as less useful than interaction with the detainees and their lawyers, as some NGOs had broader concerns and agendas which, particularly when working together, were be found to be obstructive to the inquiry. Peter Riddell noted that a problem for any inquiry is determining for whom an NGO is speaking. [98] The Inquiry found interaction with the third group, journalists (two of whom were linked with NGOs) was an inhibition to some of the interaction.

There was no consultation process for the *Mid Staffordshire NHS Foundation Trust Inquiry*, which Robert Francis attributed to the time pressure the Inquiry was under.[99] That statutory Inquiry followed the earlier non-statutory inquiry into the Mid-Staffordshire NHS Foundation Trust .[100] In the report of the earlier inquiry, the chair, Robert Francis, had concluded that there was a need for "an independent examination of the operation of each commissioning, supervising and regulatory body, with respect to their monitoring function and their capacity to identify hospitals failing to provide safe care".[101] He reported that during that first inquiry he had received many demands for a further public inquiry, one element of which being that there should be such an

[97] Ibid.
[98] Ibid Q66.
[99] Robert Francis oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q215.
[100] *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009*, chaired by Robert Francis QC.
[101] *Independent Inquiry into care provided by Mid Staffordshire NHS Foundation Trust January 2005 – March 2009* (February 2010) HC375-I recommendation 16.

investigation.[102] That recommendation was accepted by the minister and the statutory *Mid Staffordshire NHS Foundation Trust Public Inquiry* was subsequently convened (see 3.5.3).

It could be argued that participants therefore, in effect, had an element of influence over the terms of reference of the second inquiry as a result of the reporting of their demands during the first inquiry. However, in evidence to the HL Select Committee Julie Bailey, founder of Cure the NHS,[103] stated that one of the disappointments, and key things missing from the statutory inquiry, was an opportunity for those most closely affected by the subject matter of the Inquiry to have an input into the terms of reference and that, as a result, some things were missed.[104]

The original non-statutory *Independent Panel Inquiry into Child Sexual Abuse* did not have a formal consultation period. However, following intense public pressure, the panel inquiry was disbanded and the terms of reference of the new statutory inquiry, the *Independent Inquiry into Child Sexual Abuse* (*IICSA*) were reviewed in light of feedback from survivors (see 4.9.2). As discussed in more detail below (6.6.4), the *IICSA* may, in practice, represent a turning point in the approach towards consultation. Three subsequent inquiries with large numbers of participants including survivors, victims, family members and pressure groups, the *Undercover Policing Inquiry, Grenfell Tower Inquiry and Infected Blood Inquiry*, each had a formal consultation process before the final terms of reference were published.

6.6.2. Challenges to the breadth and interpretation of terms of reference

The research shows that attempts to exert pressure on a minister or chair of an inquiry in order to influence terms of reference, in the absence of a consultation process, have generally been unsuccessful. As explained above, one of the most common sources of disagreement over an inquiry's terms of reference relates to their breadth and interpretation (see 6.2). During the *Billy Wright Inquiry* into the death of the loyalist

[102] Robert Francis supplemental written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence'.
[103] Which had campaigned extensively for a statutory inquiry into the failings of the Mid Staffordshire NHS Foundation Trust and the wider failure of the associated regulatory and supervisory systems.
[104] Julie Bailey oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q183 (citing 'whistleblowing' as an example of an issue that should have been included in the terms of reference).

paramilitary leader at HMP Maze in Northern Ireland, which ultimately concluded that there was no state collusion in the murder, participants attempted to influence the chair's interpretation the inquiry's terms of reference. [105] It was argued that the chair had been overly swayed by the Secretary of State for Northern Ireland's definition of 'collusion', rather than that adopted by the Cory Collusion Report,[106] which was commissioned by the UK Government and had recommended a public inquiry be held into the death.[107] Representations were made by families to adopt the broader definition in the Cory Report (see 6.3.1). However, those representations were rejected by the inquiry panel on the basis "we must have primary regard to our Terms of Reference". The Secretary of State for Northern Ireland subsequently indicated that such matters could still be covered by the inquiry without consideration of them being 'collusion'.[108]

Further, a number of prison officers who were called to give evidence before the *Billy Wright Inquiry*, challenged the minister over the terms of reference, on the basis that the wording requiring the Inquiry to determine whether any wrongful acts or omissions facilitated the death was incompatible with section 2(1) of the 2005 Act, which states that an inquiry has no power to determine, any person's civil or criminal liability. They wrote to the minister asking him to amend the terms of reference under section 15(6) of the 2005 Act to make them compatible with Article 2. They were unsuccessful and brought a legal challenge, which was also unsuccessful (see 6.7.1).[109]

The death of Robert Hamill, who died from injuries he sustained during an affray in Portadown, Co Armagh in 1997, was also the subject of the Cory Report, which concluded there was sufficient evidence to warrant a public inquiry. The minister excluded analysis of the role the Director of Public Prosecutions in respect of prosecutions arising out of the death from the terms of reference. In this case, it was both the family of the deceased and the inquiry itself that sought an extension to the terms of reference to include the DPP. However, the Secretary of State rejected the requests on the basis of

[105] See also the discussion in chapter 4 of this thesis.
[106] See The Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12.
[107] Cory P, 'Cory Collusion Inquiry Report Billy Wright' (TSO, 1 April 2004) HC 472.
[108] The Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12.
[109] See also Beer J, Dingemans J, and Lissack R (eds), *Public Inquiries* (OUP 2011) para 2.114.

the DPP's decisions having been reasonable.[110] The family subsequently brought a legal challenge (see 6.7.2).

6.6.3. Broader political pressure

The research also shows there are instances of broader political pressure, such as campaigning and media coverage, the lobbying of members of parliament and cross-party discussions, influencing decisions on the terms of reference of individual inquiries. The *Iraq Inquiry* was convened to consider Britain's involvement in the Iraq conflict between mid-2001 and July 2009, from the run-up to the conflict, the subsequent military action, to its aftermath, in response to sustained public and political pressure. There was no formal consultation process. Because of the heavily political nature of the subject matter of the Inquiry, the Government was criticised for the lack of parliamentary debate on the terms of reference.[111]

The length of the Inquiry and delay in publishing its report were the subject of much criticism. One of the difficulties the Inquiry faced, which contributed to the delay, was the fact that its terms of reference were so broad. When speaking to the BBC, Lord Butler, who had chaired the earlier privy counsellor review into intelligence about weapons of mass destruction,[112] concluded that part of the problem was the Government's response to the public and political pressure, stating that, when setting up inquiries of this sort, governments "try to satisfy everybody… They do not want to be seen to be restricting anything, which can, or does, lead to great problems." He also concluded that, when pressing for a public inquiry with a wide remit, people needed to be mindful of unforeseen consequences, which are a lengthy drawn out inquiry and delay in publication of the report, its findings and recommendations.

The *Leveson Inquiry* was unusual in that its terms of reference were agreed at a high level, between the leaders of the three main political parties, and had cross-party support.[113] The Government consulted with the chair, the Opposition, the chairs of relevant select committees, and the devolved administrations. The Prime Minister also

[110] The Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 10.
[111] HC Deb 15 June 2007, vol 494, cols 25-26.
[112] In 2004.
[113] Robert Jay QC oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q124.

talked to the family of Milly Dowler, a murdered teenager whose phone was hacked by newspaper reporters, and to the Hacked Off campaign group.[114]

The terms of reference of the *Leveson Inquiry* were first announced by the Prime Minister as 'draft terms of reference'[115] (despite the fact that three years later, the Government rejected the HL Select Committee's recommendation that a convening-minister set out only draft terms of reference when announcing an inquiry (see 6.4.3)).[116] The terms of reference were amended a number of times, during a tight two week consultation period, growing very substantially from that initial announcement. [117] Final terms of reference were subsequently announced once the consultation was completed.

The *IICSA*, which was convened after the HL Select Committee Report was published, illustrates how public pressure outside a formal consultation process can, on occasions, be sufficient to influence, or force the amendment of, an inquiry's terms of reference. On this occasion it is arguable that public pressure forced amendment to the terms of reference to too great a degree. [118] The *IICSA*'s terms of reference were significantly broadened over time in response to public and political pressure, to the point that many feared the inquiry had become unworkable.

The terms of reference for the original non-statutory *Independent Panel Inquiry into Child Sexual Abuse* set out the scope of the Inquiry, including the statement that the Inquiry Panel would "cover England and Wales" and "consider these matters from the 1970s to the present".[119] In response to sustained public pressure and the resignation of two chairs to the Inquiry, the panel was disbanded in 2015 and a new statutory inquiry was convened. At that stage the Home Secretary also reviewed the inquiry's terms of reference, in light of ongoing feedback from survivors. This resulted in a significant widening of the scope of the Inquiry, including the removal of any cut-off date for the

[114] HC Deb 20 July 2011, vol 531, col 918. Hacked off is a campaign group for a free and accountable press, formed in response to the phone-hacking revelations in 2011.
[115] HD Deb 20 July 2011, vol 531, col 918.
[116] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) paras 49 and 51.
[117] Sir Brian Leveson oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q85 and HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 143.
[118] See also the discussion in discussion on this point in Emma Ireton, "The ministerial power to set up a public inquiry: issues of transparency and accountability" (2016) 67(2) NILQ 209.
[119] 'Independent Panel Inquiry into Child Sexual Abuse Terms of Reference' <http://data.parliament.uk/DepositedPapers/Files/DEP2014-1359/Terms_of_reference_CSA_Inquiry.pdf> accessed 31 May 2020.

work of the Inquiry and provision for liaison to take place between the Inquiry and its counterparts, beyond the scope of the inquiry in England and Wales to elsewhere in the United Kingdom.[120]

While this was welcomed by those pressing for change, it resulted in a much more complex and drawn-out process. Many feel that by responding to pressure from participants and the wider public in this way, the *IICSA* has become too far-reaching. Many fear that the Government has risked significantly delaying the outcome of the Inquiry and ultimately frustrating its objectives. The failure to get the model right from the outset, followed by repeated backtracking on earlier decisions, risked seriously damaging public confidence in the Inquiry.[121] Furthermore, influence of this type is dependent on well-informed, well-mobilised groups building a momentum of publicity and support, sufficient to trigger the engagement of the minister, which is an inconsistent and unreliable approach to engagement with participants. It is no substitute for a formal process of consultation.

Unlike the *Detainee* Inquiry, where engagement with participants at the terms of reference stage involved a relatively small number of people, the *IICSA* was managing a relationship with hundreds of thousands of victims of historic institutional sexual abuse. Lord Macdonald, the Former Director of Public Prosecution, spoke both of the difficulties of this, but also, most significantly, of the need for an inquiry to maintain independence from all participants.

Speaking at a crucial time, when the inquiry's third chair had just resigned and her replacement had not yet been announced (see 5.7.1), Lord MacDonald spoke of the fact that the *IICSA* had an extremely serious problem with scale, which was making the inquiry unmanageable. He concluded that was a result of it trying to conflate two vast topics: firstly that of providing catharsis for the victims of abuse and secondly carrying out a forensic analysis of the policy that led to the abuse and identifying changes that might

[120] HC Deb 12 March 2015, vol 594, col 41WS. As child protection is a devolved matter, other jurisdictions in the United Kingdom" will look at the issues within their own geographical remit. However, joint protocols will be set up with counterpart inquiries in Scotland, Northern Ireland and in Jersey to ensure that information can be shared and lines of investigation can be followed across geographical boundaries."

[121] As discussed in Emma Ireton, 'Bowing to Public Pressure: the child abuse inquiry' [2016] The Conversation <https://theconversation.com/bowing-to-public-pressure-the-child-abuse-inquiry-66354> accessed 31May 2020.

minimise the risk of such offending in the future. He was concerned about the risk that the inquiry would take many more years than the six or seven originally estimated by the then chair, Dame Lowell Goddard. He also noted that any attempt at that stage to refocus the inquiry, to cut it down to size and make it manageable, would be met with the response that that is all "part of the establishment cover up and conspiracy" stating:

> "This is an inquiry that is going to produce objective, forensic conclusions which are very damaging to some people and some institutions potentially. And therefore, the inquiry has to run along rigorous quasi-judicial or judicial lines. You simply can't have, I'm afraid, victims of this conduct, controlling the means by which the inquiry is delivered. And that would be a form of justice that would go seriously off the rails. I think this is a huge problem of managing relations with of the many tens of thousands, hundreds of thousands people who are the victims of this sort of crime, managing relations with them and delivering something which can come to conclusions." [122]

In a statement, on her subsequent appointment as chair, Professor Alexis Jay reassured victims and survivors that the panel would not be seeking any revision of the Inquiry's terms of reference or introducing any new restrictions on its scope. It planned to review its working practices to address the scale of the inquiry.[123]

It is clear that the absence of a formal consultation process, responding to constant political pressure, and incrementally revisiting the terms of reference, has created tremendous challenges for the *IICSA*. This approach has not been repeated and appears to mark a turning point in the Government's approach to consultation. As discussed below, since this inquiry, ministers seem more open to announcing a formal consultation process when an inquiry is first announced and have been resistant to later calls to vary terms of reference, particularly where to do so would extend the inquiry and delay publication of its report.

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[122] 'Abuse inquiry: Lord Macdonald on Dame Lowell Goddard resignation' *BBC, The World at One* (London, 5 August 2016) <www.bbc.co.uk/news/av/uk-politics-36988842/abuse-inquiry-lord-macdonald-on-dame-lowell-goddard-resignation> accessed 31 May 2020.
[123] Statement published on the *IICSA* website (6 September 2019) https://www.iicsa.org.uk/news/statement-professor-alexis-jay-obe.

6.6.4. A new approach to consultation?

There are indications from subsequent inquiries that lessons may well have been learnt from the *IICSA*. Holding a formal consultation period, with the chair and with interested parties and, on occasions the wider public, is appearing to become the norm. There appears to be a greater emphasis on getting the terms of reference right at an early stage and a reluctance to revisit, amend and broaden terms of reference in response to ongoing pressure from participants and the public.

The *Undercover Policing Inquiry* was announced a month after the announcement of the *IICSA*, into the conduct of officers in the 'National Public Order Intelligence Unit' (NPOIU) and Metropolitan Police Service's 'Special Demonstration Squad' (SDS).[124] The minister stated "My officials will consult Lord Justice Pitchford and interested parties to the inquiry over the coming months on setting the terms of reference"[125] and that the Inquiry would "consult all interested parties in the coming months and will review and publish their terms of reference for the inquiry…"[126] The terms of reference were announced four months later, "to inquire into and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968…"

The terms of reference included the statement that "The inquiry will not examine undercover or covert operations conducted by any body other than an English or Welsh police force." Pressure was subsequently brought to bear by participants of the inquiry, Northern Irish and Scottish Member of Parliament and organisations such as Amnesty International, to extend the terms of reference to include Northern Ireland and Scotland, as result of evidence of the deployment of undercover officers across jurisdictional boundaries.[127]

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[124] Inquiry including into instances of women unknowingly entering into relationships with undercover police officers, claims that the family of murdered teenager Stephen Lawrence's had been monitored by police and that undercover officers had spied on political campaigners and had used the names of dead children to create their identities.

[125] HC Deb 12 March 2015, vol 594, col 44WS. The convening minister being Theresa May, the Home Secretary.

[126] HC Deb 26 March 2015, vol 594, col 1581.

[127] 'Undercover policing inquiry must be extended to Northern Ireland, say Amnesty' (*Amnesty International UK Press releases*, 1 March 2008) <https://www.amnesty.org.uk/press-releases/undercover-policing-inquiry-must-be-extended-northern-ireland-say-amnesty> accessed 1 June 2020.

An exchange of correspondence between Scottish and Irish ministers and the Home Secretary was summarised in the case of *Gifford* (discussed at 6.7.4).[128] The Home Secretary refused to revisit and extend the terms of reference on the basis that the Inquiry was extensive and complex, and already underway. The minister noted that amending the terms of reference would require further consultation and delay the Inquiry, when there was a pressing need to conclude it swiftly and make recommendations. Notably, the minister insisted on a narrow approach, stating the Home Office was confident the inquiry could gain an understanding of historical failings and make recommendations without needing to consider every instance of undercover policing, wherever it was undertaken. Legal challenges were subsequently commenced in respect of both Northern Ireland and Scotland, but they too were unsuccessful (See 6.7.4).

When the *Grenfell Tower Inquiry* was convened, the Prime Minister adopted a similar, more structured approach towards consultation. The chair, Sir Martin Moore-Bick, was asked to consult the victims, family members and other interested parties on the terms of reference for the Inquiry and provide the Prime Minister with his recommendations for consideration prior to the final terms of reference being published.[129] Six weeks later, he wrote to the Prime Minister to confirm with details of the consultation process. He explained that:

> "[the consultation] took the form of meetings with local residents and other interested parties as well as an invitation to respond to a consultation document posted on the Inquiry's web site. Over 550 written responses were received, all of which have been acknowledged and carefully considered." [130]

A brief summary of those responses were enclosed together with draft terms of reference covering:

> "not only the fire itself, but matters such as the history of the building, its most recent refurbishment, the state of building and fire regulations, and aspects of

[128] Summarised in *In* the *Petition of Matilda Gifford* [2018] CSOH 108 | [2018] 11 WLUK 337.
[129] Letter from Theresa May to Sir Martin Moore-Bick (28 June 2017).
[130] Letter from Sir Martin Moore-Bick to Theresa May (10 August 2017) reproduced in *R (Daniels) v Rt Hon May, the Prime Minister v Sir Martin Moore-Bick* [2018] EWHC 1090 (Admin) [2018] 5 WLUK 97 [13].

the relationship between the residents of the tower and the local authority, including in the days immediately following the fire."[131]

He noted that it had become clear from the consultation that many of those who were affected by the fire, and some others, felt strongly that the scope of the Inquiry should be very broad and include an examination of social housing policy, the relationship between the residents of the estate and the local authority and the tenant management organisation. Many also felt strongly that the Inquiry should examine the response of local and central government to the disaster.[132]

Whilst sharing the first of those concerns, Moore-Bick concluded that the terms of reference should not be extended to those broader questions raised since it would significantly add to the length of the Inquiry and delay its findings, which might include identifying other defects elsewhere, putting others at risk. He also suggested that those matters, which, in his view, were not suitable for a judge-led inquiry, would be best dealt with by a different kind of process or body, in parallel with the Inquiry, by persons with experience in the areas of the provision and management of social housing, local government finances and disaster relief planning.[133] He did, however, agree that the terms of reference should be expanded to include the response of local and central government in the days immediately following the fire.

Throughout the period from the appointment of Moore-Bick as chair through the consultation period, there was also significant public pressure exerted through the media by survivors, families of the deceased and pressure groups, calling for very broad terms of reference, including an examination of local and national social housing policy.[134] When, a few days after his appointment, Moore-Bick had expressed the view that the terms of reference may not be broad enough to satisfy survivors, there were calls for his resignation, which were strongly resisted by the minister (see also 5.7.2).[135]

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[131] Ibid.
[132] Ibid.
[133] Ibid.
[134] 'Grenfell Tower fire campaigners call for broad inquiry' *BBC News* (London, 4 August 2017) <www.bbc.co.uk/news/uk-40828638> accessed 1 June 2020.
[135] 'Grenfell fire inquiry head must quit – survivors' *Sky News* (London, 3 July 2017) <https://news.sky.com/story/grenfell-fire-inquiry-head-must-quit-survivors-10934824> accessed 1 June 2020.

Despite this, the terms of reference were published by the Prime Minister's Office on 15 August 2017 in the form suggested by Moore-Bick at the conclusion of the consultation.[136] They include looking at the causes of the fire, the construction and modification of the building and the response of local and central government immediately following the fire. However, they do not extend to local and national social housing policy, in spite of the persistent calls for them to do so.

Both the *UCPI* and *Grenfell Tower Inquiry* consultation processes demonstrate once again how the multiplicity of interests in a public inquiry, and differing views on its primary role, are giving rise to challenges seeking to influence the form and nature of an inquiry. Broader terms of reference are attractive to victims, survivors and family members who are desperate for answers and accountability. Those broader terms of reference, however, mean a longer and more protracted inquiry, which delays the publication of findings, identification of lessons learnt, addressing public concern, restoring public confidence and preventing of recurrence not only for those victims, survivors and family but for the wider public as a whole. The minister and the chair need to balance carefully the diverse interests in, and competing expectations of the role of, a public inquiry. As stated above, an inquiry's terms of reference will rarely satisfy everyone. Many of the participants to the *Grenfell Tower Inquiry*, particularly many survivors and family members, were unhappy with the final terms of reference and felt that the consultation exercise was "window dressing that satisfied no one".[137]

A similar approach to formal consultation was adopted in The *Infected Blood Inquiry*, convened a month after the *Grenfell Tower Inquiry,* after many years of campaigning. There was a comprehensive public consultation process, which was launched on the inquiry's website. Almost 700 responses were received and considered by the chair before he wrote to the minister for the Cabinet Office setting out a summary of the

[136] Prime Minister's Office, 'Grenfell Tower Inquiry terms of reference published' (15 August 2017) <www.gov.uk/government/publications/grenfell-tower-inquiry-terms-of-reference-published> accessed 1 June 2020.
[137] Evidence of Jason Beer to the JUSTICE working party 'When Things Go Wrong' (15 November 2019) <https://justice.org.uk/our-work/system-wide-reform/when-things-go-wrong/> accessed 1 June 2020.

consultation responses and his recommendations for the terms of reference.[138] The minister accepted his recommendations. [139]

In comparison to the *Grenfell Tower Inquiry,* the outcome of the consultation process was much more positively received. Lawyers for over 300 of the people affected by being given contaminated blood welcomed the terms of reference stating:

> "It seems clear from the terms of reference unveiled by Sir Brian today that he, and the rest of the inquiry team, have really listened and taken on board what members of the community, those affected by this scandal, told them during the consultation process."[140]

Whilst there is no legal requirement for consultation on the terms of reference beyond the minister's consultation with the chair, and the Government expressly reserved its power not to consult where it wished to respond swiftly to issues of public concern (see 6.5), there does appear to have been a shift towards the holding of a period of formal consultation. This, in turn, is likely to raise expectations in respect of future inquiries and provide greater motivation for those pressing for consultation over an inquiry's terms of reference, making formal consultation more frequent.

6.7. Legal influence

Finally, this analysis turns to legal influence over the terms of reference of specific individual inquiries. There are more opportunities in practice to influence decisions on an inquiry's terms of reference than, for example, the decision whether or not to convene an inquiry, whether it is statutory or non-statutory or the identity of the chair (see chapter 3, 4 and 5). As seen above, ministerial decisions made when setting the terms of reference may be influenced by political means. The chair's recommendations to the minister on the final terms of reference, and the chair's interpretation of the final terms

[138] Letter from Sir Brian Langstaff to Rt Hon David Lidington (7 June 2018) www.infectedbloodinquiry.org.uk/sites/default/files/Letter-from-Chair-to-CDL-1.pdf accessed 1 June 2020.
[139] Letter from Rt Hon David Lidington to Sir Brian Langstaff (2 July 2018) www.infectedbloodinquiry.org.uk/sites/default/files/CDL-letter-to-Sir-Brian-Langstaff-1.pdf accessed 1 June 2020.
[140] Leigh Day 'Lawyer for contaminated blood victims welcomes Infected Blood Inquiry terms of reference' (*Leigh Day,* 2 July 2018) <www.leighday.co.uk/News/News-2018/July-2018/Lawyer-for-contaminated-blood-victims-welcomes-Inf> accessed 1 June 2020.

of reference, may be influenced by representations to the chair or minister or, particularly more recently, as part of a formal consultation process. Where such steps have been unsuccessful, attempts have also been made to challenge decisions on setting and amending an inquiry's terms of reference by judicial review.

The following section examines: challenges to the minister's interpretation of the 2005 Act when setting the terms of reference, the interpretation of 'public interest' when a minister amends the terms of reference, challenges seeking amendments to terms of reference to reflect a subsequent change in law and challenges to the minister's decision not to broaden an inquiry's terms of reference.

6.7.1. Billy Wright – challenge to the minister's interpretation of the 2005 Act when setting the terms of reference

A number of prison officers who were called to give evidence before the *Billy Wright Inquiry* challenged the terms of reference of the inquiry, which were:

> "To inquire into the death of Billy Wright with a view to determining whether any wrongful act or omission by or within the prison authorities or other state agencies facilitated his death, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; and to make recommendations."[141]

They argued that inclusion of the words "determining… wrongful act or omission" and "negligent" made them incompatible with section 2(1) 2005 Act, which states "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability."[142]

The court refused permission to proceed with the judicial review challenge and held that, although the terms of reference could be interpreted in the way that the applicants contended, the terms of reference did not require the Inquiry to do so. Taking note of statements from the minister and counsel to the inquiry, and correspondence from the Inquiry, the court was not satisfied that the applicants had established a case that the

[141] HL Deb 16 November 2004, vol 666, col 49.
[142] *R an application by Steven Davis for Leave to apply for judicial review* (NIQB, 6 August 2007) judgment of Weatherup J reported in Beer et al *Public Inquiries* (OUP 2011) para 2.114-2.116.

Inquiry intended to approach its terms of reference in a way that breached section 2(1) of the 2005 Act.

6.7.2. Hamill – challenge to the minister's interpretation of 'public interest' when amending the terms of reference

The *Hamill Inquiry* was initially established under section 44 of the Police (Northern Ireland) Act 1998 and, following a request from the chair, was subsequently converted to a 2005 Act inquiry (see 4.3.1). The family of Robert Hamill applied to judicially review the Secretary of State's decision not to extend the Inquiry's terms of reference to include analysis of the role the Director of Public Prosecutions in respect of prosecutions connected with his death, on the grounds that it would not be in the public interest to do so (see 6.6.2).[143] The court upheld the family's complaint that the test applied did not correspond to the test of public interest under section 15(6) of the 2005 Act,[144] which states that the minister can amend an inquiry's terms of reference, where an inquiry is converted into a 2005 Act inquiry, "if he considers that the public interest so requires". Instead, the minister had determined the issue by considering whether the case involved "exceptional circumstances", which erroneously incorporated a concept applied in the judicial review approach to challenges to prosecutorial decisions. The concept of "exceptional circumstances" should have been treated as a factor in assessing the public interest, not as the very basis for measuring the public interest.

The decision was referred back to the Secretary of State for reconsideration by reference to the statutory test. The Secretary of State then, whilst still declining to extend the terms of reference, did state that the terms of reference could be interpreted as allowing scrutiny of DPP decisions, insofar as they shaped the RUC investigation, but not the merits of the prosecutorial decisions themselves.[145]

6.7.3. Al-Sweady – challenge to reflect a subsequent change in law

The *Al-Sweady Inquiry* was itself convened as the result of a successful judicial review application (see 3.6.7). Approximately 18 months after the Inquiry commenced there

[143] *Re Hamill's Application for Judicial Review* [2008] NIQB 73; [2008] 7 WLUK 52.
[144] "The Minister may at any time after setting out the terms of reference under this section amend them if he considers that the public interest so requires."
[145] Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 10.

was a hearing before the Grand Chamber of the European Court of Human Rights in *Al-Skeini v United Kingdom* (in connection with the *Baha Mousa Inquiry,* see also chapter 3).[146] Whilst many caution against revisiting terms of reference once an inquiry is well underway,[147] core participants to the Inquiry felt that the *Al-Skeini* case affected the terms of reference of the *Al-Sweady Inquiry* and requested that the terms of reference be amended.

Prior to the *Al-Skeini* decision, the Supreme Court had taken the view that Articles 2 and 3 of the ECHR extended only to those detained in British controlled bases in Iraq. However, the Grand Chamber held that the obligation under the Convention was wider and it extended beyond the British bases and would cover soldiers engaged in security operations who were exercising authority and control over individuals killed in the course of security operations.[148] Section 5(3) of the 2005 Act provides that "The Minister may at any time after setting out the terms of reference under this section amend them if he considers that the public interest so requires." The core participants to the *Al-Sweady Inquiry* sought amendments to the terms of reference to reflect the findings in *Al-Skeini*.

It was estimated that the proposed amendments would increase the cost of the Inquiry by approximately £9 million and extend it by some 70 weeks.[149] The Secretary of State refused to amend the terms of reference on the basis that there was a very strong public interest in avoiding further delay given that the incidents occurred more than seven years ago. He also considered it was important that the Inquiry should be conducted in an efficient and cost-effective manner.[150]

The court held that the Secretary of State was in a better position than the court to assess public interest and was entitled in that context to have regard to the delay and the cost involved in altering the terms of reference. It specifically noted that, in the Secretary of State's view, the position adopted may in fact be compliant with the state's obligations under Articles 2 and 3 but, if not, there would be further investigation to ensure those obligations were properly discharged. The court recognised that the Inquiry had to balance interests of those participants who had cases currently being heard by the

[146] *Al-Skeini v United Kingdom* (2011) 53 EHRR 18.
[147] See above.
[148] See *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) [8].
[149] Ibid [13].
[150] Ibid [17].

Inquiry, which would be delayed, with the interests of those who had new rights recognised under the Convention as a result of the *Al-Skeini* case, who would have to wait longer for their cases to be determined. There was also a forceful argument in the submission that one inquiry dealing with all relevant matters was desirable. It was for the minister to assess that balance. Permission for judicial review was refused.[151] This is a further, clear illustration of the tension arising from different expectations of a public inquiry, based on the capacity in which a party engages with that inquiry, including participants, the minister, and the wider public (see 2.5).

6.7.4. Undercover Policing Inquiry – challenge to the minister's decision not to broaden the terms of reference

As discussed at 6.6.4 above, political pressure was brought in respect of the *Undercover Policing Inquiry*, seeking to extend the terms of reference to investigate the conduct of officers in the NPOIU and the SDS in Northern Ireland and Scotland as well as England and Wales.[152] In a letter to the Minister of Justice of Northern Ireland, the then Minister of State for Police and the Fire Service stated:

> "The inquiry as it stands is extensive and complex, with around 200 core participants. Amending the terms of reference at this stage would require further consultation and delay the progress of the inquiry.
>
> In the interests of learning lessons from past failures and improving public confidence, it is important that the inquiry proceed swiftly and make recommendations as soon as possible. The Home Office is confident the inquiry can both gain an understanding of historical failings and make recommendations to ensure unacceptable practices are not repeated without a need to consider every instance of undercover policing, wherever it was undertaken … On balance therefore, the former Home Secretary has confirmed that she does not intend to amend the terms of reference."[153]

[151] Ibid [30]-[36].
[152] The National Public Order Intelligence Unit and the Special Demonstration Squad.
[153] Letter from the Minister of State for Police and the Fire Service, the Rt Hon Brandon Lewis MP to Claire Sugden, Minister of Justice of Northern Ireland (25 July 2016) quoted *In the Petition of Matilda Gifford* [2018] CSOH 108 | [2018] 11 WLUK 337 [9].

In the case of *Gifford*[154] a challenge was brought to the decision not to extend the terms of reference to include Scotland (a similar challenge was brought in respect of Northern Ireland).[155] The petitioner argued that "undue weight had been given to the disadvantages of extending the terms of reference, as against the advantage that would be gained in promoting transparency and public confidence in policing, given the available information as to the extent of undercover police activity in Scotland."[156] The court rejected arguments stating:

> " I do not consider that it is open to me to assess the balance struck in relation to these competing considerations. Each of the considerations listed above is one which the Secretary of State was entitled to take into account, and she was also entitled to look at them cumulatively. Although the reasons given are brief, they do not disclose irrationality."[157]

These cases illustrate the courts' approach of deliberate restraint and a reluctance to interfere with the decision of the minister. However, they do assist with clarifying the public interest test applied when deciding whether or not to amend terms of reference, in relation to the public inquiry process as a whole. Once again, they also illustrate the challenges of balancing multiple competing interests in, and expectations of, a public inquiry.

6.8. Conclusion

This chapter examined the setting of an inquiry's terms of reference by the minister. In doing so, it analysed the merits of narrow and broad terms of reference, the role of the minister in setting the terms of reference and concerns over independence from Government, as motivation behind attempts that have been made to restrict the power of the minister, to change the timing of announcements and to increase consultation. It showed that attempts by select committees to bring about change to the decision-making process in relation to the public inquiry process as a whole have been largely

[154] *In* the *Petition of Matilda Gifford* [2018] CSOH 108 | [2018] 11 WLUK 337.
[155] *Re Kenny's Application for Leave to Apply for Judicial Review Northern Ireland* [2018] NIQB 76; [2018] 10 WLUK 626.
[156] *In the Petition of Matilda Gifford* [2018] CSOH 108 | [2018] 11 WLUK 337.
[157] Ibid.

ineffective. However, when looking at political and legal influence exerted in respect of individual inquiries, it showed that there are examples of influence over the terms of reference that have, in some cases, appeared also to influence the process adopted for later inquiries.

An inquiry's terms of reference are central to determining an inquiry's scope, role and ultimately its success. Frequently there is a tension between those most closely affected by the subject matter of an inquiry seeking a broad inquiry, and as full an account as possible of the events and surrounding circumstances of the matter of public concern, and the need for the inquiry to be cost effective and capable of delivering lessons learnt and recommendations to prevent recurrence as quickly as possible.

Narrow terms of reference can give the appearance of the Government attempting to avoid difficult political issues by restricting the scope of an inquiry. Concerns over the power of the minister to set the terms of reference have been frequently expressed. Attempts by the PASC to temper these powers by introducing a role for Parliament, and by the HL Select Committee by requiring the consent of the chair to the terms of reference rather than merely consultation, were rejected by the Government, keen to resist limitations on the power of the minister. Further, constitutional issues remain unaddressed since, in the current absence of a legal requirement for the Lord Chief Justice to consent to an inquiry's terms of reference where a member of the judiciary is appointed as the chair, the minister is in a unique and anomalous position whereby that minister can direct a member of the judiciary as to how to act.

Whilst there is a requirement for the minister to consult with the chair to the inquiry, in practice, the pressure to announce the terms of reference quickly when the inquiry itself is announced has meant that the consultation has often been merely perfunctory. The PASC recommendation that there be a short period of consultation before the final terms of reference are announced, together with the similar recommendation from the HL Select Committee that the 2005 Act be amended to allow the announcement of the terms of reference to be made separately to that of the announcement of the inquiry, to allow for a 'cooling off period' for consultation, were both rejected by the Government. The rejection was on the basis that it is not practical or sensible to have two sets of terms of reference in the public domain. However, in practice, it appears to be becoming increasingly common that at least an indication of terms of reference are being

announced as part of a formal consultation process before the final terms of reference are set.

There is no requirement for the minister to consult with those most closely affected by a public inquiry although, in practice, consultation has taken place to a various extent for a number inquiries. Both the PASC and HL Select Committee recommended that consultation, beyond that already required with the chair, be a requirement for public inquiry. Whilst on the face of it the Government accepted this recommendation, the proviso of "unless the Government wished to respond swiftly to an issue or issues of public concern and it would potentially be problematic in cases where there are there are multiple victims ",[158] which is frequently the case, means this has made little difference to the pre-existing stance of the Government.

Representations from family members, survivors and victims, seeking amendment to terms of reference of specific individual inquiries have generally been met with resistance from ministers. In the case of the *Robert Hamill Inquiry,* representations from family members were rejected by the inquiry panel, although there was a limited relaxation of interpretation of the terms of reference subsequently by the minister. In the case of the *Billy Wright Inquiry*, representations from both family members and the chair were rejected by the minister. In the case of the *Iraq Inquiry* and the *IICSA,* public and media pressure did have an effect on broadening the inquiry's terms of reference, though arguably to the point of being detrimental to those inquiries, increasing their length and significantly delaying the publication of their findings and recommendations. Subsequently, post-consultation representations from participants and family members during the *Undercover Policing* were rejected by the minister. Similarly, political pressure exerted outside the formal consultation process of the *Grenfell Tower Inquiry*, and threats of a boycott, were rejected by the chair and the minister.

The *IICSA* appears to have been a turning point in the Government's approach to consultation and the terms of reference. It illustrated clearly that, whilst engagement with those closely affected by a public inquiry is extremely important, it must be balanced with effective management of expectations and the design of an inquiry that is manageable, cost effective and able to delivery timely findings and recommendations.

[158] Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014) oara 55.

Seeking to please everyone risks ultimately producing an unworkable inquiry that pleases no one. Since the *IICSA*, there appears to have been a shift towards ministers announcing a formal consultation process on inquiry's terms of reference.

The more recent *Undercover Policing, Grenfell* Tower and *Infected Blood Inquiries* adopted well-publicised and extensive formal consultation processes at the outset, despite the fact the Government needed to respond quickly and the inquiries involved multiple victims and survivors. It is arguably a much more effective approach, allowing participants, interested groups and, on occasion, the wider public to provide input into the terms of reference before the final form was announced, though not all participants were satisfied with the process. Once the terms of reference were set for those inquiries, the Government then appeared much more resistant to revisiting the terms of reference in response to public opinion and maintained a strong focus on controlling the length and manageability of those inquiries. The response to the consultation process for the *Infected Blood Inquiry* was much more positive, with participants stating that they felt the Inquiry had really listened and had taken on board what those affected by the scandal had said during the process.

The research shows that, whether through formal or informal processes, public consultation must be carefully managed. Not all public concerns can or will be addressed in the final terms of reference, which can result in participants and the public feeling ignored. Clear communication of what is and is not to be considered by the inquiry is essential, as is the extent to which an inquiry is or is not required to make findings of responsibility and accountability.[159]

Where political pressure on the minister and representations to the chair have failed, legal challenges have been brought, but with little success. Permission to bring a judicial review challenge was refused in connection with the *Billy Wright Inquiry* over the Inquiry's interpretation of the terms of reference and the *Al-Sweady Inquiry* over the minister's assessment of 'public interest' and balancing the breadth of the inquiry with the need for a cost effective inquiry and timely reporting. In respect of the *Undercover Policing Inquiry*, the court stated that finding the balance between the breadth of an inquiry's terms of reference and issues of transparency and public confidence is a matter

[159] See Centre for Effective Dispute Resolution '*Inquiries into Inquiries Outcome of Symposium and Proposed Next Steps*' (24 April 2013).

for the minister. There was limited success for the legal challenge to the *Hamill Inquiry*, where the court found that the Secretary of State had applied the wrong public interest test. The decision was referred back to the Secretary of State for reconsideration by reference to the statutory test, resulting in some broadening to the interpretation of the terms of reference, but not to the extent sought. Whilst not achieving the outcome sought by the applicants, these challenges did at least provide some clarification for future inquiries.

Chapter Seven - Restrictions on Public Access[1]

7.1. Introduction

The word 'public' within the term 'public inquiry' can be misleading. Whilst a public inquiry may be held entirely in public, it may also be held in private or a combination of the two. Once convened, which aspects of the inquiry will be held in public and which will open to public scrutiny will be determined by decisions of the minister and the chair of the inquiry.

It seems right in principle that an inquiry into matters of public concern should itself be heard in public unless there is a strong public interest argument for the inquiry, or some part of it, to be heard in private,[2] for example to protect matters of national importance or security. Where public inquiries are convened under the Inquiries Act 2005 ("the 2005 Act") there is a presumption that they will be held in public.[3] However, restrictions may be imposed by the minister or the chair of the inquiry under section 19 of the 2005 Act[4] where it is deemed necessary. Further, the Act does not preclude a minister from choosing to convene an inquiry outside the statutory framework and there is no such presumption for non-statutory inquiries. Concern has been expressed that, on occasions, ministers appear to be choosing to 'sidestep' the 2005 Act and to set up non-statutory inquiries, in order to restrict the extent of public scrutiny.[5]

There has been much debate following decisions by the minister or chair to restrict attendance at an inquiry and disclosure or publication of evidence or documents. Many such decisions are the subject of judicial review proceedings, as well as public and media

[1] An article based on material in this chapter was published in Emma Ireton, "How Public is a Public Inquiry?" [2018] PL 277.
[2] Royal Commission on Tribunals of Inquiry, *Royal Commission on Tribunals of Inquiry, 1966 : report of the Commission under the chairmanship of the Rt. Hon. Lord Justice Salmon* (Cmnd 3121, 1966) also known as 'The Salmon Report'.
[3] Inquiries Act 2005 (2005 Act), s 18.
[4] For example to protect national security or otherwise in the public interest.
[5] An issue explored in: Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67,2 NILQ 209.

scrutiny and criticism. Concern has also been expressed over the power of the minister or the chair to withhold material in the report itself from publication.[6]

The previous chapters examined decisions made when setting up a public inquiry: whether or not to convene an inquiry, whether it will be statutory or non-statutory, the appointment of the chair and panel and the setting of its terms of reference. This chapter examines influences on how 'public' a public inquiry will be once convened and how the principles of political openness and open justice apply to public inquiries. First, looking at political and legal influence over the public inquiry process as a whole, it analyses arguments for and against all or part of an inquiry being heard in private and considers restrictions that may be imposed on public access by the minister or chair. It examines the need to balance the interests of witnesses and the fairness and transparency of an inquiry, concern over motivation for convening a non-statutory inquiry and attempts to promote greater openness and to abrogate the minister's power to restrict access. Second it analyses political and legal challenges to decisions made by the minister and chair, which have sought greater openness to hearings, the publication of evidence, and challenges to orders for anonymity.

7.2. Open justice, political openness

The principles of open justice and political openness are both relevant to public inquiries. As discussed in chapter 2, public inquiries are part of the political process rather than the legal process (see 2.1).[7] They have no power to determine civil or criminal liability;[8] they produce a report, which is delivered to the minister who convened the inquiry and is laid before Parliament. The findings and recommendations of a public inquiry report are not legally binding. It is for the Government to decide what action, if any, to take in response to a public inquiry report. However, public inquiries are also quasi-judicial, analysing large quantities of evidence, establishing facts and determining accountability.

[6] For statutory inquiries, under the 2005 Act, s 25(4).
[7] That position being confirmed in the 2005 Act, s 2(1) "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability". See also the discussion in Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart 2017) 50.
[8] Although interferences of legal liability may be drawn from its finding of facts, 2005 Act, s 2.

Whilst the principle of open justice, whereby legal proceedings are open to the public and may be freely reported by the press, does not apply to public inquiries in the same way as it does for civil and criminal court proceedings, the considerations that underlie the open justice principle do apply also to quasi-judicial inquiries and hearings (see below).[9]

According to Jaconelli, open justice in the court system comprises six presumptive elements.[10] These include: arrangements made for attendance of members of the public and representatives of the media at proceedings; the right to report proceedings; the availability of documents for inspection by the public; open availability of the names of participants, including witnesses; and proceedings held in the presence of the accused. These key elements of open justice also apply to the public inquiry process, plus an additional presumptive element that needs to be added, namely the availability of the inquiry report for inspection by the public.[11] In the case of public inquiries, all of these elements may be the subject of restrictions; the significance of this is discussed below.

The principle of open justice was described by Lord Neuberger as "a fundamental feature of the rule of law in any modern democratic society".[12] It is a constitutional principle that has been recognised for centuries,[13] is deeply rooted in common law systems and has been incorporated into a number of written constitutions such as those of the US and Ireland.[14] It is also a fundamental principle enshrined in Article 6(1) of the European Convention on Human Rights (ECHR).[15] There are key tensions, however, between the demand for open justice and other conflicting pressures, such as national security and personal privacy (see 7.3).

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[9] *Kennedy v The Charity Commission* 2014 UKSC 20, [2015] 1 AC 455.
[10] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial (*OUP 2002) 2-4.
[11] An issue explored in Emma Ireton, "How Public is a Public Inquiry?" [2018] PL 277.
[12] Lord Neuberger, statement of 2 October 2013, quoted in Joshua Rozenburg, 'Open justice rises up the agenda' *The Guardian* (London, 4 October 2013) <www.theguardian.com/law/2013/oct/04/senior-uk-judges-open-justice> accessed 1 June 2020.
[13] Toulson LJ, *R (Guardian News and Media Ltd) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] QB 618.
[14] The Sixth Amendment of the Constitution of the United States of America and art 34.1 of the Constitution of Ireland.
[15] "The right to a fair and public hearing", though it is subject to any Act of Parliament expressly overriding that right, Human Rights Act 1998 s 3(1).

The principle of open justice was clearly affirmed in the case of *Scott v Scott*,[16] an appeal against an order of contempt of court following the disclosure to a third party of notes of a family hearing that had been heard in camera. Lord Acton stated:

> "The hearing of a case in public may be, and often is, painful, humiliating, or deterrent, both to parties and witnesses… but all this is tolerated and endured because it is felt that in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, and the best means of winning for it public confidence and respect."[17]

Viscount Haldane noted that there are common law exceptions to the broad principle, but they must be justified by some more important principle, the chief exception being the interests of justice.[18] Lord Shaw went further, analysing open justice in the context of the constitutional heritage of a free country. He quoted the philosopher Jeremy Bentham (1748—1832) on the importance of publicity in safeguarding justice:

> "In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice."
>
> "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial."
>
> "The security of securities is publicity"[19]

Quoting the constitutional historian Henry Hallam (1777-1859), who stressed the role not only of open legal processes but also open political processes in protecting civil liberty, Lord Shaw continued:

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[16] *Scott v Scott* [1913] AC 417.
[17] Ibid Lord Atkinson [463].
[18] "… the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done." Viscount Haldane LC in *Scott v Scott* [1913] AC 417 [437]-[439]. See the general principle on exceptions set out by Lord Diplock in *Attorney General v Leveller Magazine Ltd [1979] AC 440* [449]–[450]. See also Lord Woolf in *R v Legal Aid Board ex p Kaim Todner* [1999] QB 966, 976 "an exception can only be justified if it is necessary in the interests of the proper administration of justice".
[19] *Scott v Scott* [1913] AC 417 [477].

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances…"[20]

As stated above, whilst the considerations that underlie the open justice principle do apply to quasi-judicial inquiries and hearings, the principle of open justice does not apply in the same way to public inquiries as it does to the courts. There is no legal presumption in favour of a fully open inquiry (see 3.62 and 7.10).[21] In the case of *Kennedy v The Charity Commission*[22] the Supreme Court applied the common law principles of open justice to the proceedings of a quasi-judicial inquiry. The case centred on an appeal against a decision that the Charity Commission was not required to disclose, under the Freedom of Information Act 2000, documents concerning an inquiry it had conducted and on the effect of Article 10 ECHR.[23] The inquiry in question was held in private and was conducted under subject-specific legislation, but in its decision, the court also considered inquiries conducted by ministers into matters of public concern under the Inquiries Act 2005.

Lord Toulson concluded that the considerations that underlie the open justice principle in relation to judicial proceedings apply also to quasi-judicial inquiries and hearings, stating "How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?"[24] He went on:

> "The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or

[20] Ibid; see also Lord Thomas in *Guardian News v Erol Incedal [2016] EWCA Crim 11* "the principle of open justice is fundamental to the rule of law and to democratic accountability".
[21] *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794.
[22] *Kennedy v The Charity Commission* 2014 UKSC 20, [2015] 1 AC 455.
[23] The right to Freedom of Expression including the freedom to receive and impart information and ideas without interference by public authority.
[24] *Kennedy v The Charity Commission* 2014 UKSC 20, [2015] 1 AC 455 [124].

importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle."[25]

A public inquiry may be necessary to discharge the Government's obligation to conduct an effective official investigation into allegations of breach of Articles 2 and 3 ECHR, the right to life and prevention of torture or of inhuman or degrading treatment or punishment respectively.[26] To be effective, an investigation must have "a sufficient element of public scrutiny to ensure practical accountability…" (see also 7.10.1).[27] However, public scrutiny is not an automatic requirement and it does not require all proceedings to be in public. The test is "whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[28] Case law suggests "the more serious the events that call for inquiry, the more intensive should be the process of public scrutiny."[29]

The extent to which public inquiries are open to public scrutiny may therefore vary significantly from one inquiry to another, according to their nature and subject matter, with the decision resting in part with the minister convening the inquiry and in part with the chair to the inquiry. Such decisions have generated much criticism and debate. Considerations relating to the principles of political openness and open justice underpin the political and legal challenges brought against decisions to restrict access to public inquiries that are examined in detail below (see 7.9 and 7.10).

Influence over the Public Inquiry Process as a whole

The following section explores political and legal influence on the public inquiry process as a whole. It looks at arguments made both for and against all or part of an inquiry being heard in private, the minister's and chair's power to restrict access to a

[25] Ibid [125].
[26] "Everyone's right to life shall be protected by law" and "No one shall be subjected to torture, or to inhuman or degrading treatment or punishment" respectively.
[27] See Lord Bingham's summary in *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653 on the Zahid Mubarek Inquiry**,** a non-statutory inquiry.
[28] Ramsahai v Netherlands (2008) 46 EHRR 43 para 353.
[29] *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 para 62.

public inquiry and the effect of those restrictions. It then examines four key reasons behind attempts to influence the public nature of an inquiry, identified from analysis of the data. These are: protecting the interests of witnesses; concern over the motivation behind a minister's decision to convene an inquiry outside the statutory framework; criticism of the extent of the minister's power to restrict access to a public inquiry and criticism of the minister's power to withhold material in the inquiry report from publication.

7.3. Arguments for and against all or part of a public inquiry being heard in private

There are arguments both for and against all or part of a public inquiry being held in public. Holding a public inquiry as openly and publicly as possible is fundamental to democratic accountability. It allows members of the public access to the same evidence as is used by the inquiry in its public hearings, to scrutinise the process, to draw their own conclusions and to seek, politically, to hold those in authority to account. As considered in more detail below, apparent undue secrecy can give rise to the perception that there is something to hide or that the decision to hold all or part of an inquiry is motivated by an attempt to avoid accountability. Holding public inquiries in public is also often key to participants, such as survivors and their families, families of victims, NGOs and pressure groups, who are anxious for a much and long sought-after opportunity for their voices to be heard[30] as well as to the media and wider public who seek answers to address matters of public concern.

Conversely, other considerations such as national security, personal privacy, and the avoidance of stress or personal risk to witnesses called to give evidence to an inquiry may, on occasions, justify holding all or part of a public inquiry in private. This section examines arguments that have been put forward for and against all or part of an inquiry being heard in private, and by whom, in attempts to influence the extent of the public nature of public inquiries.

[30] Ashley Underwood QC, oral evidence taken before the House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence' Q251 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 28 May 2020.

The Government offered five main reasons that it claimed justified holding proceedings in private when it gave evidence to the 2005 House of Commons Public Administration Select Committee ('PASC'). These were: national security; statutory barriers to disclosure and legal and commercial confidentiality; personal privacy; unnecessary intrusion or distress to witnesses; and simpler, faster procedures.[31] In its 2010 post-legislative scrutiny of the 2005 Act (see 2.6), the Ministry of Justice also argued that powers in the Act "to restrict the disclosure or publication of evidence provided to an inquiry has been useful in encouraging witnesses who might otherwise be reluctant to be frank and open with an inquiry."

However, many have argued that the advantages of witnesses giving evidence in public outweigh the disadvantages. In 2001, Lord Justice Kennedy in *R (Wagstaff) v Secretary of State for Health*[32] stated:

> "There are positive known advantages to be gained from taking evidence in public, namely—
>
> (a) witnesses are less likely to exaggerate or attempt to pass on responsibility:
>
> (b) information becomes available as a result of others reading or hearing what witnesses have said:
>
> (c) there is a perception of open dealing which helps to restore confidence:
>
> (d) there is no significant risk of leaks leading to distorted reporting."

Beer provides a comprehensive list of advantages of conducting an inquiry in public.[33] It includes: enhancing public confidence in the process, conclusions and recommendations; enabling the public to form its own conclusions on the subject matter of the inquiry; and assisting in discharging a state's investigative obligations in cases where Articles 2 and 3 of the ECHR are engaged and defeating arguments of violation of rights under Article 10 ECHR. However, Beer points out that one risk of conducting an inquiry in public is that of adversely affecting the interests and reputations of individuals and organisations by airing, in public, allegations that might eventually turn out to be false.[34] Many, including NGOs and campaign groups, have argued that the provisions of the 2005 Act that allow

[31] HC 606-ii, GBI 09, Ev 39.
[32] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.
[33] Beer J, Dingemans J, and Lissack R (eds), *Public Inquiries* (OUP 2011) para 6.03.
[34] Ibid para 6.04.

restrictions to public access, and reduced transparency, undermine public confidence in public inquiries and make the presumption of openness subordinate to the powers of restriction.[35]

It is not only the Government who has argued in favour of a public inquiry being held in part in private. It was clear from the evidence given to the HL Select Committee that some participants press for restrictions on public access. Many witnesses are apprehensive and reluctant to give evidence in public, particularly before those public inquiries that have a more adversarial feel.[36] As discussed in 2.1, the rules of evidence in court proceedings generally do not apply to public inquiries and an inquiry chair has significant discretion to determine the procedure of an inquiry.[37] Some inquiries have addressed or alleviated such concerns by, for example, providing witnesses with the option to give evidence from behind a screen or in private (see below).[38] Some inquiries have chosen to restrict access to inquiry records to protect witnesses from very real concerns about confidential subject matter such as physical or sexual abuse or to protect rights of whistle-blowers.[39]

Arguments both for and against gathering evidence in private were heard by the 2005 PASC as part of its review of public inquiries and consideration of the Inquiries Bill. It concluded that circumstances may sometimes require inquiries to hold all or part of their proceedings in private, but expressed concern about the minister's wide power to restrict public access by restriction notice and recommended that it be removed (see below).[40] Similarly, the HL Select Committee heard arguments both for and against the hearing of evidence in private. For example, Liberty asserted that, without public examination of the core facts, culpable and discreditable conduct cannot be brought to public notice nor can suspicion of deliberate wrongdoing be allayed and that, where core evidence is kept

[35] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 88.
[36] See, for example, the evidence of Julie Bailey, founder of Cure the NHS giving evidence in relation to participation in the *Mid Staffordshire NHS Foundation Trust Public Inquiry* and Christopher Jefferies in respect of the *Leveson Inquiry*: oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Qs155 and 157.
[37] 2005 Act, s 17 for statutory inquiries.
[38] Ibid Julie Bailey oral evidence, Q155.
[39] Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 18.
[40] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 99.

secret, it is difficult to see how lessons can be learnt.[41] The HL Select Committee also concluded that security or other sensitive issues might require evidence to be heard in secret, but again recommended that the minister's power to restrict public access to an inquiry be abrogated (see 7.7).

Once again, it is apparent that the capacity in which a party engages with a public inquiry makes a profound difference to views over the most appropriate form of a public inquiry. Successive governments have been extremely protective of the powers of the executive, and matters such as national security maintenance of law and order are central to the fundamental roles of the executive.[42] However, the role of a public inquiry is to hold those in authority to account, which may include the minister's department or the Government itself. Participants seeking accountability and answers, such as survivors and family members, NGOs and campaign groups, and those seeking to address wider public concern, seek to maximise openness and transparency, concerned that decisions to hold all or part of an inquiry in private may be a result of attempts to hide information or avoid accountability. Some witnesses called to give evidence that might be highly sensitive,[43] or might give rise to concerns over their safety, will have strong personal reasons to wish to give evidence in private. Each time a decision is made about restrictions to public access, a balance needs to be found between competing interests and expectations.

7.4. The Power to restrict attendance at hearings, access to documents and the right to report

7.4.1. Statutory and non-statutory powers to restrict access

A minister's or chair's powers to restrict access to a public inquiry differ depending on whether the inquiry is statutory or non-statutory. For statutory inquiries, those powers are set out in the Inquiries Act 2005. The explanatory notes to the 2005 Act, recognised that there may be circumstances in which part or all of an inquiry must be held in private and noted that, over the previous 15 years, more than a third of the notable inquiries

[41] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 27.
[42] See the judgment in *R (Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 158; [2010] 3 WLR 554 on decisions in connection with national security government ministers, the doctrine of separation of powers.
[43] For example in the case of inquiries into sexual abuse.

held had some sort of restrictions imposed on public access. These ranged from "wholly private inquiries, such as the *Penrose inquiry* into the collapse of Equitable Life and the *"Lessons Learned" (Foot and Mouth) Inquiry*, to mainly public inquiries such as the *Bloody Sunday inquiry* and the *Hutton inquiry*, in which a small amount of highly sensitive material was withheld from the public domain." [44]

Whilst, as explained above, there is no general legal presumption in favour of a fully open inquiry, for statutory inquiries, section 18 of the 2005 Act introduced a presumption that they will be held in public:

> "Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—
>
> (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
>
> (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."[45]

However, section 19 of the 2005 Act[46] provides for the minister convening the inquiry, or the chair to the inquiry, to impose restrictions on attendance at an inquiry and the disclosure or publication of evidence or documents. Restrictions are imposed by means of a restriction notice given by the minister to the chair or by a restriction order made by the chair. A restriction on the disclosure or publication of documents or evidence continues indefinitely,[47] unless otherwise specified or the order or notice is varied or revoked.[48]

Section 19(3) provides that, when a statute, enforceable EU obligation or rule of law requires it, including the common law principle of fairness and public interest immunity,

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[44] Explanatory Notes to the Inquiries Act 2005, para 38.
[45] 2005 Act, s 18(1).
[46] Read in conjunction with the provisions in 2005 Act, s 20.
[47] Compared with the Thirty Year Rule under Public Records Act 1958, s 3 and the Freedom of Information Act 2000, whereby certain Government records are released after thirty years (currently being transitioned to twenty years). However, some Government records may be retained indefinitely under Public Records Act 1958, s 3(4) where they are "required for administrative purposes or ought to be retained for any other special reason".
[48] 2005 Act, s 20(5).

a restriction notice or order must be made.[49] In the absence of such a requirement, restrictions may be made by the minister or chair as are considered to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest. Regard must be had to matters set out in section 19(4) and (5) such as: the allaying of public concern, the risk of death or injury, damage to national security, international relations or economic interests of the UK that could be avoided or reduced, issues of confidentiality, cost and delay to or impairment of the inquiry.[50]

The scope of 'public interest' is very broad and the minister or chair must only 'have regard' to those matters, nothing more. Where a potential conflict of interest arises, such as where the actions of the minister's own department are under scrutiny, the minister could interpret 'public interest' in such a way as to avoid scrutiny and accountability. Further, whilst consideration must be given to the fact that a restriction order or notice may not be conducive to the fulfilment of an inquiry's terms of reference, it does not follow that it cannot be made. A minister or chair may therefore consider such an order or notice to be necessary in the public interest and impose restrictions, notwithstanding that it would hamper fulfilment of the public inquiry's terms of reference.[51]

Conversely, where an inquiry is not convened under the 2005 Act and is a non-statutory inquiry, the inquiry is able to deal with such matters more simply, having a wider discretion to restrict attendance at an inquiry and to restrict disclosure or publication of evidence or documents. There are no specific requirements for chairs of non-statutory inquiries to take steps to ensure the public and media are able to attend hearings, access simultaneous transmissions or are able to access evidence and documents provided to the inquiry. Ministers on occasions appear to be choosing to sidestep the use of the 2005 Act, including its presumption that inquiries will be held in public, in favour of convening non-statutory inquiries.[52] This has also given rise to speculation that some such decisions

[49] Ibid, s 19 (3).
[50] 2005 Act, s 19(4)-(5).
[51] See the consideration in the Undercover Policing Inquiry *Restriction Orders: Legal Principles and Approach Ruling* 3 (*3* May 2016) <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> para 32.
[52] As discussed in Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67,2 NILQ 209.

may have been motivated by a wish to conceal or suppress some aspects of the truth from the public (see 7.6).[53]

7.4.2. The effect of restrictions

In order to fully understand the concern over restricted access to public inquiries, and the reasons behind attempts to influence the public inquiry process as a whole and the Government's response, it is necessary to examine the effect of such restrictions. Restrictions may result in the exclusion of all or part of the public and the press,[54] and all or some core participants or interested parties and their legal representatives from the oral hearings.[55] Consequently, parts of an inquiry may be conducted in closed hearings, with access restricted to the inquiry team and those giving the sensitive evidence. Alternatively, there may be private hearings, where the chair decides who may be privy to the information and might, for example, include witnesses with a common interest.

Though public access may be restricted to the hearings themselves, or by way of simultaneous transmission of the proceedings, there may still be access to the evidence in terms of witness statements and transcripts of witness evidence at a later stage. Disclosure or publication of documents and evidence may be restricted, for example, to a witness or class of witnesses, or to core participants and their legal advisers, with further restrictions on their wider publication.[56] An alternative to a refusal to disclose a document is the use of redactions and ciphers.[57]

The powers under section 19, or similar restrictions imposed in non-statutory inquiries, do not restrict the evidence being seen and heard by the inquiry itself, but its onward disclosure or publication. However, restricting public access to that evidence has a considerable impact on the transparency of the proceedings and perceptions of

[53] See question of Baroness Buscombe, HL Select Committee, 'Written and Corrected Oral Evidence' Q36.
[54] See further discussion regarding the press below.
[55] 2005 Act, s 19(1)(a).
[56] Ibid s 19(1)(b); see also Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.30.
[57] See the discussion in *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 ('*Saville 1*); [1999] 4 All ER 860 where it was held that the public nature of the inquiry would be preserved despite the maintenance of anonymity by the use of ciphers in place of the names of soldiers giving evidence to the *Bloody Sunday Inquiry*.

independence, which are vital to public trust and confidence in the process (see 7.9.1 to 7.9.5).

7.5. Protecting the interests of witnesses

The following sections examine four key reasons behind attempts to influence the public nature of an inquiry, identified from analysis of the data. These are: protecting the interests of witnesses, concern over the motivation for convening a non-statutory inquiry, criticism of the minister's power to restrict access and criticism of the minister's power to withhold material in the inquiry report from publication.

Turning to the first of these, protecting the interests of witnesses, as discussed at 7.3 above, the chair must manage a balancing act at common law between the competing interests of witnesses, their subjective fears, impact on their health, and any other factors which might make it unfair to require the witness's identity to be exposed, and the effect this would have on the fairness and transparency of the inquiry.[58] The subject matter of many inquiries can be very sensitive, addressing issues such as health or abuse, or can result in witnesses fearing for their life or security if they are to appear in public before the inquiry. A restriction notice or order made in respect of a 2005 Act inquiry, or ruling of a chair during a non-statutory inquiry, may restrict the disclosure of the name and personal details of a witness, permitting them to give evidence anonymously or from behind a screen.

Whether to grant such an application for anonymity depends firstly upon whether a refusal would so endanger the life of the witness as to infringe his or her rights under Article 2 of the European Convention on Human Rights and secondly whether such refusal would be unfair (see 7.10.2).[59] Section 17(3) of the 2005 Act requires the chair, when making any decision as to the procedure or conduct of an inquiry, to act with fairness; there is no difference between the standard of fairness to be applied under section 17(3) and that at common law.[60] When applications for anonymity are granted,

[58] See Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' paras 57- 58.
[59] Ministry of Justice, Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005 (Cm 7943, 2010) para 30.
[60] Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 210.

the identity of the witness is withheld from the public, though not necessarily the evidence itself. The evidence in support of the decision might be also be subject to a restriction notice or order.

In practice, whilst requests for anonymity are made relatively frequently,[61] they are not readily granted and the process for considering applications is time consuming, expensive and distracting to the inquiry process.[62] Applications for anonymity made to an inquiry are more common in inquiries involving military or security intelligence, where the inquiry may be dealing with very sensitive and secret information and where identifying witnesses may potentially jeopardise operations or endanger national security or lives.[63] For example, the *Robert Hamill, Azelle Rodney Undercover Policing, and Billy Wright Inquiries* received a significant number of applications for anonymity and other protective measures from police officers and, in the latter case, prison officers.[64] In each case the applications for anonymity and other protective measures were opposed by those seeking to maximise the openness and transparency of the Inquiry (see 7.9.4, 7.9.5 and 7.10.2).

The balancing act between the competing interests of witnesses and the need for transparency and fairness of the inquiry has not been specifically addressed by select committee recommendations. As a result, any influence over the public inquiry process as a whole has been as a result of challenges brought in respect of specific individual inquiries, which have in turn had an impact on future inquiries (see 7.9 and 7.10 below).

7.6. Concern over Motivation for Convening a Non-statutory Inquiry

The second key reason behind attempts to influence the public nature of an inquiry is concern over the motivation behind a minister's decision to convene an inquiry outside the statutory framework. As discussed in chapter 4, it has frequently been asserted that such decisions may be the result of a wish to avoid the presumption a statutory inquiry

[61] See discussion in Ministry of Justice, '*Memorandum to the Justice Select Committee: Post-Legislative Assessment of the Inquiries Act 2005*' (Cm 7943, 2010) 34.
[62] Ibid para 34.
[63] Ibid para 30.
[64] Anonymity was also a key issue for soldiers during the pre-2005 *Bloody Sunday Inquiry* (see 7.10.2 below). On anonymity generally, see Ruth Costigan and Philip Thomas, 'Anonymous witnesses' [2000] 51(2) NILQ 326.

will be heard in public, arising from political agendas and a wish to conceal or suppress some aspects of the truth from the public.[65] The *Iraq Inquiry* and *Detainee Inquiry* came under particular criticism from Parliament, participants, the public and the media in this respect (see 7.9.1).

In written evidence to the HL Select Committee, Beatson LJ acknowledged these concerns, though noted that there may be good reasons in the individual cases for such decisions. He did, however, stress the importance of "careful consideration of the justification for not using the procedure… established by Parliament as the appropriate one for inquiries."[66]

During the HL Select Committee evidence gathering process, Baroness Buscombe posed the question:

> "Why should the public have any trust in a non-statutory inquiry when, the very people who were behind that legislation instantly chose to avoid it when, for example, setting up the Iraq inquiry? . . . Can we not read from that, being cynical, that this means that some of the truth can be avoided where the inquiry is non-statutory?[67]

Professor Tomkins' response was that there might never have been an *Iraq* or *Detainee Inquiry* had the option of a non-statutory inquiry not been available, because of the Government's concern over the sensitivity of the subject matter (see 4.4).[68] It was also Peter Riddell's view[69] that the Government would not have set up the *Detainee Inquiry* as a statutory inquiry because of the secret nature of a large part of the evidence.[70] Both concluded that the subject matter of those inquiries, dealing with matters of secret intelligence, meant that the Government would not have assigned statutory powers to a

[65] Particularly Human Rights organisations such as Liberty and Rights Watch. For example Rights Watch written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q12.
[66] Lord Justice Beatson written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 23.
[67] See question of Baroness Buscombe, HL Select Committee, 'Written and Corrected Oral Evidence' Q36.
[68] Professor Tomkins oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q36, referring also to the 2005 Act, s 21 powers of compulsion.
[69] Panel member of the Detainee inquiry.
[70] Peter Riddell oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q69.

judge-led or panel-led inquiry, but would only have convened a non-statutory Privy Council inquiry.

The HL Select Committee Report, however, noted that security issues have been dealt with by statutory inquiries, notably the *Azelle Rodney Inquiry.*[71] The *Azelle Rodney Inquiry* engaged a pragmatic solution of requiring the majority of Metropolitan Police Officers' statements to be re-drafted, using minor redactions, to reveal the intelligence gathered as part of covert operations without revealing the source of that information.[72] The HL Select Committee Report also noted that there was an anticipation that the 2005 Act inquiries would deal with sensitive issues of this type, with the then Parliamentary Under-Secretary of State for Constitutional Affairs[73] stating, during the second reading of the Inquiries Bill: "The Bill would [put] on a proper, more comprehensive footing our ability to conduct an effective public inquiry in circumstances where national security issues may well arise."[74]

The HL Select Committee concluded that it would not recommend the removal of the possibility of a non-statutory inquiry being held, for example "where security issues are involved, or other sensitive issues which require evidence to be heard in secret". However, it did recommend that ministers "should give reasons for any decision to hold an inquiry otherwise than under the Act". The Government did not specifically address this recommendation in response to the HL Select Committee report (however, it did expressly reject the recommendation that inquiries into issues of public concern should normally be held under the 2005 Act, in line with the approach seen in previous chapters, to resist attempts to restrict the discretion and power of the executive (see 4.6.1)).

It is clear that there are occasions on which the use of a 2005 Act inquiry may not be appropriate. However, it remains a serious concern that ministers appear, on occasion, to have chosen to avoid the use of the legislation, passed by Parliament, in an apparent attempt to avoid scrutiny or conceal the truth from the public. It is even more difficult to justify decisions not to convene an inquiry under the Act since statutory inquiries such as

[71] Inquiry into the shooting of Azelle Rodney by a police marksman.
[72] Michael Collins supplementary written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' footnote 20.
[73] Christopher Leslie.
[74] HC Deb, 15 March 2005, vol 670, col 150 and HL Select Committee Report, The Inquiries Act 2005: *post-legislative scrutiny* para 79.

the *Azelle Rodney Inquiry* have demonstrated that pragmatic solutions can be found to deal with sensitive security issues. It is disappointing that the Government did not respond to the recommendation that reasons should be given for convening a non-statutory inquiry, particularly in light of successive governments' clear resistance to select committee recommendations in favour of the use of statutory inquiries (see 4.6 and 4.6.1). However, concern over the motivation behind the convening of non-statutory inquiries may be alleviated by the fact that there appears to be a trend towards new inquiries being convened under the 2005 Act (see 4.11).

7.7. Criticism of the extent of the minister's power to restrict access

The third key reason behind attempts to influence the public nature of an inquiry is concern over the extent of the minister's power to restrict access. The introduction of the minister's power to issue a restriction notice under the 2005 Act, in addition to the chair's power to make a restriction order, was highly controversial because of the potential for ministerial interference in a public inquiry, undermining its independence. The powers vested in the minister in this respect go beyond those of other Commonwealth jurisdictions.[75] In a letter to US Congressman Chris Smith, Judge Peter Cory (the chair of the *Cory Collusion Inquiry*[76] and a former Justice of the Supreme Court of Canada) concluded "I cannot contemplate any self respecting Canadian judge accepting an appointment to an inquiry constituted under the new proposed [A]ct."[77] In a letter to the Under-Secretary of State for Constitutional Affairs,[78] Lord Saville (chair of the *Bloody Sunday Inquiry* and former Justice of the Supreme Court) was severely critical of the power vested in ministers to restrict public access to an inquiry, stating it made:

> "a very serious inroad into the independence of any inquiry and [was] likely to damage or destroy public confidence in the inquiry and its findings".

[75] Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.28.
[76] An inquiry convened by the UK Government to investigate allegations of collusion by members of the security forces in the context of certain deaths in Northern Ireland (see chapter 6).
[77] Letter Judge Peter Cory to Chris Smith (15 March 2005) available at <www.patfinucanecentre.org/collusion-pat-finucane/canadian-judge-peter-cory-slams-finucane-inquiry-legislation> accessed 1 June 2020.
[78] Letter Lord Saville to the Under-Secretary of State for Constitutional Affairs (26 January 2005) quoted in HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 197.

Where the actions of the Government itself, or the minister's own department, are under scrutiny, the minister's power to issue a restriction notice and restrict attendance at the inquiry, or the disclosure or publication of material provided to the inquiry, gives rise to a clear conflict of interest. As examined below, many have argued that the power should only be exercisable by the chair.

During the second reading of the Inquiries Bill, Lord Goodhart argued that "[the] nature of the power to maintain secrecy by restricting public access to the hearings and the evidence and, more importantly, by the possibility of withholding parts of the report from publication" was the most serious failing of the Bill. [79] The 2005 Public Administration Select Committee report, *Government by Inquiry,*[80] criticised the minister's wide powers to restrict public access to inquiries, stating "[t]his subverts accepted presumptions of openness and public interest and we recommend it should be reversed."[81] The Joint Committee on Human Rights stated "we remain of the view that the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation" (see also 7.8).[82]

In evidence before the subsequent HL Select Committee, Liberty described the obligation on the chair to "take such steps as he considers reasonable" to secure public access to an inquiry as being "disappointingly weak" adding "[t]his weak obligation is then attenuated by a series of further provisions which carve out exceptions allowing access to inquiry proceedings and documents to be limited." [83]

The HL Select Committee expressed similar concerns to those of the earlier PASC. It noted, however, that the predicted collapse in public confidence in 2005 Act public inquiries, resulting from the powers given to ministers under the Act including the power to restrict access, had not materialised. One explanation for this might be that the wish to avoid the risk of negative press coverage and public criticism may have had a greater

[79] HL Deb 9 December 2004, vol 667, col 1004.
[80] Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I.
[81] Ibid para 99.
[82] Joint Committee on Human Rights, *8th Report* (HL 2004–05, HL 60, HC 388).
[83] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 12.

influence over the minister's decision-making than the incentive to interfere.[84] Strong objections at the Bill stage to the introduction of ministerial powers to restrict access to a public inquiry did not prevent it progressing through the legislative process and being brought into force. However, a minister who is seen to be interfering with a public inquiry is likely to be subject to severe public and political criticism, which may well be a significant influencing factor in the decision-making process.

Many of the witnesses before the HL Select Committee expressed the strong view that once an independent public inquiry has been convened, decisions about the conduct of the inquiry should rest with the chair rather than the minister (thereby also avoiding those decisions being subject to political influence more broadly).[85] In its report, the HL Select Committee recommended that the power of the minister to restrict public access to an inquiry by restriction notice should be abrogated and that only the chair should be allowed to restrict access to an inquiry, on the basis that the chair's power to issue a restriction order is sufficient. [86]

Despite the weight of the criticism, once again the Government's response was to reject the attempt by select committees to restrict the power of the executive, stating:

> "Ministers must have the power to issue notices imposing restrictions on attendance at an inquiry and/or on the disclosure or publication of any evidence or documents provided to an inquiry. They will understand the nature of national security and other sensitive material. It is not appropriate that this power is ceded to the inquiry chairman alone."[87]

During the subsequent House of Lords debate, the Government's rejection was strongly criticised. Baroness O'Loan weighed up the need to protect national security with the need for public administration of justice, warning that:

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[84] See evidence of Stephen Sedley, Former Lord Justice of Appeal and chair of the non-statutory *Tyra Henry Inquiry* and inquiry into the air crash in which Dag Hammarskjöld was killed in 1961, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q41.

[85] See, for example, Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 10 and Julie Bailey and Christopher Jefferies oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q161.

[86] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143).

[87] Ministry of Justice, Government Response to the *Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 69.

> "There is a temptation in any organisation to cover up its wrongdoing. We have seen it across so many professions and institutions. Governments will not be immune to that temptation and those who have advised them and their successors may seek to cover up past wrongdoing to protect what they perceive to be the stability of the present…" adding
>
> "The reality is that an inquiry that is deeply immersed in what might be millions of pages of documents is much better placed to assess the relevance of documentation and capable of protecting that which requires to be kept secret than the Government and their advisers…" and concluding
>
> "For 10 years there has been consistent criticism of this Act by parliamentary committees, by many noble and learned Lords and by other very distinguished academics. It is beyond time for change." [88]

The power to make a restriction notice has not in fact been exercised frequently and the most serious concerns expressed when the 2005 Act have not been realised. However, the fact the power exists, and has on occasions been used,[89] has undermined the perception of the independence of public inquiries convened under the 2005 Act and remains a motivating factor behind attempts to bring about changes to the legislation.

7.8. Criticism of the minister's power to withhold material in the inquiry report from publication

The fourth key reason behind attempts to influence the public nature of an inquiry is criticism of the minister's power to withhold material in the report of statutory inquiries from publication under section 25(4) of the 2005 Act. A public inquiry has no power to rule on or to determine any person's civil or criminal liability but,[90] at the conclusion of an inquiry, a report is produced by the chair or panel and is delivered to the minister who

[88] HL Deb 19 March 2015 vol 760 col 1165.
[89] For example there were four restriction notices given by the minister to the chair of the *Litvinenko Inquiry* and six Restriction Orders during the *Hamill* and *Wright Inquiries*, relating to preventing the publication or disclosure of particular evidence and to closed parts of the proceedings. (See Committee on the Administration of Justice written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 9.
[90] 2005 Act, s 2(1)

convened the inquiry.[91] The report contains: the facts determined by the inquiry; where its terms of reference required it to make recommendations, its recommendations;[92] and anything else that the chair or panel consider to be relevant to the terms of reference.[93] The report must then be published and laid by the minister before Parliament.[94]

The starting point for 2005 Act inquiries is that the party responsible for publication has a duty to publish the report in full.[95] However, drawing direct parallels to the provisions relating to restriction notices and orders, material may be withheld from publication to such an extent as required by law or considered "necessary in the public interest".[96] Regard must be had to matters such as: the extent to which doing so might inhibit the allaying of public concern; would reduce the risk of death or injury, damage to national security, international relations, or the economic interests of the UK; or certain conditions as to confidentiality.[97] The default position is that it is the minister who receives the report and is required to arrange for its publication (and may therefore withhold information), unless he or she has notified the chair before the inquiry commences that the chair is to have responsibility, or the chair has subsequently agreed to accept responsibility on being invited by the minister to do so.[98]

Establishing the facts, allaying public concern, and holding those in authority to account are some of the key purposes of a public inquiry. In particular, where the actions of the minister's department or the Government itself are under scrutiny, withholding material from the report has the potential to seriously undermine and damage public confidence not only in that inquiry, but also in the public inquiry process as a whole. Where the chair is responsible for publication, there is at least transparency; the public sees the report in the form delivered to the minister.[99] However, where the minister is responsible for publication, and potentially for redacting information from the final report, it raises a number of additional and serious concerns such as lack of independence, the

[91] A duty for statutory inquiries under 2005 Act, s 24.
[92] Ibid, s 24.
[93] Ibid s 24(1).
[94] Ibid ss 24 and 25 and *Maxwell v Department of Trade and Industry* [1974] QB 523, following dissatisfaction over Lord Denning's inquiry into the Profumo affair.
[95] 2005 Act, s 25(3).
[96] Ibid s 25(4).
[97] Ibid ss 25(5) and (6).
[98] Ibid.
[99] See Robert Francis written evidence, House of Lords Select Committee on the Inquiries Act 2005, 'Written and corrected oral evidence' para 76.

Government being given advantage over others through being given advance sight of the report, and the potential for action to be taken, or at least appear to be taken, out of political self-interest.

When the Inquiry Bill was introduced, the Joint Committee on Human Rights expressed concern that the minister's power to withhold material from publication in the public interest is wide enough to compromise the independence of an inquiry.[100] It also raised concerns specifically over inquiries designed to fulfil the Article 2 obligation to hold an effective and independent investigation, asserting that, in such cases, responsibility for publishing the report should rest with the chair.[101] However, no amendment was made to the Bill to address this concern.

The 2005 PASC report on the effectiveness of inquiries expressed concern about the potential for the Government to gain advantage over others through being given advance sight of the inquiry report, stating:

> "It is important that ministers should not manipulate the publication date of an inquiry report for their own ends or undermine a parliamentary debate on its findings by limiting access to it, as was notably the case with Sir Richard Scott's report on Arms to Iraq". It noted, however, that:
>
> "recent practice has been good, with chairs keeping a tight hold on availability of the report to all the parties and making their own press statements on publication".[102]

The PASC recommended that a presumption should be included in the Bill that chairs would handle publication, that publication arrangements should ensure fairness to all concerned and should allow adequate time for parliamentary consideration and debate.[103] The first recommendation was rejected by the Government, on the basis that the Bill as drafted represented the practice in most past inquiries.[104] Additionally, it stated that it 'makes sense' in practical terms for the minister or a sponsoring

[100] Joint Committee on Human Rights, *8th Report* (HL 2004–05, HL 60, HC 388) para 3.11.
[101] Ibid para 3.13.
[102] Although the Hutton Report was leaked before formal publication. Public Administration Select Committee, *Government by Inquiry, First Report of Session 2004–05* (TSO, 2005) HC 51-I para 135.
[103] Ibid paras 136-137.
[104] Though it noted in the case of the *Hutton Inquiry* and the *Shipman Inquiry*, the chair made arrangements for publication.

department to take responsibility for publication because they will have arrangements already in place for the printing and publication of reports. It did, however, recognise that there may be circumstances in which it is more appropriate for the inquiry chair to make the arrangements, stating that the Bill already allowed for this. There was no specific response to the ensuring 'fairness to all concerned' point, but the Government did accept the last of the three recommendations and a new clause was added to the Inquiries Bill, requiring the minister to lay the published inquiry report before Parliament.[105]

In evidence before the HL Select Committee, Liberty criticised the power to allow redactions from the inquiry's final report, stating:

> "The self-defeating nature of these provisions is striking. Public inquiries are established to allay public concern or establish whether it is justified, often where wrongdoing (frequently by the State) has been concealed or not sufficiently investigated. It is entirely counterproductive if the wrongdoing or error that is uncovered is then suppressed by the inquiry established to investigate it and, if the public feel information is being withheld from them, risks further undermining public confidence in the inquiry system."[106]

Rt Hon Dame Janet Paraskeva[107] noted that the balance of the power of roles is skewed from the inquiry to the minister, as the minister decides what is published, and argued that the decisions on publication should be in the hands of the chair or panel and not the minister who convened the inquiry.[108]

In its report, the HL Select Committee reiterated that under section 25 the minister can at any time invite the chair to accept responsibility for publication of the report of the inquiry, in which case only the chair has the power to withhold material from publication. However, the default position is that the responsibility for publication is the minister's, in

[105] Clause 26, ultimately 2005 Act, s 26. Secretary of State for Constitutional Affairs and Lord Chancellor, *Government Response to the Public Administration Select Committee's First Report of the 2004-5 Session: "Government By Inquiry"* (Cm 6481, 2005) 17.
[106] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 15.
[107] Panel member of the Detainee Inquiry.
[108] The Rt Hon Dame Janet Paraskeva written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 3 and 5.

which case the power to withhold material from publication is the minister's.[109] The HL Select Committee recommended that, whoever is responsible for publication of the inquiry report, section 25(4) should be amended so that, save in matters of national security, only the chair has the power to withhold material from publication.[110] That recommendation was also rejected by the Government on the basis that:

> "the Government does not consider that the inquiry chair should be responsible for judging any risks to national security or international relations. The executive is best placed to assess that risk and the potential damage that might be caused."[111]

The proposition that only the minister was capable of understanding the nature of national security and other sensitive material was severely criticised in the subsequent House of Lords debate (see also above).[112]

Once again, parliamentary committees have striven, unsuccessfully, to restrict the power of the minister in order to increase transparency and the independence of public inquiries from the executive. Successive governments have rejected attempts to permit anyone other than the minister ultimately to decide whether or not material in the report will be withheld from publication.

It is the potential for interference, as much as the reality itself, that undermines public confidence in the process. When publication of the *Chilcot Report*[113] was imminent, and the report was to be released first to the Government to allow for national security checking prior to its publication, there was evidence of renewed mistrust in the Inquiry itself. Newspaper articles expressed concern over the process and the potential for censorship.[114] Scepticism was also expressed during a Commons debate with Jeremy Corbyn[115] stating "I think I shall be disappointed when it is published. I suspect that it will

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[109] HL Select Committee Report, The Inquiries Act 2005: *post-legislative scrutiny* para 207.
[110] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 207, recommendation 20.
[111] Ministry of Justice, Government Response to the *Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 70.
[112] See also HL Deb 19 March 2015, vol 760, col 1163.
[113] The report of the *Iraq Inquiry*.
[114] Chris Ames, 'Will the Chilcot report tell the full story? It's on a knife edge' *The Guardian* (London, 18 April 2016) www.theguardian.com/commentisfree/2016/apr/18/chilcot-report-full-story-iraq-war-inquiry-tony-blair-saddam-hussein accessed 1 June 2020.
[115] Prior to being elected Labour Leader in September 2015.

be full of redactions and that we will have to read a million words before we discover which bits have been redacted."[116] In fact, the report was subsequently published without any redactions at all, but earlier distrust about apparent undue secrecy, and the potential for interference with the report before publication, had undermined public trust in the process.

Influence over Individual Inquiries

Moving on from examining political and legal influence in relation to the public inquiry process as a whole, the following section examines political and legal challenges to decisions restricting access to individual public inquiries. The challenges seek greater openness to hearings, the publication of evidence and to challenge orders for anonymity.

7.9. Political influence on the minister and representations to the chair

The significance of the role of political influence on the decision on whether to hold an inquiry in public was recognised by Professor Sir Ian Kennedy, chair of the *Bristol Royal Infirmary Inquiry,*[117] a pre-2005 Act inquiry, in evidence to the HL Select Committee:

> "ultimately the choice as to whether there is a public inquiry or not, given that one has that choice, will be a political choice. It will be a function of the degree of pressure and the generation of calls for one… In the Bristol inquiry, the first two options were a private within the hospital, and then a private outwith the hospital. Only when the pressure was such that the Secretary of State felt that it was irresistible was there a public inquiry."

The Bristol Inquiry report concluded

> "Holding an Inquiry in private is more likely to inflame than protect the feelings of those affected by the Inquiry, not least because of the notion of secrecy and exclusion which it fosters."[118]

[116] HC Deb, 29 January 2015, vol 591, col 1072.
[117] Convened under National Health Service Act 1977, s 84 conducted between October 1998 and July 2001 into the management of the care of children receiving complex cardiac surgical services.
[118] Bristol Royal Infirmary, *Learning From Bristol* (Cm 5207, 2001) para 6.

The following sections examine how pressure from Parliament, participants, the wider public and media have sought to influence decisions over restrictions on public access in relation to individual inquiries.

7.9.1. The Iraq Inquiry – openness and public perception

The *Iraq Inquiry* into the UK's involvement in the conflict in Iraq is an example of an inquiry in which there was an exceptional level of public interest and that came under widespread criticism for its secrecy. When the Inquiry was announced, the intention was that the non-statutory inquiry, conducted by a committee of Privy Counsellors, would be held in private, for reasons of national security and speed.[119] There followed intense pressure from Parliament,[120] the public and the media for the Inquiry to be held in public. The 2009 Public Administration Select Committee on the Iraq Inquiry concluded that the decision to hold the *Iraq Inquiry* in private was "totally unsatisfactory"[121] adding:

> "The need for effective accountability and public confidence demands that the inquiry be conducted as openly and publicly as possible... There needs instead to be a presumption in favour of the inquiry proceeding in an open and public manner. There should be only very limited exceptions to this general rule, which would be best decided by the members of the inquiry itself, not by the Government."[122]

When the then Prime Minister, Gordon Brown, asserted that a more open inquiry would be bad for the armed forces, he was contradicted by senior military figures. General Sir Mike Jackson, head of the Army during the Iraq invasion, stated:

> "I would have no problem at all in giving my evidence in public...The main problem with a secret inquiry...is that people would think there is something to hide."

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[119] HC Deb, 15 June 2009, vol 511, cols 23-38.

[120] For example with William Hague, Shadow Foreign Secretary, during the House of Commons debate "proceedings of the Committee of Inquiry should whenever possible be held in public" HC Deb, 24 June 2009, vol 494, col 800 and "The Prime Minister says that the inquiry has to be held in private to protect national security, but it looks to me suspiciously as though he wants to protect his reputation and that of his predecessor instead… it is perfectly possible to have a limited number of sensitive sessions in camera while retaining the fundamental principle that the vast bulk of the inquiry… should be open to all" HC Deb 15 June 2009, vol 494 col 28.

[121] Public Administration Select Committee *Iraq Inquiry* (2008-09, HC 721) 7.

[122] Ibid p8.

Air Marshal Sir John Walker, the former head of defence intelligence, said:

> "There is one reason that the inquiry is being heard in private and that is to protect past and present members of this Government. There are 179 reasons why the military want the truth to be out."[123]

The Prime Minister later announced that that some of the hearings would be held in public, at the discretion of the chair, Sir John Chilcot, who then announced the Inquiry's commitment that hearings would be held in public wherever possible.[124] Ultimately most of the hearings were indeed held in public, the proceedings were streamed live and archive footage of each hearing session was made available via the Inquiry's website. However, despite this fact, there was still widespread media criticism of the scale of the private hearings when it was announced that 35 witnesses had been heard in private.[125]

At the outset of the Inquiry, the Government and the Inquiry agreed a documents protocol on the handling of information provided to the Inquiry, naming the Cabinet Secretary as final arbiter in discussions about disclosure.[126] The chair requested publication of sensitive cabinet-level discussions and communications between the Prime Minister, Tony Blair, and President George W Bush, which the Inquiry judged were vital to the public's understanding of the Inquiry's conclusions. It took years of discussions with successive cabinet ministers before an agreement was finally reached to publish a small number of "gists and quotes", which the Inquiry deemed sufficient to explain their conclusions.[127]

The resulting delay in publishing the report (particularly its delay until after the May 2015 General Election) damaged public perception of the Inquiry, and prompted widespread allegations in the media of political interference and an "establishment fix-up", with politicians warning of "public incredulity" and the risk that public will assume the report

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[123] Referring to the 179 British soldiers who died during the conflict. HC Deb, 24 June 2009, vol 494, col 810.
[124] Sir John Chilcot already having written to Gordon Brown on 21 June 2009 stating his belief "that it would be essential to hold as much of the proceedings of the Inquiry as possible in public."
[125] See eg 'Iraq inquiry has heard from 35 witnesses in private' *BBC* News (London, 8 July 2010). <www.bbc.co.uk/news/10558991> accessed 1 June 2020 and Chris Ames, 'Chilcot inquiry succumbs to secrecy' *The Guardian* (London, 8 July 2010) www.theguardian.com/commentisfree/libertycentral/2010/jul/08/chilcot-inquiry-iraq-secret-witness accessed 1 June 2020.
[126] Available at <www.gov.uk/government/publications/iraq-inquiry-information-sharing-protocol > accessed 1 June 2020.
[127] Letter from Sir John Chilcot to Sir Jeremy Heywood, cabinet Secretary (28 May 2014).

is being "sexed down".[128] Sir John Chilcot was required to give evidence on the progress of the Inquiry to the Commons Foreign Affairs Committee. He strongly denied those allegations, stating the timetable had been prolonged by: the gravity of the subject matter; the huge scope of the Inquiry; covering decisions made over a nine year period; the complexity of advice, discussion and debate interlinked with those decisions; as well as the lengthy process of issuing warning letters.[129] However, by then, public confidence in the Inquiry had been undermined and the public perception of the Inquiry damaged.

The tension is evident between the Government's predisposition to seek to restrict public access, arguably in an attempt to avoid political embarrassment and scrutiny, and subsequent strong pressure from those seeking openness, transparency and full public accountability. In this case, pressure from Parliament, participants, the public and media was sufficient to significantly influence the Government's decision over restrictions to public access.

7.9.2. Finucane – objections to a 2005 Act inquiry and the minister's power to impose restrictions

On occasions, individuals or groups have sought to influence the decision to restrict public access to an individual public inquiry by refusing to cooperate where it was felt it was insufficiently open and public.[130] As discussed in chapter 3, the family of Patrick Finucane, initially opposed the establishment of a 2005 Act inquiry into his murder by paramilitaries and collusion by the state. A key objection was the minister's power under section 19 to impose restrictions on the disclosure and publication of evidence. The

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[128] See, eg Andrew Grice and James Cusick, 'Everyone wants the report published – but no one knows when' *The Independent* (London, 24 February 2015); Michael Savage 'Chilcot to face MPs over delays to 'sexed down' Iraq war report' *The Times* (London 22 January 2015) 18; and Patrick Wintour and Nicholas Watt 'Chilcot report on Iraq war delayed until after general election' *the Guardian* (London, 21 January 2015) <www.theguardian.com/uk-news/2015/jan/20/chilcot-report-iraq-war-delayed-general-election> accessed 1 June 2020.

[129] Foreign Affairs Select Committee, 'Oral evidence taken before the Foreign Affairs Select Committee' (4 February 2015) <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html> accessed 31 May 2020.

[130] For example Amnesty International withdrew cooperation from the *Detainee Inquiry* into whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11, in part due to lack of transparency and that much of the Inquiry was to be held behind closed doors. See Amnesty International UK, 'The Detainee Inquiry' (*Amnesty International UK Press releases*, 18 May 2020) <www.amnesty.org.uk/detainee-inquiry> accessed 1 June 2020.

family argued that the Act gave ministers unacceptable control over the Inquiry, particularly to keep evidence secret. The family was supported by a number of organisations, including Amnesty International and the Northern Ireland Human Rights Commission.[131]

The family subsequently changed its position, having seen the 2005 Act in practice, including the approach to disclosure of sensitive information during the *Baha Mousa Inquiry*, which introduced protocols to establish its independence and transparency,[132] and also having received undertakings regarding the use of restriction notices. However, the Government subsequently announced an independent review, to be carried out by Sir Desmond de Silva QC, rather than the public inquiry that had been promised to the family. The family objected to the independent review on the basis it was a "review of papers - all behind closed doors", with no opportunity for participation by the family.[133] The family has continued to campaign for an independent public inquiry since then. Judicial review proceedings to challenge the decision not to hold a full public inquiry were unsuccessful, as were subsequent appeals.[134] The Supreme Court ultimately made a declaration that there has still not been an Article 2-compliant investigation into the death, but it concluded that it did not follow that a public inquiry of the sort sought by the family must be ordered (see 4.10.1).[135]

7.9.3. The Detainee Inquiry- boycotting and the minister's power to impose extensive restrictions on a non-statutory inquiry

Threats of boycotts over restrictions to public access also caused significant challenges to the progress of the non-statutory *Detainee Inquiry.* Whilst the powers of the minister under the 2005 Act have been heavily criticised, the minister's power to restrict access to a non-statutory inquiry can be even more extensive. A number of NGOs and victims of rendition and torture withdrew co-operation from *Detainee Inquiry* into whether the UK

[131] Jason Beer et al, *Public Inquiries* (OUP) para 1.85.
[132] See the discussion in Mark Devenport, 'Finucane: Could Baha Mousa inquiry provide a template?' *BBC News* (London, 12 December 2012) <www.bbc.co.uk/news/uk-northern-ireland-20705511> accessed 1 June 2020.
[133] 'Owen Paterson says Pat Finucane review will uncover the truth' *BBC News* (London 12 October 2011) <www.bbc.co.uk/news/mobile/uk-northern-ireland-15276132> accessed 1 June 2020.
[134] *Re (Finucane) v Secretary of State for Northern Ireland* [2015] NIQB 57; *In the matter of an application by Geraldine Finucane for Judicial Review (Northern Ireland)* [2019] UKSC 7.
[135] Ibid.

Government was implicated in the improper treatment of detainees held by other countries after the terrorist events of 9/11.[136] This was due in part to the minister's power to restrict access.

The terms of reference set by the minister for the non-statutory inquiry gave the Government, and not the inquiry panel, the power to determine what documents were published as part of the investigation. The final say on publication of documents and evidence rested with the Cabinet Secretary, who was answerable to Government (even though the Government's own actions were central to the subject matter of the inquiry). With the exception of the heads of agencies, all members of the security services were to have given evidence behind closed doors, precluding public scrutiny of the evidence given and preventing participants from challenging the evidence and the inquiry process.

In evidence to the HL Select Committee, Liberty cited the *Detainee Inquiry* as an example of how an inquiry "which is limited in its independence and in its ability to uncover the truth will not inspire the confidence of the public or of persons involved, and will therefore fail in its chief objective of allaying public concern." Even with the concerns expressed over the minister's powers to restrict access under the 2005 Act, had the *Detainee Inquiry* been set up under the 2005 Act, it would have benefitted from the presumption of openness (albeit a weak one) and the panel would have had considerably more control over what documents and evidence would be disclosed.[137] Liberty concluded:

> "it is difficult to resist the conclusion that the non-statutory path was chosen deliberately to limit the powers of the panel to uncover the truth, and to limit the access of the public to whatever conclusions the panel would reach. The purpose of such an inquiry therefore becomes little more than a cynical public relations exercise, to diffuse political criticism, and ensure that potentially embarrassing events or issues are kicked into the long grass until an anodyne or inconclusive report is produced."

[136] An inquiry into whether, and if so to what extent, the UK Government and its security and intelligence agencies in the aftermath of the 9/11 terrorist attacks in the US were involved in, or aware of, improper treatment or rendition of detainees held by other countries.
[137] Liberty written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 18.

The Inquiry was, in fact, never completed, although not as a direct result of the boycott (see 6.4.1). Although, technically, the inquiry could have continued without the participation of those who had withdrawn their cooperation, since it was focused on the actions and behaviours of specific agencies, it would have significantly undermined public confidence in the Inquiry, its findings and recommendations (see 6.6.1).

7.9.4. The Undercover policing inquiry – refusals to cooperate and restrictions and the granting of anonymity

Threats of boycotts were also made in relation to the statutory *Undercover Policing Inquiry;* on this occasion they were focused on decisions of the chair. The Inquiry has been severely criticised for its levels of secrecy, particularly in relation to the granting of anonymity to police witnesses.[138] The original chair of the Inquiry, Lord Justice Pitchford who was superseded by Sir John Mitting,[139] decided against granting blanket anonymity to all undercover officers, determining that applications for restriction orders would be heard on a case by case basis. However, the subsequent scale of the granting of anonymity to police officers, with "scant and largely uninformative" reasoning being given for those decisions, has been highly controversial.[140]

The legal representative for 13 women participating in the inquiry wrote to the minister raising concerns, including in relation to restriction orders and anonymity granted by the chair.[141] In contrast to the *Detainee Inquiry,* on this occasion, whilst noting the minister's commitment to ensuring that the Inquiry could get to the truth of what happened and ensuring that all lessons are learned to restore public confidence, the minister reminded the legal representative of the independence of the Inquiry and that matters of restrictions were a matter for the chair, stating:

> "[r]estriction orders are a legal matter for the Inquiry as the Inquiries Act 2005 provides for the Chair alone to make restriction orders. Safeguarding the

[138] An inquiry into undercover police operations conducted by English and Welsh police forces in England and Wales.
[139] On grounds of ill health.
[140] Rob Evans, 'Campaigners stage walkout of 'secretive' police spying inquiry' *The Guardian* (London, 21 March 2018) <https://www.theguardian.com/uk-news/2018/mar/21/campaigners-stage-walkout-of-secretive-police-spying-inquiry> accessed 31 May 2020; 'Undercover policing inquiry: Chairman urged to quit' *BBC News* (London, 21 March 2018) <https://www.bbc.co.uk/news/uk-43487941> accessed 31 May 2020.
[141] Letter from Ms Wistrich to Sajid Javid (3 April 2008).

> independence of the Inquiry is of paramount importance, and it would not be acceptable for the Government to intervene in an Inquiry's decision-making."[142]

He also noted that judgments made on applications for anonymity remain subject to review by the chair as the Inquiry progressed.

Many of the women who had unknowingly entered into long term relationships with undercover police officers have indicated that they will refuse to cooperate with an inquiry that is held largely in secret. Stephen Lawrence's family called for the undercover police officers who had spied on them while they pressed for a full investigation into Stephen's murder to be named and indicated that they too would not cooperate with an inquiry they consider is not sufficiently open.[143] Lady Doreen Lawrence, mother of Stephen Lawrence[144] subsequently criticised the chair, Sir John Mitting for "turning what should be a transparent, accountable and public hearing into an inquiry cloaked in secrecy and anonymity" and called, unsuccessfully, for his resignation (see 5.7.3).[145]

The chair's decision not to release the cover names of the undercover police officers could prevent some victims knowing they were targeted and from coming forward, and restrict questioning of the evidence put forward by the police officers during the hearings, thereby restricting the inquiry's ability to establish the truth.[146] The quantity of applications for anonymity has contributed significantly to the delay in the inquiry. It was convened in 2015 and has yet to commence its evidence hearings, which the Inquiry has indicated will not now commence before September 2020. It will not be clear until that stage to what extent participants will withdraw cooperation from the Inquiry. Whilst threats of boycotts have kept the concern about issues over restrictions and anonymity in

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[142] Letter from Sajid Javid to Ms Wistrich (21 June 2018).
[143] Rob Evans 'Doreen Lawrence calls for undercover police who spied on family to be named' *The Guardian* (London, 16 July 2015) <www.theguardian.com/uk-news/2015/jul/15/doreen-lawrence-name-undercover-police-spied-family> accessed 1 June 2020 and 'The Today Programme' (BBC Radio 4, 3 May 2016) respectively.
[144] Murdered in a racist attack in 1993.
[145] Rob Evans, 'Campaigners stage walkout of 'secretive' police spying inquiry' *The Guardian* (London, 21 March 2018) <https://www.theguardian.com/uk-news/2018/mar/21/campaigners-stage-walkout-of-secretive-police-spying-inquiry> accessed 31 May 2020.
[146] See the statement of Peter Francis, A key witness, and police whistle-blower in Evans R, 'Undercover police whistleblower joins boycott of inquiry' *The Guardian* (London, 9 May 2016) <https://www.theguardian.com/uk-news/2018/may/09/undercover-uk-police-whistleblower-joins-boycott-of-inquiry> accessed 1 June 2020.

the forefront of the mind of the inquiry, the public and the media, it is not possible to isolate and ascertain what effect, if any, it has had on decisions of the chair in this regard.

7.9.5. Azelle Rodney – a more pragmatic approach to secrecy

The *Azelle Rodney Inquiry* demonstrates that it is not inevitable, where an inquiry imposes restrictions as a result of it handling highly sensitive intelligence material and grants applications for anonymity, that issues of damage to public confidence in the inquiry will arise.

The *Azelle Rodney Inquiry* investigated the circumstances by which Azelle Rodney was shot dead by an armed officer of the Metropolitan Police in 2005; significant numbers of applications for anonymity were made. The Inquiry dealt with the applications on a case by case basis, balancing the need to protect witnesses and the need for openness. The chair refused anonymity and screening to two officers, granted both to the officer who had fired the fatal shot, and granted anonymity to the remaining firearms officers, who were referred to by ciphers, but refused them screening. He granted anonymity and screening to the intelligence officers, and refused both to the surveillance officers.[147] Screened witnesses were visible only to the chair, counsel to the inquiry, counsel to the core participant, the deceased's mother, and a friend or relative notified in advance to the police and also attendant staff. The inquiry also had to deal with highly sensitive intelligence material. It did so by using minor redactions which allowed the material to be referred to during the inquiry without revealing the source of the intelligence. The pragmatic solutions found by the Inquiry also meant that it did not need to go into private session. In contrast to the *Undercover Policing Inquiry*, feedback from participants about the handling of issues of anonymity and sensitive information was positive.[148]

Similarly, as discussed above, the protocols adopted for dealing with sensitive material during the *Baha Mousa Inquiry* created a precedent that, in part, reversed the Finucane family's original objections to the convening of a 2005 Act inquiry into the murder of Patrick FInucane, on the basis of the minister's powers under section 19 of the 2005 Act

[147] Summarised in *R(E) v Chairman of the Inquiry into the Death of Azelle Rodney Inquiry* [2012] EWHC 563 (Admin) 9 -11.
[148] See, for example, Helen Shaw on behalf of Inquest, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q233.

(see 7.9.2 4.10.1). All inquiries are different and have their own challenges; it does not follow that an approach adopted for one inquiry is necessarily applicable to another. However, there is clearly a strong argument for ensuring that, where possible, lessons learnt from one inquiry are applied to those that follow. As seen above, direct political and legal pressure have had little influence on the Government's approach to restrictions in relation to the public inquiry process as a whole, and political pressure on the minister and submissions to the chair appear to have had little practical influence over decisions in relation to specific individual inquiries. This research would indicate that a potentially more productive approach to seeking to influence the approach of public inquiries to restrictions on public access would be to focus on the dissemination of lessons learnt from previous inquiries (see also 8.7).

7.10. Legal Influence

Finally, this section examines legal influence over decisions made in relation to restrictions on public access. It is clear from the case law that there is no general presumption that a public inquiry will be held in public (see the detailed discussion at 3.6.2). The Divisional Court case of *Wagstaff*[149] concerning the *Shipman Inquiry*[150] briefly encouraged the view that, where an inquiry was to be held, that courts might compel the inquiry to be held in public. However, the following year the judges in the Divisional Court case of *Persey* fundamentally disagreed, concluding that the minister's decision to convene an inquiry in private, rather than in public, was a lawful one with which the court could not interfere. [151] There is the presumption that a statutory 2005 Act inquiry will be held in public, with the potential restrictions discussed above, but there is no such presumption for non-statutory inquiries. As also discussed above, the fact that the considerations that underlie the open justice principle in relation to judicial proceedings also apply to public inquiries was established in *Kennedy v The Charity Commission* (see 7.2).[152]

[149] *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292.
[150] Inquiry into issues arising from the case of Dr Harold Shipman following his conviction for murdering 15 of his patients.
[151] *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794.
[152] *Kennedy v The Charity Commission* [2014] UKSC 20; [2015] 1 AC 455.

Further legal challenges in relation to individual inquiries, on issues relating to public scrutiny and involvement of next of kin, protective measures for witnesses, and rights of access of the media are examined below.

7.10.1. Article 2, public scrutiny and involvement of next of kin

The issue of public scrutiny and the involvement of next of kin was the subject of a judicial review challenge in relation to the *Mubarek Inquiry,*[153] which resulted in the landmark judgment of Lord Bingham in the House of Lords[154] in *Amin* concluding, whether assessed singly or cumulatively, the investigations that had already been conducted into Mubarek's death did not satisfy the UK's obligations under Article 2,[155] because they lacked independence, having been held in private with the families unable to play an effective part. The judgment made reference to *Jordan v United Kingdom* and the fact that, to satisfy Article 2, an investigation must incorporate certain features including "a sufficient element of public scrutiny to ensure practical accountability…" and the "next of kin must be involved to the appropriate extent".[156] It also referred to the domestic case of *Edwards,*[157] a case in which the Inquiry was held in private and the parents of Edwards, a young prisoner who was killed in a shared prison cell, had only been allowed to attend the Inquiry when they themselves were giving evidence. They were not represented and were unable to put any questions to witnesses. The Court held that the parents, "cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests" and that this was a further reason why that investigation did not comply with Article 2 (see also 3.6.5 and 4.8).[158]

Public scrutiny is not an automatic requirement and it does not require all proceedings to be in public. The subsequent judgment of *Ramsahai v Netherlands* in the European Court of Human Rights stated:

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[153] Inquiry into the murder of Zahib Mubarek in Feltham Young Offender Institution.
[154] Allowing the appeal and restoring the first instance decision.
[155] Imposing on governments an obligation to conduct an effective official investigation where one or more of the substantive obligations in Article 2 has, or may have, been violated and it appears an agents of state are or may be implicated in some way.
[156] *Jordan v United Kingdom* (2001) 37 EHRR 52, 41. See Lord Bingham's summary in *R v (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653; on the Zahid Mubarek Inquiry**,** a non-statutory inquiry.
[157] *Edwards v United Kingdom* (2002) 35 EHRR 19.
[158] Ibid, para 82–84 and 87.

> "The test is 'whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[159]

Case law suggests "the more serious the events that call for inquiry, the more intensive should be the process of public scrutiny."[160]

7.10.2. Protective measures for witnesses- the common law duty of fairness and Article 2 ECHR

The extent to which it is appropriate for an inquiry to grant anonymity to witnesses also differs between inquiries and has also been the subject of a number of legal challenges.

The balancing act at common law between the competing interests of witnesses seeking to protect their identity from being exposed, through restrictions on the disclosure of names and personal details or permitting them to give evidence anonymously or from behind a screen, and the need for fairness and transparency of an inquiry has been challenged a number of times before the courts.

A notable example is during the *Bloody Sunday Inquiry*;[161] soldiers who feared for their safety sought anonymity before the Inquiry and permission to give evidence in an alternative venue, on grounds of security.[162] In both cases, the Court of Appeal dismissed the appeal of the Inquiry. In the former, it found in favour of the granting of anonymity and concluded that there must be compelling justification to reach a decision which contravened, or might contravene, human rights and that the more substantial that interference the more the court would require by way of justification before being satisfied that the decision was reasonable. It noted that that the public nature of the inquiry would be preserved despite the maintenance of anonymity; evidence would be taken in public and reports of the proceedings published. It concluded that, whilst the tribunal was clearly concerned with the views of the victims' relatives as to procedural

[159] *Ramsahai v Netherlands* (2008) 46 EHRR 43 [353].
[160] *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 [62].
[161] A pre-2005 Act inquiry into "the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day".
[162] *R v Lord Saville of Newdigate Ex p B (No2) also known as R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 ('*Saville 1*) and *R (A) v Lord Saville of Newdigate* [2001] EWCA Civ 2048, [2002] 1 WLR 1249 ('*Saville 2*').

fairness, it had neglected to give sufficient weight to the opposing views on fairness if anonymity was withdrawn. In the latter case, it found in favour of witnesses giving evidence at an alternative venue, concluding that rather than attempting to identify a phrase which encapsulated the threshold of risk at which Article 2 rights were engaged, where a public authority was required to desist from an activity which would expose an individual to the risk of a terrorist threat, it was a matter of fact and degree in every case.[163]

In *Officer L and Others*,[164] the *Robert Hamill Inquiry*[165] successfully appealed a Court of Appeal decision quashing the inquiry's ruling dismissing applications for restriction orders, which would have allowed certain police officers to have their names withheld and to give evidence from behind a screen. The House of Lords first reviewed the obligations of an inquiry to a witness under Article 2 ECHR (that everyone's right to life shall be protected by law) and second it considered the position at common law. It held that the test under Article 2 is whether, in the absence of protective measures, when viewed objectively, a risk to the witness's life would be created, or a pre-existing risk materially increased; the risk must be "real and immediate" and the threshold is high.[166] It held that the common law duty of fairness to witnesses entailed consideration of concerns other than the risk to life; subjective fears, even if not well-founded, could be taken into account, particularly if that has an adverse impact on their health.[167] It also held that, for reasons of simplicity, a request for anonymity could be approached as a single decision under the common law, having regard in the process to the requirements of Article 2.[168]

The *Leveson Inquiry* allowed some witnesses, who were either employees or former employees of various newspapers, to give evidence anonymously. The journalists in

[163] See also generally Anne Hegarty, 'Truth, law and official denial: The case of Bloody Sunday' (2004) 15 Crim Law Forum 199 and also observations on conflicting tensions over whose interests were at the heart of the process at 229.
[164] Re *Officer L and Others* [2007] UKHL 36, [2007] 1 WLR 2135.
[165] Into the death of Robert Hamill and the acts and omissions of the Royal Ulster Constabulary 2004-2011, which was converted to a 2005 Act Inquiry.
[166] Ie that the correct test was whether the risk of injury or death would be materially increased if evidence was to be given without anonymity. Only if the answer to that question was 'yes' did the question whether that increased risk would amount to a real and immediate risk to life arise.
[167] The common law test going further than the Article 2 test and incorporating a balancing exercise between the competing interests. See more detailed discussion in Jason Beer et al, *Public Inquiries* (OUP 2011) paras 6.93-6.109.
[168] Re *Officer L and Others* [2007] UKHL 36, [2007] 1 WLR 2135 [27].

question had offered to give evidence only under conditions of anonymity because of fears of career blight. A newspaper organisation applied for judicial review of the chair's decision, submitting that to allow them to do so would be unfair and contravene the principles of natural justice. The application was dismissed with the court finding that it was of the greatest importance that the inquiry should be, and be seen by the public to be, as thorough and balanced as was practically possible. If the chair was prohibited from admitting the evidence given anonymously, the inquiry would not have examined available material. In determining where fairness lay in a public inquiry a balance had to be struck. The court also stressed the fact that the decision was one for the chair. Judicial review is a means for correcting unlawfulness and it is not for the court to micromanage the conduct of an inquiry.[169]

The same year, during the Azelle Rodney Inquiry, an application was made by fourteen of the Metropolitan Police officers for permission to seek judicial review of the chair's decision to refuse their application that they be screened. In refusing permission to seek judicial review, Lord Justice Laws stated

> "there is, in my judgment, a very pressing public interest in openness on the facts of this case. It concerns, after all, a man sitting in a car with no weapon in his hand who has eight shots fired at him at close range causing his death… It seems to me the Chairman was fully entitled to put what he called a premium on achieving as public an Inquiry as possible, "so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained 'cover up'"".[170]

The ruling of the *Undercover Policing Inquiry* subsequently summarised the common law test[171] as requiring: a measurement of the public interest in the openness of the inquiry; the nature, content and importance of the evidence; the contribution if any that identification of the witness would make to public confidence in the inquiry; and the

[169] *R (Associated Newspapers Ltd)* v *Leveson* [2012] EWHC 57 (Admin) [2012] 1 WLUK 369.
[170] *R (E) v Chairman of the Inquiry into the Death of Azelle Rodney Inquiry* [2012] EWHC 563 (Admin) 26.
[171] From consideration of cases including notably Northern Ireland cases: *Re A and others' Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6; *Re Witnesses A, B, C, K and N's Application for Judicial Review* [2007] NIQB 30; and *Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy* 2002 NICA 25(1).

nature of the personal interests of the witness, including the actual or perceived risk of harm to that witness.[172]

These cases do not identify a trend either for or against the imposition of restrictions, but have provided guidance for future inquiries, both on the test under Article 2 and the common law duty of fairness. It is likely that legal challenges will continue to be brought by witnesses as their interests and those of the public interest in the holding of as open a public inquiry as possible can be so diametrically opposed and the consequences so serious.

7.10.3. The Media – no additional right of access

Finally, the courts have considered the effect of restrictions on the media. Article 10 ECHR protects the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. It is a qualified right, however, since it carries with it duties and responsibilities and it has to be balanced with, amongst other things, the risk of harm to the public interest.

The case of *Kennedy* considered the position of the press with regard to Article 10.[173] It confirmed that the media has no general right of access under Article 10 to information held by the state which the state is unwilling to disclose, nor does it have a right of access to inquiry proceedings properly held in private.[174] Public inquiries are not 'public authorities' within the meaning of the Freedom of Information Act (FOIA)[175] and therefore the FOIA does not apply. Many public authorities that participate in public inquiries, such as government departments and NHS Trusts, are caught by the provisions of the FOIA and are susceptible to FOI requests.[176] They may hold documents connected to the inquiry such as correspondence with the inquiry, evidence and witness statements. section 32(3) exempts information from the right to disclosure where it is held only by virtue of being contained in any document placed in the custody of a person conducting

[172] Undercover Policing Inquiry *Restriction Orders: Legal Principles and Approach Ruling* 3 (*3* May 2016) <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> accessed 1 June 2020 para 211.
[173] *Kennedy v the Charity Commission* [2014] UKSC 20 [2015] 1 AC 455.
[174] *Kennedy [48]-[59], referring to R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794.
[175] Freedom of Information Act 2000, sch 1.
[176] 2005 Act, s 1.

an inquiry,[177] or is created by a person conducting an inquiry, for the purposes of the inquiry.

During the Undercover Policing Inquiry, the media emphasised the importance of the open justice principle, the role of the media as the public's eyes and ears, and its role as public watchdog. Submissions were made, with reference to Art 10 ECHR, that the media should have access to the process by which the chair determines applications for restriction orders during that inquiry, so that submissions could be received before the order was made, and also to closed material submitted in support of those applications, on terms of confidentiality.[178] The chair, Sir Christopher Pitchford,[179] ruled that the approach under Article 10 added nothing to the approach to restriction orders under section 19, stating "I can see no arguable basis for giving to the media rights of access not enjoyed either by the public in general or core participants in particular."[180] Thus both a legal challenge and submissions to the chair have been unsuccessful in this respect.

7.11. Conclusion

This chapter examined political and legal influence over both the minister and the chair's decision to restrict access to a public inquiry. It examined how the principles of political openness and open justice apply to public inquiries and their applicability to challenges to restrictions imposed.

Looking first at political and legal influence over the public inquiry process as a whole, it analysed arguments for and against all or part of an inquiry being heard in private, considered the powers to impose restrictions on public access, examined the need to balance the interests of witnesses and those of the public in an open inquiry, concern over motivation behind convening a non-statutory inquiry, and attempts to promote

[177] Though the definition of Inquiry in Freedom of Information Act, s 32(4) (c) refers only to statutory inquiries. As to practical issues arising in respect of s 32 exemptions under the FOIA, see Eversheds written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 49.
[178] Referring to Article 10 ECHR and *Guardian News and Media Limited and others v Incedal and another* [2014] EWCA Crim 1861, [2015] 1 Cr App R 4 and *Guardian News and Media Limited and others* [2016] EWCA Crim 11.
[179] A Lord Justice of Appeal.
[180] Undercover Policing Inquiry *Restriction Orders: Legal Principles and Approach Ruling* 3 paras 201-209 (*3* May 2016) <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> accessed 1 June 2020.

greater openness and to restrict the power to restrict access. It found that attempts to influence the process by formal political means, by Parliament and parliamentary committees, have been largely unsuccessful.

Second, it analysed political and legal challenges to decisions of the minister and chair in respect of individual public inquiries, seeking greater openness to hearings and the publication of evidence, and challenges to orders for anonymity. It found that, in some cases, political pressure may influence decisions over restrictions to public inquiries, though concludes that focus on the dissemination and adoption of practical and procedural lessons learnt from previous inquiries to effectively manage the handling of sensitive material is an important consideration. Legal challenges have provided some clarity, particularly over the application of Articles 2 and 10 of the ECHR, and are likely to continue on what is a highly contentious subject.

Openness and public scrutiny of a public inquiry are essential for democratic accountability and for open justice, which demands that a public inquiry is held as publicly as possible. It allows both participants and the wider public to scrutinise the process, draw their own conclusions based on the evidence presented to the Inquiry, and to seek to hold those in authority to account. Whilst the 2005 Act ostensibly sets out a presumption that a public inquiry convened under the Act will be heard in public, concern has been expressed since the introduction of the Inquiries Bill, that the provisions granting the power to restrict public access makes that presumption subordinate to the powers of restriction. There is also concern that the provisions undermine confidence in the statutory public inquiry process, particularly when exercised by the minister who convened the Inquiry, and the minister's own department or the Government itself, might be under scrutiny. Further, concern has been repeatedly expressed about the motivation behind ministers' decisions to convene non-statutory inquiries in an apparent attempt to 'side-step' the statutory presumption of openness and to conceal or suppress some aspects of truth from the public.

As seen in other chapters, the Government has consistently resisted attempts to reduce the power of the convening minister over the public inquiry, in this case by repeatedly rejecting calls that only the chair should have the power to restrict access to a public inquiry and that the minister's power of restriction should be abrogated. The additional recommendation from the HL Select Committee that the Government should give

reasons for convening a public inquiry otherwise than under the 2005 Act, to address concerns over the motivation behind a minister's to convened a non-statutory inquiry, received no response.

It is notable that, despite vocal opposition to the inclusion of these powers throughout the passage of the Bill, through Parliament from members of parliament, very senior members of the legal profession and pressure groups, the Act came into force with those provisions intact. However, in practice, the predicted interference in public inquiries by the exercise of the powers of restrictions, and an accompanying collapse in public confidence in the public inquiry process, did not materialise. An explanation for this may well be that the influence of public and media scrutiny of a minister's actions when setting up a public inquiry, and the severe public and political criticism which that minister is likely to face in the event of interference, has proven a disincentive to unwarranted interference. The fact the minister retains these powers does, however, remain a concern for the independence of public inquiries. As seen in the case of the *Iraq Inquiry*, the potential for interference alone,[181] as much as the reality itself, is sufficient to undermine confidence in an inquiry.

Similarly controversial is the minister's power to gain advantage over others through being given advance sight of the inquiry report and to withhold evidence from publication, thereby potentially compromising the independence of an inquiry. In line with its stance on other proposals seeking to curb the power of the minister, recommendations that would give the chair, rather than the minister, the power to withhold evidence in the report from publication have been rejected by the Government (though one concession that was made during the passage of the Bill was that the minister be required to lay the published report before Parliament.

Whilst participants of a public inquiry have attempted, with limited success, to exert political pressure on a minister regarding the extent of openness of a public inquiry, public inquiries themselves are independent and may not be subjected to political influence. Participants have made submissions to the chair of an inquiry and, as the *Azelle Rodney Inquiry* has demonstrated, pragmatic solutions can be found to enable an inquiry to protect sensitive material whilst maximizing the openness of the inquiry.

[181] In this case a non-statutory inquiry where there is no initial presumption that the inquiry will take place in public.

Where participants have felt that an inquiry was insufficiently open and public, there is recourse to a legal challenge or, on occasions, participants have refused to cooperate with the inquiry.

There have been a number of legal challenges brought in connection with individual public inquiries on the issue of restrictions on public access, which have provided guidance for the public inquiry process as a whole, in particular on the applicability of the principle of open justice, the lack of a general presumption in favour of an open inquiry, on the extent of public scrutiny that is required, and the nature of the protection of the interests of witnesses and the rights of the media. Such factors will undoubtedly influence future inquiries.

The extent to which it is appropriate for restrictions to be made varies between inquiries. There will always be tensions between the demand for public scrutiny and open justice on the one hand and conflicting pressures such the protection of national security and the duty of fairness to witnesses on the other. There will continue to be political and legal challenges when restrictions are imposed.

Chapter Eight - Conclusion

8.1. Introduction

This chapter returns to the research questions posed in chapter one, namely:

a. Who is served by post-2005 public inquiries?
b. Where does the power to determine the form and nature of those inquiries lie?
c. What political and legal influence is being exerted over the exercise of that power?
d. What are the constraints on those influences?
e. How fixed is the current form and nature of post-2005 Act Inquiries?
f. What overall conclusions may be drawn on the significance of legal and political influence on the form and nature of post-2005 public inquiries?

Each question is addressed in turn, with a summary of the findings for each question. The chapter then draws overall conclusions on the findings, examines those findings within a wider context, and identifies areas for future research. The chapter concludes with final thoughts on the implications of the research for future reviews of the form and nature of public inquiries.

8.2. Who is served by post-2005 public inquiries?

The starting point for this research was identifying what a public inquiry is and who, primarily, is served by a public inquiry. The analysis and evaluation of the data shows that, in practice, views differ significantly depending on the capacity in which an individual or body engages with a public inquiry.

Public inquiries form part of the political rather than the legal process.[1] They have no power to determine civil or criminal liability. A report containing the inquiry's findings and recommendations is delivered to the minister who convened the inquiry; it is laid before Parliament and is published. The decision whether or not to implement its recommendations is a political decision for the Government. However, public inquiries

[1] That position being confirmed in the Inquiries Act 2005 (2005 Act), s (1) "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability". See also the discussion in Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing 2017) 50 and discussion in Emma Ireton, '*How Public is a Public Inquiry*' [2018] PL 277.

are also quasi-judicial bodies with many of the features and aims of a court process. This can often give rise to expectations from participants, the public, and media that are more akin to those of a legal process, such as the expectation that an opportunity will be given to advance a particular stance or position, or that findings of culpability will be made, as might be expected from an adversarial legal process (see 2.1).

The role of a public inquiry can differ significantly between inquiries, depending on an inquiry's subject matter and terms of reference (see 2.5). Conflicting tensions arising from differing expectations about the primary role of a public inquiry raise the significant question of who is served by, and whose interests should be at the heart of, the process. This is exacerbated by fact that the role of a public inquiry is not defined in statute and there is an absence of any case law defining the justification and philosophy of public inquiries generally (2.5).[2] These conflicting expectations in turn lead to conflicting views over the most appropriate form and nature of a public inquiry.

For many participants, the primary role of a public inquiry is: to provide answers for victims, survivors and family members; to hold those in authority to account; and to provide those directly affected by the subject matter of an inquiry with the opportunity for their voice to be heard (see 3.1). For the general public and campaign groups, the primary role may be to learn lessons, address public concern and prevent recurrence (see 2.1). For the minister and the Government, addressing matters of public concern is a function of the executive and a primary role of a public inquiry is to inform executive decision-making when addressing that public concern, as well as being a means to discharge the State's obligations under the European Convention on Human Rights (ECHR). For members of parliament and select committees, public inquiries are an important instrument of administrative justice and one of the means by which the executive is held to account (see 2.5 and 3.3).

The research clearly demonstrates the tensions between the expectations and interests of participants to an inquiry who are most directly affected by the subject matter of an inquiry, the wider public and the Government. A clear example of this was seen in the analysis of attempts to influence the breadth of an inquiry's terms of reference (see 6.6.2). Victims, survivors and family members have often demanded broad terms of

[2] Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing, 2017) 27.

reference, seeking as full an account as possible of the events and broader circumstances that form the subject matter of an inquiry. However, broad terms of reference may delay publication of lessons learnt and recommendations to prevent recurrence, thereby adversely affecting wider public interests. Conversely, where narrow terms of reference are set, it may appear that the Government is attempting to deflect criticism or avoid political difficulties by restricting the scope of the inquiry (see 6.2 and further discuss below).

The research shows tensions over the form and nature of public inquiries in each of the areas that form the subject of the substantive chapters: the decision whether or not to convene an inquiry, the decision whether to convene a statutory or non-statutory inquiry, the choice of chair, and the decision to restrict public access. These tensions have, in turn, led to challenges being brought in an attempt to influence decisions on the form and nature of public inquiries.

8.3. Where does the power to determine the form and nature of those public inquiries lie?

Before examining such influence on decisions, it is first necessary to identify where the power to determine the form and nature of public inquiries lies. The Inquiries Act 2005 transferred responsibility for convening statutory public inquiries from Parliament to the executive, vesting the power to convene a statutory inquiry, and to determine its form and nature, in the minister.[3] Non-statutory inquiries continue to be convened by the Government under the prerogative powers of the executive, with decisions on the form and nature of a non-statutory inquiry being made by the minister. In both cases, the minister in question is the one whose department is most relevant to the matter of public concern.

Ministerial discretion to determine the form and nature of statutory and non-statutory inquiries is very broad. There is no process whereby those demanding an inquiry may make an application. Neither the courts nor Parliament can mandate a minister to convene a public inquiry (see 3.1.2). There is no transparency to the decision-making process and no prescribed set of criteria against which a decision may be tested (see

[3] 2005 Act, s1.

3.4.1). There is no requirement for a minister to give reasons when refusing a public inquiry, though ministerial statements are often given and reasons should always be given in specific circumstances, such as where there has been a failure of regulation (see 3.4.2).[4] The minister who convenes an inquiry will determine whether it will be a statutory or non-statutory inquiry, in discussion with others in government. Again, there is no formal process or criteria and no transparency to the decision-making process (see 4.5).

The minister also has the power to appoint and terminate the appointment of the chair and any panel members.[5] There is no application process and no independent assessment of the merits of any potential chair. For statutory inquiries, there are only two factors a minister must take into account: suitability and impartiality.[6] For non-statutory inquiries, there are no express requirements at all. There is little transparency to the appointment process and concerns have been expressed about the lack of independence from the executive and the political establishment (see 5.2.1).

A public inquiry's terms of reference are set, and may be amended, by the minister. For statutory inquiries there is a legal requirement to consult with the chair and, for non-statutory inquiries, consultation with the chair is seen as good practice.[7] Parliament must be informed, but has little involvement in determining terms of reference (see 6.3.1).[8] The chair is then responsible for interpreting and discharging those terms of reference.

Both the minister and the chair have the power to restrict public access to a public inquiry and to restrict the disclosure or publication of evidence or documents.[9] The minister also has the power to withhold material in an inquiry's report from publication.[10] Concern is expressed over the breadth of both the minister's and the chair's powers of restriction (see 7.4.1 and 7.7).

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[4] Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014) paras 33-36.
[5] Ibid, ss 4 and 12(3).
[6] Ibid Act, ss 8 and 9 respectively.
[7] Ibid, s 5(4) and see Robert Francis written evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' para 35.
[8] 2005 Act, s 6(1).
[9] Ibid, s 19 for statutory inquiries and power derived from the prerogative powers of the executive for non-statutory inquiries.
[10] Ibid, s 25(4) for statutory inquiries.

Further, as discussed below, the Government itself has power over the form and nature of the public inquiry process as whole. It may propose new legislation, as in the case of the Inquiries Bill, propose amendments to existing legislation or, as is evidenced within this research, reject recommendations for changes to the existing public inquiry procedural framework made by parliamentary committees and others.

The power to determine the form and nature of a public inquiry therefore lies predominantly with the minister. The extensive power of the minister has been severely criticised. So too has the lack of transparency and consistency to the ministerial decision-making process (see 2.4). The research shows that members of parliament and parliamentary committees have criticised the diminution of Parliament's role in the public inquiry process and therefore the weakening of the role of public inquiries in ensuring ministerial accountability. Participants, pressure groups, the media and the wider public have also been critical of the lack of consultation, particularly with survivors and family members, and with the public more widely, over the form and nature of a public inquiry (see 2.4). There are clear arguments in favour of the power of the minister being reduced and the power of the independent chair being increased.

8.4. What political and legal influence is being exerted over the exercise of that power?

8.4.1. Influence generally

This thesis asserts that concerns over the extent of the powers of the minister; the lack of openness and independence to the decision-making process; and conflicting expectations about the role, or primary role, of a public inquiry, and thereby whose interests should be at the heart of the public inquiry process; are major reasons for the numerous and frequent attempts to influence the form and nature of post 2005 inquiries (see 2.4, 2.5, 2.6 and chapters 3 to 7).

Both the minister and the chair are accountable to the courts. Decisions of the minister, and procedural decisions of the chair during an inquiry, are subject to judicial review. Court judgments may have implications for subsequent public inquiries. Further, the provisions of the European Convention on Human Rights (ECHR) have directly influenced each of the areas addressed by the substantive chapters of the thesis. When making

decisions over the form and nature of public inquiries, the minister is also politically accountable to Parliament and the electorate.

The research shows that formal political influence is exerted by Parliament and parliamentary committees[11] in an attempt to change the public inquiry procedural framework as a whole and, in particular, the procedural framework for statutory inquiries under the Inquiries Act 2005 and the Inquiry Rules 2006 (see 2.6.1). Further, ministers must comply with the Ministerial Code, which incorporates the Seven Principles of Public Life, devised by the Committee on Standards in Public Life, [12] which set out the basis of the ethical standards expected of public office-holders, including requirements for openness and accountability (see 3.4).

The research also demonstrates that informal political pressure, in the form of public pressure from individuals, campaign groups and the wider public, including pressure via the media and lobbying of members of parliament, is being exerted on ministerial decisions in respect of individual public inquiries. Direct requests to change the form and nature of an inquiry have also been made by inquiry chairs and coroners; for example, requests to convert a non-statutory inquiry or an inquest into a statutory inquiry, to broaden the scope of an inquiry or to increase its powers (see 4.9.3).

As discussed above, once an inquiry is underway and the chair makes decisions about an inquiry's form and nature when interpreting the terms of reference or when making decisions about restrictions on public access,[13] it is inappropriate for political pressure to be exerted on the chair or panel members. A public inquiry must operate entirely independently of political pressure. There are, however, appropriate channels for representations to be made to the chair. The research suggests that those most closely connected to a public inquiry often seek to influence the chair's decisions once an inquiry is underway, either by making submissions to the inquiry as part of the inquiry process or, increasingly frequently, through a formal process of consultation (see 4.9.2 and 6.6.4)

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[11] Drawing on evidence from witnesses giving evidence to select committees, including highly experienced practitioners, participants and NGOs.

[12] The most recent version of which is the Cabinet Office, 'Ministerial Code' (August 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf> accessed 29 May 2020; Committee on Standards in Public Life, 'The Seven Principles of Public Life' (May 1995) <*www.gov.uk/government/publications/the-7-principles-of-public-life*> accessed 29 May 2020 respectively.

[13] With input from any panel members.

or, on occasions, by boycotting or threatening to boycott all or part of an inquiry (see 3.5.2, 4.9.2, and 6.6.1).

Political and legal influence operates therefore at two levels: on decisions of the minister and chair in relation to specific individual inquiries and on the decisions of Government in response to attempts to reform the public inquiry process as a whole.

8.4.2. Political and legal influences and individual inquiries

When examining individual inquiries, there was evidence of political and legal influence in relation to each of the key decisions made by ministers and inquiry chairs that form the subject of each of the substantive chapters.

It is apparent that a momentum of public pressure calling for a public inquiry can often build up from the media, the families of victims, support groups, NGOs and campaign groups, and from Parliament, as a result of the lobbying of members of parliament. Often the reasoning behind the calls is that, without a public inquiry, the voices of those most directly affected by the matter of public concern would not be heard (see 3.1.1). In addition, a small number of judicial review challenges have led to a public inquiry being convened (see 3.6).

Most members of the general public are unlikely to be aware of the significance of the difference between a statutory and non-statutory inquiry (see 4.9.2). However, this distinction is significant. Campaign groups, participants and family members have applied pressure on ministers to convene a statutory inquiry where they felt it was essential for an inquiry to have powers of compulsion and for evidence to be given on oath and in public (see 4.9.2). Requests from chairs and coroners have been acceded to where they have asserted that statutory powers were necessary in order to obtain the evidence necessary to carry out a thorough investigation (see 4.9.3).

A number of challenges to decisions on the appointment of the chair and panel members have been brought by groups of survivors and by family members, campaign groups and members of parliament. These have been as a result of concerns about links to the establishment, suitability, and issues of diversity and equality (see 5.8). Legal challenges to decisions on the appointment of the chair and panel members have been brought, but without success (see 5.8).

Frequent attempts have been made to influence the terms of reference of individual inquiries, both at the level of the minister setting the terms of reference and the chair interpreting them. The aim is usually to broaden or narrow the terms of reference to fit a participant's or group of participants' perspectives about the most appropriate role and priorities of a public inquiry. Attempts to influence terms of reference outside a formal consultation process are largely unsuccessful (see 6.6.2). Some successful judicial review challenges on the setting and interpretation of terms of reference have been brought (see 6.7 and below).

Such challenges are brought predominantly by participants, including family members and pressure groups. Underpinning those challenges are tensions between their expectations of the primary role of an inquiry and of whose interests should be at the heart of the process, and the competing priorities of the minister convening the inquiry. It is essential to bear in mind that inquiry participants are not a single homogenous group; they have diverse and conflicting interests. Many of those most closely affected by a public inquiry, such as survivors, victims, family members and campaign groups, hold strong views about the most appropriate form and nature for an inquiry in order to best serve what they consider to be the public inquiry's primary role. Those views, however, may differ significantly from the views of other participants, for example the views of family members of a prisoner who died in custody and those of the prison officers (see 7.4).

This conflict was particularly apparent from the analysis of evidence relating to restrictions on public access to an inquiry in chapter 7. Many participants, families of survivors and victims, NGOs and campaign groups are anxious for an inquiry to be held as publicly as possible to allow voices to be heard, to promote public accountability and to address public concern. Yet, on occasions, other participants, witnesses and the Government have sought restrictions on public access, for example for reasons including: national security; legal and commercial confidentiality; unnecessary intrusion or distress to witnesses; and fears for personal safety (see 7.3, 7.9 and 7.10). Political pressure from Parliament, the public, and media have been exerted on the minister; representations have been made to the minister and chair; and boycotts and threats of a refusal to cooperate have been made by some participants (see 7.9.1 to 7.9.4). Legal challenges have been brought, some of which were successful, which have clarified issues such as:

the applicability of the principle of open justice; the application of Article 2 ECHR; and the extent of public scrutiny and protective measures for witnesses that should be applied (see 7.10.1 to 7.10.3).

Such conflicting tensions cannot be entirely resolved, but a fair balance between competing interests must be found. The wishes of particular participants, however tragic the case, are material considerations but cannot be conclusive. An inquiry must be independent, not only from government and the political establishment, but also from survivors, campaign groups and participants (see 5.9 and 6.6.3).

8.4.3. Political and legal influences and the public inquiry process as a whole

In addition to political and legal influence being exerted over individual inquiries, it has also been exerted over the public inquiry process as a whole, in respect of each of the subject areas addressed by the substantive chapters. Legal challenges have brought clarity to the decision-making process, setting key principles for future inquiries. Political influence has predominantly originated from scrutiny by Parliament and select committees. Clear areas of concern have emerged: the lack of independence from Government and the minister, conflicts of interest, the motivation behind the decisions made, the lack of transparency of the decision-making process and the extensive powers of the minister.

The PASC and the HL Select Committee adopted different positions on concerns over conflicts of interest arising when a minister decides whether or not to convene a public inquiry, and the lack of transparency of that decision-making process, where the inquiry might investigate the actions of the minister's department or the Government itself (see 3.2 and 3.4). The PASC, and a number of witnesses before the HL Select Committee, called for a greater role for Parliament to address this. The HL Select Committee, however, recommended that such concerns be dealt with by greater openness, transparency and fairness in the decision-making process (see 3.3).[14]

Concern that a minister may be motivated to convene a non-statutory rather than a statutory inquiry in order to evade strong statutory investigatory powers, and to reduce

[14] House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) 6.

the risk of damaging or politically embarrassing evidence emerging, led to the HL Select Committee recommending that public inquiries should normally be convened under the 2005 Act. That recommendation, which was strongly supported during the subsequent House of Lords debate, was rejected by the Government (see 4.5, 4.6.1 and 7.6).

The potential for conflicts of interest, and the haste in which decisions are made, to lead to the appointment of chairs thought to be unsuitable or unduly sympathetic to the executive resulted in the HL Select Committee recommending that the appointment process for the inquiry chair should be both less hurried and more transparent (see 5.3).[15] The recommendation in respect of the former was accepted by the Government.[16]

Witnesses before the HL Select Committee also raised concerns about judges being appointed as chairs where inquiries may relate to matters of political controversy, because of potential risks to perceptions of independence, impartiality and the political neutrality of the judiciary (see 5.4.2 to 5.4.4.) Further, very senior members of the judiciary have long argued that decisions about the appointment of members of the judiciary should require the consent of the Lord Chief Justice,[17] for reasons of constitutional propriety and the independence of the judiciary (see 5.4.4). The PASC recommended a presumption in favour of appointing panel members to sit with the chair, to provide a broader range of specialist expertise, underpin the inquiry's independence, and assist the chair in formulating recommendations. Conversely the HL Select Committee recommended a presumption in favour of the appointment of a single chair, for reasons of speed and efficiency, which was accepted by the Government (see 5.5.3).[18]

Also in response to concerns over conflicts of interest and lack of independence, the HL Select Committee recommended, unsuccessfully, that the 2005 Act be amended so that the consent of the chair, rather than just consultation with the chair, is needed before the minister can set or amend the terms of reference (see 6.3.2).[19] Further, the PASC and HL Select Committee recommended that should there be a short period before final

[15] HL Select Committee Report, *The Inquiries Act 2005: post-legislative scrutiny* para 114.
[16] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 39.
[17] Or other appropriate senior member of the judiciary.
[18] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 45.
[19] HL Select Committee Report, The Inquiries Act 2005: post-legislative scrutiny para 145.

terms of reference are announced, to enable consultation with the chair to be more than merely perfunctory, which was also rejected (see 6.4.3).

The extent of the minister's power to restrict public access to an inquiry, and to withhold information from publication in the inquiry report, has also given rise to concerns about conflicts of interest, lack of transparency, the motivation behind ministerial decisions and the potential for ministers to interfere in the public inquiry process (see 7.6 and 7.7). Attempts were made to restrict the statutory power of the minister, by members of parliament in parliamentary debates, select committees and campaign groups during the passage of the Inquiries Bill, but were unsuccessful. Subsequent recommendations from the HL Select Committee, that the minister's powers be abrogated, were rejected by the Government.[20] In practice, unwarranted interference appears to have been prevented by the influence of public and media scrutiny at the level of individual public inquiries, and the potential for severe public and political criticism of the minister and the Government, appearing to provide a sufficiently powerful disincentive (see above and 7.11).

In contrast to the position for individual inquiries, therefore, political influence on the public inquiry process as a whole has predominantly originated from Parliament and select committee scrutiny. In this context, the tension has been between the stance taken by successive governments, staunchly protecting the powers of the minister and thereby the executive, and those seeking to restrict the powers of the minister, increase the openness and independence of public inquiries and thereby increase ministerial accountability.

8.5. What are the constraints on those influences?

8.5.1. Constraints on influence from Parliament and parliamentary committees

The research shows that formal political influence exerted by Parliament and parliamentary committees,[21] which seeks to influence the public inquiry procedural

[20] Ministry of Justice, Government Response to the *Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 69.

[21] And witnesses giving evidence to select committees, including highly experienced practitioners, participants and NGOs.

framework and, in particular, the procedural framework for statutory inquiries under the Inquiries Act 2005 and the Inquiry Rules 2006, is subject to significant constraints. Direct parliamentary involvement in the decision-making process diminished with the introduction of the 2005 Act (see 3.3). Responsibility for convening a public inquiry was transferred from Parliament to the minister.[22] At the same time, significant powers were granted to the minister namely: the power to appoint and terminate the appointment of the chair and panel members,[23] to determine an inquiry's terms of reference,[24] restrict public access and withhold material in the final report from publication (see 2.3 and 2.4).[25]

Parliament and parliamentary committees have sought to restrict these powers. However, successive governments have been resistant to any recommendations that would have the effect of reducing the power of the minister and thereby the executive (see 3.10, 4.11, 5.9, 6.8 and 7.11).

Select committees are one of the key methods by which Parliament scrutinises government policy and administration and legislation. However, it is not uncommon for ministerial departments to be uncooperative with select committees during the taking of evidence and government responses may be late, defensive, or fail to consider, or properly take account of, their findings and recommendations.[26] The Government is not obliged to accept the recommendations of a select committee (see 2.6.1). As is discussed in detail below, successive governments have, in practice, failed to engage constructively with select committees recommending public inquiry reform. The Government's engagement with the HL Select Committee's scrutiny process was described as "contemptuous and peremptory" and its response to the report as "extraordinarily negative and unhelpful" (see 4.6.2).[27]

Further, the Government chose to introduce the Inquiries Bill in 2004, knowing that the PASC review of the effectiveness of public inquiries was underway but had not yet published, and with no white paper as a precursor, no pre-legislative scrutiny and no

[22] 2005 Act, s 1.
[23] Ibid, ss 4 and 12 for statutory inquiries.
[24] Ibid, s 5 for statutory inquiries.
[25] Ibid, ss 19 and 25 for statutory inquiries.
[26] See chapter 4 paras 4.6.2 and 4.7.1 and House of Commons Liaison Committee, *Select committee effectiveness, resources and powers, Second Report of Session 2012–13*, (TSO 2012), HC 697 para 107.
[27] HL Deb 19 March 2015, vol 760, col 1140.

consultation with interested or affected groups. There was no post-legislative scrutiny of the Inquiries Act 2005 until the HL Select Committee was set up in 2013 to review the law and practice relating to statutory and non-statutory inquiries (see 2.6.1),[28] thus further constraining the potential for Parliament and parliamentary committees to exert influence over the form and nature of public inquiries in practice.

In practice, therefore, the research shows that parliamentary influence over the form and nature of public inquiries is now minimal. Further, the Government's opposition to select committee recommendations for change and failure to engage with legislative scrutiny and consultation processes has severely curtailed potential influence from Parliament and parliamentary committees.

8.5.2. Constraints on influence from challenges by individuals and campaign groups

For individual inquiries, the research shows that the onus of challenging decisions on the form and nature of a public inquiry predominantly falls on victims, survivors, family members and campaign groups. It is these individuals or groups who exert sustained calls for public inquiries to be convened, to ensure that matters of public concern are fully investigated (see 3.1.1).

However, political and legal challenges brought by these individuals or groups provide an inconsistent approach to influence over public inquiries. The individuals and groups most directly affected by an issue of public concern may lack the means or resources to pursue a sustained campaign (see 3.10). Where political challenges are brought, the outcome will depend on how much time, resources, and ability they have to pursue such challenges as well as, often, the extent to which their campaign captures media attention. Bringing such challenges can be particularly onerous and distressing for survivors and family members (see 4.11).

Boycotts and threats of a boycott have been used by individuals and campaign groups as a form of influence. However, such an approach will not be adopted lightly as it deprives those participants of the opportunity for their voice to be heard and to ensure that the inquiry has all the relevant information available to ensure that the subject matter of the

[28] HL Select Committee Report, The Inquiries Act 2005: post-legislative scrutiny para 5.

inquiry is fully investigated and the matter of public concern addressed (see 3.5.2, 3.5.3, 4.9.2, 5.7.1, 6.6.1, 6.8, 7.9.3 and 7.8.4). The research indicates that representations from participants may influence the outcome of the decision-making process but, whilst representations are a material consideration for the minister or chair to whom they are addressed, they are not conclusive, as seen in connection with the appointment of the chair and panel members (see 5.9) and with the interpretation of the terms of reference (see 6.6.3). Whilst the recent apparent greater willingness on the part of the Government to hold formal consultation with those with a particular interest in a public inquiry and the general public more widely, as in the case of the *Grenfell Tower* and *Infected Blood Inquiries,* is something to be welcomed, there is no legal obligation on the Government to adopt formal consultation and, when it does so, it must be managed very carefully (see below).

The judicial review procedure is costly and complicated, as well as potentially stressful and distressing for survivors and the bereaved, which can in turn deter individuals or groups from bringing a challenge.[29] Judicial review is not readily available; permission of the court is required to bring proceedings and it is restricted to those who the court considers have 'sufficient interest' in the matter to which the application relates (see 2.6).[30] The research suggests that ministerial concessions going some way towards, but falling short of the outcome sought, can be sufficient to frustrate a challenge by judicial review and have, on occasions, resulted in participants withdrawing their challenge when such 'part-way' decisions have been made (see 3.6.3). Very tight time limits apply, with the associated risk of challenges being ruled out of time. This provides particular hurdles for those unfamiliar with, or unprepared for, issuing a legal challenge, as is often the case with such individuals and groups (see 2.6).

The controversial changes to judicial review introduced by the Criminal Justice and Courts Act 2015, including the tightening of the criteria for granting judicial review and changes to the rules on the legal costs of interveners in judicial review proceedings, make it even harder for individuals and campaign groups to bring challenges (see 2.6.2 and 3.10).[31]

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[29] Disaster Action written evidence to the House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" para 4.4 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020.
[30] See Senior Courts Act 1981, s 31(3).
[31] Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67(2) NILQ 209, 215.

The court may review the lawfulness of a decision, but not the decision itself. The court's approach to reviewing decisions of the minister and chair has been one of deliberate restraint and reluctance to interfere, consistent with the principle of the separation of powers and the court's exercise of its supervisory jurisdiction.

The minister's powers to determine the form and nature of public inquiries are extensive. Challenges to decisions made in respect of individual inquiries have fallen predominantly to victims, survivors, family members and campaign groups, placing an unreasonable burden on that group. The effectiveness of such challenges is limited by issues such as the time, resources and ability of those individuals or organisations, making this an inconsistent means of scrutinising and checking the exercise of those powers. That, when considered together with the clear ineffectiveness of Parliament and parliamentary committees to bring about reform to the public inquiry process as a whole, is a significant cause for concern (see 8.7).

8.6. How fixed is the current form and nature of post-2005 Act inquiries?

The research demonstrated that formal political influence exerted by Parliament and parliamentary committees, seeking to influence the public inquiry procedural framework (and, in particular, the procedural framework for statutory inquiries under the Inquiries Act 2005 and the Inquiry Rules 2006) has been largely unsuccessful. This is particularly so where changes would have the effect of weakening or abrogating the powers of the minister. Informal political influence, at the level of individual public inquiries, via the media and the lobbying of members of parliament, has had some success in bringing about change. Representations made to the minister and chair, and participation in consultation processes have, on occasions, influenced decisions on the form and nature of public inquiries. There have been few examples of successful judicial review challenges. Where legal challenges have been brought, they have provided helpful clarity and guidance for successive inquiries.

The following sections examine the question of how 'fixed' the current form and nature of public inquiries are in respect of the subject matter of each of the substantive chapters of the thesis (see also the table summarising changes to the form and nature of post-2005 public inquiries in Appendix 4).

8.6.1. Convening a Public Inquiry

Recommendations that an independent body should oversee the decision whether or not to convene a public inquiry have been repeatedly rejected (see 3.2). So too has the recommendation that Parliament should have an active role in the making of these decisions (see 3.3). Recommendations that the minister's wide discretion over whether or not to convene a public inquiry should be restricted by requiring decisions to be made by reference to published criteria have also been rejected (see 3.4.1). Although the Government accepted the HL Select Committee's recommendation that reasons should be given to Parliament for decisions not to hold a public inquiry in certain circumstances, that acceptance was qualified (see 3.4.2).

Informal political pressure in relation to specific individual inquiries, from victims, survivors, family members and campaign groups, including pressure from lobbying members of parliament, has managed to influence decisions to convene a public inquiry in some cases. Examples include the *Infected Blood Inquiry* (see 3.5.1 and 3.5.2), the *Mid Staffordshire NHS Foundation Trust* and the *Detainee Inquiries* (see 3.5.3), which may also have set precedents for future inquiries. The *Finucane Inquiry* is currently the only example of pressure from family members that has frustrated attempts by a minister to convene a public inquiry (see 3.5.2). [32]

The court's approach to reviewing decisions over whether or not to convene a public inquiry has been one of deliberate restraint and reluctance to interfere (3.6.1). There is clear authority from pre-2005 case law that the court cannot mandate a minister to convene a public inquiry nor prevent a minister from convening an alternative form of inquiry (see 3.6.2).[33] Many judicial reviews of decisions not to convene a public inquiry have been brought; a few have been successful, particularly in the areas of national security and the armed forces, where there has appeared to be particular reluctance on the part of government to convene a public inquiry (see 3.6). More recent cases have tended to centre on the state's obligations under Articles 2 and 3 of the ECHR. They have

[32] Although the family subsequently changed its mind, but then failed to persuade the Government to convene a statutory inquiry.

[33] *R v Secretary of State for Health, ex parte Crampton* (CA, 9 July 1993) in connection with the *Allitt Inquiry*; *R (Wagstaff) v Secretary of State for Health* [2001] 1 WLR 292, in connection with the *Shipman Inquiry*; and R (Persey) v Secretary of State for the Environment, Food and Rural Affairs [2002] EWHC 371 (Admin) [2003] QB 794, in connection with the *Foot and Mouth Inquiry.*

laid down minimum standards for Article 2 and 3 investigations and the territorial application of the ECHR, with implications for later ministerial decisions on the convening of public inquiries (see 3.6.4 to 3.6.7).

The Government has rejected all recommendations that would give an independent body or Parliament any role in overseeing the decision of whether or not to convene a public inquiry and attempts to fetter the discretion of the minister by introducing published criteria. This is a pattern of response that can be seen in each of the other areas that are the subject of the substantive chapters in the thesis (see below).

Whilst there has been some successful political influence over decisions at the level of individual inquiries, as explained above, this is an inconsistent form of check on the extensive power of the minister and its effectiveness is greatly affected by the specific circumstances of the individuals or organisations concerned. As would be expected, the court's approach to challenges to the decision of ministers has been restrained.

8.6.2. Statutory or non-statutory

Successive governments have been resistant to formal political pressure that has sought to constrain the minister's discretion to convene non-statutory as opposed to statutory inquiries. They have rejected recommendation that there should be a presumption in favour of public inquiries being convened under the Inquiries Act 2005. In a concession to greater openness and transparency, in response to the HL Select Committee report the Government did accept that there should be some explanation of a minister's decision to convene an inquiry otherwise than under the Act, but only in limited circumstances (see 4.6.1).[34]

The Government rejected the HL Select Committee recommendation that the existing prescriptive and onerous procedure requiring the serving of warning letters under rules 13 to 15 of the Inquiry Rules 2006 be revoked and replaced with the chair's discretion (see 4.7). In doing so the Government was severely criticised for failing to effectively engage with the evidence of highly experienced practitioners on the operation of the rules in practice and the recommendations of HL Select Committee (see 4.7).[35] Bearing in

[34] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 35.
[35] HL Deb 19 March 2015, vol 760, cols 1142-1152.

mind the actions of the minister's own department and the Government itself may be the subject matter of an inquiry, this might be another example of the Government adopting a protective stance towards the interests of the minister and wider executive.

Informal political pressure brought in relation to specific individual inquiries, particularly from victims, survivors, family members and campaign groups, as well as pressure from members of parliament, has been successful in some cases in influencing a minister's decision to convene a statutory inquiry as opposed to a non-statutory inquiry, for example in the case of the *Mid Staffordshire Inquiry* and the *IICSA* (see 4.9.2). There have also been successful requests for the conversion of an inquest to a statutory inquiry from chairs of non-statutory inquiries and coroners, for example the *Billy Wright Inquiry and the Manchester Arena Inquiry* (see 4.9.3).[36]

Intense and effective campaigning resulted in the 2015 conversion of the *Independent Panel Inquiry into Child Sexual Abuse* to a statutory inquiry, the *IICSA*, as well as bringing about changes to its chair and terms of reference (see 4.9.2). The *IICSA* appears to mark a turning point in the influence of public campaigning on the form and nature of a public inquiry, perhaps triggering the Government's recent increased willingness to engage in consultation and associated reluctance to later revisit decisions (see 4.9.2 and 8.7). In its 2014 report, the HL Select Committee criticised what it saw as the underuse of the 2005 Act at that time in favour of convening non-statutory inquiries (see 4.6).[37] However, since the publication of that report, 10 of the 12 public inquiries convened have been statutory inquiries (four as statutory inquiries from the outset, four having been converted from inquests at the request of the coroner, and two, the *IICSA* and the *Infected Blood Inquiry*, converted to a statutory inquiry following pressure from participants) (see 4.9.2).

The court cannot mandate a minister to convene a statutory rather than a non-statutory inquiry, but can only review the legality of the decision-making process; the scope for legal challenge is limited. There have been some successful judicial review challenges. The *Mubarek*, *Baha Mousa*, *Al-Sweady* and *Litvinenko Inquiries* were all convened as

[36] With the exception of the *Iraq inquiry* where the chair was offered, but chose not to have, statutory powers.

[37] HL Select Committee Report, The Inquiries Act 2005: post-legislative scrutiny paras 64 and 65.

statutory inquiries following successful judicial review challenges (see 4.10).[38] The body of case law has clarified the requirements that must be fulfilled in order for an investigation to be compliant with Articles 2 and 3 of the ECHR and the need for statutory powers of compulsion (see 4.8).[39]

In summary therefore, the Government has once again rejected attempts to constrain the minister's discretion, by rejecting a presumption in favour of the use of the 2005 Act. It also failed to even address recommendations, from experienced public inquiry practitioners, for reform of the controversial statutory warning letter process. The concession that was made to increasing the transparency of the decision-making process by giving reasons for convening an inquiry otherwise than under the 2005 Act, was qualified, thus reducing its impact. There have been some successful legal challenges, which have clarified the requirements for Article 2 and 3 investigations. Where influence has been observed, however, is as a result of informal political pressure from participants and requests from inquiry chairs, which have resulted in some non-statutory inquiries being converted to statutory inquiries, and requests from coroners, which have resulted in inquests being converted to statutory inquiries. Despite the Government's refusal to be bound to a presumption in favour of convening statutory rather than non-statutory inquiries, it is particularly notable that in recent years the majority of inquiries convened have been statutory inquiries.

8.6.3. The chair

The Government has also rejected recommendations seeking to limit the power of the minister over the appointment of the chair and any panel members, namely: that the appointment of the chair should be delegated to an alternative non-government body, or that the function should fall to Parliament (see 5.2); and that the minister should obtain the consent of the chair before appointing a panel member or assessor and before terminating the appointment of a panel member (see 5.6).[40] The HL Select Committee's

[38] There have been two cases where the decision to convene a statutory inquiry was challenged unsuccessfully by family members: *Finucane* and *Billy Wright* (see 4.10.1 and 4.10.2).
[39] *Jordan v United Kingdom* (2001) 37 EHRR 52, *Edwards v United Kingdom* (2002) 35 EHRR 19, *R v (Amin) v Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 AC 653, Commissioner of the Police for the Metropolis v DSD [2015] EWCA Civ 646 (the latter, that the nature, scope and rigour of the investigative exercise required by Articles 2 and 3 is essentially the same).
[40] Although concern has frequently been expressed about the lack of independence of the appointment process of the chair and panel members of a public inquiry, this was not specifically

recommendation that a notice of intention to terminate the appointment of a chair be laid before Parliament was accepted, however, as was the recommendation that there should be a single chair, rather than a panel, unless there are strong arguments to the contrary, on the basis that was already invariably the case (see 5.5.3 and 5.7).

Another practical change has been the Government's acceptance of the HL Select Committee recommendation that the announcement of the inquiry and name of the chair should not necessarily be the subject of the same statement and that the legislation should be amended accordingly.[41] This was intended to reduce the haste of the decision-making process, although it remains the case that there is often pressure from the public, media and campaign groups to make a quick announcement (see 5.3).

Issues surrounding the appointment of members of the judiciary as the chair of an inquiry were the subject of consideration and recommendations of the PASC and HL Select Committee. In the period between publication of the two reports, and two weeks before the Inquiries Act 2005 came into force, the Constitutional Reform Act 2005 also came into force and enshrined the independence of the judiciary in statute, creating greater formal separation of powers. The Government accepted the HL Select Committee recommendation that the consent of the Lord Chief Justice should be sought for the appointment of a member of the judiciary as the chair of an inquiry, on the basis that it would be merely putting current practice onto a statutory footing (see 5.4.4).

The Government did not address concern about the appointment of judges as chairs of inquiries in its response to the HL Select Committee report, however, the research shows that in practice the number of serving judges has fallen since the introduction of the 2005 Act, with the decrease being increasingly apparent over the last five years. There are a number of possible explanations for this fall in numbers. This may be due to concerns about the extent of ministerial powers over the public inquiry process and consequent conflicts with the constitutional independence of the judiciary. It may indicate a change in approach on the part of ministers, favouring the appointment of retired judges. It may be the result of discussions with, and reluctance on the part of, the Lord Chief Justice for

addressed in the recommendations of the HL Select Committee and no changes in this respect were proposed or have been made (see 5.9 and 8.7.2).

[41] Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014) para 39.

the appointment of serving judges. It may be an issue of resources, but it is more likely a combination of all those factors (see 5.4.5).

There have been a number of high-profile attempts by campaigners and participants to influence decisions on the appointment of the chair and panel members of specific individual inquiries, most of which have been unsuccessful. A notable exception is the *IICSA*, where intense pressure from participants and the media resulted in the resignation of the first two chairs to the Inquiry (see 5.7.1). However, concern has been raised about the fact that campaign groups do not represent the interests of all participants. Often there is a very wide range of participants to an inquiry, with diverse and conflicting interests, to be taken into account (see below). Since the *IICSA*, with the *Grenfell Tower Inquiry* and subsequent inquiries, the Government appears to have taken a more robust response to resisting pressure calling for the removal of a chair. Whilst it is not possible to identify specific challenges that have directly resulted in the appointment of a panel rather than a single chair, it appears that challenges may have influenced and played a part in such decisions (see 5.7.1 to 5.7.3 and 5.81). The few legal challenges that have been brought to decisions on the appointment of a chair, or whether to appoint panel members, have been unsuccessful.

Once again, the Government has opposed reform that would limit the power of the minister, by rejecting recommendations that would create a role for a non-governmental body or Parliament in the appointment of the chair, or would require the consent of chair to the appointment of a panel member. A concession was made to openness by accepting the recommendation of a notice of intention to terminate the appointment of the chair being laid before Parliament. Further acceptance of the recommendation regarding separating the timing of the announcement of the identity of the chair from the announcement of the inquiry itself brought about a positive practical change (though with no associated limit on the power of the minister). Informal political challenges to the appointment of a specific chair have been largely unsuccessful and legal challenges have been unsuccessful. It is notable is that, despite no express statement from the Government on a change in policy, the research shows that the number of serving judges appointed as inquiry chair has decreased over recent years.

8.6.4. Terms of Reference

Attempts by the PASC and HL Select Committee to restrict the power of the minister when determining an inquiry's terms of reference by: increasing the role of Parliament, requiring the consent of the chair,[42] or by introducing a specific obligation requiring wider consultation, were all rejected by the Government (see 6.3.2 and 6.5). The Government also rejected the recommendation that there be a 'short cooling off period' after the announcement of an inquiry. This recommendation was intended to allow the minister, when announcing an inquiry, to set out only draft terms of reference, with final terms of reference being the subject of a further statement (to allow time for consultation with the chair and to avoid the terms of reference being set in undue haste (6.4.3)).[43] In practice, however, ministers invariably set out the broad scope of an inquiry at the outset of an inquiry, which is then finessed for the formal announcement of the terms of reference.[44] There does not appear to be a significant difference between the current position and what was sought by the recommendation (see 6.4.3).

The HL Select Committee recommendation that interested parties, particularly victims and victims' families, should be given an opportunity to make representations about the final terms of reference was accepted by the Government. However, this was with the caveat that it was thought to be unhelpful where the Government wished to respond swiftly to an issue of public concern, or where there are multiple victims, leaving the position open to interpretation and lacking clarity and certainty.[45] In practice, this has been mitigated by an apparent change in approach from the Government, whereby the Government is more willing to announce formal consultation periods when announcing new inquiries (see 6.6.4).

Frequent attempts have been made to influence the terms of reference of individual inquiries, particularly by survivors, victims, family members and NGOs. Those attempts have generally been unsuccessful, except in the cases of the *Iraq Inquiry* and the *IICSA* (see 6.6.3). Prior to the *IICSA*, practice differed between inquiries as to whether or not formal consultation with participants and the wider public took place. Following intense

[42] Rather than consultation.
[43] HL Select Committee Report, The Inquiries Act 2005: post-legislative scrutiny para 146.
[44] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (Cm 8093, 2014) para 53.
[45] Ibid para 55.

public pressure, the terms of reference of the *IICSA* were revisited and significantly broadened, to the point that many feared the inquiry had become unworkable (see 6.6.3). Following the *IICSA* there appears to have been a change in attitude towards a new, more consistent approach of adopting a formal consultation process early on and resisting later calls to revisit and amend the terms of reference (see 6.6.4). In practice, terms of reference are increasingly being expressed in more detailed and focused terms, possibly to assist in resisting pressure for them to be broadened (see 6.2).[46]

Legal challenges to decisions regarding the terms of reference of individual inquiries have been largely unsuccessful. The court has made it clear that it is for the minister to balance the competing interests of those affected by such decisions (see 6.7.3 and 6.7.4).

In summary, attempts to restrict the power of the minister (in this case by increasing the role of Parliament and the chair and creating an obligation to consult widely), have again been rejected by the Government. The concession to consultation with those mostly affected by an inquiry was qualified in such a way as to preserve the minister's discretion. Again, legal challenges have been largely unsuccessful, with the courts being reluctant to interfere with the minister's decision making. The few earlier successful attempts at influencing an inquiry's terms of reference by informal political pressure appear, in practice, to have prompted the greater use of a formal consultation process, coupled with a resistance to respond to subsequent political pressure.

8.6.5. Restrictions on public access

The Government has rejected recommendations that the minister's power to restrict access to public inquiries should be abrogated and that only the chair should have that power. The Government has also rejected the recommendation that, save in matters of national security, only the chair should have the power to withhold material from publication.[47] This resulted in severe criticism during the subsequent House of Lords debate on the HL Select Committee report (see 7.7 and 7.8).[48]

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[46] Emma Norris and Marcus Shepheard, 'How public inquiries can lead to change' (Institute for Government 2017) <www.instituteforgovernment.org.uk/publications/how-public-inquiries-can-lead-change> accessed 28 May 2020.

[47] Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014) para 69.

[48] HL Deb 19 March 2015 vol 760 cols 1163 and 1165.

However, in practice, these powers have been rarely used and the predicted collapse in confidence in the public inquiry process did not materialise.[49] An explanation for this may well be that intense public and media scrutiny of the minister's actions when setting up a public inquiry, and the potential for severe public and political criticism, has proven a sufficient disincentive to unwarranted interference. Press influence and public reaction may be more powerful than the minister's imperative to interfere (see 7.7 and 7.11).[50]

Other forms of political pressure have been applied in attempts to influence decisions on restrictions to public access. Intense pressure from Parliament, the public and the media resulted in the *Iraq Inquiry* being heard more publicly (see 7.9.1). For other inquiries, it is more difficult to identify the extent to which representations to the minister and chair, campaigning, and boycotts, or threats of a boycott, have influenced decisions on restrictions, but they may have done so by keeping the issue of restrictions at the forefront of the mind of the chair, minister and the public (see 7.9.2 to 7.9.5).

The many legal challenges that have been brought in connection with decision on restrictions to public access have provided guidance for future practice on a number of fronts including the applicability of the principle of open justice, Article 2 of the ECHR and public scrutiny, the common law duty of fairness, and balancing competing interests with regard to protective measures for witnesses and the rights of the media (see 7.10.1 to 7.10.3).

In relation to restrictions on public access, the Government has once again rejected recommendations to restrict the minister's powers. The research identifies isolated examples of political pressure influencing decisions on public access in relation to specific individual inquiries, though in practice it is difficult to ascertain the extent to which decisions have or have not been influenced. The courts have again demonstrated a reluctance to interfere with the decisions of the minister and chair, though the cases brought have provided clarification for future inquiries.

[49] HL Select Committee Report, The Inquiries Act 2005: post-legislative scrutiny 7.
[50] See evidence of Stephen Sedley, Former Lord Justice of Appeal and chair of the non-statutory *Tyra Henry Inquiry* and inquiry into the air crash in which Dag Hammarskjöld was killed in 1961, oral evidence to the HL Select Committee, 'Written and Corrected Oral Evidence' Q41.

8.6.6. Summary

Whilst a number of HL Select Committee recommendations have been accepted by the Government, none were recommendations that addressed the most significant concerns raised over the years about: the lack of independence of public inquiries from ministers and from government, conflicts of interest, the motivation behind the decisions made and the lack of transparency to the decision-making process. In particular, they do not include any of the proposed restrictions to the extensive powers of the minister under the 2005 Act. In some cases the acceptance of recommendations merely recognised current practice where practice had evolved, in any event, over the years.

It is informal political influence, at the level of individual public inquiries, that has brought about the most significant changes, such as the apparent move towards convening statutory rather than non-statutory inquiries, increased consultation with participants and the public, a cautionary approach towards the use of ministerial powers to restrict public access to inquiries and a move towards hearing inquiries in public wherever possible.

Judicial review challenges, reviewing the decision-making process rather than the decisions themselves, have not directly brought about a change to the form and nature of public inquiries. However, the cases brought have provided clarification and guidance for subsequent inquiries.

8.7. Overall conclusions drawn on the significance of legal and political influence on the form and nature of post-2005 public inquiries

This chapter sought to address each of the research questions by observing legal and political influence over the form and nature of public inquiries and generating explanations, theories and conclusions from the analysis of the data, aided by doctrinal analysis and wider desk-based research. Having addressed each research question in turn, the following section draws overall conclusions on the findings.

Public inquiries are major instruments of accountability and an important component of our administrative justice system, holding those in authority to account. They are unique, ad hoc bodies. Unlike other accountability mechanisms, such as courts and tribunals, they operate on a macro-level, reviewing broad administrative systemic and

regulatory failure and high-level policy considerations, rather than individual isolated incidents, in order to address public concern. The fact that there is no permanent 'inquiry system' with a fixed form and nature means that every time a public inquiry is set up the minister and chair must determine its form and nature according to its requirements for addressing its specific terms of reference (see 2.2).

A key theme emerging from the research has been the tensions between the power of the minister and the scrutinising role of Parliament and parliamentary committees and between the conflicting expectations and interests of participants to an inquiry who are most directly affected by the subject matter of an inquiry, the wider public and the Government. This thesis asserts that these conflicting tensions, expectations and interests, together with concern over the extent of the powers of the minister and the lack of openness and independence to the decision-making process, are major reasons for the numerous and frequent attempts to influence the form and nature of inquiries.

Where the actions of the minister's own department or the Government itself are the subject matter of an inquiry, clear conflicts of interest arise, since the power to determine an inquiry's form and nature lies predominantly with the minister. The minister decides: whether or not an inquiry will be convened, the extent of its investigative powers, the identity of the chair, its subject matter and the extent of public access. Successive governments have rejected attempts to restrict the power of the minister, or to introduce an element of independent oversight to the decision-making process, based on the argument that addressing public concern is a matter for the executive.

Looking firstly at tension between the executive and scrutiny by Parliament and parliamentary committees, the research shows that successive governments have also repeatedly rejected recommendations for change aimed at increasing the independence and transparency of public inquiries, which would in turn increase the capability of public inquiries to hold those in authority, including the executive, to account. This reflects the tension between two incompatible views of the constitution, the first being that the ministers' democratic authority derives solely from Parliament, which scrutinises their actions, and the second being that the executive is the centre of the system and that Parliament is peripheral. Howarth succinctly refers to these two incompatible views as

'Westminster versus Whitehall'.[51] Since the second half of the twentieth century the 'Whitehall' view has been dominant and remains so, with the associated weakening of ministerial accountability to Parliament.[52] Successive governments' protective stance over the minister's power over the form and nature of public inquiries, which are one of the key mechanisms for holding the executive to account, is an illustration of that dominance, which is unlikely to change in the foreseeable future.[53]

Nevertheless, the research shows that public inquiries have been evolving. This appears to be due, in large part, to ministers and the Government being more responsive to targeted pressure and challenges to decisions made in respect of individual inquiries, which have built up momentum and caught the widespread attention of the public and the media, than to pressure from parliamentary committees. In some instances, it may be that successful campaigning has created higher expectations and greater motivation for inquiry participants and campaign groups of later inquiries, encouraging them to challenge decisions made in respect of those later inquiries. In other instances, it might be the case that successful campaigning on earlier inquiries has set new precedents or 'base-lines' that are proving difficult for subsequent ministers to ignore without being subjected to severe public and political criticism.

In some cases, the Government has retrospectively recognised and accepted changes that have occurred in practice. For example, the Government accepted the HL Select Committee recommendations that there should be a single chair, rather than a panel, unless there are strong arguments to the contrary and that the consent of the Lord Chief Justice should be sought for the appointment of a member of the judiciary as the chair of an inquiry, on the basis that it was merely recognising current practice at the time of the report. In both cases, neither was common practice at the time of the introduction of the 2005 Act (see 5.5.3 and 5.4.4).

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[51] David Howarth D, 'Westminster versus Whitehall: Two Incompatible Views of the Constitution' (*UK Const Law Blog*, 10 April 2019) https://ukconstitutionallaw.org/ accessed 1 June 2020.
[52] Despite the Westminster approach having made some advances, ibid.
[53] See Alison Young, 'Taking (Back) Control?' (*UK Const Law Blog*, 23 April 2019) <https://ukconstitutionallaw.org/> accessed 1 June 2020 which also argues that the battle between 'Whitehall and Westminster' overlooks other views of democracy and that there is a need to also engage more fully with the public.

Looking secondly at conflicting tensions arising from differences in expectations over the role of a public inquiry and the multiplicity of interests in the process and outcome of an inquiry, the starting point is to appreciate how the differences in expectations arise. There are many accepted roles, or elements to the role, of a public inquiry: learning lessons, providing catharsis, making recommendations to prevent recurrence; developing public policy, and discharging the Government's obligations to investigate alleged breaches of Articles 2 and 3 of the European Convention on Human Rights.[54] There is also "an astonishing absence of any case law defining the justification and philosophy of public inquiries generally."[55] This has resulted in a situation whereby expectations about the primary role of a particular public inquiry can differ significantly depending on the capacity in which individuals or organisations engage with, or have an interest in, a public inquiry.

It is important to distinguish between the position of the Government, the general public and those most closely affected by the subject matter of an inquiry. For the Government, an inquiry provides a mechanism for finding facts and producing recommendations on which to reflect and inform government policy in order to address public concern. For members of the public, the primary role may be seen to be restoring public confidence, addressing public concern by lessons learned and preventing recurrence. For many survivors, family members and campaign groups, a public inquiry offers an opportunity for their voices to be heard, for them to receive long sought-after answers, for those in authority to be held to account, and for justice to be obtained.

When looking at the general public, one of the arguments used to justify the strength of a public inquiry as an instrument of accountability is that they are open to public scrutiny, enabling the public to form its own judgement on both the subject matter of the inquiry and the process itself, thereby holding the Government and other public bodies, public administration agencies, public corporations and regulators to account (see 2.1). However, in reality, most members of the public have very limited understanding of public inquiries (see for example 4.9.1 in the context of understanding the difference between statutory and non-statutory inquiries). For such scrutiny to be effective, there is a need for much greater public legal education in this area (see 8.7.2).

[54] Beer et al, *Public Inquiries* (OUP 2011) paras 1.02- 1.10.
[55] Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing 2017) 27.

The research shows that, in practice, the onus of scrutinising and challenging decisions made by ministers on the form and nature of individual public inquiries has fallen predominantly on participants. This provides an arbitrary and inconsistent source of scrutiny, which is dependent on the ability, resources and willingness of participants to pursue a sustained campaign or legal challenge. It also may hinge on the extent to which such a campaign captures the media's and public's attention and support (see 3.10 and 4.11).

There are often conflicting expectations over the role of a public inquiry and conflicting interests in the outcome of an inquiry between different groups of participants. An individual or group does not represent the interests of all participants, who often have diverse and conflicting interests. This gives rise to a serious question about how appropriate it is for the form and nature of a major instrument of accountability to be influenced most significantly, neither by legal challenges, Parliament and parliamentary committees, nor the wider electorate, but by the actions of certain participants, who themselves have a direct interest in the outcome of the inquiry process. In such instances, inquiry participants are participating in a public inquiry process by contributing to its findings and recommendations, having also influenced the form and nature of the very process itself (see 4.11).

Finally, the research highlights conflicting expectations between participants and the minister. Many participants have strong views about the appropriate form and nature of a public inquiry, such as seeking broad terms of reference in order for the inquiry to produce as full an account as possible of the events being investigated and seeking a chair or panel members with a background that reflects the community, experience and background of that group of participants. It is for the minister to balance the competing interests of all those affected by decisions on the form and nature of public inquiries, including different groups of participants and also the general public. A key priority for the minister is achieving cost-effective and timely completion of an inquiry in order to inform government and address the matter of public concern, which can often conflict with the priorities of participants.

The powers of the minister are extensive and the power to make decisions on the form and nature of public inquiries ultimately rests with the minister. There is also the issue of potential conflicts of interest arising where the actions of the minister's own department

or the Government itself are the subject matter of an inquiry. The research evidences significant constraints on the participants' ability to influence the decision-making of the minister.

Nevertheless, some attempts have been successful. As seen, for example in both the *IICSA* and the *Contaminated Blood Inquiry* (later the *Infected Blood Inquiry*), failure by the minister to get the form and nature of a public inquiry right at the outset, and then revisiting and revising decisions made in response to informal political pressure, risks exposing those decisions to legal challenges and undermining public confidence in the public inquiry itself (see 4.9.2 and 6.6.3 and 6.6.4). Further, political pressure from groups of participants and the media, resulted in the resignation of three chairs of the *IICSA* and a spiralling increase to the scope of the Inquiry, which many fear have made it unmanageable.[56]

Significantly, the *IICSA* appears to mark a turning point in the influence of public campaigning on the form and nature of a public inquiry and appears to have acted as a catalyst for the Government's recent increased willingness to engage in consultation, despite the Government's express resistance to a statutory requirement for consultation (see 6.6.4). This move towards the adoption of formal consultation is something to be welcomed. It provides the minister with the opportunity to take into account the multiplicity of interests in a public inquiry before decisions are reached, reducing the likelihood of later challenges and facilitating a more consistent and less arbitrary approach to decision-making. Further, it reduces the burden of scrutiny that otherwise falls on individual participants, and groups of participants, by including a much broader range of participants including, on occasions, the wider public. It also provides a more accessible and manageable means by which to influence decision-making at the outset.

Consultation must, however, be carefully managed and must be more than mere 'window dressing' (see 6.6.4). Not all concerns raised can or will be addressed, which can result in participants and the public feeling ignored, which can in turn undermine confidence in the inquiry process. Equally, an approach that seeks to please everyone risks ultimately producing an unworkable inquiry that pleases no one (see 6.8).

[56] Emma Ireton, 'Bowing to public pressure: the child abuse inquiry' [2016] The Conversation <https://theconversation.com/bowing-to-public-pressure-the-child-abuse-inquiry-66354>.

Whilst consultation goes some way to addressing these issues, what is missing is the courts and the Government expressly addressing and clarifying the issue of the underlying rationale for public inquiries. Public inquiries have evolved slowly over time, responding in an ad hoc manner to legal and political pressure, without any overarching focus. On occasions, public inquiries are attempting to perform a number of roles that are, in some respects, incompatible. There needs to be clearer articulation of the role and purpose of public inquiries, who they seek to serve, and how they can do so most effectively.

8.7.1. Conclusions in the wider context

The Inquiries Act 2005 came into force with the support of all parties, albeit: with limited parliamentary scrutiny, in the absence of pre-legislative scrutiny and consultation with interested or affected groups, and whilst concerns remained about the diminution of the role of Parliament and the increased powers of the minister. Although the 2005 Act created a single comprehensive statutory framework for public inquiries, ministers from both sides of the political divide have chosen, on many occasions, to continue to convene public inquiries outside the legislation, without clear and transparent reasons and justification being given. When the Act has been used, governments from both sides of the political divide have consistently protected the powers of the minister by resisting attempts to introduce any element of independent scrutiny to the decision-making process. It is difficult to avoid the conclusion that those decisions were made by the executive for reasons of political self-interest, to avoid political embarrassment, scrutiny and accountability.

Statute is the highest form of law in the UK. However, significantly, despite a clear statutory framework having been passed by Parliament, the public inquiry process has evolved since the Act came into force, both within and outside that statutory framework. This shift has not occurred through legislative change or as a direct result of action through the courts, but independently, as a result of the practical reality of the decision-making process being influenced by the wider political context. Most often, that influence appears to have been concern about the potential for severe public and political criticism of the minister and the Government at that particular point in time. For this important component of our administrative justice system, in which many people,

organisations and the Government have huge personal stakes, in practice the determining factors go beyond the law and operate in a situation that is more fluid than the legal system. This is an issue that should be recognised directly and the practical and constitutional implications addressed (see 8.7.2).

A further key issue is the needs of those most deeply affected by the subject matter of a public inquiry, including victims, survivors and family members. As discussed above, for many participants, a public inquiry's primary role is to provide an opportunity for their voices to be heard, to obtain answers and for justice to be obtained. The resemblance of a public inquiry to court proceedings is often misleading and can give rise to misplaced expectations. Participants are not 'users' of an accountability process designed to achieve justice on their behalf, but they are participants in a broader political administrative justice process. This can result in them feeling marginalised and excluded (see 2.2). Whilst the role of a public inquiry can, and often does, include catharsis,[57] and an inquiry may put the needs of those most deeply affected by the subject matter of a public inquiry at the heart of the process, that is not always the case. The extent and nature of challenges revealed by the research shows a high level of participant dissatisfaction with the current public inquiry process. It raises serious questions about what more can and should be done to better address the needs of participants to a public inquiry and also identifies the need for greater public legal education on public inquiries, to manage expectations about the role of a public inquiry and what it might deliver.

As discussed above, public inquiries are unique accountability mechanisms, operating as they do on a macro-level. A minister may decide, for reasons of cost, time or otherwise in the public interest, not to convene an inquiry, to set very narrow terms of reference or to restrict public access to a public inquiry. If attempts to challenge those decisions are unsuccessful, there is no alternative accountability mechanism that operates at that macro level available to victims, survivors, family members and campaign groups in order to obtain the answers and justice that they seek. This raises a further issue of how to address the needs of those most deeply affected by a matter of public concern when they are not addressed by a public inquiry (see 8.7.2).

[57] Beer et al, *Public Inquiries* (OUP 2011) paras 1.02- 1.10.

8.7.2. Direction for future research

When examining these research findings in the wider context, key issues of significance and further questions were raised, from which the following areas for future research may be identified.

a. This research was designed as focused observational research on the current and evolving state of post-2005 public inquiries rather than practice-based research on proposed policy reform. There is clear scope for future detailed research on proposed policy reform in each of the five areas that form the subject matter of the substantive chapters. Examples include: how to increase the transparency of the decision-making process on whether or not an inquiry to convene an inquiry; how to increase the independence of the appointment process for the inquiry chair; and reform of the rule 13 to 15 Inquiry Rules 2006 warning letter process (see 3.4, 4.7 and 5.2.1).[58]

b. There is also scope for further detailed constitutional and political research. The extensive powers of the minister over the form and nature of public inquiries, which are themselves one of the key mechanisms for holding the executive to account, raise significant questions about accountability of the executive. The manner in which public inquiries have evolved over time raises issues within the context of the principle of the separation of powers and raises questions about broader issues of administrative justice and accountability, including and whether they are best protected by legal or political processes;

c. It is clear from the research, and the examination of challenges brought by participants to a public inquiry, in particular victims, survivors and family members, that there is significant dissatisfaction and frustration with the current process. Participants can feel marginalised and their expectations of the role of an inquiry and what it may deliver can conflict significantly with those of the minister and the inquiry itself. However, this research shows that some inquiries have managed participants' expectations, consultation, and issues such as the

[58] The warning letter process being the process, required by rule 13 Inquiries Rules 2006, whereby a letter must be sent to a person if the inquiry report, or any interim report, is to include any "explicit or significant criticism" of the person.

handling of sensitive information, much better than others (see for example the discussion on the *Grenfell Tower Inquiry* and *Infected Blood Inquiry* on consultation over the terms of reference at 6.6.4 and handling sensitive material during the *Azelle Rodney Inquiry* 7.9.5). There is important work to be done on analysing and disseminating learning lessons, both good and bad, from past inquiries, both from "lessons learned papers" produced by inquiry teams at the conclusion of a public inquiry[59] and through empirical research with inquiry participants and legal practitioners.

d. This research also highlighted the absence of any alternative process to address the needs of those most deeply affected by a matter of public concern where they are not addressed by a public inquiry. There is valuable research to be done on the reform of current processes, to place the needs of those most closely affected by the subject matter of an inquiry at the heart of the process. There is also the potential for the creation of parallel or alternative processes, to address this need. For example, an alternative process may take the form of a 'truth commission' or a process similar to 'The Truth Project', which forms part of the *IICSA,* which was adopted in order to offer "victims and survivors of child sexual abuse the chance to share their experiences and be heard with respect".[60]

e. Public scrutiny is a principle at the heart of the public inquiry process; public inquiries are open to enable the public to form its own judgement both on the subject matter of an inquiry and the process itself, thereby holding those in authority to account. In order for this to be effective in practice, there is a need to address the current limited public understanding of the role and powers of public inquiries and what they can deliver (see 2.2). There is scope for much work on legal education in this area, through publications, incorporating material on public inquiries into teaching curricula for law, politics and social administration

[59] Draft Cabinet Office guidance requires the secretary of an inquiry to submit a "lessons learned paper" to Cabinet Office at the conclusion of an inquiry. In practice, they have rarely been completed. The Government accepted the HL Select Committee recommendation that such papers should be submitted going forwards. Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014) para 59.
[60] See <www.truthproject.org.uk/i-will-be-heard> accessed 30 May 2020.

courses, continuing professional development courses for practitioners and training for participant groups such as support groups.

8.8. Final thoughts

As Edward Heath concluded during a House of Commons debate on the convening of a non-statutory inquiry to review decisions made by the UK Government in the period leading up to the Argentine invasion of the Falkland Islands in 1982[61] "The plain fact is that we have never succeeded in finding the perfect form of inquiry." [62] That remains the case today.

It is not only select committees that have reviewed, and made recommendations on, the effectiveness of the public inquiry process. Other organisations, including campaign groups and law reform and human rights organisations have carried out their own reviews and made recommendations for change, both in relation to the form and nature of public inquiries but also, more broadly, on wider aspects of public inquiry procedure.

In 2002, families of those killed in the Lockerbie bombing[63] wrote to the Foreign Secretary expressing dissatisfaction over the fact that the onus fell on the families of the deceased to ensure that all aspects of the disaster were fully investigated, including years of lobbying of successive governments.[64] They put forward a proposal, supported by Disaster Action,[65] that a flexible, open framework for the investigation of disasters should be set up, such as the creation of

> "an independent 'disasters ombudsman', whose role would be to decide upon the nature and extent of an inquiry after events where issues of safety, culpability or national and/or international significance arise following a disaster. Families

[61] The *Franks Review*.
[62] HC Deb 8 July 1982, vol 27, col 494. See also the preamble of Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday* (Hart Publishing, 2017).
[63] A charity founded by survivors and bereaved people from UK and overseas disasters, founded on the principles of accountability, support and prevention.
[64] Letter from UK Families Flight 103 to Jack Straw (19 July 2002) reproduced in House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence", 161, http://www.parliament.uk/documents/lords-committees/Inquiries-Act-005/IA_Written_Oral_evidencevol.pdf.
[65] Into the Lockerbie bombing of Pan Am flight 103.

and other interested parties should have a single point of contact to put their case for an inquiry."[66]

This proposal was rejected by the Government in line with its ongoing resistance to recommendations that an independent body should be involved in the decision to convene an inquiry or that the minister's wide discretion over whether or not to convene a public inquiry should be restricted (see 8.5.1).

In 2017, the chair of the *Hillsborough Independent Panel*[67] produced a lessons learned report on the experiences of the Hillsborough families,[68] including drawing up a charter for adoption by public bodies to bring about cultural change in relation to transparency and acting in the public interest, which would apply in the context of public inquiries as well as other forms of inquiries and investigations. The Government has not responded to the charter and, to date, no government departments have signed up.[69]

In 2019, JUSTICE convened a working party, of which I am a member: 'When Things Go Wrong', chaired by Sir Robert Owen, chair of the *Litvinenko Inquiry.* It was convened to make recommendations to reform institutional responses to deaths or other serious incidents where a "systemic pattern of failure" is evident, in particular looking at public inquiries and inquests.[70] Matters under review include: the feasibility of a merger of the inquest and the public inquiry system in the case of mass fatalities, with the Chief Coroner overseeing the power to convene and determine the terms of reference of such inquiries; forming a central inquiries unit to coordinate the setting up and running of new inquiries; and the introduction of a duty of candour for public bodies to avoid 'institutional defensiveness' at inquests and inquiries.[71]

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[66] Letter (19 July 2002) reproduced in Disaster Action written evidence to the House of Lords Select Committee on the Inquiries Act 2005, "Written and corrected oral evidence" app 1 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> accessed 29 May 2020.

[67] The Right Reverend James Jones KBE. The independent panel inquiry into overcrowding at a football stadium that led to fatalities and injuries at an FA cup match in 1989.

[68] James Jones *'The patronising disposition of unaccountable power' A report to ensure the pain and suffering of the Hillsborough families is not repeated' (2017,* HC511).

[69] The Crown Prosecution Service was the first public body to sign up in 2018 <www.cps.gov.uk/cps/news/crown-prosecution-service-signs-charter-families-bereaved-through-public-tragedy> accessed 1 June 2020 and a number of councils have also become signatories.

[70] <https://justice.org.uk/our-work/system-wide-reform/when-things-go-wrong/> accessed 1 June 2020.

[71] In line with the proposed Public Authority (Accountability) Bill 2016-17 ('Hillsborough Law) to *inter alia* set a requirement on public institutions, public servants and officials and on those carrying out

There are clear lessons that can be taken from the conclusions of this research in relation to such reviews and working parties. Critically reviewing the public inquiry process, and keeping issues such as the need to improve the independence and transparency of public inquiries and their ability to hold those in authority to account in the forefront of the Government's thinking is clearly valuable. However, where those reviews and working groups continue to focus their recommendations at government, seeking statutory change and the imposition of restrictions on the power and the discretion of the minister, there is currently little chance of success.

In the meantime, however, at the level of individual inquiries, informal political influence over decisions of the minister, representations made to the chair and consultation processes at the level of individual inquiries have, in some cases, brought about significant changes both to the form and nature of those individual public inquiries but also to the public inquiry process more widely. There is therefore considerable scope for recommendations from such reviews and working groups, and from academic research based on the collation, analysis and dissemination of lessons learned from past inquiries, to bring about effective change when focused on change at the level of individual inquiries. Guidance, research briefings, public education and other literature, aimed at the minister, chairs, legal practitioners and participants of individual inquiries, can set new expectations and baselines for future inquiries. In time, such actions may effect positive changes which may provide a basis for best practice for the public inquiry procedural framework.

functions on their behalf to act in the public interest and with candour and frankness; to define the public law duty on them to assist courts, official inquiries and investigations.

Appendix 1

The House of Lords Select Committee on the Inquiries Act 2005 Call for Evidence[1]

The Select Committee on the Inquiries Act 2005 was set up on 16 May 2013, primarily with the task of conducting post-legislative scrutiny of that Act. Its remit however goes wider: it is "to consider the law and practice relating to inquiries into matters of public concern, in particular the Inquiries Act 2005". The Committee will therefore be looking at the Act, to see whether it is satisfactorily governing the matters which Parliament intended it to, but will also be looking to see whether the law and practice relating to inquiries generally is satisfactory, and whether the law, practice and procedure may need amending. The Committee has to report by 28 February 2014.

This is a public call for written evidence to be submitted to the Committee. The deadline is 31 July 2013.

An inquiry can be set up under the Inquiries Act 2005 only if it appears to a minister that "(a) particular events have caused, or are capable of causing, public concern, or (b) there is public concern that particular events may have occurred." Thus, for example, inquiries into major new infrastructure projects, though they may cause great public concern, are outside the remit of the Act, and outside the remit of the Committee's inquiry.
The objects of the Act were stated to be "to make inquiries swifter, more effective at finding facts and making practical recommendations, and less costly whilst still meeting the need to satisfy the public expectation for a thorough and wide ranging investigation. It also aimed to restore public confidence in the inquiry process particularly given the concerns and controversies generated by the conduct of inquiries such as the Bloody Sunday Inquiry and other earlier pre-2005 Act inquiries."
The Committee would welcome general views on whether the Act has achieved these objects. It would in particular welcome views on the following issues:

1. What is the function of public inquiries? What principles should underlie their use?

2. To what extent does the Inquiries Act 2005 reflect those principles?

3. Does the Act achieve the right balance between the respective roles of ministers, Parliament, the courts and inquiry panels themselves in making decisions about inquiries?

4. In particular, is it right that ministers should have the power to set up, or not to set up, an inquiry, to set its terms of reference, appoint the chairman and members, suspend or terminate the inquiry, and restrict the publication of documents?

5. Should other persons have any of these powers in addition to or instead of ministers?

[1] The House of Lords Select Committee on the Inquiries Act 2005, 'Call for Evidence' (2013) <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/Call%20for%20Evidence_2_final_version.pdf> accessed 30 May 2020.

6. Are inquiries generally set up when they are needed, and not when they are not? Are there examples of cases where an inquiry would have been useful, but minsters declined to set one up? Are there cases where an inquiry has unnecessarily been set up to deflect or defer criticism?

7. Is there a danger that the role of ministers will prevent the setting up of inquiries into their conduct, or restrict the roles of inquiries looking into the conduct of ministers?

8. Is the degree of involvement of the judiciary in inquiries appropriate?

9. Do lawyers acting for the inquiry or representing those complaining or complained against make an appropriate contribution? Is an inquisitorial or an adversarial process more appropriate for argument before inquiries? Is it easy enough for people to represent themselves?

10. Some inquiries set up before the Act was passed were both lengthy and inordinately expensive. An aim of the Act was to make inquiries briefer and less costly. Has it achieved this? If not, what could be done to improve this?

11. Inquiries are often asked to report by a particular date, and often fail to do so. Should there be a power to curtail an inquiry's proceedings? If so, exercisable by whom?

12. Is it right that ministers can and do continue to set up inquiries otherwise than under the Act? Is there any justification for this?

13. Is there a role for independent reviews to be established otherwise than under the Act (like the Hillsborough Independent Panel)?

14. Has the Act succeeded in securing confidence in inquiries from those closely involved – the core participants – and from the wider public generally? If not, what could be done to improve this?

15. Where an inquiry reveals or confirms wrongdoing, should evidence given to the inquiry be admissible in civil or criminal proceedings, and if so, with what safeguards?

16. Are the recommendations made by inquiries adequately implemented? Should there be a procedure for an inquiry to reconvene to consider this?

17. The Inquiry Rules 2006 have been criticised, not least by the Ministry of Justice, as being too restrictive and not allowing an inquiry panel sufficient freedom to regulate their own proceedings. Do you agree with this view? How might the Rules be improved?

18. At present, certain inquiry records become subject to the Freedom of Information Act 2000 after the inquiry has ended. Should an inquiry's record be kept confidential after the inquiry has concluded? How else might the interface between the Inquiries Act 2005 and the Freedom of Information Act 2000 need to be changed?

You need not address all these questions

Appendix 2

List of Witnesses to the House of Lords Select Committee on the Inquiries Act 2005[1]

Those witnesses marked with * gave both oral evidence and written evidence. Those marked with ** gave oral evidence and did not submit any written evidence. All other witnesses submitted written evidence only.

Witness	Capacity in which evidence given
Julie Bailey CBE**	Core participant
Rt Hon Lord Justice Beatson	Former Lord Justice of Appeal and author of *Should Judges Conduct Public Inquiries*[2]
Jason Beer QC**	Counsel to the Inquiry and counsel for core participants
Sir David Bell**	Inquiry assessor
Judith Bernstein*	Head of Coroners, Burials, Cremation and Inquiries Policy Team, Law and Access to Justice, Ministry of Justice
Lord Bichard KCB**	Inquiry chair, non-judge
Sir Louis Blom-Cooper QC**	Advisor to the Department for Constitutional Affairs on the preparation and content of the Bill for the Inquiries Act 2005
Susan Bryant*	Director of Rights Watch UK
Rt Hon Sir John Chilcot GCB	Inquiry chair, non-judge
Michael Collins (QQ 248–271) *	Inquiry secretary
Committee on the Administration of Justice (Northern Ireland)	Independent human rights organisation
Rt Hon Lord Cullen of Whitekirk KT**	Inquiry chair

[1] Based on the list of witnesses in House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) app 2.
[2] (2005) 121 LQR 221.

Disaster Action	A charity formed by survivors and bereaved people from UK and overseas disasters
Jonathan Duke-Evans*	Head of Claims, Judicial Reviews and Public Inquiries, Ministry of Defence
Alun Evans**	Inquiry secretary
Eversheds	Solicitors to the inquiry and solicitors to core participants
Robert Francis QC*	Inquiry chair, barrister
Rt Hon Lord Gill **	Lord President of the Court of Session Inquiry chair
Herbert Smith Freehills	Solicitors to core participants
Sir Jeremy Heywood, KCB, CVO	Secretary of the Cabinet
Lee Hughes**	Inquiry secretary to statutory and non-statutory inquiries
INQUEST**	(See also Helen Shaw, Co-Director, INQUEST for oral evidence)
Sir Robert Jay**	Counsel to the inquiry
Christopher Jefferies**	Core participant
Stephen Jones	Solicitors to the Inquiry and solicitors to core participants
Judi Kemish*	Solicitor to the inquiry
Professor Sir Ian Kennedy**	Inquiry chair, non-judge legal academic
Rt Hon Sir Brian Leveson**	Inquiry chair
Liberty*	(See also Rachel Robinson, Policy Officer, for oral evidence)
Dr Karl Mackie CBE**	Chief Executive, Centre for Effective Dispute Resolution (CEDR)

Richard Mason*	Deputy Director, Ministry of Justice
Ministry of Defence*	(See also Jonathan Duke-Evans for oral evidence)
Rt Hon Dame Janet Paraskeva DBE	Inquiry panel member
Rt Hon Peter Riddell CBE**	Outgoing Director of The Institute for Government
Rights Watch UK*	(See also Susan Bryant, Director of Rights Watch UK for oral evidence)
Rachel Robinson*	Policy Officer, Liberty
Rt Hon Sir Stephen Sedley**	Former Lord Justice of Appeal and inquiry chair
Damien Paul Shannon	Academic
Helen Shaw*	Co-Director, INQUEST
Dr Judith Smith**	Inquiry expert witness and assessor
Rt Hon Lord Thomas of Cwmgiedd	Lord Chief Justice of England and Wales
Professor Adam Tomkins**	Professor of Public Law, Glasgow University
Ashley Underwood QC*	Counsel to the Inquiry and counsel for participants
Shailesh Vara MP*	Parliamentary Under-Secretary of State, Ministry of Justice

Appendix 3

Table of Public Inquiries convened in England, Wales and Northern Ireland from 2003 to present.[1]

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
Bichard Inquiry (Soham murders)	December 2003–June 2004	To urgently enquire into child protection procedures in Humberside Police and Cambridgeshire Constabulary in the light of the trial and conviction of Ian Huntley for the murder of Jessica Chapman and Holly Wells. In particular to assess the effectiveness of the relevant intelligence-based record keeping, the vetting practices in those forces since 1995 and information sharing with other agencies, and to report to the Home Secretary on matters of local and national relevance and make recommendations as appropriate.	Non-statutory	Sir Michael Bichard (now Lord Bichard)	Non-lawyer Sitting alone
Review of intelligence on weapons of mass destruction, Foreign and Commonwealth Office	February 2004–July 2004	To investigate the intelligence coverage available in respect of weapons of mass destruction (WMD) programmes in countries of concern and on the global trade in WMD, taking into account what is now known about these programmes; as	Non-statutory	Lord Butler of Brockwell	Non-lawyer Sitting with a panel

[1] Based on information from: House of Lords Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) app 4 and 5, the National Audit Office Investigation into government-funded inquiries (HC 836 Session 2017–2019 23 May 2018) and inquiry websites.

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
		part of this work, to investigate the accuracy of intelligence on Iraqi WMD up to March 2003,and to examine any discrepancies between the intelligence gathered, evaluated and used by the Government before the conflict, and between that intelligence and what has been discovered by the Iraq survey group since the end of the conflict; and to make recommendations to the Prime Minister for the future on the gathering, evaluation and use of intelligence on WMD, in the light of the difficulties of operating in countries of concern.			
Zahid Mubarek Inquiry	April 2004–June 2006	In the light of the House of Lords judgment in the case of R v Secretary of State for the Home Department 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.	Non-statutory	Mr Justice Keith	Judge Sitting with advisers
Rosemary Nelson Inquiry	November 2004–May 2011	To inquire into the death of Rosemary Nelson with a view to determining whether any wrongful act or omission by or within	Non-statutory	Sir Michael Morland	Judge

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
		the Royal Ulster Constabulary, Northern Ireland Office, Army or other state agency facilitated her death or obstructed the investigation of it, or whether attempts were made to do so; whether any such act or omission was intentional or negligent; whether the investigation of her death was carried out with due diligence; and to make recommendations.	Section 44 of the Police (Northern Ireland) Act 2005		Sitting with a panel Retired High Court Judge
Inquiries convened since 2005					
The Billy Wright Inquiry (Northern Ireland)	November 2004 to October 2010	To inquire into the circumstances surrounding the death of Billy Wright who was murdered at the Maze prison in Northern Ireland on 27 December 1997.	Inquiries Act 2005 (converted from an inquiry under the Prisons Act (Northern Ireland) 1953 at request of chair)	Lord MacLean	Judge Sitting with a panel Retired Scottish Appeal Judge
The Robert Hamill Inquiry (Northern Ireland)	November 2004 to February 2011	To inquire into the circumstances surrounding the death of Robert Hamill, who died from injuries he sustained during an affray in Portadown, Co Armagh in 1997.	Inquiries Act 2005 (converted from an inquiry under the Police (Northern Ireland) Act 1998 at request of chair)	Sir Edwin Jowitt	Judge Sitting with a panel Retired High Court Judge

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
The E coli Inquiry, (Wales)	March 2006 to March 2009	To investigate circumstances that led to the outbreak of *E coli* 0175 in South Wales.	Inquiries Act 2005	Prof Hugh Pennington Professor of Bacteriology at Aberdeen University	Non-lawyer Sitting alone
Independent Inquiry into Contaminated Blood and Blood Products	March 2007–February 2009	To investigate the circumstances surrounding the supply to patients of contaminated NHS blood and blood products; its consequences for the haemophilia community and others afflicted; and suggest further steps to address both their problems and needs and those of bereaved families.	Non-statutory	Lord Archer of Sandwell	Lawyer QC Sitting with a panel Former Solicitor General
Human Tissue Analysis in UK Nuclear Facilities	April 2007–November 2010	Investigation into the circumstances in which, from 1955, organs/tissue were removed from individuals at NHS or other facilities, and sent to and analysed at nuclear laboratory facilities.	Non-statutory	Michael Redfern QC	Lawyer QC Sitting alone
The Baha Mousa Inquiry	August 2008 to September 2011	To investigate the circumstances surrounding the death of Baha Mousa, an Iraqi civilian who died in Iraq in 2003 and the treatment of others detained with him by the British armed forces.	Inquiries Act 2005 (following judicial review)	Sir William Gage	Judge Sitting alone Serving Lord Justice of Appeal when

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
					appointed, subsequently retired
C difficile Inquiry (Northern Ireland)	October 2008 to March 2011	To investigate the outbreak of *Clostridium difficile* infection in Northern Health and Social Care Trust Hospital in March 2009.	Inquiries Act 2005	Dame Deirdre Hine	Non-lawyer Sitting with a panel Former Chief Medical Officer for Wales
The Bernard (Sonny) Lodge Inquiry	February 2009 to December 2009 (ad hoc investigation began in September 2008)	An ad hoc investigation into the death of Bernard (Sonny) Lodge at HMP Manchester in August 1998.	Inquiries Act 2005 (converted following request from chair)	Barbara Stow	Non-lawyer Sitting alone Former Assistant Prisons and Probation Ombudsman
Iraq Inquiry	June 2009 to July 2016	Inquiry to consider the UK's involvement in Iraq, including the way decisions were made and actions taken.	Non-statutory	Sir John Chilcot	Non-lawyer Sitting with a panel
FV Trident	October 2009–February 2011	Investigation into why the Trident fishing vessel sank with the loss of seven lives in 1974.	Non-statutory Merchant Shipping Act 1995, s269	Sir Stephen Young QC	Lawyer QC Sitting alone (with advisers)

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
Al-Sweady Inquiry	November 2009 to December 2014	To investigate and report on the allegations made by claimants in the Al-Sweady judicial review proceedings against British soldiers of unlawful killing at Camp Abu Naji, and the ill-treatment of five Iraqi nationals detained at Camp Abu Naji and subsequently at the divisional temporary detention facility at Shaibah Logistics Base.	Inquiries Act 2005 (following judicial review)	Sir Thayne Forbes	Judge Sitting alone Retired High Court Judge
The Azelle Rodney Inquiry	June 2010 to July 2013	To ascertain how, where and in what circumstances Azelle Rodney came by his death on 30 April 2005.	Inquiries Act 2005	Sir Christopher Holland	Judge Sitting alone Retired High Court Judge
The Detainee Inquiry	July 2010 to December 2013	To examine whether the UK government and its intelligence agencies were involved in improper treatment of detainees held by other countries in counter-terrorism operations overseas, or were aware of improper treatment of detainees in operations in which the UK was involved.	Non-statutory	Sir Peter Gibson	Judge Sitting with a panel Retired Court of Appeal judge
Mid Staffordshire NHS Foundation Trust Inquiry	June 2010 to February 2013	To consider the role and intervention of the primary care trust and strategic health authority, how the trust was able to gain foundation status with poor clinical standards and why regulatory bodies did not act sooner to investigate the trust with	Inquiries Act 2005	Robert Francis QC	Lawyer QC Sitting alone

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
		mortality rates significantly higher than the average since 2003.			
The Leveson Inquiry	July 2011 to November 2012	Inquiry into the culture, practices and ethics of the press and the system of regulation.	Inquiries Act 2005 (following litigation)	Sir Brian Leveson	Judge Sitting with a panel Court of Appeal Judge (now President of the Queen's Bench Division)
Office of the Children's Commissioner's Inquiry into Child Sexual Exploitation in Gangs and Groups	November 2011– November 2013	Inquiry into Child Sexual Exploitation in Gangs and Groups.	Non-statutory Children Act 2004, s 3	Sue Berelowitz sitting with a panel	Non-lawyer Deputy Children's Commissioner for England
Inquiry into Historical Institutional Abuse 1922 to 1995 (Northern Ireland)	May 2012 (Non-statutory part) January 2013 (statutory part)– June 2017	To examine if there were systemic failings in Northern Ireland by institutions or the state in their duties towards those children in their care between the years of 1922–1995.	Part 1 non-statutory Part 2 Inquiries Act 2005	Sir Anthony Hart	Judge Sitting with a panel Retired High Court judge of Northern Ireland

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
The Morecambe Bay Investigation	September 2013 to March 2015	To investigate the service provided by the University Hospitals of Morecambe Bay Trust, and response of the Trust to shortcomings previously identified.	Non-statutory	Dr Bill Kirkup	Non-lawyer Sitting with a panel
Independent Panel Inquiry into Child Sexual Abuse	July 2014 (disbanded- see IICSA below)	To consider whether public bodies and other non-state institutions have taken seriously their duty of care to protect children from sexual abuse.	Non-statutory	Baroness Butler-Sloss (resigned) Fiona Woolf (resigned)	Judge/Lawyer respectively Sitting with a panel (Former Lord Justice of Appeal and solicitor having held a number of senior positions respectively)
The Harris Review	February 2014 to July 2015	To learn lessons from self-inflicted deaths of young adults in custody aged between 18 and 24 and to identify actions to prevent further deaths.	Non-statutory	Lord Toby Harris	Non-lawyer Sitting with a panel
Inquiries convened after publication of the HLSC Report					
The Litvinenko Inquiry	July 2014 to January 2016	An investigation into the death of Alexander Litvinenko in order to ascertain who the deceased was, how, when and	Inquiries Act 2005 (Request for conversion from coroner at inquest	Sir Robert Owen QC	Judge Sitting alone

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
		where he came by his death and where responsibility for the death lies.	and judicial review)		Retired High Court Judge
Independent Inquiry into Child Sexual Abuse (IICSA)	Feb 2015-present	Investigation to consider the extent to which State and non-State institutions failed in their duty of care to protect children from sexual abuse and exploitation; to consider the extent to which those failings have since been addressed. To identify further action needed to address any failings identified; to consider the steps which it is necessary for State and non-State institutions to take in order to protect children from such abuse in future; and to publish a report with recommendations.	Inquiries Act 2005 (following public pressure)	Justice Lowell Goddard Prof Alexis Jay	Judge/Non-lawyer respectively Sitting with a panel
Undercover Policing Inquiry	March 2015-present	To investigate and report on undercover police operations conducted by English and Welsh police forces in England and Wales since 1968. To examine the contribution undercover policing has made to tackling crime, how it was and is supervised and regulated, and its effect on individuals involved – both police officers and others who came into contact with them.	Inquiries Act 2005	Sir Christopher Pitchford (resigned due to ill health) Sir John Mitting	Judge Sitting alone Serving Lord Justice of Appeal when appointed and subsequently retired;

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
					and retired High Court judge respectively
Anthony Grainger Inquiry	March 2016-July 2019	To ascertain when, where, how and in what circumstances Mr Anthony Grainger came by his death during a Greater Manchester police operation, and then to make any such recommendations as may seem appropriate.	Inquiries Act 2005 (Converted from an inquest at the request of the chair)	His Hon Thomas Teague QC	Judge Sitting alone Circuit Judge
Magnox Inquiry	March 2017-present	Independent inquiry into the award of the Magnox decommissioning contract by the Nuclear Decommissioning Authority (NDA) and its subsequent termination.	Non-statutory	Steve Holliday	Non-lawyer Sitting alone
Renewable Heat Incentive Inquiry (Northern Ireland)	January 2017 – March 2020	To investigate, inquire into and report on the Non-Domestic Renewable Heat Incentive scheme ("the RHI scheme"). This will include its design, governance, implementation and operation, and efforts to control the costs of that scheme, from its conception in 2011 to the conclusion of the Inquiry.	Inquiries Act 2005	Rt Hon Sir Patrick Coghlin	Judge Sitting with panel Retired member of the Court of Appeal of Northern Ireland
Grenfell Tower Inquiry	June 2017-present	To examine the circumstances surrounding the fire at Grenfell Tower on 14 June 2017.	Inquiries Act 2005	Sir Martin Moore-Bick	Judge Sitting alone (phase 1)

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
					Sitting with a panel (phase 2) Retired Court of Appeal Judge Former Lord Justice of Appeal
Infected Blood Inquiry	July 2017-present	Investigation into why men, women and children in the UK were given infected blood and/or infected blood products; the impact on their families; how the authorities (including government) responded; the nature of any support provided following infection; questions of consent; and whether there was a cover-up.	Inquiries Act 2005 (following pressure from participants)	Sir Brian Langstaff	Judge Sitting alone High Court Judge of Northern Ireland, retired following appointment
Independent Inquiry into Ian Paterson	December 2017-February 2020	Investigation into the circumstances and practices surrounding the former breast surgeon Ian Paterson, who was convicted in April 2017 of wounding with intent and unlawful wounding.	Non-statutory	The Right Reverend Graham James, Bishop of Norwich	Non-lawyer Sitting alone
Manchester Arena Inquiry	October 2019 – present	To investigate the deaths of the victims of the 2017 Manchester Arena terror attack.	Inquiries Act 2005 (Converted from an inquest at the	Sir John Saunders	Judge

Inquiry	Dates	Purpose of the Inquiry	Type of Inquiry	Chair	Type of chair
			request of the chair)		Retired High Court Judge
Public inquiry into the mistreatment of detainees at Brook House immigration removal centre	November 2019 - present	To investigate allegations of mistreatment at Brook House immigration removal centre.	Inquiries Act 2005	Kate Eves	Non-lawyer Sitting alone
Jermaine Baker Inquiry	February 2020-present	To investigate the circumstances of the death of Jermaine Baker during a Metropolitan Police Service operation on 11 December 2015.	Inquiries Act 2005 (Converted from an inquest at the request of the chair)	Clement Goldstone QC	Judge Retired Senior Circuit Judge

Appendix 4

Political and Legal influence on the form and nature of post-2005 public inquiries[1]

Table 1: Government acceptance of House of Lords Select Committee on the Inquiries Act 2005 recommendations affecting the form and nature of public inquiries

Recommendation	Government response
Reasons should be given to Parliament for decisions not to hold a public inquiry in certain but limited circumstances, such as where there has been a 'failure in regulation' and following a request by a coroner to convert an inquest into an inquiry.[2]	Qualified Government acceptance of select committee recommendation.
There should be some explanation of a minister's decision to convene an inquiry otherwise than under the Act, but only in limited circumstances such as when invited to do so by a specific public body or when an investigation by a regulatory body has been widely criticised.[3]	Qualified Government acceptance of select committee recommendation.
A notice of intention to terminate the appointment of a chair should be laid before Parliament.[4]	Government acceptance of select committee recommendation.

[1] From the recommendations in House of Lords Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: Post-legislative Scrutiny (HL 2013–2014 143) and the Government response in Ministry of Justice, Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005 (Cm 8093, 2014).
[2] 3.4.2
[3] 4.6.1
[4] 5.6

There should be a single chair, rather than a panel, unless there are strong arguments to the contrary.[5]	Government acceptance of select committee recommendation on the basis that "this is invariably the case".
The announcement of the inquiry and name of the chair should not necessarily be the subject of the same statement and that the legislation be amended accordingly.[6]	Government acceptance of select committee recommendation, stating section 6(2) of the Inquiries Act 2005 should be amended accordingly (legislation has yet to be amended).
The consent of the Lord Chief Justice should be sought for the appointment of a member of the judiciary as the chair of an inquiry.[7]	Government acceptance of select committee recommendation stating "this would merely put current practice onto a statutory footing".
Interested parties, particularly victims and victims' families, should be given an opportunity to make representations about the final terms of reference.	Qualified Government acceptance of select committee recommendation (leaving the position vague and open to interpretation).[8]

[5] 5.5.3
[6] 5.3
[7] 5.4.4
[8] 6.5

Table 2: Political influence and legal influence in respect of individual inquiries

Political influence and legal challenges in respect of individual inquiries	Effect at the level of an individual inquiry	Effect at the level of the public inquiry process as a whole
Decisions to convene an inquiry in individual cases	Informal political influence has resulted in some decisions to convene a public inquiry.[9]	May have set precedents for future inquiries.
	Some successful judicial review challenges have been followed by decisions to convene a public inquiry.[10]	Case law has laid down minimum standards for Article 2 and 3 ECHR investigations and the territorial application of the ECHR.[11]
Decisions to convene a statutory rather than a non-statutory inquiry in individual cases	Informal political influence[12] and requests from chairs of non-statutory inquiries, and coroners, have resulted in some decisions to convene a statutory rather than a non-statutory inquiry.[13]	May have set precedents for future inquiries Despite past concern about the underuse of the 2005 Act, since 2015 a high proportion of statutory inquiries have been convened.[14]

[9] 3.5.1 and 3.5.3
[10] 3.6.5 to 3.6.7 and 3,6.9
[11] 3.6.4 to 3.6.7
[12] 4.9.2
[13] 4.9.3
[14] 4.11

	Some successful Judicial review challenges have been followed by decisions to convene a statutory inquiry.[15]	Case law has clarified the requirements that must be fulfilled in order for an investigation to be compliant with Articles 2 and 3 of the ECHR and the need for statutory powers of compulsion.[16]
Fall in the number of serving judges	A number of possible factors are likely to have contributed to this fall.[17]	In practice, the number of serving judges has fallen since the introduction of the 2005 Act, with the decrease being increasingly apparent over the last five years.[18]
Increase in formal consultation with participants and sometimes the wider public.[19]	Informal political influence from participants has resulted in greater formal consultation for some inquires.	Since the IICSA, there has been a noticeable increase in the announcement of formal periods of consultation.
Decisions to broaden terms of reference of individual public inquiries[20]	Informal political influence has resulted in the broadening of some public inquiry terms of reference.	There appears to have been a shift over the years towards more detailed and specific terms of reference, leaving them less open to broad interpretation, possibly to assist with resisting pressure to expand the terms of reference.[21]
Ministerial power to restriction public access to public inquiries rarely used	Press influence and public reaction appear to have proven a sufficient disincentive to unwarranted interference.[22]	The anticipated level of use, and a resultant predicted collapse in public confidence in 2005 Act public inquiries, resulting from the powers given to ministers to restrict access, have not materialised.

[15] 4.10
[16] 4.8
[17] 5.4.5
[18] 5.4.5
[19] 6.6.4
[20] 6.6.3
[21] 6.6.4
[22] 7.6 and 7.11

A move to inquiries being held in public wherever possible[23]	Informal political influence has resulted in some inquires being heard more openly than initially decided.	May have set precedents for future inquiries.
Achieving a balance between the competing interests of fairness to those witnesses seeking anonymity, and the need for fairness and transparency of an inquiry	Judicial review challenges have resulted in both the granting and the refusal of anonymity for witnesses.	Legal challenges have provided guidance for public inquiries generally on the applicability of the principle of open justice, article 2 of the ECHR and public scrutiny, the common law duty of fairness and on balancing competing interests with regard to protective measures for witnesses and the rights of the media.[24]

[23] 7.7 and 7.9.1
[24] 7.10.1 to 7.10.4

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Copy of Material Published in Advance of the Thesis

How Public is a Public Inquiry?

[2018] PL 277

Abstract

Public inquiries convened by ministers into matters of public concern are major instruments of accountability within the administrative justice system. This article examines the tensions between the demand for public scrutiny of public inquiries and open justice on the one hand and conflicting pressures such as the protection of individual privacy and national security on the other. With reference to the Bristol Royal Infirmary, the Iraq Inquiry, the Undercover Policing and Azelle Rodney Inquiries and others, and drawing comparisons with the civil and criminal court systems, it looks at examples of inquiries with very different degrees of openness. The article analyses the key elements that comprise open justice in the public inquiry process and the methods by which restrictions are imposed on those elements. Openness is not always possible, however, the article argues that each time a concession is made against openness, there is a real risk that public confidence in the public inquiry process, and thereby the effectiveness of that process, is diminished. Finally, the article argues that the power of the minister to impose restrictions on public access, and perceptions of undue secrecy and ministerial interference, significantly exacerbates the undermining of public scrutiny and public trust in the independence and integrity of public inquiries.

Introduction

"Public inquiry" is a term often used to refer to a wide range of types of inquiry held by public or private bodies or persons. Such investigations range from planning and highways inquiries, investigations into industrial accidents, to inquiries dealing more broadly with issues of public policy reform. This article is concerned specifically with those public inquiries that are convened by a minister into matters of public concern. They are a major instrument of accountability and an important component of our administrative justice system, alongside courts, inquests, tribunals, the ombudsman and auditors.

Calls for this type of public inquiry are frequently made following events causing national concern, such as institutional child abuse, the war in Iraq, undercover police operations, the culture, practices and ethics of the press and a disaster with large scale loss of life.[1] Their role is to establish facts and address public concern, either by allaying it by showing that it is misplaced or, if justified, by for example pronouncing its view on culpability; learning lessons; providing catharsis; and

[1] *The Independent Inquiry into Child Sexual Abuse*, *North Wales Child Abuse*, *Iraq* (*Chilcot*), *Undercover Policing*, *Leveson* and the *Grenfell Tower Inquiries* respectively

making recommendations to prevent recurrence.[2] Public inquiries, however, have no power to determine civil or criminal liability.[3]

The term "public" is often misleading. "Public inquires" may be held entirely in public, but may also be held in private, or consist of a combination of the two. The Inquiries Act 2005 was introduced to repeal the numerous pieces of statutory provisions relating to public inquiries and replace them with a single piece of legislation.[4] Where public inquiries are convened under the Inquiries Act 2005 ("the 2005 Act") there is a presumption that they will be held in public.[5] However, restrictions may be imposed by the minister or the chair to the inquiry, where it is deemed necessary.[6] The Act does not preclude a minister choosing to convene an inquiry outside the statutory framework.[7] Concern has been expressed that, on occasions, ministers are choosing to 'sidestep' the 2005 Act and to set up non-statutory inquiries, in order to restrict the extent of public scrutiny.[8]

This article examines both statutory and non-statutory inquiries. It considers the principles of political openness and open justice and explores the application of those principles to the public inquiry process. Drawing comparisons with the civil and criminal court system it examines the tensions between the demand for public scrutiny and open justice on the one hand and conflicting pressures such as privacy, the risk of death or injury, or the risk to national security on the other. With reference to the *Bristol Royal Infirmary Inquiry*, the *Iraq Inquiry,*[9] *the Undercover Policing and Azelle Rodney Inquiries* and others, it explores examples of inquiries with very different degrees of openness. The article reviews the key elements that comprise open justice in the public inquiry process and the methods by which restrictions are imposed on those elements. The article contends that each time a concession is made against openness, there is a real risk that public confidence in the public inquiry process, and thereby the effectiveness of that process, is diminished. Finally, the article argues that the power of the minister to impose restrictions on public access and public scrutiny, and perceptions of undue secrecy and ministerial interference, significantly exacerbates the undermining of public trust in the independence and integrity of public inquiries.

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[2] See Michael Collins, Judi Kemish and Ashley Underwood QC 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' written evidence para 7 www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf .
Other functions include developing public policy and discharging the Government's obligations to investigate alleged breaches of Articles 2 and 3 of the European Convention on Human Rights; see list in Jason Beer et al, *Public Inquiries* (OUP 2011) para 1.02- 1.10

[3] Inquiries Act 2005 (2005 Act), s2

[4] House of Lords Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 31 identifies arguably two statutory provisions, relating to Health and Safety at Work and Financial Services, that might continue to apply independently of the 2005 Act.

[5] 2005 Act, s18

[6] 2005 Act, s19 (eg to protect national security or otherwise in the public interest)

[7] Such as the *Iraq Inquiry* and the *Mid Staffordshire NHS Foundation Inquiry*

[8] An issue I have explored in some detail in an earlier article: Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67 (2) NILQ 209-229

[9] Known also as the *Chilcot Inquiry*

A Hybrid Process

Public inquiries are part of the political process rather than the legal process.[10] The report ultimately produced by a public inquiry is delivered to the minister who convened the inquiry and is subsequently laid before Parliament. Its recommendations are not legally binding. Where a Government refuses to implement the recommendations of a public inquiry, any influence or pressure brought to bear on that decision derives from political pressure from Parliament, the public, the media and others, such as non-governmental organisations (NGOs), survivors and their families. By holding a public inquiry in public, as well as placing its finding and recommendations in the public sphere, it opens the process up to public scrutiny, enabling the public to form its own judgements on the subject matter of the inquiry and on the process itself and, thereby, hold the Government to account.

On the other hand, public inquiries are also quasi-judicial bodies, analysing large quantities of evidence, establishing fact and determining accountability. The procedure and conduct of a public inquiry is not prescribed but is determined by the chair of the inquiry when the inquiry is convened.[11] In general terms, the rules of evidence in civil and criminal proceedings do not apply. However, in many ways, the powers and procedures of public inquiries resemble those of a court process. Evidence may be taken during oral hearings; many public inquiries have the power to take evidence on oath and to compel witnesses to give evidence; [12] and principles such as public interest immunity and common law and statutory duties of fairness to witnesses are applied. Some public inquiries are held in court buildings.[13] The majority of public inquiries are chaired by a judge, retired judge or senior member of the legal profession, with Counsel and a Solicitor to the Inquiry appointed, further reinforcing their resemblance to court processes.[14] If a public inquiry is to allay public concern, and if the public is to have confidence in its quasi-judicial process, it must be open and seen to be procedurally and substantively fair in the same way as for the civil and criminal court processes.

Public inquiries may be thought of therefore as a hybrid of a political and legal process, both procedurally and also in their aims "between the assumptions of law - that truth can be uncovered and justice delivered; and of politics - that social debate and audit will help society improve its workings." [15] Within the political process, if the Government and those in authority are to be held to account, openness and transparency, one of the Seven Principles of Public Life devised by the Committee on Standards in Public Life,[16] are essential. Within the legal

[10] That position being confirmed in the 2005 Act, s(1) "An inquiry panel is not to rule on, and has no power to determine, any person's civil or criminal liability" see also the discussion in Sir Louis Blom-Cooper, *Public Inquiries Wrong Route on Bloody Sunday*(Hart Publishing 2017) 50

[11] 2005 Act, s17(1)

[12] 2005 Act, ss21 and 17 respectively

[13] Such as the Leveson Inquiry

[14] Some are chaired by senior civil servants or experts from outside the legal profession, chosen for their expertise in the subject matter of the inquiry or the in the operation of the public body concerned.

[15] Centre for Effective Dispute Resolution *"Setting up and Running a Public Inquiry: Guidance for Chairs and Commissioning Bodies"* (London: CEDR, 2015) <www.cedr.com/docslib/PI_Guide.pdf>

[16] Committee on Standards in Public Life. *The 7 Principles of Public Life* (HMSO, 1995) www.gov.uk/government/publications/the-7-principles-of-public-life Also known as the Nolan Principles.

process, openness and transparency are embedded within the principle of open justice.

Open Justice and Political Openness

Open justice, the principle whereby legal proceedings are open to the public and may be freely reported by the press, was described by Lord Neuberger, as "a fundamental feature of the rule of law in any modern democratic society".[17] It is a constitutional principle that has been recognised for centuries,[18] is deeply rooted in common law systems and has been incorporated into a number of written constitutions such as those of the United States and Ireland.[19] It is also a fundamental principle enshrined in Article 6(1) European Convention on Human Rights (ECHR).[20] There are key tensions, however, between the demand for open justice and other conflicting pressures. For example, hearings in the family division are regularly heard in camera to protect individuals' privacy; closed material procedures[21] are used in civil proceedings to protect issues of national security.

The principle of open justice was clearly affirmed the case of *Scott v Scott*,[22] an appeal against an order of contempt of court, following the disclosure to a third party of notes of a family hearing that had been heard in camera. Lord Acton stated:

> "The hearing of a case in public may be, and often is, painful, humiliating, or deterrent, both to parties and witnesses… but all this is tolerated and endured because it is felt that in public trial is to be found on the whole the best security for the pure, impartial, and efficient administration of justice, and the best means of winning for it public confidence and respect."[23]

Viscount Haldane noted that there are common law exceptions to the broad principle, but they must be justified by some more important principle, the chief exception being the interests of justice.[24] Lord Shaw, went further and looked at open justice in the context of the constitutional heritage of a free country, quoting the philosopher Jeremy Betham (1748—1832) on the importance of publicity in safeguarding justice:

> ""In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is

[17] Lord Neuberger statement of 2 October 2013 quoted in Joshua Rozenburg, 'Open justice rises up the agenda' *The Guardian* (London, 4 October 2013)

[18] Toulson LJ *R. (Guardian News and Media Ltd) v. City of Westminster Magistrates' Court* [2012] EWCA Civ 420; [2013] Q.B. 618

[19] The Sixth Amendment of the Constitution of the United States of America and Article 34.1 Constitution of Ireland

[20] "The right to a fair and public hearing" though it is subject to any Act of Parliament expressly overriding that right Human Rights Act 1998, s3(1)

[21] Under the Justice and Security Act 2013

[22] *Scott v Scott* [1913] AC 417

[23] Lord Atkinson *ibid*

[24] "… the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of courts of justice must be to secure that justice is done." Viscount Haldane LC in *Scott v Scott* [1913] AC 417 at 437-439. See the general principle on exceptions expounded by Lord Diplock in *Attorney General v Leveller Magazine Ltd* [1979] AC 440, 449–450 See also Lord Woolf in *R v Legal Aid Board exp Kaim Todner* [1999] QB 966, 976 "an exception can only be justified if it is necessary in the interests of the proper administration of justice"

> no justice." "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." "The security of securities is publicity"

Quoting the constitutional historian Henry Hallam (1777-1859), who stressed the role of open legal and political processes in protecting civil liberty:

> "Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known laws truly interpreted, and fair constructions of evidence; and the right of Parliament, without let or interruption, to inquire into, and obtain redress of, public grievances…"[25]

The principle of open justice does not apply in the same way to public inquiries as it does to the courts. There is no legal presumption in favour of a fully open inquiry.[26] In the case of *Kennedy v The Charity Commission*[27] the Supreme Court applied the common law principles of open justice to the proceedings of a quasi-judicial inquiry. The case centred on an appeal against a decision that the Charity Commission was not required to disclose, under the Freedom of Information Act 2000, documents concerning an inquiry it had conducted and on the effect of Article 10 ECHR.[28] The inquiry in question was held in private and was conducted under subject-specific legislation, but in its judgment, the court also considered inquiries conducted by ministers into matters of public concern under the Inquiries Act 2005.

Lord Toulson concluded that the considerations that underlie the open justice principle in relation to judicial proceedings apply also to quasi-judicial inquiries and hearings, stating "How is an unenlightened public to have confidence that the responsibilities for conducting quasi-judicial inquiries are properly discharged?"[29] He went on:

> "The application of the open justice principle may vary considerably according to the nature and subject matter of the inquiry. A statutory inquiry may not necessarily involve a hearing. It may, for example, be conducted through interviews or on paper or both. It may involve information or evidence being given in confidence. The subject matter may be of much greater public interest or importance in some cases than in others. These are all valid considerations but, as I say, they go to the application and not the existence of the principle."[30]

A public inquiry may be necessary to discharge the Government's obligation to conduct an effective official investigation into allegations of breach of Articles 2 and 3 ECHR, the right to life and prevention of torture or of inhuman or degrading treatment or punishment respectively.[31] To be effective, an investigation must

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[25] *Scott v Scott* [1913] AC 417 at 477; see also Lord Thomas in *Guardian News v Erol Incendal [2016] EWCA Crim 11*" the principle of open justice is fundamental to the rule of law and to democratic accountability"

[26] *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794

[27] *Kennedy v The Charity Commission* 2014 UKSC 20, [2015] 1 AC 455

[28] The Right to Freedom of Expression including include the freedom to receive and impart information and ideas without interference by public authority

[29] *Kennedy* [2015] 1 AC 455 para 124

[30] *Kennedy* [2015] 1 AC 455 para 125

[31] "Everyone's right to life shall be protected by law" and "No one shall be subjected to torture, or to inhuman or degrading treatment or punishment." respectively

have "a sufficient element of public scrutiny to ensure practical accountability…" [32] However, public scrutiny is not an automatic requirement and it does not require all proceedings to be in public. The test is

> "whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities' adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts."[33]

Case law suggests "the more serious the events that call for inquiry, the more intensive should be the process of public scrutiny."[34]

The extent to which public inquiries are open to public scrutiny will therefore vary from one inquiry to another, according to its nature and subject matter, with the decision resting in part with the minister convening the inquiry and in part with the chair to the inquiry. Such decisions have generated much criticism and debate and have been the subject of a number of judicial review cases.[35]

The Choice: Public or Private

The decision as to whether or not to convene an inquiry and, if so, whether it will be a public inquiry is one for the minister whose department is most relevant to the matter of public concern necessitating the inquiry. Once convened, how much of that inquiry will be held in public, and will be open to public scrutiny, will be determined by both that minister and the chair of the inquiry. The Government offered five main reasons that it said justified holding proceedings in private when it gave evidence to the 2004-5 House of Commons Public Administration Select Committee. These were: national security; statutory barriers to disclosure and legal and commercial confidentiality; personal privacy; unnecessary intrusion or distress to witnesses; and simpler, faster procedures.[36]

Another reason that has been put forward in favour of private rather than public inquiries is that it may be easier to elicit the truth from witnesses when questioning is away from the full glare of publicity as it might encourage witnesses to speak more openly and frankly.[37] However, many argue the advantages of witnesses giving evidence in public outweigh the disadvantages. Lord Justice Kennedy in *R (Wagstaff) v Secretary of State for Health*[38] stated:

> "There are positive known advantages to be gained from taking evidence in public, namely—
> (a) witnesses are less likely to exaggerate or attempt to pass on responsibility:
> (b) information becomes available as a result of others reading or hearing what witnesses have said:

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[32] See Lord Bingham's summary in *R (Amin) v. Secretary of State for the Home Department* [2003] UKHL 51 [2004] 1 A.C. 653 on the Zahid Mubarek Inquiry**,** a non-statutory inquiry

[33] *Ramsahai v Netherlands* (2008) 46 EHRR 43 para 353

[34] *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129 para 62.

[35] *See R v Secretary of State for Health, ex parte Crampton* Unreported (CA, 9 July 1993) (the *Allitt Inquiry*); *R v Secretary of State for Health, ex parte Wagstaff*; *R v Secretary of State for Health ex parte Associated Newspapers Ltd* [2001] 1 WLR 292 (the *Shipman Inquiry*); *R (Persey) v Secretary of State for Environment, Food and Rural Affairs* (the *Foot and Mouth Inquiry*).

[36] HC 606-ii, GBI 09, Ev 39

[37] Council of Tribunals, *Annual Report of the Council of Tribunals for 1995/96* (TSO 1996) HC (1996-97) 114 or Public Administration Select Committee *First Report 2004-5* (TSO 2005)

[38] [2001] 1 WLR 292

(c) there is a perception of open dealing which helps to restore confidence:
(d) there is no significant risk of leaks leading to distorted reporting."

Beer provides a comprehensive list of advantages of conducting an inquiry in public.[39] It includes additional points such as: enhancing public confidence in the process, conclusions and recommendations; enabling the public to form its own conclusions on the subject matter of the inquiry; and assisting in discharging a state's investigative obligations in cases where Articles 2 and 3 of the ECHR are engaged and defeating arguments of violation of rights under Article 10 ECHR. However, Beer points out that a risk of conducting an inquiry in public is that of adversely affecting the interests and reputations of individuals and organisations by airing, in public, allegations that might eventually turn out to be false.[40]

Holding a public inquiry as openly and publicly as possible is key for participants, such as survivors and their families, families of victims, NGOs and pressure groups, who are anxious for a much and long sought-after opportunity for their voices to be heard.[41] On occasions, individuals or groups have refused to cooperate with a public inquiry where it was felt that it was insufficiently open and public.[42] It is also fundamental to democratic accountability. It allows the public to access to the same evidence as is used by the inquiry in its public hearings, to scrutinise the process, to draw their own conclusions and to seek, politically, to hold those in authority to account. As considered in more detail below, apparent undue secrecy can give rise to the perception that there is something to hide or that the decision to hold all or part of an inquiry is motivated by an attempt to avoid accountability.

Giving evidence to the 2013-14 House of Lords Select Committee on the Inquiries Act, *Professor Sir Ian Kennedy*, chair of the *Bristol Royal Infirmary Inquiry*[43] a pre-2005 Act inquiry, specifically recognised the role of political influence in the decision of whether to hold an inquiry in public, stating

> "ultimately the choice as to whether there is a public inquiry or not, given that one has that choice, will be a political choice. It will be a function of the degree of pressure and the generation of calls for one… In the Bristol inquiry, the first two options were a private within the hospital, and then a private outwith the hospital. Only when the pressure was such that the Secretary of State felt that it was irresistible was there a public inquiry."

The Bristol Inquiry report concluded

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[39] Jason Beer et al, *Public Inquiries* (OUP 2011) paras 6.03

[40] Ibid para 6.04

[41] Ashley Underwood, oral evidence taken before the HL Select Committee (20 November 2013) Q251 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/ documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>

[42] For example Amnesty International withdrew cooperation from the Detainee Inquiry into whether Britain was implicated in the improper treatment of detainees, held by other countries, that may have occurred in the aftermath of 9/11, in part due to lack of transparency and that much of the Inquiry was to be held behind closed doors see Amnesty International UK, *The Detainee Inquiry* (1 August 2013), Amnesty International UK, <http://www.amnesty.org.uk/detainee-inquiry>

[43] Convened under National Health Service Act 1977, s84 conducted between October 1998 and July 2001 into the management of the care of children receiving complex cardiac surgical services.

> "Holding an Inquiry in private is more likely to inflame than protect the feelings of those affected by the Inquiry, not least because of the notion of secrecy and exclusion which it fosters."[44]

Two Contrasting Case Studies in Openness: The Bristol Royal Infirmary and the Iraq Inquiry

In his earlier published lecture,[45] *Public Inquiries: Experiences from the Bristol Public Inquiry,* Professor Sir Ian Kennedy described the public nature of the Inquiry.

> "The Inquiry worked in the open. What it saw and heard by way of evidence, the public saw and heard. There can be no more simple, yet demanding, principle of accountability. The evidential basis on which any view reached by the Panel was arrived at was made explicit. In this way, any view could be challenged."

Unlike the court system, there is no permanent venue for public inquiries and, once an inquiry is convened, the chair must choose its location and premises. Some inquiries are held in court buildings, but many are held in other types of premises such as government offices, council buildings and privately owned buildings.[46] Ian Kennedy described the amount of specific thought given to public accessibility and media access, and the level of design and planning that went into the layout for the Bristol Public Inquiry in this respect, which was set up on three floors of an office block.

In contrast to court buildings, where the space available to members of the public may be very limited because of practical constraints, seating at the *Bristol Royal Infirmary Inquiry* was provided for more than 200 people within the hearing chamber and screens were set up in other rooms with simultaneous transmission of proceedings. The inquiry hearings were also transmitted to three additional remote locations.[47]

All of the evidence seen by the Inquiry was made public. Every document required by the Inquiry during the hearings was electronically scanned and displayed on television screens in the hearing chamber so that the public could see what the Inquiry could see, enhancing accountability and serving to "make real what, to the public, would otherwise be abstract discussions."[48] The transcript of each hearing was transmitted instantly to screens and a transcript of the day's hearing published within an hour of the hearings finishing on the Inquiry website, on which the statements of witnesses were also posted.

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[44] Bristol Royal Infirmary *Learning From Bristol* (TSO 2001) (cm 5207, 2001) para 6

[45] Professor Sir Ian Kennedy, Lecture, 7 February 2002: 'Public Inquiries: Experiences from the Bristol Public Inquiry' in Lord Woolf et al (eds), *Law, Medicine and Ethics: Essays in Honour of Lord Jakobovits* (London, Cancerkin, 2007) p30-36

[46] Eg the *Leveson*, *Al-Sweady*, *Mid Staffordshire NHS Foundation Inquiry* and the *Independent Jersey Care Inquiries* respectively

[47] To enable families and others interested in the inquiry to follow the hearings without having to travel to Bristol.

[48] By comparison, we have also seen a significant increase in the use of technology in the court system, with increased utilisation of digital storage, case management systems and digital presentation, driven by the need, shared with the public inquiry process, to achieve greater time and cost efficiencies, and reduced reliance on hard copy documents. However, in contrast to the approach adopted at the *Bristol Royal Infirmary Inquiry* and other inquiries, in the court system, whilst documents will often be available electronically to lawyers, the witnesses and judge, they will not be available electronically to the public, which will be an onlooker of the process, but not the documents.

Recognising the important role the media has to play in 'taking the Inquiry to a wider public' dedicated facilities were set up for the press and broadcast media, including a room for television interviews and a news-room with state of the art technology. A dedicated team was set up to assist the media for example by providing briefings, clarification and press releases.

The *Bristol Royal Infirmary Inquiry* is not alone in its approach to openness and accessibility. Many public inquiries make widespread use of ever-advancing technology. Approaches to broadcasting have varied between inquiries.[49] Although broadcasting was refused during the *Bristol Royal Infirmary Inquiry*, out of regard for the witnesses and sensitivity of the subject matter, some public inquiries are now televised and streamed live over the internet. For example, the *Leveson Inquiry* was accessible in its entirety via televised broadcasting and live streaming.

Witnesses can be very nervous and find the prospect of appearing before a public inquiry and its teams of legal representatives, very intimidating.[50] Whilst the use of cameras and sound recording provide an objective view on proceedings, and means of checks, it can make the prospect even more intimidating and can result in witnesses being reluctant to come forward to give evidence. The trend, however, appears to be moving towards increased broadcasting of public inquiry hearings. Despite the highly sensitive nature of the Inquiry, Alexis Jay, the chair of the *Independent Inquiry into Child Sexual Abuse* stated "I am satisfied that the considerable arguments in favour of broadcasting outweigh those against it. I am confident that the Inquiry can take appropriate measures to preserve anonymity and mitigate the risks of broadcasting that have been identified."[51]

In contrast to the *Bristol Royal Infirmary Inquiry*, the *Iraq Inquiry* into the UK's involvement in the conflict in Iraq is an example of an inquiry in which there has been huge public interest and that has come under widespread criticism for its secrecy. When the Inquiry was announced, the intention was that the non-statutory inquiry, conducted by a committee of Privy Counsellors, would be held in private, for reasons of national security and speed.[52] There followed intense pressure from Parliament,[53] the public and the media for the Inquiry to be held in public. The Public Administration Select Committee on the Iraq Inquiry concluded that the decision to hold the Iraq Inquiry in private was "totally unsatisfactory"[54] adding:

> "The need for effective accountability and public confidence demands that the inquiry be conducted as openly and publicly as possible... There needs instead to be a presumption in favour of the inquiry proceeding in an open and public manner. There should be only very limited exceptions to this

[49] See Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.76

[50] See, for example Select Committee on the Inquiries Act 2002: 'Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> Q118 and 122 (16 October 2013)

[51] Independent Inquiry into Child Sexual Abuse, 'Chair's Ruling on Broadcasting of Inquiry Proceedings in the Janner, Anglican, Rochdale and Lambeth Investigations' (13 April 2016) <www.iicsa.org.uk/key-documents/593/view/Ruling%20on%20Broadcasting%20of%20Inquiry%20Proceedings.pdf> para 11-12

[52] HC Deb 15 June 2009, vol 494, cols 23-38

[53] William Hague, Shadow Foreign Secretary "proceedings of the Committee of Inquiry should whenever possible be held in public" HC Deb, 24 June 2009,vol 494, col 800

[54] Public Administration Select Committee *Iraq Inquiry* (2008-09, HC 721) p7

> general rule, which would be best decided by the members of the inquiry itself, not by the Government."[55]

When the then Prime Minister, Gordon Brown, asserted that a more open inquiry would be bad for the armed forces, he was contradicted by senior military figures. General Sir Mike Jackson, head of the Army during the Iraq invasion, stated:

> "I would have no problem at all in giving my evidence in public...The main problem with a secret inquiry...is that people would think there is something to hide."

Air Marshal Sir John Walker, the former head of defence intelligence, said:

> "There is one reason that the inquiry is being heard in private and that is to protect past and present members of this Government. There are 179 reasons why the military want the truth to be out."[56]

The Prime Minister later announced that that some of the hearings would be held in public, at the discretion of the chair, Sir John Chilcot, who then announced the Inquiry's commitment that hearings would be held in public wherever possible.[57] Ultimately most of the hearings were indeed held in public, the proceedings were streamed live and archive footage of each hearing session was made available via the Inquiry's website. However, despite this fact, there was still widespread media criticism of the scale of the private hearings when it was announced that 35 witnesses had been heard in private.[58]

At the outset of the Inquiry, the Government and the Inquiry agreed a documents protocol on the handling of information provided to the Inquiry, naming the Cabinet Secretary as final arbiter in discussions about disclosure.[59] The chair requested publication of sensitive cabinet-level discussions and communications between the Prime Minister, Tony Blair, and President George W Bush, which the Inquiry judged were vital to the public's understanding of the Inquiry's conclusions. It took years of discussions with successive cabinet ministers before an agreement was finally reached to publish a small number of "gists and quotes", which the Inquiry deemed sufficient to explain their conclusions.[60]

The resulting delay in publishing the report (particularly its delay until after the May 2015 General Election) damaged public perception of the Inquiry, and prompted widespread allegations in the media of political interference and an "establishment fix-up", with politicians warning of "public incredulity" and the risk

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[55] Ibid p8

[56] Referring to the 179 British soldiers who died during the conflict. HC Deb, 24 June 2009, vol 494, col 810

[57] Sir John Chilcot already having written to Gordon Brown on 21 June 2009 stating his belief "that it would be essential to hold as much of the proceedings of the Inquiry as possible in public."

[58] See eg 'Iraq inquiry has heard from 35 witnesses in private' *BBC* News (8 July 2010) <www.bbc.co.uk/news/10558991> and Chris Ames, 'Chilcot inquiry succumbs to secrecy' *The Guardian* (8 July 2010) <www.theguardian.com/commentisfree/libertycentral/2010/jul/08/chilcot-inquiry-iraq-secret-witness>

[59] Cabinet Office, *Protocol between the Iraq Inquiry and Her Majesty's Government Regarding Documents and Other Written and Electronic Information* (TSO, 2009), available at <www.gov.uk/government/publications/iraq-inquiry-information-sharing-protocol >

[60] Letter from Sir John Chilcot to Sir Jeremy Heywood, cabinet Secretary, date 28 May 2014 <www.iraqinquiry.org.uk/media/185932/2014-05-28-letter-chilcot-to-heywood.pdf>

that public will assume the report is being "sexed down".[61] Sir John Chilcot was required to give evidence on the progress of the Inquiry to the Commons Foreign Affairs Committee. He strongly denied those allegations, stating the timetable had been prolonged by: the gravity of the subject matter; the huge scope of the Inquiry, covering decisions made over a nine year period; the complexity of advice, discussion and debate interlinked with those decisions; as well as the lengthy process of issuing warning letters.[62] However, by then, public confidence in the Inquiry had been undermined and the public perception of the Inquiry damaged. Each time a concession to secrecy is made during a public inquiry, there is a real risk that public confidence in the inquiry will diminish; the effect is cumulative.

Elements of Openness and Public Scrutiny and Capacity of Attendance

As these examples show, the extent to which public inquiries are open to public scrutiny goes beyond the issue of whether hearings are open to the public. In analysing the principle of open justice in the context of civil and criminal trials, Jaconelli concludes that open justice in the court system comprises six presumptive elements, which are discussed below.[63] They relate to attendance at proceedings; the availability of documents and the details of participants, including witnesses; and the proceedings taking place in the presence of the accused.

The relevance of those presumptive elements to openness and public scrutiny in the quasi-judicial public inquiry process, which in many ways resembles the court process, (adjusting for the fact there is no 'accused' in the public inquiry process) are illustrated by the case studies above and in the following discussion on restrictions. An additional presumptive element that needs to be added for public inquiries is the availability of the inquiry report for inspection by the public, also discussed below.

Jaconelli also draws a distinction between two different capacities in which attendance at trial may take place. The first is a person's presence at a trial as one of the *dramatis personae* described, for most purposes, as being "clearly and uncontroversial identified: the judge, the parties, their legal representatives, witnesses and jurors and the personnel of the court building". The second is described as "simply as a spectator", the latter being the focus for the discussion of open justice.[64] Jaconelli expressly excludes Witness Support or Victim Support Schemes, stating they "undoubtedly rank as members of the public".

The demarcation in a public inquiry, an inquisitorial process rather than the adversarial system of court proceedings in the common law systems such as that of England and Wales, is not as clear. As an inquisitorial process, there are no parties to a public inquiry and no accused. In addition to the Chair of the inquiry,

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[61] See, eg Andrew Grice and James Cusick, 'Everyone wants the report published – but no one knows when' *The Independent (*London, 24 February 2015); Michael Savage'Chilcot will face MPs over delays to 'sexed down' Iraq war report' The Times (London 22 January2015) p 18; and Patrick Wintour and Nicholas Watt 'Chilcot report on Iraq war delayed until after general election' *the Guardian* (London, 21 January 2015) https://www.theguardian.com/uk-news/2015/jan/20/chilcot-report-iraq-war-delayed-general-election

[62] Foreign Affairs Select Committee, *Oral evidence: Progress of the Iraq Inquiry* (TSO 2015) 4 February 2015 at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/foreign-affairs-committee/progress-of-the-iraq-inquiry/oral/17950.html

[63] Joseph Jaconelli, *Open Justice: A Critique of the Public Trial* (OUP 2002) p2-4

[64] Ibid p16

who may sit with a panel and may appoint assessors to advise and assist with technical issues in specialist fields, witnesses and legal representatives, there is also usually Counsel to the Inquiry, the Solicitor to the Inquiry, and the inquiry secretariat.

Further, some individuals or organisations have a particularly close connection with the work of a public inquiry. It may be that they have played a significant role in the issues being investigated by the inquiry and are likely to face severe criticism during the course of an inquiry's proceedings or in the report itself. It may be that they have a significant interest in the processes and outcome of the inquiry, and perhaps in trying to persuade the inquiry to reach a particular conclusion. They may be victims of the events under investigation or their family members, NGOs or campaigners, support groups, innocent bystanders or protagonists.

Such individuals or organisations may be formally recognised by the public inquiry and designated a privileged position within the process. Under the 2005 Act, they are known as core participants; in non-2005 Act inquiries they are generally referred to as 'interested parties' or 'full participants'. Such a designation is significant as this privileged status provides the primary means of direct access to the inquiry and involvement in, and contribution to, the process. Core participants may receive advance notice of evidence before it is published,[65] have the right to propose questions for Counsel to the Inquiry to ask witnesses, may apply to ask questions of a witness giving evidence[66] and may receive a copy of the final version of the report prior to publication. As such, they have the opportunity to anticipate or contribute to the direction of the inquiry or potentially deflect or manage any criticism that may be directed at them.

However, the appointment of such participants is discretionary. The Chair must act in accordance with their duty to act with fairness and, in the case of 2005 Act inquiries, their duty to avoid any unnecessary cost.[67] For 2005 Act Inquiries, applicants must meet the criteria under Rule 5(2) Inquiries Rules 2006 but that alone does not guarantee core participant status. Selection among qualifying applicants may well be necessary in order to ensure not only cost-effective but also time efficient management of an inquiry.[68] As a result, a person or organisation who feels they have a particularly close connection to the work of an inquiry, or feels they will be particularly affected by its outcome, may not be designated core participant or equivalent status.[69] The remedy for those who wish to be core participants but have not been designated as such is judicial review. However, in practice, such applications are very rare.[70]

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[65] Albeit sometimes only hours or a few days

[66] Inquiry Rules 2006 (SI 2006/1838) r10

[67] 2005 Act, s17(3)

[68] When exercising this discretion, the chair may take into account matters such as ensuring that those that are designated adequately and proportionately represent the range of different interests that are relevant to the inquiry's terms of reference and also the need to control the amount of information the inquiry can receive. See further discussion in Isabelle Mitchell, Sarah Garner and Peter Jones 'Public inquiries: a core participant - to be or not to be', *Insight* (7 July 2016)

[69] Some choose not to apply for this privileged status, for example to avoid unwelcome publicity or scrutiny or because of cost or time issues (*ibid*)

[70] Jason Beer QC, oral evidence before the HL Select Committee (16 October 2013) 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf> Q117

Imposing Restrictions on Attendance at Hearings, the Right to Report and Access to Documents

The explanatory notes to the 2005 Act, recognising that there may be circumstances in which part or all of an inquiry must be held in private, state that over the previous 15 years, more than a third of the notable inquiries held had some sort of restrictions imposed on public access. These ranged from

> "wholly private inquiries, such as the Penrose inquiry into the collapse of Equitable Life and the "Lessons Learned" (Foot and Mouth) Inquiry, to mainly public inquiries such as the Bloody Sunday inquiry and the Hutton inquiry, in which a small amount of highly sensitive material was withheld from the public domain." [71]

Whilst, as explained above, there is no legal presumption in favour of a fully open inquiry, where inquiries are convened under the 2005 Act, s18 sets out a presumption that they will be held in public:

> "Subject to any restrictions imposed by a notice or order under section 19, the chairman must take such steps as he considers reasonable to secure that members of the public (including reporters) are able—
> (a) to attend the inquiry or to see and hear a simultaneous transmission of proceedings at the inquiry;
> (b) to obtain or to view a record of evidence and documents given, produced or provided to the inquiry or inquiry panel."[72]

This is in contrast, for example, to the civil court system where the requirement for a hearing in public specifically does not require the court to make special arrangements for accommodating members of the public.[73]

However, s19 recognises that openness is not always possible.[74] It provides for the minister convening the inquiry, or chair to the inquiry, to impose restrictions on attendance at an inquiry and the disclosure or publication of evidence or documents. Restrictions are imposed by means of a restriction notice given by the minister to the chair or by restriction order made by the chair. A restriction on the disclosure or publication of documents or evidence continues indefinitely,[75] unless otherwise specified or the order or notice is varied or revoked.[76]

S19(3) provides that, when a statute, enforceable EU obligation or rule of law requires it, including the common law principle of fairness and public interest immunity, a restriction notice or order must be made.[77] In the absence of a such requirement, restrictions may be made by the minister or chair as are considered to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest. Regard must be had to matters set out in s19(4)- (5) such as the allaying of public concern, the risk of death or injury, damage to national

[71] Explanatory Notes to the Inquiries Act 2005, para 38
[72] 2005 Act, s18(1)
[73] CPR 39.2 (2) Civil Procedure Rules 1998
[74] Read in conjunction with the provisions in 2005 Act, s20
[75] Compared with the Thirty Year Rule under Public Records Act 1958, s3 and the Freedom of Information Act 2000, whereby certain Government records are released after thirty years (currently being transitioned to twenty years). However, some Government records may be retained indefinitely under S3(4) Public Records Act 1958 where they are "required for administrative purposes or ought to be retained for any other special reason".
[76] 2005 Act, s20(5)
[77] 2005 Act, s19(3)

security, international relations or economic interests of the UK that could be avoided or reduced, issues of confidentiality, cost and delay to or impairment of the inquiry.[78]

Concern has been expressed that the potential scope of public interest is very broad and the minister or chair must only 'have regard' to those matters, nothing more. Further, whilst consideration must be given to the fact that a restriction order or notice may not be conducive to the fulfilment of an inquiry's terms of reference, it does not follow that it cannot be made. A minister or chair may therefore consider such an order or notice to be necessary in the public interest and impose restrictions, notwithstanding that the order would hamper fulfilment of the public inquiry's terms of reference.[79]

By contrast, where an inquiry is not convened under the 2005 Act and is a non-statutory inquiry, the inquiry is able to deal with such matters more simply, having a wider discretion to restrict attendance at an inquiry and to restrict disclosure or publication of evidence or documents. There are no specific requirements for chairs of non-statutory inquiries to take steps to ensure the public and media are able to attend hearings, access simultaneous transmissions or are able to access evidence and documents provided to the inquiry. As discussed in detail in an earlier article,[80] ministers on occasions appear to be choosing to sidestep the use of the 2005 Act, including its presumption that inquiries will be held in public, in favour of convening non-statutory inquiries. This has given rise to speculation that some such decisions may have been motivated by a wish to conceal or suppress some aspects of the truth from the public.[81]

The first three of Jaconelli's six presumptive elements of open justice in the court system are: the provision of adequate facilities for attendance of members of the public and representatives of the media; the right of those in attendance to report the proceedings;
and the availability of documents produced for the purposes of the trial for inspection by the public. These are also key elements of open justice in the public inquiry process. All three areas may be the subject of restrictions.

Restrictions may result in the exclusion of all or part of the public from the oral hearings (or all or some core participants or legal representatives). [82] Consequently, parts of an inquiry may be conducted in closed hearings, with access restricted to the inquiry team and those giving the sensitive evidence, or in private hearings, where the chair decides who may be privy to the information and might, for example, include witnesses with a common interest. Though public access may be restricted to the hearings themselves, or by way of simultaneous transmission of the proceedings, there may still be access to the evidence in terms of witness statements and transcripts of witness evidence at a later stage. Disclosure or publication of documents and evidence may be restricted, for example, to a witness or class of witnesses, or to core participants and their legal

[78] 2005 Act, s19(4) –(5)
[79] See the consideration in the Undercover Policing Inquiry *Restriction Orders: Legal Principles and Approach Ruling* 3 (3 May 2016) available at www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf para 32
[80] Emma Ireton, 'The ministerial power to set up a public inquiry: issues of transparency and accountability' (2016) 67, 2 NILQ 209-229
[81] See question of Baroness Buscombe, oral evidence taken before the HL Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) 10 July 2013 Q36
[82] 2005 Act, s19(1)(a)

advisers, with further restrictions on their wider publication.[83] An alternative to a refusal to disclose a document is the use of redactions and ciphers.[84]

Restrictions apply also to the press. Article 10 ECHR protects the right to freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority. It is a qualified right, however, since it carries with it duties and responsibilities and it has to be balanced with, amongst other things, the risk of harm to the public interest. The media has no general right of access under Article 10 to information held by the state which the state is unwilling to disclose,[85] nor does it have a right of access to inquiry proceedings properly held in private.[86] Public inquiries are not 'public authorities' within the meaning of the Freedom of Information Act (FOIA)[87] and therefore the FOIA does not apply. Many public authorities that participate in public inquiries, such as government departments and NHS Trusts, are caught by the provisions of the FOIA and are susceptible to FOI requests.[88] They may hold documents connected to the inquiry such as correspondence with the inquiry, evidence and witness statements. S32(3) exempts information from the right to disclosure where it is held only by virtues of being contained in any document placed in the custody of a person conducting an inquiry,[89] or created by a person conducting an inquiry, for the purposes of the inquiry.

During the Undercover Policing Inquiry, the media emphasised the importance of the open justice principle, the role of the media as the public's eyes and ears and its role as public watchdog. Submissions were made, with reference to Art 10 ECHR, that the media should have access to the process by which the chair determines applications for restriction orders during that inquiry, so that submissions could be received before the order was made, and also to closed material submitted in support of those applications, on terms of confidentiality.[90] The chair, Sir Christopher Pitchford,[91] ruled that the approach under Article 10 added nothing to the approach to restriction orders under s19, stating "I can see no arguable basis for giving to the media rights of access not enjoyed either by the public in general or core participants in particular."[92]

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83 2005 Act, s19(1)(b) See also Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.30 .

84 See the discussion in *R v Lord Saville of Newdigate Exp A* [2000] 1 WLR 1855**;** [1999] 4 All ER 860 where it was held that the public nature of the inquiry would be preserved despite the maintenance of anonymity by the use of ciphers in place of the names of soldiers giving evidence to the Bloody Sunday Inquiry

85 *Kennedy v the Charity Commission* 2014 UKSC 20, [2015] 1 AC 455

86 *R (Persey) v Secretary of State for the Environment, Food and Rural Affairs* [2002] EWHC 371 (Admin) [2003] QB 794) at paragraphs 48-59; *R (Howard) v Secretary of State Health* [2002] EWHC 396 (Admin), [2003] QB 830 at paragraph 110

87 Freedom of Information Act 2000, sch 1

88 2005 Act, s1

89 Though the definition of Inquiry in s32(4) (c) refers only to statutory inquiries. As to practical issues arising in respect of s32 exemptions under the FOIA, see Eversheds written evidence para 49 House of Lords Select Committee on the Inquiries Act 2005 Written and Corrected Oral Evidence <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>

90 Referring to Article 10 ECHR and *Guardian News and Media Limited and others v Incedal and another* [2014] EWCA Crim 1861, [2015] 1 Cr App R 4 and Guardian News and Media Limited and others [2016] EWCA Crim 11

91 A Lord Justice of Appeal

92 Undercover Policing Inquiry, *Restriction Orders: Legal Principles and Approach Ruling* <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> paras 201-209

The powers under s19, or similar restrictions imposed in non-statutory inquiries, do not restrict the evidence being seen and heard by the inquiry itself, but its onward disclosure or publication. However, restricting public access to that evidence has a huge impact on the transparency of the proceedings and perceptions of independence, which are vital to public trust and confidence in the process.

Open Justice, Witnesses and the Common Law Duty of Fairness

Jaconelli's remaining three presumptive elements of open justice in the court system relate to the identity of witnesses and are: that names of participants, including witnesses, should be openly available; the trial take place in the presence of the accused; and that the accused be entitled to confront his accusers face to face.[93] At common law the default position is that witnesses in civil or criminal judicial proceedings give evidence in public using their true identity, and the defendant or other party is entitled to confront their accuser.[94] However, CPR 39.2(4) Civil Procedure Rules 1998 provides that the court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness. In criminal proceedings, s86 Coroners and Justice Act 2009 provides that a court may, in certain circumstances, make a witness anonymity order.

For public inquiries too there is a balancing act at common law between the competing interests of witnesses, their subjective fears, impact on their health, and any other factors which might make it unfair to require the witness's identity to be exposed, and the effect this would have on the fairness and transparency of the inquiry.[95] The subject matter of many inquiries can be very sensitive, addressing issues such as health or abuse, or can result in witnesses fearing for their life or security if they are to appear in public before the inquiry. A restriction notice or order made in respect of a 2005 Act inquiry, or ruling of a chair during a non-statutory inquiry, may restrict the disclosure of the name and personal details of a witness, permitting them to give evidence anonymously or from behind a screen.

This balancing act has been challenged a number of times before the courts, notably during the Bloody Sunday Inquiry[96] where soldiers sought anonymity before the inquiry, and to give evidence in an alternative venue, on grounds of security. [97] In *re Officer L and Others,*[98] brought during the later *Robert Hamill Inquiry*[99], the House of Lords reviewed the obligations of an inquiry to a witness under Article 2 ECHR (that everyone's right to life shall be protected by law) and then the common law. It held that the test under Article 2 is whether, in the absence of protective measures, when viewed objectively, a risk to the witness's life would be created, or a pre-existing risk materially increased; the risk must be

[93] Which may be prevented by eg the erection of a screen or use of a video link, which would prevent the giving of evidence before the public as well as the accused.
[94] See, for example, *Archbold: Criminal Pleading Evidence and Practice* (2017 Edn) para 4.3 and 4.5a
" See Robert Francis 'Select Committee on the Inquiries Act 2002: Written and Corrected Oral Evidence' written evidence paragraph 57- 58 <www.parliament.uk/documents/lords-committees/Inquiries-Act-2005/IA_Written_Oral_evidencevol.pdf>
[96] A pre-2005 Act inquiry into 'the events of Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day'
[97] *R v Lord Saville of Newdigate, ex p A* [2000] 1 WLR 1855 *('Saville 1)* and *R(A) v Lord Saville of Newdigate* [2001] EWCA Civ 2048, [2002] 1 WLR 1249 *('Saville 2')*
[98] [2007] UKHL 36, [2007] 1 WLR 2135
[99] Into the death of Robert Hamill and the acts and omissions of the Royal Ulster Constabulary 2004-2011, converted to a 2005 Act Inquiry.

"real and immediate" and stated the threshold is high. It held that the common law duty of fairness to witnesses entailed consideration of concerns other than the risk to life; subjective fears, even if not well-founded, could be taken into account, particularly if that has an adverse impact on their health. The ruling of the *Undercover Policing Inquiry* summarised the common law test[100] as requiring: a measurement of the public interest in the openness of the inquiry; the nature, content and importance of the evidence; the contribution if any that identification of the witness would make to public confidence in the inquiry; and the nature of the personal interests of the witness, including the actual or perceived risk of harm to that witness.[101]

In addition to obligations under Article 2 and the common law principles of fairness, applications for anonymity might be made by reference to Article 3 ECHR[102] and Article 8 (the right to respect for his private and family life, his home and his correspondence). S17(3) 2005 Act requires the chair, when making any decision as to the procedure or conduct of an inquiry, to act with fairness; there is no difference between the standard of fairness to be applied under section 17(3) and at common law.[103]

In practice, whilst requests for anonymity are relatively frequently made, they are not readily granted. When they are granted, the identity of the witness is withheld from the public, though not necessarily the evidence itself. The evidence in support of the decision might be also be subject to a restriction notice or order.

The granting of anonymity may be challenged because of lack of openness. The granting of anonymity to police witnesses has been a highly controversial issue during the Undercover Policing Inquiry.[104] Some of the women who had unknowingly entered into long term relationships with undercover police officers have indicated that they will refuse to cooperate with an inquiry that is held largely in secret. Stephen Lawrence's family called for the undercover police officers who had spied on them while they pressed for a full investigation into Stephen's murder to be named and indicated that they too will not cooperate with an inquiry they consider is not sufficiently open.[105] The chair of the Inquiry[106] decided against granting blanket anonymity to all undercover officers, determining that applications for restriction orders would be heard on a case by case basis.

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[100] From consideration in other Northern Ireland cases notably *Re A and others' Application for Judicial Review (Nelson Witnesses)* [2009] NICA 6; *Re:Witnesses A, B, C, K and N's Application for Judicial Review* [2007] NIQB 30; and *Re an Application for Judicial Review by the Next of Kin of Gerard Donaghy* (unreported)

[101] Undercover Policing Inquiry, *Restriction Orders: Legal Principles and Approach Ruling* <www.ucpi.org.uk/wp-content/uploads/2016/05/160503-ruling-legal-approach-to-restriction-orders.pdf> paras para 211

[102] That no-one shall be subjected to torture, or to inhuman or degrading treatment or punishment. Both the chair of the *Baha Mousa* and *Undercover Policing Inquiries* concluded that the threshold test for Article 3 ECHR should be the same, one of objectively verified immediate risk (of torture, inhuman or degrading treatment or punishment) ibid para 176

[103] Ibid para 210

[104] Into undercover police operations conducted by English and Welsh police forces in England and Wales

[105] E.R. Evans, "Doreen Lawrence calls for undercover police who spied on family to be named", *The Guardian*, 16 July 2015, <www.theguardian.com/uk-news/2015/jul/15/doreen-lawrence-name-undercover-police-spied-family> and 'The Today Programme' (BBC Radio 4, 3 May 2016) respectively

[106] Lord Justice Pitchford

Similarly, the *Azelle Rodney Inquiry* illustrates how applications for anonymity are heard on a case by case basis, balancing the need to protect witnesses and the need for openness. The inquiry investigated the circumstances by which Azelle Rodney was shot dead by an armed officer of the Metropolitan Police in 2005. The chair refused anonymity and screening to two officers, granted both to the officer who had fired the fatal shot, and granted anonymity to the remaining firearms officers, who were referred to by ciphers, but refused them screening. He granted anonymity and screening to the intelligence officers, and refused both to the surveillance officers.[107] Screened witnesses were visible only to the Chair, Counsel to the Inquiry, counsel to the core participant, the deceased's mother, and a friend or relative notified in advance to the police and also attendant staff.

An application was made by fourteen of the Metropolitan Police officers for permission to seek judicial review of the Chair's decision to refuse their application that they be screened. In refusing permission to seek judicial review, Lord Justice Laws stated "there is, in my judgment, a very pressing public interest in openness on the facts of this case. It concerns, after all, a man sitting in a car with no weapon in his hand who has eight shots fired at him at close range causing his death… It seems to me the Chairman was fully entitled to put what he called a premium on achieving as public an Inquiry as possible, "so that at the least to counter or neutralise the obvious alternative surmise, namely a sustained 'cover up'"".[108]

Criticism of the Minister's Power to Restrict Access

The introduction of the minister's power to issue a restriction notice under the 2005 Act, in addition to the chair's power to make a restriction order, was highly controversial.[109] The powers vested in the minister in this respect go beyond those of other commonwealth jurisdictions.[110] A major role of public inquiries is to hold those in authority to account, and it is often the actions of the Government itself, or the minister's own department, that are under scrutiny during a public inquiry. A minister's power to restrict attendance at the inquiry, or the disclosure or publication of evidence or documents provided to the inquiry, by issuing a restriction notice at any time before or during the course of an inquiry, gives rise to a clear conflict of interest. Many have argued that the power should only be exercisable by the chair.

The 2004 Public Administration Select Committee report, *Government by Inquiry,*[111] criticised the minister's wide powers to restrict public access to inquiries, stating "This subverts accepted presumptions of openness and public interest and we recommend it should be reversed."[112] The Joint Committee on Human Rights stated

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[107] Summarised in *R (on the application of E) v Chairman of the Inquiry into the Death of Azelle Rodney Inquiry* [2012] EWHC 563 (Admin) para 9-11

[108] [2012] EWHC 563 para 26

[109] See, for example, the letter from Judge Peter Cory (a former Justice of the Supreme Court of Canada and chair of the *Cory Collusion Inquiry*) to US Congressman Chris Smith quoted in Pat Finucane Centre, 'Press Release: Canadian Judge Peter Cory slams Finucane Inquiry legislation' (15 March 2005) www.patfinucanecentre.org/collusion-pat-finucane/canadian-judge-peter-cory-slams-finucane-inquiry-legislation and the letter from Lord Saville of Newdigate (former Justice of the Supreme Court of the United Kingdom and chair of the *Bloody Sunday Inquiry*) to the Under-Secretary of State for Constitutional Affairs, quoted in HC Deb, 15 March 2005, vol 423, col 189

[110] Jason Beer et al, *Public Inquiries* (OUP 2011) para 6.28

[111] HC 2004-5, 51-I

112 Ibid para 99

> "we remain of the view that the independence of an inquiry is put at risk by ministerial power to issue these restrictions, and that this lack of independence may fail to satisfy the Article 2 obligation to investigate, in cases where an inquiry under the Bill is designed to discharge that obligation."[113]

The 2013-14 House of Lords Select Committee, that provided post-legislative scrutiny of the 2005 Act, expressed similar concerns. It noted that the predicted collapse in public confidence in 2005 Act public inquiries, resulting from the powers given to ministers under the Act including the power to restrict access, had not materialised.[114] Nevertheless the Select Committee recommended that only the chair should be allowed to restrict access to an inquiry on the basis that the chair's power to issue a restriction order is sufficient.[115]

The Government rejected the suggestion stating "Ministers must have the power to issue notices imposing restrictions on attendance at an inquiry and/or on the disclosure or publication of any evidence or documents provided to an inquiry. They will understand the nature of national security and other sensitive material. It is not appropriate that this power is ceded to the inquiry chairman alone." In the subsequent House of Lords debate, the Government's rejection was highly criticised. Baroness O'Loan weighed up the need to protect national security with the need for public administration of justice,[116] warning that

> "There is a temptation in any organisation to cover up its wrongdoing. We have seen it across so many professions and institutions. Governments will not be immune to that temptation and those who have advised them and their successors may seek to cover up past wrongdoing to protect what they perceive to be the stability of the present…" adding
>
> "The reality is that an inquiry that is deeply immersed in what might be millions of pages of documents is much better placed to assess the relevance of documentation and capable of protecting that which requires to be kept secret than the Government and their advisers."

Whilst the power to make a restriction notice has not been frequently exercised, the fact the power exists, and has on occasions been used,[117] has undermined the perception of the independence of public inquiries convened under the 2005 Act.

The Report -Publication and Withholding Material

The final area that will be addressed, and is similarly controversial, is the minister's power to withhold evidence when the report is published. A public inquiry has no power to rule on or to determine any person's civil or criminal

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[113] Joint Committee on Human Rights, *Scrutiny: Fourth Progress Report, Eighth Report of Session 2004–05* TSO), HL Paper 60, HC 388)

[114] Eg the family of Patrick Finucane, a Northern Ireland solicitor, initially opposed the establishment of a 2005 Act inquiry into his murder by paramilitaries and collusion by the state because of the s19 power to impose restrictions on the disclosure and publication of evidence. The family subsequently changed its position, having seen the 2005 Act in practice and having received undertakings regarding the use of restriction notices. However, the government ultimately decided to hold an independent review rather than the public inquiry that had been promised to the family. The family brought judicial review proceedings to challenge that decision, which were unsuccessful.

115 House of Lords Select Committee, *The Inquiries Act 2005: Post-legislative Scrutiny* (HL 2013–2014 143) para 206

116 HL Deb 19 March 2015, vol 760, col 1165

[117] eg there were four restriction notices given by the minister to the chair of the Litvinenko Inquiry

liability[118] but, at the conclusion of an inquiry, a report is produced by the chair or panel and is delivered to the minister who convened the inquiry. [119] The report contains: the facts determined by the inquiry; where its terms of reference required it to make recommendations, its recommendations;[120] and anything else that the chair or panel consider to be relevant to the terms of reference.[121] The report must then be published and laid by the minister before Parliament.[122]

The starting point for 2005 Act inquiries is that the party responsible for publication has a duty to publish the report in full.[123] However, drawing direct parallels to the provisions relating to restriction notices and orders, material may be withheld from publication to such an extent as required by law or considered necessary in the public interest.[124] Regard must be had to matters such as: the extent to which doing so might inhibit the allaying of public concern; would reduce the risk of death or injury, damage to national security, international relations, or the economic interests of the UK; or certain conditions as to confidentiality.[125] The default position is that it is the minister who receives the report and is required to arrange for its publication (and may therefore withhold information), unless he or she has notified the chair before the inquiry commences that the chair is to have responsibility, or the chair has subsequently agreed to accept responsibility on being invited by the minister to do so. [126]

Establishing the facts, allaying public concern, and holding those in authority to account are some of the key purposes of a public inquiry. In particular, where the actions of the minister's department or the Government itself are under scrutiny, withholding material from the report has the potential to seriously undermine and damage public confidence not only in that inquiry, but also in the public inquiry process as a whole. Where the chair is responsible for publication, there is at least transparency; the public sees the report in the form delivered to the minister. However, where the minister is responsible for publication, and potentially for redacting information from the final report, it raises a number of additional and serious concerns such as lack of independence, the Government being given advantage over others through being given advance sight of the report, and the potential for action to be taken, or at least appear to be taken, out of political self-interest.

When the Inquiry Bill was introduced, the Joint Committee on Human Rights expressed concern that the minister's power to withhold material from publication in the public interest is wide enough to compromise the independence of an inquiry.[127] It also raised concerns specifically over inquiries designed to fulfil the Article 2 obligation to hold an effective and independent investigation, asserting that, in such cases, responsibility for publishing the report should rest with the

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[118] 2005 Act, s2(1)

[119] A duty for statutory inquiries under 2005 Act, s24

[120] 2005 Act, s24

121 2005 Act s24(1)

122 2005 Act, ss 24 and 25 and *Maxwell v Department of Trade and Industry* [1974] QB 523. Following dissatisfaction over Lord Denning's inquiry into the Profumo affair

[123] 2005 Act, s25(3)

[124] 2005 Act, s25(4)

125 2005 Act, ss25(5) and (6)

126 2005 Act, s25(2) "before the setting-up date"

[127] Joint Committee on Human Rights, *Scrutiny: Fourth Progress Report, Eighth Report of Session 2004–05* HL Paper 60, HC 388) para 3.11

chair.[128] No amendment was made to the Bill to this effect. The 2004 Public Administration Select Committee report on the effectiveness of inquiries stated

> "It is important that ministers should not manipulate the publication date of an inquiry report for their own ends or undermine a parliamentary debate on its findings by limiting access to it, as was notably the case with Sir Richard Scott's report on Arms to Iraq". It noted, that
>
> "recent practice has been good, with chairs keeping a tight hold on availability of the report to all the parties and making their own press statements on publication".

However, it recommended a presumption should be included in the Bill that chairs would handle publication,[129] which was rejected. Subsequently, the House of Lords Select Committee, at the post-legislative scrutiny stage, recommended that, whoever is responsible for publication of the inquiry report, s25(4) be amended so that, save in matters of national security, only the chair has the power to withhold material from publication. That recommendation too was rejected[130].

It is the potential for interference, as much as the reality itself that undermines public confidence in the process. When publication of the Chilcot Report[131] was imminent, and the report was to be released first to the Government to allow for national security checking prior to its publication, there was evidence of renewed mistrust in the Inquiry itself. Newspaper articles expressed concern over the process and the potential for censorship.[132] Scepticism was also expressed during a Commons debate with Jeremy Corbyn[133] stating "I think I shall be disappointed when it is published. I suspect that it will be full of redactions and that we will have to read a million words before we discover which bits have been redacted."[134] In fact the report was subsequently published without any redactions at all, but earlier distrust about apparent undue secrecy, and the potential for interference with the report before publication, had undermined and damaged public trust in the process.

Conclusion

A public inquiry is a hybrid of a political and legal process, and the need for openness and public scrutiny essential for democratic accountability and for open justice demands that a public inquiry is held as publicly as possible. The presumption that inquiries convened under the 2005 Act will be held in public can be, and often is, subject to restrictions and there is no such presumption for non-statutory inquiries. Each of the number of functions served by a public inquiry may be undermined by such restrictions. Public confidence in the findings or recommendations of an inquiry is diminished where evidence on which they are based has not been made publicly available. Restricting access to oral hearings impedes the potential for catharsis for witnesses who are anxious for their voice to be heard. The decision to hear evidence in secret frequently gives rise to the

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[128] *Ibid* para 3.13

[129] *Ibid* paras 136-137

[130] Ministry of Justice, *Government Response to the Report of the House of Lords Select Committee on the Inquiries Act 2005* (TSO, 2014), Cm 8093, 2014 para 70

[131] The report of the *Iraq Inquiry*

[132] Chris Ames 'Will the Chilcot report tell the full story? It's on a knife edge' *The Guardian* (London, 18 April 2016) <www.theguardian.com/commentisfree/2016/apr/18/chilcot-report-full-story-iraq-war-inquiry-tony-blair-saddam-hussein>

[133] Prior to being elected Labour Leader in September 2015

[134] HC Deb, 29 January 2015, vol 591, col 1072

suspicion that it has been motivated by a desire to conceal information or avoid accountability.

The fact that those restrictions may be imposed not only by the chair to the inquiry but also by the minister who convened the inquiry raises particular cause for concern. It is often the Government itself, or the minister's own department, that is under scrutiny, which gives rise to a clear conflict of interest. When a decision is made by the minister to restrict public access to an inquiry, it is difficult to avoid allegations that the decision has been motivated by political self-interest, undermining public confidence in the independence and integrity of the public inquiry. Despite repeated calls for change from the public, and repeated recommendations from successive Parliamentary committees that the power of ministers to restrict public access to public inquiries be abrogated, no changes have been made.

There will always be tensions between the demand for public scrutiny and open justice on the one hand and conflicting pressures such as the duty of fairness to witnesses and the protection of national security on the other. There is no doubt that, in certain circumstances, restrictions on the extent to which public inquiries are conducted in public are necessary. However, public inquiries are a major form of administrative accountability and are, by definition, convened for the benefit of the public as a whole. Each time a restriction is imposed on the public nature of an inquiry, there is a risk that public confidence in the inquiry will be undermined, reducing the weight and impact of its report and its ability to address public concern; the effect is cumulative. It is vital that, whilst maintaining a fair balance between the personal rights of individuals and the public, conducting public inquiries as openly and publicly as possible remains a paramount objective.