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The *Inquiries Bill [HL]* *2004-05*

Bill 70 of 2004-05

The *Inquiries Bill [HL]* is due to receive its second reading in the House of Commons on 15 March 2005. The Bill aims to modernise the framework for conducting statutory inquiries set up by Ministers into events that have caused public concern or which have the potential to cause public concern. The Bill repeals the *Tribunals of Inquiry (Evidence) Act 1921*, the current statutory basis for many of the major inquiries of this type, as well as a number of other legislative inquiry provisions. By doing so the Bill removes the requirement - in fact used only 24 times since 1921 - for resolutions of both Houses to allow such inquiries to be established. The Bill however ensures that Parliament is informed whenever such inquiries are set up or their terms of reference are amended.

The Bill also allows for joint inquiries and for inquiries established under other provisions to be converted into inquiries under the Bill. Provision is made for Ministers to oversee inquiry procedures and to ensure that costs do not escalate. The Bill applies to the devolved administrations and the Scottish Parliament has agreed a Sewel Motion allowing the Bill's provisions to apply to Scotland.

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Summary of main points

The Bill:

- Repeals the *Tribunals of Inquiry (Evidence) Act 1921*, the current statutory basis for certain inquiries (thereby removing the 1921 Act's requirement for parliamentary resolutions to approve such inquiries). It also repeals a number of other statutory provisions allowing Ministers to establish inquiries
- Gives the power to call an inquiry to the appropriate Minister (clause 1)
- Makes provisions to ensure that an inquiry does not rule on any person's civil or criminal liability (clause 2)
- Makes provision for Ministers to set the terms of reference, appoint the Chairman and additional panel members when necessary (clauses 3-5)
- Gives the Minister a duty to inform Parliament when exercising powers under the Act (Clause 6)
- Gives the Minister the power to move a motion before the relevant Parliament or Assembly approving an inquiry into ministerial misconduct (clause 7)
- Introduces a statutory requirement on ministers to have regard for the impartiality and expertise of panel members (clauses 8-10) and if intending to appoint a judge to the panel to obtain the agreement of the appropriate senior judicial figure (clause 11)
- Gives the Minister power to determine whether an inquiry should be in public, or wholly or partly in private (clause 19-20) and to suspend the inquiry if necessary (clause 14)
- Allows inquiries established otherwise than under the Bill to be converted into inquiries under the Bill (clauses 16-17)
- Gives the Secretary of State for Constitutional Affairs (or other relevant authorities) the power to determine rules of procedure for inquiries, and to ensure that inquiries are delivered in a timely and effective fashion and undertaken with reasonable cost (clause 42)
- Gives statutory inquiries the power to require witnesses to attend or to provide documents or other written evidence, and applies legal professional privilege to witnesses (clause 22). Sanctions for non-compliance with an inquiry are also introduced (clause 36)
- Gives either the Minister or the Chairman the power to publish the report to the extent practicable (clause 26)
- Gives the devolved administrations power to instigate inquiries into devolved subjects. It also gives the power to establish joint inquiries where this is appropriate (clauses 28-32)
- Establishes

A number of amendments were made during the Bill's passage through the House of Lords. These included amendments ensuring that Parliament is informed when such inquiries are set up or when their procedures are modified. The Government was

defeated twice on amendments in the House of Lords, both on third reading. One gives a Minister the power - but not the requirement - to move a motion before the relevant Parliament or Assembly for a resolution approving an inquiry into ministerial conduct. The other applies where a judge is considered for an inquiry panel and introduces a requirement to obtain the consent of the appropriate senior judicial figure instead of simply a requirement to consult him or her.

This paper also considers the report of the Public Administration Select Committee on *Government by Inquiry*, the Government's response to that report, and the Government's consultation exercise undertaken in advance of the Bill. A list of notable inquiries from 1900 to 2004 is available at Annex A in PASC's report.

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I Introduction

The *Inquiries Bill [HL]* was introduced into the House of Lords on 25 November 2004, had its second reading on 9 December 2004 and completed its passage there on 28 February 2005. Opening the debate on second reading on the 9 December 2004, the Parliamentary Under-Secretary of State, Department of Constitutional Affairs, Baroness Ashton, explained the Bill's intention:

> This is a Bill to reform the arrangements for conducting [independent] inquiries to make them as effective as possible…it is not about inquiries conducted by Parliamentary Select Committees, nor is it about planning and licensing inquiries, or inquiries set up by public bodies, including local authorities. It does not attempt to specify when an inquiry should be set up…In the future, as in the past. Ministers will have to consider the particular circumstances and all the options available. Ministers will not call an inquiry under the Bill when there are other investigatory procedures for dealing with the matter. So the bill will not lead to more or to fewer inquiries being called.[1]

Baroness Ashton accepted that ministers had a number of statutory powers available to call inquiries but "deficiencies in the legislation could prevent us setting up inquiries in the most effective form" and "the statutory powers vary slightly from one piece of legislation to another" which "creates potential risks to the effectiveness of the inquiry." She also commented that a future inquiry might need to cover both devolved and reserved business, and the Bill addresses this issue.[2]

Another driver for the legislation was the cost of inquiries. Baroness Ashton said "the Government are absolutely clear that inquiries must have all the powers and resources necessary to get at the truth, but it is quite proper that the best use is made of public money in doing so."[3]

Commenting that the Government had worked closely with the devolved administrations to produce the Bill, Baroness Ashton continued "we are now in a position to propose legislation that will provide a comprehensive statutory framework for major inquiries across the United Kingdom. The Bill is suitable for the whole range of major inquiries. We want the benefits of this framework to be available as soon as possible for any future inquiries that may be called."[4]

During the passage of the Bill the Government made a number of amendments but also sustained two defeats, one inserting a new clause to give the Minister power to move a

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1 HL Deb 9 December 2004 c984
2 c985
3 c985
4 c986

motion before the relevant Parliament or Assembly approving an inquiry into ministerial misconduct, and one amendment to require the consent of the appropriate judge when choosing a Chair instead of simply a requirement to consult him or her.

The Bill was introduced into the House of Commons on 1 March 2005 and is due to receive its second reading on 15 March 2005. The Bill's main purpose is to modernise the framework for conducting statutory inquiries set up by Ministers into events that have caused public concern or have potential to cause public concern. The *Explanatory Notes* comment that "current legislation does not cover all areas where inquiries might be needed, and can sometimes be too narrow in scope, and the Bill is thus intended to provide a framework under which future inquiries can operate effectively to deliver valuable and practicable recommendations in reasonable time and at a reasonable cost."[5] The Bill deals mainly with what have been termed 'investigatory' or 'public' inquiries, but also consolidates a number of other statutory inquiry provisions.

Reaction to the Bill has generally been favourable - particularly in respect of the Government's decision to rationalise inquiry rules and procedures - but aspects of the Bill have generated concern. The Public Administration Select Committee (PASC) in its report *Government by Inquiry* said "it is because inquiries play an important role in the public life of this country, as part of the armour of accountability, that they deserve to be taken seriously. This means reviewing their operation from time to time to ensure that they are working effectively and efficiently for the purposes for which they are established. That is what we have set out to do in this report. It is also why we welcome the Government's proposal to bring inquiries under a unifying statute".[6] However like a number of commentators the Committee recognised that there are "a number ways in which we believe the *Inquiries Bill* can be improved".[7] The removal of Parliament's role in establishing certain inquiries under the *Tribunals of Inquiry (Evidence) Act 1921* – albeit only used 24 times since the 1921 Act was passed – and the perceived enhancement of Ministerial powers - including the choice of terms of reference, the decision whether the inquiry should sit in public or private, and the decision whether to publish all or parts of the final report - resulted in adverse comments in the House of Lords and in *Government by Inquiry*, as well as in other media. PASC for example said "we also do not want to see Parliament removed from the picture altogether, as a consequence of the repeal of the [1921 Act]."[8]

Because the Bill repeals the 1921 Act, Parliament will no longer have a direct say in the establishment of such inquiries. Neither is it intended to provide a channel for those wanting a public inquiry to bring one about, unless the relevant Minister accepts the

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[5] *Inquiries Bill explanatory notes*, Bill 70-EN, available at http://www.publications.parliament.uk/pa/cm200405/cmbills/070/en/05070x--.htm

[6] Public Administration Select Committee First report of 2004-05, *Government by Inquiry*, HC 51-I, 2004-05, para 229

[7] Ibid

[8] Ibid

arguments for one; this does not represent a change from the current situation. However, amendments passed in the House of Lords ensure that Parliament, or the relevant devolved administration or administrations, will be informed – either in the form of an oral or written statement – if a Minister uses the Bill's powers to set up an inquiry, amend its terms of reference, or make other changes to the nature of the inquiry.

II Reviews of inquiry procedure

The Bill was preceded by a number of reviews of the inquiry process (see the appendix for a list of Lord Justice Salmon's cardinal principles that an inquiry should follows). PASC began their inquiry into *Government by Inquiry* with the publication of an *Issues and Questions* paper on 24 February 2004.[9] The Committee's intention was "to consider whether, nearly forty years after Lord Salmon examined the 1921 Act, experience of the inquiry process suggests that the time is right to revisit the best way of conducting investigations into matters of serious public concern when things go wrong and what the role of Parliament should be in that if any"[10] and "whether there should be a reconsideration of the way inquiries' terms of reference are set and their chairs are appointed."[11] It also sought views on whether "there should be greater Parliamentary involvement in the establishment of inquiries."[12] In the course of the inquiry the Committee took evidence from Lord Hutton, Lord Falconer, Secretary of State for Constitutional Affairs, and the secretaries to the Ashworth Hospital Inquiry and the Foot and Mouth - Lessons Learned Inquiry, amongst others.

The Government were prompted in part by the PASC initiative to undertake a consultation exercise with the aim of updating inquiries legislation. Other events – such as the publicity surrounding the Hutton and Butler Inquiries and the expected cost of the Bloody Sunday Inquiry – and publicity over the Government's decision not to instigate inquiries into, for example, the deaths at Deepcut Army Barracks (although a review, not an inquiry, has been started by the Defence Minister Adam Ingram) also prompted the review of inquiries legislation. A further impetus for change was the government's decision to hold an inquiry into the murder of Patrick Finucane. Paul Murphy, Northern Ireland Secretary, announced the Inquiry on 23 September 2004, stating "In order that the inquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, it will be necessary to hold the inquiry on the basis of new legislation which will be introduced shortly."[13]

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9 PASC *Issues and questions* paper, available at http://www.parliament.uk/documents/upload/Inq%20iandqpaper3.doc
10 Ibid
11 Ibid
12 PASC press notice, "PASC looks at Government by inquiry", 24 February 2004
13 Northern Ireland Office press notice, *Statement by Secretary of State Paul Murphy MP on Finucane Inquiry*, 23 September 2004

The Government are also determined to keep inquiry costs under control as a result of the publicity surrounding the cost of the Saville Inquiry into Bloody Sunday. It is estimated that this will eventually cost in the region of £155m.[14]

a. The Government's proposals

The Department of Constitutional Affairs published a consultation document entitled *Effective inquiries* in May 2004.[15] The review concentrated mainly on the *Tribunals of Inquiry (Evidence) Act 1921* which gives Parliament a statutory involvement in the establishment of inquiries under the Act. However, other statutory provisions allowing inquiries such as s34 of the *Police Act 1985* also came within the remit of the review. The consultation paper considered the use of public inquiries, seeking views on a number of areas, and formed the Government's response to PASC's "*Issues and Questions Paper*". It noted:

> There has been a long standing practice in the UK of setting up formal and open inquiries, where necessary, to look into matters that have caused public concern. Ministers are not under any statutory duty to set up such inquiries, but have found them to be a useful method of dealing with matters that have warranted formal, independent investigation. The types of inquiry discussed here are not conducted by Government or by any permanent organisations, but by independent, temporary bodies set up for the purpose. These bodies may or may not have statutory powers, for example to require the production of evidence or the attendance of witnesses. Inquiries are funded through public money, and are usually asked to report their conclusions to Ministers, but during their lifetimes they are independent from Government and Parliament...
>
> In general, inquiries of this type have helped to restore public confidence through a thorough investigation of the facts and timely and effective recommendations to prevent recurrence of the matters causing concern. Many inquiries have helped to bring about valuable and welcomed improvements in public services. (Examples are discussed in response to question 20 from the Public Administration Select Committee, in the main body of the paper.) However, there have been cases where inquiries have been marred by arguments about procedure, or have taken much longer or cost more than expected. **The Government believes that there is a strong case for considering what steps could be taken to make inquiry procedures faster and more effective, and to contain cost escalation.**
> As part of this work, there is a need to consider whether current legislation provides a suitable basis for appropriate and effective inquiries. **There are three possible routes for the types of inquiry under discussion here:**
>
> ***instigated under Ministerial powers in subject-specific legislation*** - Ministers have statutory powers to set up inquiries in particular areas, such as health or

[14] The Bloody Sunday Inquiry's website is at http://www.bloody-sunday-inquiry.org/

[15] Available at http://www.dca.gov.uk/consult/inquiries/

> policing. The subject-specific legislation generally gives such inquiries formal powers, such as the power to compel witnesses. For example, the Macpherson Inquiry into the death of Stephen Lawrence was done under subject-specific powers in the Police Act.
> ***instigated by Ministers and, following resolutions of Parliament, provided with statutory powers under the Tribunals of Inquiry (Evidence) Act 1921*** - The 1921 Act provides a statutory basis for inquiries into matters of "urgent public importance". The Act briefly covers the taking of evidence before such inquiries, as well as providing them with formal powers, including the power to compel witnesses. The Shipman Inquiry, for example, was set up under the 1921 Act.
> ***instigated by Ministers and conducted on a non-statutory basis*** - Non-statutory inquiries have no formal powers, but instead rely upon the co-operation of all those involved. They can have a greater degree of flexibility of form than some statutory inquiries, but can run into difficulties if witnesses are unwilling to co-operate. The Hutton Inquiry is an example of a recent non-statutory inquiry.
>
> All three routes have been used in recent years, with varying degrees of frequency. The majority of the recent examples … were conducted under route (a) - statutory powers in subject-specific legislation. Just over a third were conducted on a non-statutory basis, and four were conducted under the 1921 Act. Later in this paper, the Government considers the advantages and disadvantages of each of the current statutory and non-statutory routes, explores the options for improvement and sets out the key features which should enable an inquiry to operate effectively. **One option would be to create a new statutory framework for the type of inquiries discussed in this paper - that is, inquiries set up by Ministers to look into matters that have caused or have potential to cause public concern.**

The paper asked for views on a number of areas that might be considered for possible future legislation. Responses were requested by 29 July 2004; an analysis of the consultation responses was then published on 28 September 2004.[16] Fifty-seven responses were received and the Government held three consultation seminars. The majority of responses to the consultation were in favour of the proposals, although there were some areas of dispute, including for example the paper's contention that Ministers alone should have the power to set up and oversee inquiries. Indeed, the consultation paper had been explicit about the Government's view that Parliament should not be involved in setting up inquiries even though the consultation paper quotes Salmon as saying that the great advantage of the resolution procedure was that it "affords some safeguard against this [1921 Act inquiry] procedure being too readily invoked":

> Today, the use of inquiries has evolved beyond the 1921 Act, and inquiries of different forms are used more frequently as a mechanism for dealing with matters of public concern…With the majority of inquiries held under subject-specific legislation (which does not require a resolution of Parliament) or on a non-

[16] See http://www.dca.gov.uk/consult/inquiries/inquiriesCPR-12-04.pdf

> statutory basis, Parliament is not routinely asked to determine the form of inquiries. The Government would have concerns about introducing into any new legislation a requirement for Parliamentary resolutions, akin to that in the 1921 Act, because such legislation would be used for a far greater range of inquiries. Some might be set up into local incidents, under delegated powers with no direct Ministerial involvement. It would be inappropriate, and a waste of valuable Parliamentary time, to require a resolution of both Houses of Parliament to sanction the establishment of a wide range of inquiries. Where a matter does generate substantial and widespread public concern, and Parliament is sitting, it is likely to be raised there, and the decision to hold an inquiry is likely, as now, to be announced in a way which allows Parliamentary discussion.[17]

PASC's report was published on 3 February 2005. It deals comprehensively with the history of public inquiries and makes a number of recommendations for the future of such inquiries, including suggested amendments to the Inquiries Bill [HL].[18] Specific aspects of the Committee's report are discussed below. The Government's response to the Committee's report was published on 10 March 2005.[19]

III The *Inquiries Bill [HL] 2004-05*

A. Key aspects of the Bill

1. Public inquiries and the *Tribunals of Inquiry (Evidence) Act 1921*

The call for an 'independent public inquiry' or 'judicial inquiry' of some form into a particular controversial event or series of events or complex public policy issue is a regular occurrence, whether in the form of a demand in Parliament or the media. The term 'public inquiry', used in this sense, has a very broad meaning, and the history of British government shows that there are in fact a number of forms of 'inquiry' available, designed, in principle, to fulfil specific functions. Sometimes the wish may be simply to establish the relevant facts, leaving their interpretation, the allocation of 'blame' and recommendations for the future to other agencies such as Ministers, Parliament or the courts. In other circumstances it may be thought desirable that the 'inquiry' itself undertake these broader, perhaps more delicate tasks. A prime purpose of some inquiries may also be to allay public (and Parliamentary) disquiet about an issue of public concern. The 1966 Salmon Royal Commission has termed such inquiries 'inquisitorial'; other terms for this type of inquiry might be 'investigatory' or 'public'.[20] The Salmon

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17 See paragraph 17

18 HC 51-1, 2004/05, available at http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpubadm/51/51i.pdf. It also includes a long list of inquiries into matters of public concern from 1900 to 2004 at Annex 1

19 Government response to the Public Administration Select Committee's First Report of the 2004-05 session: "Government by Inquiry", Cm 6481

20 This paper partly updates Library Research Paper 96/22, *Forms of Investigatory Inquiry & the Scott Inquiry*, 9 February 1996

Commission[21] - which was asked to examine the tribunal of inquiry model established under the *Tribunals of Inquiry (Evidence) Act 1921* and whether it should be replaced by other inquiry forms - considered in its 1966 report when the need for an 'inquisitorial inquiry' arose:

> 22. The history of inquiries to which reference has been made shows that from time to time cases arise concerning rumoured instances of lapses in accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety.
> 23. These cases vary in importance, urgency and complexity and may relate to matters of local or national concern. In the past they have been dealt with by a variety of tribunals of inquiry. Our terms of reference require us to consider in particular whether or not there is a need for any permanent machinery of inquisitorial inquiry such as that which is at present provided by the Act of 1921.

The choice of an inquiry format, and its membership, will need to balance the need for the efficient and effective establishment of the facts, and any inferences or recommendations to be drawn from them, with the protection of the rights of participants, including witnesses or those who are, or could be, the subject of comment or criticism by any report of the inquiry. The issue is often therefore one of 'how judicial in form and procedure should a particular inquiry be to achieve its purpose?', and this often determines whether a judge (or senior lawyer) should head it. An inquiry composed of or headed by a legal figure is often called a 'judicial inquiry', although this is simply a descriptive term. The term often also implies that some form of 'judicial' procedure will be adopted, although this need not necessarily imply all or any of the attributes of a 'court-like' adversarial procedure. As noted above, Salmon has called such inquiries 'inquisitorial'.

The power to appoint inquiries generally resides with the responsible Minister as a result of ministerial prerogative. Diana Woodhouse, an expert on this subject and a special adviser to PASC's inquiry on *Government by Inquiry* says:

> Inquiries can be established under certain Acts of Parliament, most notably the Police Act 1964 which was used to set up the inquiries by Lord Scarman into the Red Lion Square Disorders (1974) and the Brixton Disorders (1981). Alternatively, an inquiry may be set up either under the prerogative power, a statement from the relevant secretary of State [or indeed Minister] or the Prime Minister sufficing to give it the appropriate authority, or under the *Tribunals of Inquiry (Evidence) Act 1921*.

She continues:

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[21] Royal Commission on Tribunals of Inquiry, *Report of the Commission under the Chairmanship of the Rt Hon Lord Justice Salmon*, Cmnd 3121, November 1966

> The initiative to set up an inquiry lies with the government, even if, in practice, it has little option, and is an aspect of ministerial responsibility-the minister taking amendatory action as part of his accountability to Parliament. Inquiries therefore serve the cause of public accountability. However, they also serve government interests, providing a number of benefits for ministers under siege. First, the instigation of an inquiry removes the issue from the political arena, thereby depoliticizing it and deflecting controversy. Secondly, it gives the appearance that ministers share public concern over what has happened and are anxious to discover what went wrong (ergo they could not have been personally involved, otherwise they would know). Thirdly, an inquiry buys time, allowing public anger to abate, interest to wane and errant ministers to be reshuffled, promoted to the House of Lords or persuaded of the virtues of a career outside politics. Fourthly, whilst an inquiry is independent from government, in some respects it is under its control. Ministers appoint the chairpersons and determine its terms of reference and the form it will take. Ministers are also responsible for the publication of the report, the impact of which can be minimised by careful timing (wherever possible ensuring publication when Parliament is in recess) and by requiring the omission of certain details in 'the public interest'.

The main statutory provision for a particular form of major 'investigatory' or 'public' inquiry is the *Tribunals of Inquiry (Evidence) Act 1921*. The Act allows both Houses of Parliament to resolve that "it is expedient that a tribunal be appointed to enquire into a matter of urgent public importance." Such tribunals of inquiry are independent of Parliament, although their establishment depends upon parliamentary resolution and upon the government to find the necessary time to debate such a motion. They were designed to replace an earlier system of investigation by parliamentary committee into matters of urgent public concern after that system was discredited by the unsatisfactory outcome of an inquiry by a Commons committee into the Marconi Affair in 1913.

The 1921 Act can be summarised as follows:

- It allows for a tribunal with all the powers of the High Court as regards examination of witnesses and production of documents, for the objective investigation of the facts relating to a matter of urgent public importance.
- It is used rarely (24 times since 1921)
- A resolution of both Houses of Parliament is required to set up such an inquiry
- It allows for the enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise
- It allows for the compelling of the production of documents
- Anyone defaulting in attendance on being summoned, refusing to take an oath or producing a required document or taking any other action which would, in a court of law, be a contempt of court, may be punished as if he had been guilty of contempt of the court. A witness before any such tribunal shall be entitled to the same immunities and privileges as if he were a witness [in civil proceedings] before the High Court or the Court of Session
- Proceedings are normally in public unless in the opinion of the tribunal it is in the public interest expedient for it not to be.

Bradley & Ewing in *Constitutional & Administrative Law* comment:

> The task of a tribunal of inquiry is to investigate certain allegations or events with a view to producing an authoritative account of the facts, attributing responsibility or blame where it is necessary to do so. Tribunals of inquiry do not make decisions as to what action should be taken in the light of their findings of fact but they may make recommendations for each action. The chairman is normally a senior judge, assisted by one or two additional members or expert assessors."[22]

Twenty four tribunals of inquiry have been established under the Act. Between 1982 and 1996 the system virtually fell into abeyance, although it has subsequently been revived with the appointment of four inquiries since 1996:

- Dunblane School Inquiry (set up 21.03.96)
- Child Abuse in North Wales Judicial Inquiry (set up 20.06.96)
- Bloody Sunday Tribunal of Inquiry (set up 19.01.1998)
- Harold Shipman Tribunal of Inquiry (set up 23.01.2001)

Some commentators have noted that one of the main problems with inquiries set up under the Act is the subsequent difficulty of mounting a criminal prosecution. The *Inquiries Bill [HL]* is not intended to address this issue.

2. Repealing the *Tribunals of Inquiry (Evidence) Act 1921* and the role of Parliament

Clause 1 gives any Minister the power to establish an inquiry into particular events which have caused, or are capable of causing, public concern, or there is public concern that particular events may have occurred. "Minister" in the context of the Bill means a UK Minister or a Minister of the devolved administrations. Baroness Ashton commented on second reading in the Lords that this clause "is deliberately drawn to cover a wider range of inquiries than is covered by the 1921 Act but … many smaller or more localised inquiries, and indeed some larger ones, are set up very effectively on a non-statutory basis or under more general powers…it is not our intention to bring all those within the more formal regime of the *Inquiries Bill*."

As noted above, the Bill repeals the 1921 Act. By doing this the Bill removes the statutory role of Parliament in establishing some inquiries and does not include provisions to replace this with similar powers. Although the 1921 Act has been used only 24 times since it was passed, and other statutory and non-statutory inquiry procedures do not give Parliament a role in the establishment of inquiries, the removal of this power has been seen by a number of commentators as an example of the increase of executive power over

[22] Longman, 12th ed., 1997, p754

that of Parliament. Lord Justice Salmon had said in his *Royal Commission on Tribunals of Inquiry*:

> The fact that a resolution of both Houses of Parliament is required before a Tribunal can be set up affords some safeguards against this procedure being too readily invoked …moreover, before the necessary resolution can be passed, questions have to be asked and the matter fully debated…thus the matter is ventilated and the Government has to justify before Parliament its decision to set up a Tribunal under the Act. For these reasons we recommend that the present procedure for setting up Tribunals under the Act be retained.[23]

PASC asked in their *Issues and Questions* paper:

> 14. Should there be greater parliamentary involvement in the setting up of such inquiries? If so what form should this take? For example should it be a 'minimalist' approach involving use of parliamentary resolutions to agree terms of reference, membership and procedures or a more 'maximalist' option which could see parliamentary committees undertaking inquiries of this nature themselves?[24]

and commented further in *Government by Inquiry* that they were:

> …deeply concerned that the Government's Inquiries Bill threatens the last remaining role for Parliament in the inquiry process. Nonetheless it also provides an opportunity to update the current provision contained in the 1921 Act to reflect our recommendations for parliamentary involvement.[25]

However, in the *Effective inquiries consultation paper* the Government said "the Government believes that the legislative basis provided by the [1921] Act is less than ideal to meet the needs of all of today's inquiries. The 1921 Act is only intended for the most substantial inquiries – those into matters of the utmost public importance."[26] The paper quoted Lord Justice Clarke, who chaired the Thames Safety Inquiry. He said:

> The time has come when it would be desirable to set up a statutory framework for inquiries generally. There is at present no generally applicable statute which covers public inquiries. The 1921 Act has been shown over the years to be much too restricted and cumbersome. In my view a statute should be enacted to give power to the appropriate Secretary of State to order a public inquiry.[27]

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[23] Cmnd 3121 para 71
[24] Op cit, p6
[25] para 178
[26] para 61
[27] para 63

The consultation paper then said "with all this in mind, the Government can see arguments for revising the legislative framework for inquiries, possibly through replacing the 1921 Act with legislation that would provide a much wider framework for inquiries."

However, a number of respondents to the consultation exercise asked for more Parliamentary involvement; while acknowledging this the Government made clear in its response that:

> The Government believes that it is right that Ministers should explain publicly any desion to establish, or not to establish, an inquiry. Ministers can be, and often are, called to justify such decisions to Parliament, and this practice will undoubtedly continue. This is Ministers' basic constitutional accountability.[28]

Following the publication of the Bill, the House of Lords Select Committee on the Constitution commented that:

> Before the powers of the 1921 Act can be exercised, a resolution of each House of Parliament is required declaring that it is expedient for a tribunal of inquiry to be appointed to inquire into a matter of urgent public importance. This is very different from the power that the Bill confers on a newly defined, but very wide, group of Ministers—including the devolved authorities—to cause an inquiry to be held when it appears that particular events have caused, or are capable of causing public concern, or that there is a public concern that particular events may have occurred.[29]

Outside bodies also raised the issue in their response to the Bill. British Irish Rights Watch was concerned about the "obliteration" of Parliament's role and suggested a new clause to the Bill stating that any MP or Peer is entitled to put down a resolution before Parliament for the establishment of an inquiry into a matter of great public concern.[30] *The Guardian* welcomed the Bill but said "The bill dilutes the role the Commons currently plays in their appointment, which needs reversing." Amnesty International said that under the Bill "the inquiry and its terms of reference would be decided by the executive and no independent parliamentary scrutiny of these decisions would be allowed".[31]

The matter was raised during the passage of the Bill through the House of Lords. Lord Norton of Louth, a noted constitutional commentator, said:

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[28] *Effective inquiries: response to consultation*, CP (R) 12/04, ODPM, 28 September 2004

[29] Ibid, p7

[30] *The Inquiries Bill: The dead hand of political control, Second briefing to the House of Lords*, BIRW, January 2005, available at http://www.birw.org/2%20Briefing.html

[31] Amnesty International news release, *UK: Finucane anniversary – Government must allow public inquiry*, 11 February 2005, available at http://www.amnestyusa.org/news/document.do?id=80256DD400782B8480256FA5005C3974

> I am concerned that the Bill vests too much power in the hands of a Minister and does so at the expense of Parliament. This is an important constitutional point. As we have already heard, under the provisions of the Bill, the 1921 Act is repealed. Under the 1921 Act, a resolution of both Houses of Parliament declaring that it is expedient that a tribunal of inquiry be appointed to inquire into a matter of "urgent public importance" is necessary before Her Majesty or a Secretary of State can appoint a tribunal of inquiry with the same power to compel witnesses to give evidence as are exercised by the High Court. Under the Bill, Parliament is excluded from the process. Clause 1 vests the power to set up an inquiry solely in the hands of a Minister.
>
> I have seen a copy of the letter from the Minister, the noble Baroness, Lady Ashton, to the British Irish Rights Watch organisation, in which she justifies the exclusion of Parliament on the grounds that inquiries under the 1921 Act are the exception rather than the rule. That point has already been touched upon by noble Lords. However, that is not an argument for excluding Parliament from the provisions of the Bill. The inquiries set up by Ministers without parliamentary sanction do not usually exercise the powers conferred under Clause 19 of the Bill. Given that, the logical read-across from the 1921 Act is to require Parliament's approval before the powers can be exercised. [32]

Following pressure from a number of speakers in the House of Lords, amendments were made to the Bill on report intended to strengthen parliamentary involvement in the process. These amendments however ensure that parliament is informed rather than directly involved in the establishment or continuation of the inquiry, as explained by Baroness Ashton:

> The amendments fall into five categories. The first set of amendments is designed to strengthen Parliamentary involvement in the process. A new clause after clause 5 (amendment number 3 on the list) places a duty on the Minister to make a written or oral statement to parliament (or the Scottish Parliament, the National Assembly for Wales, or the Northern Ireland Assembly as defined in amendment number 39) about the establishment of an inquiry, setting out the proposed terms of reference, the proposed chairman, and how many panel members the Minister proposes to appoint; amendment number 13 (to clause 14) places a similar duty on the Minister in respect of inquiries converted under clause 14; amendments numbered 9 and 10 (to clauses 12 and 13 respectively place a duty on the Minister to make a written or oral statement to parliament (or the relevant devolved parliament or assembly) about any decision to suspend an inquiry or end it early; and new clause after clause 23 (amendment number 24 places a requirement on the Minister to lay inquiry reports before Parliament (or the relevant devolved parliament or assembly).[33]

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[32] Ibid c1000

[33] Letter from Baroness Ashton to Lord Goodhart QC, 3 February 2005, Dep 05/258

Many speakers in the House of Lords expressed concern about the repeal of the 1921 Act. Lord Howe of Aberavon, who had been Chairman of the Ely Hospital Inquiry in 1967 and who has written extensively on inquiry procedures,[34] said on second reading in the House of Lords "I also share the concern expressed by the Commons Public Administration Committee at the disappearance of the 1921 Act. I do not argue at all with the fact that it may need to be brought up to date, but I believe that the existence of a power that can be expressed by Parliament, and only by Parliament, remains useful."[35]

Lord Kingsland, Shadow Lord Chancellor, commented that the Bill "manifests two unacceptable changes in the balance of constitutional power. The first change is a shift of power away from Parliament to the Executive, and the second a shift of power away from chairmen of committees of inquiry to the Minister who sets them up."

Lord Goodhart QC on behalf of the Liberal Democrats also questioned the removal of Parliament's role in the inquiry process:

> We put our names to the amendments because there is a case to be made for keeping the Tribunals of Inquiry (Evidence) Act in existence not as the sole method of instituting an inquiry, but as a reserve for inquiries of particular significance—they need not be confined to allegations of misconduct by a government department or a Minister—where it is thought that it would strengthen the inquiry to have the benefit of parliamentary approval to its establishment. There is no procedure under the Bill for parliamentary approval. We do not think that it ought to be the only method. Apart from anything else, the Bill authorises a large number of inquiries that would until now have been authorised by various individual statutes, none of which apart from the 1921 Act require parliamentary approval.

Lord Borrie however rejected these arguments:

> The idea under this Bill, as with the 1921 Act, is that the inquiry will be conducted by a judge or other appropriate independent person, possibly with other panel members who comprise part of the inquiry team. There will no doubt be, as there has been so frequently with actual tribunals of inquiry under the 1921 Act, a counsel representing the inquiry who will be the main individual asking the questions and probing matters on behalf of the inquiry to get at the truth, which is what the inquiry is all about. Frankly, I do not see any particular advantage, in terms of either constitutional propriety or practicality, whether the inquiry is set up with the approval of both Houses of Parliament or by the Minister, who, because of the normal rules of accountability, is accountable to Parliament anyway for what he does in setting up the inquiry.

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[34] See for example "The management of public inquiries", *Political Quarterly*, 70 (3), July-September 1999 pp294-304 and "Procedure at the Scott Inquiry", *Public Law*, Autumn 1996 pp445-460

[35] HL Deb 9 December 2004 c992

Without wanting to overstretch the point, I am not sure that I have heard as yet any real case for there being a continuation of, or reprieve for, the 1921 Act, instead of letting it go the way of history and replacing it with the processes proposed by this Bill, which we may amend or improve but which in any case will cover independent impartial inquiries when matters of public concern suggest that something should be looked into.

Lord Howe of Aberavon said:

On the more substantial topic of the debate, the noble Lord, Lord Borrie, closed by saying that he could see no justification for a "reprieve" of the 1921 Act. A reprieve is normally something available to a miscreant who has done something wrong and who is going to be allowed, justly, to get away with a suspended sentence. I have heard nothing at all to suggest why the Act should be repealed. That is the first proposition in the Bill, and it is for the Government to justify their conclusion.

I believe that there is still a need for the 1921 Act, for two reasons. This is why the burden of proof is on the Government as to why we should contemplate abolishing it. The first reason is that, as I understand it, the appointment of a 1921 Act tribunal does not require the initiative of a Minister of the Crown, but could be established on the initiative of a Back-Bencher of any party. I may be wrong about that; one may need Crown consent or such form that I have half-forgotten. Certainly, there are circumstances in which Parliament might well wish to establish an inquiry without much enthusiasm on the part of the Government. For this Government now to deprive Parliament of whatever initiative it has under the 1921 Act without good cause seems a gratuitous and unjustifiable step.

The other reason adds to the weight of the first. Let us look at the occasions on which a 1921 Act inquiry has been established. It is not easy to detect a very logical line of distinction between them and the rest in every case, but I can remember two that were clearly established under the 1921 Act. One was the Londonderry Bloody Sunday inquiry. The tragedy happened on 28 January, and Parliament acted on 1 February to establish the commission. It was Parliament acting with a sense of urgency, representing the national shock to that catastrophe at parliamentary level.

The other one that I have in mind is the Aberfan inquiry. The origin was different, of course, but the events were comparably catastrophic and tragic. That too was appointed under the 1921 Act, symbolising the attention that Parliament paid to those two inquiries at times of national mourning, in effect. When everyone was rallying round the local community to try to relieve the suffering following the disaster, the engagement of Parliament was important and showed that it cared about what was going on.

I can see no justification for removing the power whatever. I know that the Minister has a remarkably tidy mind. It ought to stop short of this.

Baroness Ashton responded:

> The powers and privileges given to inquiries under the 1921 Act are all available in some comparable form to inquiries under the Bill. The only notable difference—it deals with the question—is around resolutions in Parliament. I indicated that those resolutions do not do what Members of the Committee thought that they might. I undertook at Second Reading, and shall be interested during Committee, to listen very carefully to noble Lords. I want to consider further ways to strengthen parliamentary involvement in the process, and look forward to debates in Committee on that. I make a commitment to consider that very carefully. I have heard the strength of feeling and recognise what Members of the Committee are saying to me.
>
> As I indicated at Second Reading, a lot of other legislation has grown up over the years that has overtaken the 1921 Act, which is used very rarely. We talked about the 30 inquiries that have taken place over the past 14 or 15 years, of which only four were set up under the 1921 Act. Some inquiries—again, the Climbié inquiry is an example—were set up using more than one Act. The purpose that lies behind the Bill above everything else is to simplify a very complicated existing framework, and to create a single effective framework. What we are setting out to achieve will not only do the job of the 1921 Act, but—in relation to some issues to do with the choosing of a panel or with costs—do so in a more effective way.
>
> My first submission is that the 1921 Act should go because it does not do what the Committee is looking for. I commit to considering that the critical point about the role of Parliament be looked at again, both in Committee and beyond.

a. The role of select committees

The Government commented in its response to the *Effective Inquiries* consultation exercise that "it is for Parliament to consider the question of whether it might establish its own inquiries. Many questions would arise regarding the mechanisms for appointing and funding such inquiries."

PASC also considered whether select committees could undertake such inquiries (as opposed to their normal inquiries) in *Government by inquiry* although evidence taken was generally against using select committees in this way. Lord Howe of Aberavon for example thought select committees "are ill-constructed for truth-seeking inquiries" and Lord Hutton was concerned about practical constraints on members: "[an inquiry] is very time-consuming. I suppose there is a question whether the members of the select committee would have time to do that."[36] However, PASC believed that "Parliament will need to overcome the perceptions about its limitations" - including constraints on Members' time and sufficient resources - but "we believe that history shows it can be done". In order to fulfil this view, the Committee noted that "Parliament has at its disposal huge expertise and a degree of resource to draw on to conduct inquiries should it

[36] Ibid, p73

wish to do so. The select committee system has endowed Members with an inquiry habit…it is entirely possible therefore for Parliament to put together an investigatory mechanism which meets the requirements”.[37]

PASC argued that that giving full responsibility to establish inquiries to Ministers “may result in a failure to set up an inquiry when there is a strong, but perhaps politically inconvenient, case for doing so.” Although “it is right that the Government should not automatically give way to every demand for a public inquiry…giving Parliament a direct role in initiating inquiries should be a practical proposition which reflects the realities of our Parliamentary system”. The Committee considered that the Liaison Committee could provide a suitable forum for arriving at a considered view on the need for an inquiry into matters of public concern in a particular area and recommended “that Standing Order No 145 should be amended to enable to Liaison Committee to consider the value of a proposal that a specific matter of public concern should be the subject of a formal inquiry and, if so, to report a Resolution to the House for its consideration.”[38] The House could then make a final decision.

Lord Howe of Aberavon discussed the role of select committees during Committee stage in the House of Lords:

> I agree with the remarks of my noble and learned friend and my noble friend Lord Kingsland, and the noble Lord, Lord Goodhart, about the inadequacy of House of Commons inquiries of the kind that my noble friend would like to see happening. That inadequacy is through no fault of the Commons; it may not be an incorrigible shortcoming, and it may be possible to work out a way in which to do it. But at the moment the Commons committee that attempts a disciplinary inquiry suffers from the faults that tend to bedevil such inquiries.[39]

3. The use of inquiries to investigate ministerial conduct

Concern has been raised – particularly in the PASC report and the House of Lords – about the potential for inquiries to be used to investigate Ministerial conduct, an area currently the responsibility of the Prime Minister through the exercise of the Ministerial Code. Each devolved administration has a similar code.

The Ministerial Code is enforced by the Prime Minister and is the official internal, non-statutory guide to the correct standards of behaviour by Ministers.[40] The most recent edition, published in 2001, is on the Cabinet Office website.[41] The Committee on

[37] Para 214
[38] para 222
[39] HL Deb 18 January 2005 c GC197
[40] Full background on its origin may be found in Library Research Paper 97/5
[41] http://www.cabinetoffice.gov.uk/propriety_and_ethics/ministers/ministerial_code/

Standards in Public Life (the Wicks Committee) recommended a new investigation mechanism for alleged breaches of the Code in its Ninth Report of 2003.[42]

The Wicks Committee was concerned that the role of a Permanent Secretary as accounting officer had become confused between ensuring propriety of the *department's business* and the propriety of a *Minister's conduct*. It made two recommendations in this area:

> **R2. The Cabinet Secretary and Permanent Secretaries should have no responsibility for giving advice to Ministers on conflicts of interest arising under the Ministerial Code.**
>
> **R3. (a) An independent office-holder, called an Adviser on Ministerial Interests, should be established to provide advice to Ministers on compliance with those sections of the Ministerial Code which cover the avoidance of perceived and actual conflicts between their public duties and private interests, formal or otherwise**.

These recommendations were rejected by the Prime Minister.[43] The Government response was that Permanent Secretaries were best placed to 'advise Ministers on any potential conflicts of interest in relation to financial and other interests.' It proposed instead an independent adviser to provide Permanent Secretaries and Ministers with *additional* professional advice as required. Recommendation Four (below) was also rejected: '…it is for the Prime Minister to decide on the course of action required on a case by case basis.'

> **R4. (a) At the beginning of each Parliament, the Prime Minister should nominate two or three individuals of senior standing after consultation with leaders of the major opposition parties.**
> **(b) The names of these individuals should be made public.**
> **(c) Should the Prime Minister consider an investigation into an allegation of a breach of the Ministerial Code appropriate, the Prime Minister would invite one of these individuals to conduct that investigation.**
> **(d) The individual selected to carry out an investigation should investigate the facts and report his or her findings to the Prime Minister, who would decide on the consequences for a Minister. The report should be published.**

The Committee has recently expressed its concern that no appropriate investigation mechanism exists, following the inquiry chaired by Sir Alan Budd into the behaviour of

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[42] *Defining the Boundaries within the Executive: Ministers, Special Advisers and the permanent Civil Service* Cm 5775, April 2003 Full details are given in Standard Note no 2609 at http://hcl1.hclibrary.parliament.uk/notes/pcc/snpc-02609.pdf

[43] Cm 5964, September 2003

Mr Blunkett, as Home Secretary. It sent out a press notice on 27 January 2005 in which the Committee continued to press for its recommendations to be implemented:[44]

> 5. Key elements of the process that the Committee would like to see in place, to ensure clarity, transparency, accountability and public trust should be:
> (i). A revision of the Ministerial Code setting out with greater clarity and precision the importance of separating out private from public interests of Ministers;
> (ii). The timely establishment of the mechanisms for investigation, so that the general process is clear in advance of particular complaints;
> (iii). Independence of investigation, so that permanent secretaries (including the Cabinet Secretary) are not compromised by their involvement; and
> (iv). Consultation with leaders of the major opposition parties, at the beginning of a Parliament and therefore well in advance of particular cases, about the individuals nominated to lead any investigation.

As part of its report into inquiries, PASC considered the investigation of government conduct in particular areas including that of individual ministers with regard to their obligations under the Ministerial Code. In the light of the Budd Inquiry, which the Committee considered was "clearly about the Ministerial Code but was not formally so. It was also set up by the Department and the Minister whose alleged behaviour was an issue. The arrangements were also hasty and haphazard. None of this is satisfactory." The Committee considered it was "time to consider how the Ministerial Code should be properly policed."[45] The Committee further commented:

> 228. This Committee has recommended before that, on referral from the Prime Minister, or by a resolution of the House the Parliamentary Ombudsman should be empowered to conduct independent investigations on alleged breaches of the Ministerial Code and to report to the Prime Minister and to the House.372 The Committee believed then that it could provide greater transparency and accountability to the process of dealing with complaints against Ministers. An independent parliamentary mechanism for complaints, such as the Ombudsman, was seen to offer substantial benefits. It would carry greater weight than the judgement of the Minister, the Prime Minister or the Cabinet Secretary. That applied both where there is a breach of the Code but it also applies where a Minister has not transgressed and deserves to be cleared in the most transparent and authoritative manner.

and recommended:

> In light of recent events we believe that the time is now right for the Government to reconsider its view that it would be undesirable to fetter the Prime Minister's freedom to decide how individual cases should be handled. Accordingly we

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44 Available at http://www.public-standards.gov.uk/news_releases/2005/PN167allegations.htm
45 Op cit para 225

> recommend that the Parliamentary Ombudsman should be empowered to investigate alleged breaches of the Ministerial Code and other allegations about the conduct of individual Ministers.[46]

In a previous report PASC had also recommended that the parliamentary ombudsman should be given a policing role in relation to the Ministerial Code.[47] In its response to the report, the Government did not agree that it would be practical to accept the recommendation as "the Prime Minister needs to retain the right to decide whether an investigation is needed."[48]

The Committee also recommended the establishment of a Parliamentary Commission – consisting of MPs, Peers and others - to oversee such investigations.[49] This would help address the issue identified by the Committee of parliamentary involvement in certain inquiries and would also establish a framework to ensure that the nature and form of inquiries called under the new clause would be distinct from other types of ministerial inquiry. The Government's response to the PASC report noted that this "is ultimately for the House to decide and to appoint and the government would welcome any progress on this issue".[50]

The Committee also published a draft amendment to Clause 1 of the Bill to establish set procedures for an inquiry into the conduct of a Minister. This would ensure that an inquiry involving the conduct of a Minister would be established by Her Majesty under Order in Council, which would have to be approved in draft by both Houses of Parliament.[51] The Government did not accept this recommendation in their response to PASC's report as "it would prove very difficult to predict whether an inquiry will consider Ministerial conduct" and that, if the amendment were made, "most substantial inquiries would have to be set up under the procedure, just in case, because it would be impossible to say with any certainty at the start that they would not consider the actions of Ministers".[52]

PASC's amendment was introduced on report in the House of Lords but not moved. It was subsequently moved by Lord Kingsland and Lord Goodhart on Third Reading.[53] However, PASC's suggested amendment was itself been amended by this time; it no longer included a requirement for an Order in Council, and instead gives the Minister power - but not the requirement - to move a motion before the relevant Parliament or Assembly for a resolution approving the inquiry.

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46 Op cit para 228
47 Third Report of Session 2000-01, *The Ministerial Code: Improving the Rule Book*, HC 235,
48 Cm 6481 p30
49 HC 51-I First Report of 2004-5, Annex 2
50 Cm 6481, p29
51 Op cit Annex 2
52 Cm 6481, p22
53 HL Deb 28 February 2005 c13

Lord Kingsland had spoken at length on this subject on previous readings of the Bill. During second reading he noted:

> Under this Bill, it is the Minister who decides whether the inquiry will be established or not; it is the Minister who decides who shall sit on that inquiry; and it is the Minister who decides what the terms of reference of that inquiry shall be. How can that conceivably be appropriate where the relevant conduct is that of another Minister or even the department of the Minister in question?
> There is therefore a gaping hole in this Bill because that whole topic—perhaps the most important topic of all when it comes to the establishment of public inquiries—is not addressed. There should have been an entirely separate clause in the Bill where the constitutional mechanism that was established by the 1921 Act should have remained. A resolution of both Houses of Parliament should be required for the establishment of any inquiry into the conduct of a Minister or a ministerial department.[54]

He returned to the subject in Committee:

> …how will we investigate ministerial misconduct? Clearly the procedures in the Bill do not help us, because those are initiated by Ministers. A Minister is highly unlikely to initiate a procedure to investigate himself; and most unlikely to initiate a procedure to investigate his Cabinet colleagues. Where is the procedure in the Bill, in terms of both initiation and substance, that will enable the country to investigate ministerial misdemeanours?[55]

During Committee Lord Kingsland moved an amendment designed to re-insert the substance of the 1921 Act in such cases. He said:

> The 1921 Act could come into effect only as a consequence of a resolution of both Houses of Parliament. Why do we regard this as being a crucial ingredient in the new Bill? The system set up in the new Inquiries Bill may work very well for investigating issues that do not relate to the responsibilities either of Ministers in their personal capacity, or of Ministers as heads of a department and therefore responsible for actions of their civil servants. However, the Bill does not help when it is a Minister himself, or a civil servant in a Minister's department, who is alleged to have committed some form of wrongful act, or to have fallen below the constitutional standards that we expect of Ministers and civil servants. It is plainly ludicrous, if your Lordships reflect on it for no more than a few seconds, that a Minister should investigate his own conduct or that of any other Minister who is in the Government of the day.
>
> Therefore, Parliament is the proper forum to initiate an inquiry into ministerial misdemeanours. There are two ways in which this can be done. One is through

[54] HL Deb 9 December 2004 c1009
[55] HL Deb 18 January 2005 cGC203

> the mechanism of the 1921 Act; and that Act still has relevance to those situations where an inquiry requires a full-scale judicial investigation, with the judge having all the powers that he would have were he sitting in the High Court, both in relation to witnesses and legal representation.

Lord Kingsland was also concerned that "it is to Parliament that Ministers are accountable" and he suggested that "there is no reason why your Lordships could not devise a new scheme of parliamentary investigations in the form either of a reconstituted Select Committee or some other named committee which would put Parliament back in the driving seat without at the same time incurring the disadvantages of party divisions that were so manifest in the committees that met just before the First World War."[56]

Baroness Ashton responded:

> On the issue of ministerial misconduct, the Bill is concerned with events and, in looking at events, one cannot necessarily indicate at the beginning that ministerial or government departmental misconduct is involved, although that might emerge in the course of an inquiry. I am reconciled to considering what the parliamentary issues might be. It is for Parliament to consider whether additional procedures are needed. However, with the greatest respect to the noble Lord, Lord Kingsland, I urge great caution regarding the proposals that have been put forward thus far. I hope that on that basis the noble Lord will feel able to withdraw the amendment.[57]

Lord Kingsland was not convinced:

> It may be that my concerns about this are not widely shared in your Lordships' House. But if they are not, it seems to me that your Lordships would rest content with a situation where inquiries into ministerial demeanours, that go to the heart of government, are subject simply to the prerogative decision of the Prime Minister of the day who sets up an inquiry which seems to him to best suit the political circumstances. These are bespoke inquiries. They do not respect any statutory or parliamentary procedure. The chairman is named, certain powers are created and the chairman gets on with what he has to get on with under those powers. In my submission, to leave the way in which a Minister is made accountable to Parliament solely to the prerogative powers of the Prime Minister of the day is wholly wrong. I am seeking a parliamentary substitute for that procedure.[58]

The amendment was withdrawn but as noted above was re-introduced, with amendments, on third reading. Introducing the amendment, Lord Kingsland said:

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56 HL Deb 18 January 2005 cGC191
57 Ibid cGC205
58 Ibid cGC208

> The Bill is silent on the most constitutionally important form of public inquiry – an inquiry that investigates the misdemeanour of a Minister. I suspect that the reason for that is not difficult to discern. Prime Ministers prefer to set up such inquiries under the Royal prerogative, giving them maximum discretion with respect to the procedures that are used in particular cases.[59]

Lord Goodhart commented that the changes to PASC's amendment had come about so that "a government might well think it appropriate to use the parliamentary procedure in high-profile cases, to meet public concerns about the independence of the inquiry. They would not be tied down by any requirement to use that procedure in any particular case. This seems something that ought to be welcomed by the government, since it would give it a degree of flexibility that it does not have under the present Bill".[60] The Minister, Baroness Ashton, stated that "the Government cannot accept this amendment" for a number of reasons, including because the "Prime Minister is the ultimate judge of the standards of the behaviour expected of a Minister and the consequences of a breach of those standards." She also considered that although the amendment made a resolution of both Houses optional, in practice there would be "political pressure on the Prime Minister to seek such a vote on all occasions of misconduct."[61]

Despite being opposed by the Government, the amendment was agreed by 137 votes to 130 and the new clause forms **clause 7** of the current version of the Bill.

4. The use of judges to chair inquiries

Clause 11 deals with the circumstances in which a Minister proposes to appoint a serving judge as a panel members (including chairman). It lists the people the Minister should consult and from whom consent should be sought before appointing that person.

In the House of Lords on third reading, an amendment by Lord Goodhart to ensure that the consent of the relevant authority should be sought was agreed despite Government opposition. Lord Goodhart stated that the purpose of the amendment was to "require the consent of the appropriate judge instead of simply a requirement to consult him or her"[62] (the previous version of the clause said the judge should be consulted). Baroness Ashton explained the Government opposition: "Ultimately the question is who has to decide that an inquiry is so important that someone of stature and standing is needed. Even though there will be resource issues for that person's profession…I believe I should be able to go and ask them, and they should have the right to say no. It is for that reason that I cannot accept the amendment."[63] The amendment was nonetheless agreed by 149 votes to 131.

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59 HL Deb 28 February 2005 c14
60 Ibid c15
61 Ibid, c18
62 HL Deb 28 February 2005 c22
63 Ibid c26

Human rights and law reform organisation, JUSTICE, argued that "Judicial inquiries require more independence from ministers than is proposed in the Inquiries Bill". JUSTICE considered that "The Bill makes no distinction between inquiries headed by a lay chairman, such as Sir Alan Budd, and those chaired by a senior judge, such as the Scott or Hutton inquiry." JUSTICE argued that the appointment of a judicial figure necessarily involves the prestige and integrity of the judiciary as a whole. As a result, particular care must be taken to preserve both the appearance and the reality of judicial independence. A judicial inquiry must deliver a 'fair and (generally) public hearing within a reasonable time by an independent and impartial tribunal'.[64]

PASC has expressed some concerns over the use of judges to chair inquiries. While recognising the value of using senior judges to chair some inquiries as "Their training and experience give them important transferable skills, and they provide reassurance that an inquiry will be independent and fair" PASC nonetheless noted:

> 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.
> 58. With developments in public law, Human Rights Act considerations about impartiality, and the proposed establishment of a Supreme Court, which involves the institutional separation of the judges from the House of Lords, care needs to be exercised in the future use of judges for such work, particularly those from the highest court, and especially in relation to politically sensitive inquiries.[65]

PASC therefore recommended that "decisions about the appointment of judges to undertake inquiries should be taken co-equally by the Government and the Lord Chief Justice or senior law lord." The Government in its response said they were "unable to accept the Committee's recommendation" as "in order to remain truly independent a judge must be free to decide whether to accept the appointment".[66]

5. Public access and access to documents

Baroness Ashton, in a letter to Lord Goodhart, noted that the Government wanted to make it clear that the starting point for inquiries is full public access.[67] **Clause 20** allows either the minister or the chairman to restrict attendance at an inquiry, or impose restrictions on the disclosure or publication of evidence or documents provided to an inquiry. A notice issued in such a matter by the Minister is to be a 'restriction notice', that by the chairman

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[64] JUSTICE press release, "Inquiries Bill", 8 December 2004, available at http://www.justice.org.uk/inthenews/index.html

[65] *Government by inquiry*, para 57-58

[66] Cm 6481, p9

[67] Letter from Baroness Ashton to Lord Goodhart QC, 3 February 2005, Dep 05/258

a ‘restriction order’. Such a restriction can only be imposed if it is required by law or if the Minister has regard to subsection 4, which includes determining whether any such restriction might inhibit the allaying of public concern, whether the risk of harm or damage can be avoided or reduced by such a restriction, or the extent to which not imposing the restriction would cause delay to the inquiry or result in additional cost.

An amendment inserted in the Lords on report does, however, ensure that in respect of inquiry records, restriction notices and orders last only until the end of the inquiry. Baroness Ashton said that the Government’s aim was “to create a flexible framework and to set out what factors can be taken into account in decisions on this. Whether or not a particular inquiry should be held in public or in private can sometimes be controversial…I remind noble Lords that it is far from unusual for inquiries to be held with some degree of privacy.”[68]

The power for public access to evidence and documents to be restricted has been one of the more controversial aspects of the Bill. The possibility of its use in the forthcoming Finucane Inquiry is discussed below. PASC, while accepting that “circumstances may sometimes require Inquiries to hold all or part of their proceedings in private” were nonetheless “concerned that the…bill creates wide powers for ministers to restrict access to inquiries, making public accessibility subject to restriction orders. This subverts accepted presumptions of openness and we recommend it should be reversed.”[69] PASC’s report quoted Lord Salmon: “Lord Salmon’s observation on public versus private evidence gathering was succinct: “Secrecy increases the quantity of the evidence but debases its quality” and further commented that:

> The Council on Tribunals considered that “In principle, it seems right that an inquiry into a matter of public concern should itself be conducted in public, unless there is a strong public interest in the inquiry, or part of it, being held in private for reasons such as national security. […] Aside from any other consideration, public hearings go a long way towards reassuring the public that the subject matter of the inquiry has been fully investigated and that there has been no ‘cover-up’”. However it went on to suggest that on certain occasions there might be advantages in holding inquiries in private as long as its report was published: “Sometimes it may be easier to elicit the truth when questioning is not conducted in the full glare of publicity”.[70]

The Government, in its response to the Committee’s recommendation, noted it “cannot accept the Committee’s recommendation, because it does not agree with the Committee’s

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68 HL Deb 9 December 2004 c987

69 Public Administration Select Committee, *Government by Inquiry*, First report of 2004-05, HC 51-I, 2004-05, para 99

70 Ibid, para 86

premise in paragraph 88 that in the Bill the obligation of public access is subordinate to the power of restriction. There is a presumption of public access in the Bill."[71]

Lord Saville of Newdigate, Chair of the Bloody Sunday inquiry, writing in the *Times*, said that the inquiry panel should decide what evidence is heard in public and what documents are disclosed. He commented "I would not be prepared to be a member of an inquiry if at my back was a Minister with the power to exclude the public or evidence from the hearings…it is likely to damage public confidence in the inquiry and its findings, especially in the case where the conduct of the authorities may be in question".[72] Also writing in *The Times*, Baroness Ashton noted "The Inquiries Bill does not give ministers any power to decide what evidence an inquiry should hear. On the contrary, it gives inquiries full powers to collect and use all evidence needed to establish the truth. The Bill makes clear that an inquiry should be public unless either the minister who sets it up or the chairman specifies otherwise. The grounds on which they can specify privacy are clearly set out in the Bill."[73]

The *Explanatory Notes* comment:

> In some past inquiries, it has been the Minister who has specified restrictions, whereas in others the chairman has set the restrictions. Clause 20 allows for both. It replaces a range of statutory provisions on public access in the legislation that is repealed by schedule 2 including, for example, s. 81 of the Children Act 1989, which states:
>
> (2) Before an inquiry is begun, the Secretary of State may direct that it shall be held in private.
> (3) When no direction has been given, the person holding the inquiry may if he thinks fit hold it, or any part of it, in private.
>
> 41. Public access to past inquiries has been restricted for a variety of reasons. Clause 20(4) sets out a number of matters that must be taken into account when determining whether it is in the public interest to issue a restriction notice or order.[74]

Clause 21 provides for the content of restriction notices and orders, including the powers of a Minister or chairman to vary or revoke such notices or orders. The chairman is given the power under **clause 22** to issue a notice to require someone to attend the inquiry to give evidence, or to produce documents, or to provide written evidence. Compulsion may be necessary, according to the *Explanatory Notes*, if:

> (i) a person is unwilling to comply with an informal request for information;

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71 Cmnd 6481 p13
72 "Judges oppose secret inquiry plan", The *Times*, 25 February 2005, p34
73 "Inquiries Bill", letter from Baroness Ashton, The *Times*, 7 March 2005, p18
74 *Explanatory Notes* para 40-41

> (ii) a person is willing to comply with an informal request, but is worried about the possible consequences of disclosure (for example, if disclosure were to break confidentiality agreements) and therefore asks the chairman to issue a formal notice; or
> (iii) a person is unable to provide the information without a formal notice because there is a statutory bar on disclosure.

The chairman is also given the power to spell out the consequences involved in not complying with the notice, although the chairman may revoke or vary the notice if someone is unable to comply. This is to be decided by the chairman. According to Lord Fraser of Carmyllie, Chair of the inquiry into the Scottish Parliament building, this power would have allowed him to compel the BBC to produce a video of an interview with Donald Dewar about the Scottish Parliament building which had been denied to the inquiry.[75] An amendment to the *Regulation of Investigatory Powers Act 2000*, contained in Schedule 2 para 21 of the Bill, allows for intercepted communications to be disclosed as evidence to an inquiry.

Clause 23 ensures that no one may be required to give evidence or documents if they would not be required to do so in civil proceedings or if the requirement would be incompatible with a community obligation. A witness will be able to refuse to provide evidence:

> (i) because it is covered by legal professional privilege;
> (ii) because it might incriminate him or his spouse or civil partner (by virtue of section 84 the Civil Partnerships Act 2004); or
> (iii) because it relates to what has taken place in Parliament.[76]

The *Explanatory Notes* comment:

> Clause 23(2) provides expressly that it will be possible to make in an inquiry, as it is in civil proceedings, an assertion that documents or information should be withheld from the inquiry (or from public disclosure) on the grounds that they are immune from disclosure in the public interest ("public interest immunity" or PII). Such applications have been made to inquiries in the past, including the Bloody Sunday Inquiry, for example, on the grounds that disclosure of the information would be prejudicial to national security. The Government's policy on claiming PII is that Ministers will claim PII only when it is believed that disclosure would cause real damage or harm to the public interest and that this outweighs the public interest in open justice. A claim for PII should be made by the person whose duty it is to protect the information (which need not necessarily be the Crown) supported by evidence (usually in the form of a witness statement or

[75] See Lord Fraser of Carmyllie's speech on Second Reading in the House of Lords, 9 December 2004 c995-7. It has been reported on BBC Online that the BBC will hand over the tapes of the programme after they are broadcast. See http://news.bbc.co.uk/1/hi/scotland/4323057.stm

[76] *Explanatory Notes* para 55

> ministerial certificate) that disclosure would cause real damage or harm to the public interest. It is then the responsibility of the inquiry panel, having viewed the documents or information, to balance the public interest in disclosure against the public interest in maintaining confidentiality. Having carried out that "balancing exercise", the inquiry must decide whether to uphold the claim for immunity and, if so, on what terms. The inquiry panel may decide that the information may be withheld, or that it be disclosed in whole or in part (after "redaction").
>
> 59. Clause 36(4) makes clear that a person who does not produce evidence to an inquiry because it is covered by clause 23 is not committing any of the offences created in that clause relating to distortion, suppression or destruction of evidence. In the case of a refusal to comply with an order of the inquiry on the ground that the evidence was covered by clause 23, this could also be relied on as a "reasonable excuse" under clause 36(1) for failure to comply with an order of the inquiry.
>
> 60. The House of Lords has recently made it clear in its decision in *Three Rivers v Bank of England* [2004] UKHL 48 that legal advice privilege applies in relation to advice given to witnesses in the context of an inquiry. Such privilege extends to advice given about the presentation of evidence, since it is given within a relevant legal context. There is therefore no need for an express provision relating to the application of legal professional privilege to inquiries in the legislation.[77]

Clause 24 allows an inquiry panel to consider whether the public interest in avoiding the risk of damage to the economy if certain types of information are disclosed outweighs the public interest in disclosure. If it makes such a decision, the inquiry will be able to take this material into account in its deliberations but will not be able to refer to the material or its existence publicly. The *Explanatory Notes* state that this does not impact upon the general principles of public interest immunity, but exists in addition to them.[78]

6. Human rights implications of the Bill

The Joint Committee on Human Rights published its Fourth Report, which included an assessment of the human rights implications of the Bill, on 12 January 2005. [79] The Committee noted that "the most significant human rights issues raised by the Bill relate to the use of the new statutory framework to inquire into matters which engage the right to life, protected by Article 2 ECHR. Where an inquiry under the Bill is the main forum in which a death in custody or at the hands of agents of the state is investigated, it must comply with criteria of independence, transparency and effectiveness, in order to satisfy Article 2."[80]

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[77] *Explanatory Notes* para 58

[78] *Explanatory Notes* para 61

[79] HC 224 2005/06, available at http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/26/2602.htm

[80] Ibid para 2.6

The Committee also considered that issues of compliance with Article 3 ECHR may arise where the subject matter of the inquiry relates to torture or inhuman or degrading treatment or punishment. Powers of an inquiry to compel the production of evidence and the attendance of witnesses may engage rights under Article 8 ECHR.

The Committee addressed the provisions of the Bill on the basis that it could form the basis for inquiries such as the Finucane inquiry and other deaths which engage Article 2. The Committee considered that "a number of aspects of the Bill appear…to risk compromising the independence of an inquiry."[81] These included the power of a responsible Minister to bring an inquiry to a conclusion before the publication of the report…there is therefore a very wide discretionary power to terminate an inquiry at any stage." The Committee was "concerned that both the exercise of this power of suspension, and the effect which its potential use may have, could compromise the independence of an inquiry from ministerial control."[82]

The Committee was also concerned that the power for Ministers to issue restriction notices might compromise the independence of the inquiry, contrary to Article 2 ECHR, that the degree of ministerial discretion as to publication of the conclusions of an inquiry puts at risk both the independence and the appearance of independence of the inquiry and might therefore fall short of compliance with Article 2 rights; and that the provision allowing Ministers to withdraw funding from an inquiry undermines the role of the Chairman of an inquiry in interpreting and applying his or her terms of reference, and leaves open the possibility of undue ministerial influence on an inquiry.[83]

The issue is discussed in the *Explanatory Notes* to the Bill. These state that Convention issues arise in relation to a number of provisions in the *Inquiries Bill [HL]*.

> 122. Convention issues arise in relation to a number of provisions in the Inquiries Bill.
>
> 123. In terms of Article 6, case law confirms that an inquiry process as a whole does not determine civil rights or obligations, or criminal charges. Article 6 rights are not therefore engaged. An inquiry will not be directly decisive of any dispute and any findings of fact will not have any authoritative status. Clause 2 confirms that an inquiry cannot determine anyone's civil rights or obligations or criminal charge.
>
> 124. Clauses 20 and 21 make provision for restrictions to be placed on public access to an inquiry and the disclosure of information in certain circumstances. Clause 26 allows material to be withheld from publication in the report in certain circumstances. Clause 19(2) governs the circumstances in which inquiries can be

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[81] Ibid para 2.14
[82] Ibid, para 2.15
[83] Ibid, para 2.21

broadcast. Each of these clauses permits certain restrictions on the dissemination of information available to the inquiry to the public. The European Court of Human Rights has accepted that Article 10 includes a right to impart and receive information but no right to gain access to information, so in this respect Article 10 rights are not engaged by clauses 20, 21 and 26. However, Article 10 would be engaged if a person was prevented by the restriction notice from disclosing information which was learnt from the evidence another person gave to the inquiry. In such circumstances, restrictions will only occur where they could be justified under Article 10(2).

125. In relation to broadcasting considerations differ in certain respects. Clause 19(2) does not create any sort of presumption that proceedings will be broadcast. The matter is entirely within the discretion of the chairman. A ruling made in the course of the Shipman inquiry by its chairman supports the position that Article 10 does not create a presumptive right for any person to film the proceedings.

126. Furthermore, the provisions within clauses 20 and 26 are considered to be necessary to ensure that the powers of compulsion within clause 22 can be properly exercised. Clause 22 empowers the chairman to compel people to attend and provide evidence and to produce documents and/or things. Clause 19(1) places certain obligations on the chairman to facilitate public access to the inquiry and evidence, subject to restrictions. If powers of compulsion are exercised, circumstances could arise in which Article 8 rights are engaged, depending on the nature of the evidence which is requested. Where the evidence is given in public, or subsequently published, any such interference will be more acute. The power to restrict access or publication will enable the chairman to exercise powers of compulsion in a way proportionate to the legitimate aims in Article 8(2).

127. Powers of compulsion are given to inquiries in the Tribunals of Inquiry (Evidence) Act 1921 and other subject-specific statutes which will be repealed by the Bill. The powers of compulsion in the Bill are intended to allow an inquiry to fulfil its terms of reference in the public interest. A chairman may only exercise powers of compulsion within the inquiry's terms of reference (clause 5(5)) and in accordance with the provisions of the Bill. Safeguards are provided which ensure that the chairman can only exercise his or her powers of compulsion where necessary in order to fulfil the legitimate aims defined under Article 8(2) and must do so in a proportionate manner. A person may claim that he cannot, or reasonably be expected to, comply with a request and in deciding whether to revoke or vary the request the chairman must take into account the public interest. Any interference with Article 8 rights will be justifiable if it is a proportionate means of pursuing the legitimate aims within Article 8(2).

128. The state's positive obligation to ensure protection for Article 2 rights includes an obligation to hold an effective, official investigation into a death where state involvement in that death is suggested. It may be that an inquiry under this Bill will be held in order to contribute to the fulfilling of this obligation. If so, the provisions of clause 22 will be a necessary tool.

129. Rights under Article 1 of the First Protocol may be engaged in connection with clauses 13 and 22. Clause 13 allows the Minister to terminate the

> appointment of a panel member, thereby depriving him or her of remuneration. Any interference with Convention rights will be justifiable if it is in the public interest and proportionate to the legitimate aim of ensuring that those serving on any panel are capable of doing so and do not have interests which conflict with their duties as a panel member. It is considered that the restrictions on removal within clause 13 provide sufficient safeguards against an unjustifiable interference. The safeguards within clause 22 ensure that the chairman will be able to exercise his or her powers of compulsion in a way which is proportionate to the legitimate aim of clause 22, which is to enable an inquiry to carry out its terms of reference in the public interest. The powers must only be exercised in accordance with the provisions in the Bill and to the extent necessary to carry out its terms. A person can apply for a request to be varied or revoked and the chairman must take into account the public interest in considering this request.
>
> 130. Clause 38 provides immunity from suit for panel members, lawyers, assessors and assistants to the inquiry. This provision does not engage any Article 6 rights as it amounts to a substantive limitation on a cause of action, rather than a procedural bar.
>
> 131. Rights under Article 6 may be engaged in relation to clause 39, which imposes a 14 day time limit in respect of an application for judicial review of a decision made in the course of an inquiry (except in Scotland). The court is given a discretion to extend the time limit. Case law establishes that time limits can be justified and do not necessarily breach Article 6 rights. There is a public interest in an inquiry coming to its conclusions, so as to address the matter of public concern which has been referred to it, within a reasonable time. It is considered that the reduction of the usual 3 month time limit for judicial review applications strikes a fair balance between the interests of potential applicants for judicial review and the wider public interest.[84]

Christopher Leslie, Minister responsible for the Bill, has stated that the Bill is compatible with Convention rights.[85]

7. The Bloody Sunday Inquiry and the cost of inquiries

The *Regulatory Impact Assessment* issued with the Bill indicates that Ministers are particularly concerned about the cost of inquiries.[86] It says "Inquiries are funded by the taxpayer, through the sponsoring Government Department, and can result in substantial costs to others involved, within both the public and the private sector. The costs of inquiries should be proportionate to the problems that are being addressed."[87] The RIA further notes "The *Inquiries Bill* will include provisions designed to reduce the potential

[84] *Explanatory Notes* paras 122-131
[85] House of Commons Bill 70 2004-05, 1 March 2005
[86] *Inquiries Bill Regulatory Impact Assessment*, DCAF, 2005, available at http://www.dca.gov.uk/risk/ibria.pdf
[87] Ibid

for excessive cost and delay. In particular, the *Inquiries Bill* will contain measures to control costs including a statutory obligation on the chairman to have regard to costs in his planning and an obligation to publish the final costs of an inquiry." The RIA estimates that since 1990 there have been 30 substantial inquiries costing in total an estimated £300m. PASC recommended that Ministers should announce a broad budget figure early in the inquiry and then publicly justify any increases over the announced limit once the final inquiry costs are published.[88]

The Bloody Sunday Inquiry was set up in 1998 following pressure from families involved in the events who believed that the original inquiry into the events of Bloody Sunday – the Widgery Inquiry – had not uncovered the truth about the events. The Inquiry was set up under the 1921 Act.

The Inquiry is chaired by Lord Saville with two other judges - the Hon Mr William L. Hoyt and the Hon Mr John L. Toohey – accompanying him. The Inquiry began taking evidence in March 2000 and concluded with a summary of the evidence by the Inquiry's counsel, Christopher Clarke QC, in November 2004. However, the final report is not expected to be made public until the summer of 2005.

In terms of precedent, the inquiry is notable for two things – its length and cost. The Inquiry sat for oral evidence – which was completed on 13 February 2004 - on 427 days and heard 919 witnesses, and this stage has been followed by further sessions until the summing-up on 22 November 2004. The Inquiry has also been the most costly Inquiry ever; it is estimated that the Inquiry will have cost in the region of £155m by the time it is finished. The 42 day opening speech by counsel to the inquiry is the longest on record.

The *Inquiries Bill* makes provision for the oversight and payment of costs under **Clause 40**, which allows the Minister to pay remuneration and expenses to those working as inquiry panel members or for the inquiry panel. The Minister must also meet any costs incurred in holding the inquiry unless he certifies otherwise (under subsection 5). The Minister must publish the final costs of the inquiry. **Clause 41** allows reasonable expenses to be paid to witnesses to the inquiry. As the *Explanatory notes* comment:

> Legal costs of participants often constitute the most significant part of the total cost of an inquiry. The non-statutory position adopted in recent inquiries has been for the Minister to decide, in consultation with the chairman, to fund those participating in the inquiry who are considered to have such a direct interest in the inquiry that they require representation but who may be unable to pay for representation themselves. The Government would not normally meet the costs of large organisations. This clause enables this practice to continue. The chairman automatically has the power to pay costs, but the Minister can place qualifications on that power. The Minister will generally set out any broad conditions under

[88] PASC, *Government by inquiry*, para 127

which payment may be granted, and the chairman will then take the individual decisions. [89]

8. Devolution aspects of the *Inquiries Bill*

The Bill gives each devolved parliament or assembly the power to establish inquiries into areas devolved to the particular administration and makes provision for inquiries which might cover devolved subjects. **Clause 28** provides that a UK Minister may not set up an inquiry into a "devolved issue" without consulting the relevant administration. The *Explanatory Notes* state "it is envisaged that UK Ministers will not usually set up inquiries into devolved matters without the agreement of the relevant devolved administration".[90] Under **clause 28** the terms of reference of any UK-wide inquiry established under the Bill must ensure that the Inquiry cannot receive any evidence or make any recommendations that are wholly or primarily concerned with a Scottish, Welsh or Northern Ireland matter without consulting the devolved administration first. **Clause 29** gives Scottish Ministers the power to set up inquiries into matters that wholly or primarily relate to a Scottish matter; such an inquiry may take evidence on "reserved matters" although may generally not compel it. Subsection 3 does though gives the inquiry the power to compel evidence on reserved matters if this is for the purpose of inquiring into something that is wholly or primarily a Scottish matter. It will not be possible for a Scottish inquiry to compel evidence from any member of the UK Government (including Ministers and the Departments acting on their behalf) or of other administrations. **Clause 30** gives a similar power to the National Assembly for Wales.

Clause 31 givers this power to a Northern Ireland Minister, although clause 31(6) creates exceptions to the powers of Northern Ireland inquiries to exercise compulsion. This is order to give inquiries the same powers as the Northern Ireland Assembly to summon witnesses and compel evidence. A Northern Ireland Minister may not receive evidence or make recommendations on matters falling within paragraph 17 off Schedule 2 to the *Northern Ireland Act 1998*; ie on national security matters. Such matters are not excluded from the scope of inquiries established by UK Ministers, however. Northern Ireland inquiry powers may be discharged by the Secretary of State while devolution is suspended.

Clause 32 ensures that the Minister responsible must specify the part of the UK to which the inquiry relates, and the relevant rules which will apply to that inquiry. **Clause 33** allows the powers under clause 1 to be exercisable by two or more Ministers acting jointly. According to the *Explanatory Notes*, in practice this will probably be used in situations where the subject matter falls within the responsibilities of more than one Minister. **Clause 34** allows joint inquiries to be held between UK Ministers and devolved administration Ministers, or between Ministers from different devolved administrations.

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[89] *Explanatory Notes*, para 98

[90] Ibid para 68

Clause 35 allows Ministers involved in joint inquiries to determine that one or more of them should become or cease to be responsible for an inquiry.

The Scottish Committee of the Council on Tribunals in evidence to the Scottish Parliament Justice 2 Committee noted the following which could make the Bill difficult to administer:

> a) [the Bill provides for]The operation of joint inquiries.
> b) The inability in Scotland for the inquiry chairman to institute a prosecution for noncompliance with a notice.
> c) Funding of joint inquiries.
>
> …
>
> d) The possible complexity, in a Scottish inquiry, where it is required to take evidence in England or Wales and/or relating to reserved matters… – and, of course, vice versa.
> e) The appointment of members of an inquiry is important in any type of structure but particularly so where it is to be a joint inquiry involving more than one jurisdiction.
> f) The requirement to agree the terms of reference for such a joint inquiry.
> g) In any joint inquiry, there is likely to be a "lead" administration/Minister. On the one hand, that Minister may therefore assume greater responsibility; on the other, the Minister may exercise more control.[91]

The Scottish Parliament debated a Sewel motion (allowing the Westminster Parliament to legislate on this matter) on 3 February 2005.[92] The form and powers of statutory inquiries are not reserved to the UK Parliament under Schedule 5 of the Scotland Act 1998. Therefore it would be within the competence of the Scottish Parliament to legislate with regard to an inquiries regime into matters within the competence of the Parliament. However, the Scottish Executive recommended to the Parliament that the Sewel motion approach should be used for reasons explained to the Justice 2 Committee by Hugh Henry, Deputy Minister for Justice:

> A variety of events that cannot easily be categorised as reserved or devolved matters may cause public concern and result in calls for an inquiry. We and the United Kingdom Government have a shared interest in creating a modern statutory framework that recognises that reality and provides for inquiries to be set up jointly by ministers in the Scottish and UK Administrations. The Sewel process will allow the bill to make provision for joint inquiries, which I believe would benefit Scotland and which we could not obtain by way of a Scottish bill alone. Of course, we could create a new framework for inquiries into wholly devolved matters in Scotland by means of a Scottish Parliament bill but,

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[91] J2/S2/05/2/2, Notes for Justice 2 Committee Meeting 18 January 2005, Prepared by John Elliot, Chairman of the Scottish Committee of the Council of Tribunals, available at http://www.scottish.parliament.uk/business/committees/justice2/papers-05/j2p05-02.pdf

[92] SPOR 3 February 2005 col 14324 A list of Sewel Motions is available at http://www.scottish.parliament.uk/business/research/briefings-05/FS3-01.pdf

> unfortunately, there is currently no space for such a bill in our legislative programme.[93]

A memorandum by the Scottish Executive gave more details:

> It would be competent for the Scottish Parliament to legislate to create new powers and procedures in respect of inquiries in relation to any devolved subject matter (and, of course, will remain so). The *Tribunals of Inquiry (Evidence) Act 1921* is not reserved in terms of the Scotland Act, and could be repealed or amended as regards devolved matters by the Scottish Parliament. As already mentioned, there are a number of specific provisions in other legislation conferring on Scottish Ministers the power to set up inquiries into particular matters. Scottish Ministers might also wish to set up an inquiry on a non-statutory basis, and the extent of their power to set the remit of such an inquiry would be determined by an application of the purpose test in section 29(3) of the Scotland Act.
> 9. In many instances however, where events occur of sufficient seriousness to merit a formal inquiry being held, it is likely that the issues raised will involve a mixture of devolved and reserved matters. The Dunblane inquiry is a good example of this. It examined security in schools, which would now be a devolved matter, but it also made recommendations regarding firearms legislation, a reserved matter. Should a similar situation arise, there is a question as to whether it would be within the power of Scottish Ministers to set up an inquiry with a sufficiently broad remit as to enable it to examine all the relevant issues. However, it would seem unsatisfactory for Scottish Ministers to have to leave the responsibility for such an inquiry to UK Ministers. Nor would it make sense for each administration to set up its own inquiry for their respective interests, in relation to basically the same facts, resulting in the duplication of work and a waste of public money. What would be needed in that kind of situation is agreement between the administrations as to the need for an inquiry, and consultation and co-operation as to its remit and organisation. In short, a partnership approach.
> 10. Both the Scottish Ministers and the UK Government – and indeed the devolved administrations of Wales and Northern Ireland – have recognised the need for a new framework for inquiries to provide for such a partnership approach. Legislation in the Scottish Parliament could not directly create a structure which facilitates that, since it could not make any provision for inquiries into reserved matters. It can be achieved only through legislation at Westminster.[94]

The Sewel motion was agreed, although it was opposed by the Scottish National Party.

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[93] Justice 2 Committee Official Report 25 January 2005, available at http://www.scottish.parliament.uk/business/committees/justice2/or-05/j205-0302.htm

[94] Available at http://www.scottish.parliament.uk/business/committees/justice2/papers-05/j2p05-01.pdf

9. The *Inquiries Bill* and freedom of information

Inquiries Bill inquiries will not be public authorities and will not therefore be subject to the *Freedom of Information Act 2000*, although inquiry records will come within the scope of the FOI Act once the inquiry is completed (see discussion of clause 19 on page 44 below). A government amendment inserted into the Bill on report in the House of Lords allows the Rules to be produced under clause 41 to make provision for the transfer of inquiry records to a public authority.

10. Other statutory inquiries

There are currently various statutory methods by which inquiries can be instigated other than those under the *Tribunals of Inquiry (Evidence) Act 1921*. For example, the Stephen Lawrence inquiry was announced by the Home Secretary on 31 July 1997 and was held under s49 of the *Police Act 1996*; the Victoria Climbié Inquiry was held under s81 of the *Children Act 1989* and s84 of the *NHS Act 1977*. The Kennedy Inquiry into Bristol Royal Infirmary was set up under s84 of the *NHS Act 1977*. As well as repealing the 1921 Act, the Bill repeals these provisions and a number of other provisions as listed in Schedule 3. These are, as noted in the *Explanatory Notes*, "mainly ministerial powers to hold inquiries that could, in future, be established under the *Inquiries Bill*."

B. Other provisions of the *Inquiries Bill*

Clause 2 specifies that an inquiry panel cannot rule on or determine any person's civil or criminal liability (although it should not be inhibited in its work by any likelihood of liability being inferred from its determinations). The *Explanatory Notes* comment that "there is often a strong feeling, particularly following high profile, controversial events, that an inquiry should determine who is to blame for what has occurred. However, inquiries are not courts and their findings cannot and do not have legal effect. The aim of inquiries is to help restore public confidence…".[95] **Clause 3** ensures that an inquiry is to be taken either by a chairman alone or by a chairman acting with one or more members. **Clause 4** gives the power to appoint an inquiry panel to the Minister; appointment is to be by instrument in writing. The instrument must also state that the inquiry is to be held under the Act. The Minister must also consult the chairman before appointing a member to the inquiry panel.

Clause 5 deals with the setting-up and terms of reference of the inquiry. This specifies that the Minister must indicate in the instrument mentioned in clause 4 the date of the setting-up of the inquiry and before that date set out the terms of reference of the inquiry and whether or not the Minister intends to appoint other members to the inquiry panel. A Government amendment inserted in the Bill during the report stage in the House of Lords allows the Minister to amend the terms of reference if he considers it is in the public

[95] *Explanatory Notes* para 8

interest to do so. The Minister must also consult the chairman before setting out or amending the terms of reference, as PASC had recommended: "Our evidence emphasised the value of the chair of an inquiry being involved in agreeing the terms of reference."[96] PASC also recommended that the Bill should provide specifically for a short period after any announcement to ensure that the final terms of reference meet the expectations of a particular inquiry.[97] The Government in its response to PASC said "such consultation could be valuable but cannot be a universal requirement", but noted that the Bill had been drafted to allow for appropriate consultation.[98]

Clause 6 was also inserted in the House of Lords. It was introduced to allay some of the fears expressed in the House about the removal of Parliament's role in approving inquiries under the 1921 Act. The clause gives the Minister a duty to inform Parliament (or the relevant devolved legislature) as soon as is reasonably practicable in the form of a statement, either oral or written. The statement must set out the chairman, members and terms of reference of the inquiry. A further statement must be made if the Minister amends the terms of reference. A statement must be made to all the legislatures involved if an inquiry is a joint inquiry.

Clause 8 gives the Minister power to make further appointments to the inquiry panel. **Clause 9** ensures that the Minister must consider whether someone being considered for appointment to the inquiry panel has the necessary expertise to undertake the inquiry, and if there is more than one member to ensure there is balance in the composition of the panel. The *Explanatory Notes* explain that this will not usually mean that the Minister would consider the sex of the panel members unless it is particularly relevant to the subject matter of the inquiry, but that he should consider balance in terms of the relevant experience that the panel members bring.[99] **Clause 10** ensures that the Minister must not appoint someone to the inquiry panel if his impartiality cannot be guaranteed, but does not prevent the appointment of individuals with expertise in a particular subject.

Clause 12 allows the Minister – before an inquiry is set up – or the chairman once the inquiry has been set up – to appoint assessors to assist the inquiry. An assessor can only be appointed if the chairman or Minister considers them to have the expertise needed to provide assistance to an inquiry panel. The chairman may terminate the appointment of the assessor (but only with the Minister's consent if the assessor was appointed by the Minister). **Clause 13** allows inquiry panel members to resign or have the appointment terminated by the Minister on a number of grounds, including illness, failure to comply with any duty imposed on the panel member by the Act, having direct interests in the matters being investigated, or has been guilty of misconduct. The *Explanatory Notes*

[96] Op cit para 31
[97] Op cit para 85
[98] Cm 6481, p12
[99] *Explanatory Notes* para 18

state that the circumstances in which a Minister might terminate an appointment are expected to arise very rarely.[100]

Clause 14 allows the Minister to suspend an inquiry (following consultation with the chairman) to allow for the completion of relevant investigations or for civil or criminal proceedings arising out of the matters being investigated to be determined. **Clause 15** specifies that the inquiry comes to an end when the chairman notifies the Minister that the inquiry has fulfilled its terms of reference, or, more controversially, on any earlier date specified in a notice given by the Minister to the chairman. This effectively gives the Minister power to end an inquiry early, although if a Minister follows this route he must consult the chairman, set out his reasons for taking such action and lay a copy of the notice doing this before the relevant Parliament or Assembly. This latter provision was added by a government amendment on report in the House of Lords to strengthen parliamentary involvement in the process.

Clauses 16 and 17 allow inquiries begun other than under the Bill - whether statutory or non-statutory - to be converted into inquiries under the bill by the Minister. This is provided the original inquiry relates to a case where it appears to the Minister that particular events have caused or are capable of causing public concern or that there is public concern that particular events may have occurred. The Minister may also change the terms of reference of the original inquiry when it is converted but must consult the Chairman before exercising this power. The original inquiry becomes an inquiry under the Bill as from the date of the notice given by the Minister or from a later date as may be specified in the notice. Commenting on the provisions in the House of Lords, Baroness Ashton said "There is no present intention to use this power for any statutory inquiry already running... [but] an inquiry set-up on a non-statutory basis could be converted to provide it with statutory powers to compel witnesses, if it became necessary." The provisions relating to clause 6 – added on report stage in the House of Lords – also apply to clause 15, ensuring that a written or oral statement is made to parliament if inquiries are converted under clause 15 or if an inquiry's terms of reference are amended.

Clause 18 gives the chairman of the inquiry the power to decide on the procedure and conduct of an inquiry, provided it falls within the rules to be determined under clause 41. It also allows for the chairman to take evidence on oath, and gives the chairman the duty to consider the cost of the inquiry when deciding on the procedure the inquiry will follow. A Government amendment added on Third Reading in the House of Lords ensures that the inquiry chairman will have regard to the existing duty in common law to act with fairness. Baroness Ashton said "Although safeguarding costs is an important element in conducting inquiries it must not compromise fairness…one of the duties placed on the chairman to ensure that he is acting fairly will be to assess whether certain participants should be granted some form of legal representation or advice".[101]

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[100] *Explanatory Notes* para 25
[101] Ibid c33

Clause 19 gives the chairman the duty to take reasonable steps to allow the public to attend hearings. The clause states that no recording or broadcast of proceedings at an inquiry may be made unless the chairman requests or gives permission, and finally ensures that the 'court records etc' exemption in s32 of the *Freedom of Information Act 2000*, and similar provisions in the *Freedom of Information (Scotland) Act 2002*, will not apply to inquiry records transferred to public authorities after the inquiry is over (although other exemptions may still apply).

Clause 25 states that the chairman must deliver a report to the Minister setting out the facts of the inquiry and the inquiry panel's recommendations; interim reports will also be allowed. Responsibility for publishing the report will either rest with the Minister under **clause 26** or with the chairman if the Minister allows the chairman to do so. The clause has been controversial as it allows the person whose duty it is to publish the report to withhold material either as is required by statute or obligation or as that person considers to be necessary in the public interest, taking into account the extent to which withholding material might inhibit allaying of public concern, any risk of harm or damage that could be avoided or reduced by withholding any material and conditions of confidentiality. An amendment inserted on report in the Lords ensures that the power to withhold information from an inquiry report cannot override individuals' right of access to it under the FOI Act. The report must be laid before Parliament under **clause 27**. This latter provision was added by a government amendment on report in the House of Lords.

The Bill also provides for sanctions for non-compliance with an inquiry, or for actions likely to hinder the inquiry.[102] **Clause 36** specifies that a person is guilty of an offence if they do not give evidence or documents under clause 21 without reasonable excuse. An offence is also committed if someone distorts or alters evidence, prevents evidence from being given, produced or provided to the inquiry panel, or suppresses or conceals a relevant document. The offence carries the possibility of a fine not exceeding level 3 on the standard scale or to imprisonment for a term not exceeding 51 weeks in England and Wales (provided the *Management of Offenders and Sentencing Bill* currently before Parliament is passed – under current provisions the limit would be six months) and six months in Scotland and Northern Ireland. In England, Wales and Northern Ireland the chairman will be able to institute a prosecution for non-compliance with a notice issued under powers of compulsion. The chairman will have two options – a prosecution under clause 36 or enforcement of the notice at the appropriate court under **clause 37**, which gives the power of enforcement to the High Court or the Court of Session. In Scotland prosecution for any offence is the responsibility of the Crown Office and Procurator Fiscal Service.

Clause 38 gives immunity from prosecution to a member of the inquiry panel, an assessor, counsel or solicitor to the inquiry or a person engaged to assist the inquiry in

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[102] *Explanatory Notes* para 83

undertaking his duty to the inquiry during the course of the inquiry. The same privilege is attached to statements before an inquiry and in reports of proceedings before an inquiry. **Clause 39** ensures that an application for judicial review in respect of a decision made by a Minister in relation to the inquiry or by a member of the inquiry panel must be brought within 14 days of the applicant being aware of the decision.

Clause 42 allows the appropriate authority - the Lord Chancellor for inquiries for which a UK Minister is responsible, Scottish Ministers, the National Assembly for Wales and the First and Deputy Minister in Northern Ireland - to make rules on inquiry procedure which will be subject to affirmative resolution. These rules may deal with matters of evidence and procedure, awards of expenses under clause 40, and, in an amendment inserted on report stage in the House of Lords, making provision for the transfer of inquiry records to a public authority (as defined in the FOI Act) such as the inquiry's sponsoring department or the National Archives. There will be public consultation on draft rules with the intention of publishing a draft SI in summer 2005.

Clauses 43 to 54 are general clauses. **Clause 45** ensures that when devolution in Northern Ireland is suspended functions under the Bill will be discharged by the Secretary of State. **Clause 47** amends provisions in section 14 of the *Financial Services and Markets Act 2000* which is intended to extend the scope of inquiries under this Act to cover failings in the previous regulatory regime (provided they occurred after December 2001). **Clause 52** provides that the Bill will come into force by order to be made by the Lord Chancellor.

C. Reaction to the Bill

PASC welcomed the Bill "in so far as the intention of the *Inquiries Bill* is to provide a more cost-efficient and effective way of conducting inquiries through a comprehensive statutory power."[103] Tony Wright, Chair of the Committee, said "We welcome the fact that the Government is legislating to codify the inquiry process, which plays an important role in our public life, but we do not want to see Parliament removed from the picture. This is why we are proposing that there should be a Parliamentary Commission established in those politically contentious cases where the conduct of government is an issue. There is a real challenge for Parliament here, if it wants to reclaim territory that it has lost to the executive, and I hope our proposals will enable it to rise to this challenge".[104]

PASC had a number of specific concerns about the Bill:

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[103] Ibid, para 175

[104] PASC press notice 7, 2004-05, "PASC urges parliamentary commissions for major inquiries", 3 February 2005

> a) By abolishing the 1921 Act it finally removes the opportunity for formal parliamentary involvement in inquiries.
> b) It strengthens the Executive's position by enabling ministers not just to decide on the form and personnel of an inquiry before it has begun but also influence its operation. For example in creating powers to end or suspend inquiries (clauses 12 & 13), as well as to withdraw funding in cases where ministers believe an inquiry is going beyond its terms of reference, it calls into question the independence of inquiries and means that ministers rather than chairs, as now, are the interpreters of the terms of reference. In so doing the new legislation subverts the safeguards which were introduced when the original 1921 Act was debated.
> c) The legislation does not address the wider questions we posed at the beginning of this report about the purpose and nature of inquiries.
> d) As a result it does nothing to address the broader, more constitutional, issues about the circumstances in which Ministers should call an inquiry and determine its terms of reference and form. There is an assumption that one size fits all despite the acknowledgment of the wide variety of circumstances which apply.[105]

The Bill was generally welcomed on second reading in the House of Lords although again a number of specific concerns were raised. Lord Goodhart for the Liberal Democrats 'broadly welcomed' the Bill as "it is right that the ultimate responsibility should rest with the Minister, who is accountable for his or her actions in office to parliament and the electors"; Lord Goodhart was concerned that the Bill provided no role for Parliament although he believed that informing Parliament was important, rather than expecting the executive to get parliamentary endorsement for specific inquiries.[106] Lord Fraser of Carmyllie welcomed the Bill while sharing some of the general reservations about it. Lord Norton of Louth accepted the need to amend the 1921 Act and welcomed particular provisions of the Bill, although he had a number of concerns about it. Lord Kingsland, Conservative Shadow Lord Chancellor, however, was less welcoming. He said " The Bill is only a partial response to the problem that the 1921 Act was intended to confront…the core of the Bill is to shift the responsibility for establishing a public inquiry from Parliament to the Executive" and further commented:

> I turn briefly to the Bill itself. Just as, constitutionally, the Bill reflects a shift from Parliament to the Executive, so within the framework of the Bill we see a massive shift of power away from the person who chairs the inquiry towards the Minister. The Bill, as so many of your Lordships have said, is riddled with new discretionary powers for Ministers to override or overreach the decisions that traditionally are—or ought to be—made by the chairman of the inquiry…In principle, we want to see a much better inquiry procedure; but in our submission the Bill does not cover the most important aspects of inquiries and, in the Bill itself, the balance between the chairman and the Minister is entirely wrong.[107]

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[105] Ibid
[106] HL Deb 9 December 2004 c988-9
[107] Ibid c1010

ePolitix reported that Professor Brice Dickson, chief commissioner of the Northern Ireland Human Rights Commission, had said that "the Government seems to be doing all that it can to obstruct inquiries into collusions". He highlighted the *Inquiries Bill*…as a sign that the government "is not too keen to let the real truth be known in these situations. They appear to be allowing government ministers to prevent any tribunal of inquiry that is set up from hearing important information relevant to the handling of informers."[108]

Legal Week reported that proposals to streamline the inquiry process "have been welcomed by lawyers at a time when public inquiries have come under mounting criticism after the controversial Hutton Inquiry…and the long-running Bloody Sunday Inquiry…Neil Gerrard, head of DLA's regulatory practice, welcomed the bill but said that more inquiries should be set up on a statutory footing, rather than the current trend to set up the majority on an informal ad hoc basis, which have no legal powers. The Government is creating the opportunity to taker a step forward by providing a unified structure under which the rules could become clearer and more consistent".[109]

The Guardian commented:

> It is not just ministers who want reform but parliamentarians too. Here is a real test of parliamentary power. The Lords, where the inquiries bill begins its passage, is stuffed with people who have either run, advised or appeared before public inquiries and who will have firm ideas on how they should be reformed. In the Commons, the excellent select committee on public administration has been conducting a review of inquiries and is due to report in the new year. Sparks should fly in both houses, but particularly the Commons, which wants its committees to enjoy the access to government information that public inquiries are given. The bill dilutes the role the Commons currently plays in their appointment, which needs reversing. But above everything else, cut the time and cost of inquiries by curbing the lawyers.[110]

The *Guardian* was also concerned that "the *Inquiries Bill* will impose a duty on inquiry chairmen to "have a regard to the need to avoid any unnecessary cost" when making any decision as to the procedure or conduct of an inquiry. The result could be less legal representation, fewer witnesses and more inquiries held without oral hearings."[111]

The *Times* asked "The Bill, when implemented, is expected to reduce the time and cost of public inquiries – but will it?" and commented:

> The new Act will provide increased powers: for example, there will be new criminal offences of failing to give evidence, provide a witness statement or

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[108] "Rights watchdog attacks 'immoral' ministers", *ePolitix*, 10 December 20904

[109] "Litigators back Government bid to streamline inquiries regime", *Legal Week* Global Edition, 31 January 2005, available at http://www.legalweek.net/ViewItem.asp?id=22321

[110] "Curb the lawyers", *The Guardian*, 29 November 2004

[111] "Bill to limit inquiry costs", The Guardian, 27 November 2004

> produce documents. However, the statutory provisions themselves will not directly affect the length and cost of an inquiry. It will still be up to the chairman to decide on the procedure, particularly whether to rely on written evidence, to hear oral evidence, or to use both. The chairman will be required to "avoid any unnecessary cost" but it is inconceivable that a minister would interfere with the conduct of an inquiry because of any perceived breach of that requirement.
>
> Public inquiries set up by ministers represent only a tiny fraction of inquiries held; there is a whole range of statutory and one-off public or private inquiries to which the Bill, once enacted, would not apply. Some merely investigate and report, while others have significant powers; procedures vary almost as infinitely as the subjects. Some of the most common public inquiries are those dealing with planning applications, where the subject can vary from the colour of paint on a listed building to a new airport terminal.
>
> The Inquiries Bill is to be welcomed, but is of very limited application. Only time will tell whether inquiries set up by ministers will be shorter and less expensive, but for the vast majority of inquiries and tribunals the Act will not apply and it will be business as usual.[112]

The Association of the Bar of the City of New York has produced a report on the Bill based on their interest in human rights in Northern Ireland.[113] The Association commented that there are 'three controlling principles to inquiries in the United States: investigations must be independent; investigators must be impartial; and the process of the investigation and the final recommendations must be made public.' The Association considered that:

> The UK's Inquiries Bill…violates these principles in ways that the existing legislation, the [1921 Act], does not. The Inquiries Bill grants power to the executive to control all vital aspects of inquiries, taking the authority to establish inquiries out of the hands of Parliament and stripping inquiry chairpersons of control over the processes. By consolidating all inquiries under this legislation and repealing the 1921 Act, the UK would move away from inquiries as the public now knows them.[114]

The Association continued:

> A number of the above points were raised in the extensive debates in the House of Lords on December 9, 2004 and in subsequent discussions. We have reviewed the debates and agree with concerns expressed by various Lords:

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[112] "Has this £300m been well spent", *The Times*, 25 January 2005, Law, p7

[113] *An analysis of the UK Inquiries Bill and US provisions for investigating matters of urgent public concern*, The Committee on International Human Rights of the Association of the Bar of the City of New York, January 25 2005, available at http://www.serve.com/pfc/pf/inqubill/abcnyinq.pdf

[114] Ibid, p1

- there should have been pre-legislative scrutiny of draft legislation before the Bill was introduced;
- it is cause for concern that the Bill takes power from Parliament to establish inquiries and gives extensive control over all aspects of an inquiry to an individual minister;
- inquiries should be independent of the minister, and the executive, once established;
- the Bill goes too far in restricting public access to hearings, evidence, and final reports; and
- it could be a danger to give a minister untrammeled power to convert an existing inquiry into one governed by the Bill.

Public Technology commented that the Bill made "no mention of online methods being used as an efficiency-driver for inquiries and their publication. There are some high-profile inquiries…which have handled massive amounts of information, and used IT and the web to store and disseminate the inquiry information on a real-time basis. The Shipman Inquiry website is an example of 'good practice' which it's odd not to see embedded in some way in this Bill."[115]

D. The Finucane Inquiry

One impetus for changing the inquiries system was the announcement of the inquiry into the murder of Patrick Finucane, a human rights lawyer shot dead in Belfast on 12 February 1989. In May 2002 the UK and Irish governments appointed Justice Peter Cory to investigate a number of killings in which official collusion was alleged, including that of Patrick Finucane. In April 2004 Justice Cory's report was published. It concluded that 'only a public inquiry will suffice' in his case. Announcing the government's response to this conclusion on 23 September 2004, Paul Murphy, Secretary of State for Northern Ireland, said "In order that the inquiry can take place speedily and effectively and in a way that takes into account the public interest, including the requirements of national security, it will be necessary to hold the inquiry on the basis of new legislation which will be introduced shortly."

British Irish Rights Watch claimed that the *Inquiries Bill* is 'an end to public inquiries' as it shifts accountability from parliament to ministers, it gives government control over the terms of reference of inquiries, allows the minister alone to determine inquiry chairs, panel members and assessors and also gives government control over access, disclosure and publication of evidence. According to BIRW, "the *Inquiries Bill* removes in one fell swoop the notion of independent scrutiny over the actions of government and government departments and agencies. Without the independent scrutiny provided by a public

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[115] "Inquiries Bill published, but seems to lack value from IT good practice", *PublicTechnology.net*, 29 November 2004, available at http://www.publictechnology.net/modules.php?op=modload&name=News&file=article&sid=2147

inquiry, accountability is also lost. Such developments can only erode public confidence in government and ultimately undermine democracy."[116]

During the course of the Bill, the Finucane family has made their opposition to it clear. Michael Finucane, Patrick Finucane's son, was reported as saying "I would urge anyone who is interested in accountable, democratic and open government to oppose this Bill now."[117] Writing in the Guardian, he considered the use of the *Inquiries Bill* to undertake the inquiry:

> The word 'public' does not appear except in the context of 'public interest', which is not surprising since the bill is not designed to establish public inquiries at all. Instead, its focus is on giving control of inquiries to ministers so that anything potentially embarrassing to government is prevented from leaking out. The repeated assertion of the British government that an inquiry will get to the truth by using this new legislation does not stand up. The inquiries bill grants the power to a government minister to limit an inquiry through restrictive terms of reference, to curb investigations by limiting available funding, to censor the final report and even control and limit the very evidence the inquiry can consider. How can an inquiry be expected to get to the truth under the yoke of this new law? The reality is that an inquiry that is not a public inquiry becomes little more than a government-controlled charade. It is established by government, regulated by government and controlled by government throughout.[118]

The Finucane inquiry was raised during the passage of the Bill through the House of Lords. In Committee on 19 January 2005 Lord Smith of Clifton moved an amendment - later withdrawn - relating to "those particular enquiries [that] may well be unduly impaired by the imposition of restrictions, especially with regard to issues of national security. Given the particular character of Northern Ireland and its politics, "national security" could be a very widely stretched concept to cover an extensive range of issues. That would not reassure public opinion."[119] Baroness Ashton, responding to the amendment, said:

> It is relatively rare that inquiries will consider information so sensitive that disclosure could damage national security, but it has happened...The Bill does not allow restrictions to be placed on access to material simply because it relates to national security. The Minister or chairman has to weigh up what is involved in disclosing the information, weighing all the factors, including the extent to which placing a restriction would inhibit the allaying of public concern…All decisions have to be justified. Any decision that was improper or unreasonable would be challenged in the courts. I do not believe that the noble Lord, Lord Smith of

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116 British Irish Rights Watch, *The Inquiries Bill: an end to public inquiries*, 1 December 2004, available at http://www.birw.org/Public%20Inquiries.html

117 "Government's inquiries Bill 'will destroy trust'", *The Scotsman*, 8 February 2005

118 "Blair broke his promise to our family", *The Guardian*, 9 February 2005

119 HL Deb 19 January 2005 cGC287

> Clifton, was seeking to create a situation where neither the Minister nor the inquiry chairman would have any power to prevent disclosure of information that could cause real damage, so I hope that the noble Lord will feel able to withdraw his amendment. We are very clear about the framework.[120]

Amnesty International also commented on the *Inquiries Bill* and its implications for the Finucane inquiry. Amnesty considered that "only a public inquiry established under the *Tribunals of Inquiry (Evidence) Act 1921* will be able to shed light on collusion by state agents with Loyalist paramilitaries; on reports that Patrick Finucane's death was the result of state policy; and on allegations that different government authorities [played a part in the subsequent cover-up of collusion in his killing]." Amnesty continued that it:

> believes that the UK government is trying to eliminate independent scrutiny of its agents' action by introducing the new inquiries bill…under the *Inquiries Bill*:
>
> - the inquiry and its terms of reference would be decided by the executive;
> - no independent parliamentary scrutiny of these decisions would be allowed;
> - the chair of the inquiry would be appointed by the executive and the executive would have the discretion to sack any member of the inquiry;
> - the decision on whether the inquiry, or any individual hearings, would be held in public or private would be taken by the executive;
> - the decision to issue restrictive notices to block disclosure of evidence would be taken by the executive;
> - the final report of the inquiry would be published at the executive's discretion and crucial evidence could be omitted at the executive's discretion, "in the public interest.[121]

E. Parliamentary scrutiny of the Bill

The Bill was introduced into Parliament before the publication of PASC's report on *Government by Inquiry*. Thus, the early stages in the House of Lords were not informed by the Committee's report. This issue was raised by a number of peers during second reading in the House of Lords - see for example the speeches made by Lord Howe of Aberavon and Lord Norton of Louth - to which Baroness Ashton responded:

> I recognise the fact that the Public Administration Select Committee has not yet reported. On the day of the Queen's Speech I wrote to the chairman of that committee with an offer to meet and discuss this. I trust that it will be of some comfort to noble Lords to learn that the Public Administration Select Committee will have reported before the Bill is considered in another place. Therefore I am willing to assume that we shall look carefully at the committee's conclusions

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[120] HL Deb 19 January 2005 cGC288

[121] Amnesty International news release, *UK: Finucane anniversary – Government must allow public inquiry*, 11 February 2005, available at http://www.amnestyusa.org/news/document.do?id=80256DD400782B8480256FA5005C3974

> before the Bill returns to your Lordships' House. It may be worth pointing out that originally we thought that the committee would report much earlier. However, we were ready to roll and we wanted to bring the Bill forward. It is not meant to do anything other than complement the deliberations of the committee; hence we are following carefully the evidence that has been brought forward.

The Committee stage of the Bill was also completed - without amendment - before the publication of the Committee's report.

The Bill was not subject to "pre-legislative scrutiny" in the generally accepted view of the term.[122] Lord Norton of Louth commented on second reading in the House of Lords:

> I am concerned that the Bill has come forward without any prior consideration. Given that it is a measure of constitutional significance and that the Government have published a consultation paper, I see no reason why the measure should not have been published in draft and have been subject to pre-legislative scrutiny. The Deputy Leader of the House of Commons has previously stated that,
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> "a Bill should be published in draft form unless there are good reasons for not doing so".—[Official Report, Commons, 24/2/04; col. 19WH.]
>
> and has made it clear that it is the Government's intention and policy to increase the amount of legislation that is subject to pre-legislative scrutiny. This Bill would seem an obvious candidate for such scrutiny.[123]

Baroness Ashton commented that this was because "we have consulted and the Bill is ready to come forward."[124]

The issue of pre-legislative scrutiny was raised by the House of Lords Select Committee on the Constitution in its report on the *Inquiries Bill* published on 12 January 2005. The Committee wrote to the Minister expressing concern that the Committee's stated preference for bills to receive pre-legislative scrutiny had not in this case been followed; the Committee believed that "it would be wholly consistent with these sentiments for the *Inquiries Bill*, as a measure of constitutional significance, to have been the subject of pre-legislative scrutiny. In its absence, the Committee Chairman "hopes that appropriate means can be found to ensure that [the Bill] is fully scrutinised during its passage though Parliament, including taking into account the findings of PASC's inquiry into the subject".[125]

Baroness Ashton responded to this letter commenting "Our decision to introduce the Bill now reflects the growing feeling inquiries legislation needed to be re-examined and the

122 See eg Library Standard Note SN/PC/2822, 7 June 2004
123 HL Deb 9 December 2004 c999
124 Ibid c1013
125 HL Paper 21, 2004-05, p4

concerns that have been raised about the cost and duration of some inquiries". Given the PASC initiative, "we considered we have a well thought out policy which has been the subject of consultation with a wide rage of people who have had involvement or interest in inquiries. The Bill was ready and the Government felt it was time to bring it forward." Baroness Ashton continued, "we certainly intend to consider PASC's conclusions very carefully. I wrote to the Chairman of the Committee on the day of the Queen's speech to let him know that the Bill was included in it and was likely to be introduced in the Lord soon afterwards."[126]

Baroness Ashton further commented:

> I confess I had not seen this Bill as one of substantial constitutional significance. It is very much a consolidation measure. It does not introduce any new constitutional ideas, but is designed to provide a single, UK wide framework that would be suitable for any future statutory inquiry into events that have caused public concern. It draws together and simplifies the complex collection of current legislation on inquiries, filling in some gaps in areas where no suitable legislation currently exists. It reflects both the direction the case law relating to inquiries has taken and a lot of good practice that has grown up over the years in the conduct of both statutory and non-statutory inquiries. The Bill is concerned with the tools needed by inquiries to do a successful job.[127]

The Committee accepted the case for legislation, but in its response to Baroness Ashton's paper said "our preference would have been for the Bill to be published in draft and subjected to pre-legislative scrutiny…" It also confessed to being 'surprised' that the Minister did not see this as a constitutional measure but as a "consolidation measure" (a view the Committee considered was "not a tenable description of the Bill") as the "general scheme of powers that [the Bill] proposes does not so much amount to consolidation of existing statute-law as to be wholly new legislation."[128]

Second reading in the House of Lords took place on 9 December 2004, committee on 18 and 19 January 2005 (where it was not amended), report on 8 and 9 February 2005, and third reading on 28 February 2005. The Bill was amended on report and third reading. The Bill was also considered by the House of Lords Select Committee on Delegated Powers and Regulatory Reform.[129]

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[126] Ibid
[127] Ibid
[128] Ibid
[129] First report 2004-05, HL 12, available at http://www.publications.parliament.uk/pa/ld200405/ldselect/lddelreg/12/1202.htm

Appendix: The Salmon Commission on Tribunals of Inquiry

The current reviews of inquiry procedures are not the first analysis of the 1921 Act. Disquiet with the Act and dissatisfaction with alternative procedures such as that used for the Denning Inquiry into the Profumo affair led to an announcement by the Prime Minister Harold Wilson in July 1965 that a Royal Commission was to be set up to "review the workings of the *Tribunals of Inquiry (Evidence) Act 1921*, and to consider whether it should be retained or replaced by some other procedure, and, if retained, whether the changes are necessary or desirable; and to make recommendations." The Chairman of the Royal Commission was Lord Justice Salmon. The Royal Commission reported (the 'Salmon Report') in November 1966. It came up with six cardinal principles that an inquiry should follow "which, if strictly observed, the difficulty and injustice with which persons involved in an inquiry may be faced can be largely removed:"

1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
3. a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers. b) His legal expenses should normally be met out of public funds.
4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.[130]

Although the Government of the day was expected to introduce legislation implementing the Salmon principles, this did not in fact take place. Subsequent inquiries of this nature have generally followed the Salmon principles.

The Salmon report examined various alternative forms of inquiry to the tribunal of inquiry set up under the *Tribunals of Inquiry (Evidence) Act 1921*. These included:

- Royal Commission
- Departmental Inquiry
- Lord Denning's Profumo Inquiry

[130] Royal Commission on Tribunals of Inquiry, 1966. *Report of the Commission under the Chairmanship of the Rt Hon Lord Justice Salmon*. Cmnd 3121, para 32

- Transport Accident Inquiry
- Intelligence and Security Committee Inquiry

To this list can be added other types of inquiry such as *ad hoc* Committees of Privy Counsellors (as in the Falklands Islands Inquiry under Lord Franks). A more extensive summary of the Salmon principles and the types of inquiry he considered is available in Library Research Paper 96/22, *Forms of investigatory inquiry and the Scott Inquiry*, 9 February 1996.

a. Royal Commission

The distinction between a royal commission and a departmental inquiry is often more one of the formality of appointment than one of importance of subject-matter. A royal commission will be appointed by royal warrant issued by the Sovereign on the advice of a Secretary of State.[131] Wade & Bradley suggest that "usually a royal commission hears the main evidence in public and copies of the oral and written evidence received are published; the commission's report is invariably published and laid before Parliament. A departmental committee is more likely to receive evidence in private and it is less common for its evidence to be published" [132] although there will inevitably be exceptions in both cases.[133] The *Inquiries Bill* will not affect the establishment of Royal Commissions. They are not appointed under legislation and there is nothing in the *Inquiries Bill* (or indeed in the 1921 Act) to prevent Royal Commissions being set up in future.

However, it is worth pointing out Salmon's comments on Royal Commissions in his report of 1966:

> In modern times Royal Commissions have not been used to carry out inquiries into the facts of a particular case. They have been used to make recommendations on matters of broad policy. It is for this alone that they are appropriate. Their members are not customarily called upon to become involved whole time and to sit on a day by day basis. The tempo of even the most expeditious Royal Commission is altogether too slow for the requirements of an investigation into matters with which the Act of 1921 is concerned. Moreover a Royal Commission has no real power to compel anyone to give evidence or produce documents.[134]

b. Departmental inquiries

These can be considered to be:

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[131] The warrant, setting out the terms of reference and membership, will generally be reproduced at the beginning of the commission's report.
[132] *Constitutional and administrative law*, 11th ed, by Bradley & Ewing, 1993
[133] For more information on Royal Commissions see Library Research Paper 96/22, *Forms of investigatory inquiry and the Scott Inquiry*, 9 February 1996
[134] Ibid

- Ad hoc advisory committees appointed by ministers by virtue of their conventional powers
- May be appointed directly by the Minister in his own name of indirectly in the name of the Crown
- Powers depend on the terms of reference and those given by the Minister
- May be based on legislative powers which allow for the methods the Inquiry can use

There have been a number of such committees over the years. Recent examples include:

- Lessons Learned from Foot and Mouth Disease Outbreak Inquiry (9 August 2001)
- Encephalopathy and Creutzfeld Jakob Disease Inquiry (Phillips Inquiry) (Set up 22 December 1997)
- Hillsborough (June 1997)

Some of these have been chaired by a judge. If the inquiry is non-statutory,

- It may therefore be considered
- The procedure is investigative with no statutory power to compel witnesses to attend

Examples of such 'judicial' inquiries include the Bingham Inquiry into the Bank of England's role into the collapse of BCCI (1991), the Scott Inquiry into Arms to Iraq (1992) and the Hutton Inquiry into the death of Dr David Kelly (2003).[135]

c. Committees of Privy Counsellors

The use of Privy Counsellors to undertake an inquiry has been used on a number of occasions. Two of the most high profile of such inquiries were the Falkland Islands Inquiry[136] and the Butler Review of Intelligence on Weapons of Mass Destruction.[137]

d. Lord Denning's Profumo Inquiry

Lord Denning was asked by the Prime Minister on 21 June 1963 to undertake an inquiry with the following terms of reference:

> To examine, in the light of the circumstances leading to the resignation of the

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[135] See Library Standard Note SN/PC/2599, *Investigatory Inquiries*, 30 November 2004, for information on the Hutton Inquiry

[136] See Library Research Note 80, *The Falkland Islands Inquiry*, 7 July 1982

[137] See Library Standard Note SN/PC/2599, *Investigatory Inquiries*, 30 November 2004. The term 'Privy Counsellor', the spelling generally used in official sources, is preferred to 'Privy Councillor', although the latter is widely used.

> former Secretary of State for War, Mr. J.D. Profumo, the operation of the Security Service and the adequacy of their co-operation with the Police in matters of security, to investigate any information or material which may come to his attention in this connection and to consider any evidence there may be for believing that national security has been, or may be, endangered and to report thereon.[138]

The Salmon Commission was very critical of the format of Lord Denning's inquiry into the John Profumo affair, although not of the judge himself. The commission did not believe "that it can ever be right for any inquiry of this kind to be held entirely in secret save on the ground of security." However they did not think that an inquiry should be set up at all solely to investigate "salacious rumour" and "scandalous gossip" of the Profumo type. If there were a "nation-wide crisis of conscience" about a ministerial security risk or about ministers allowing a colleague to make a personal statement they ought to have known was untrue, then a 1921 Act tribunal should be appointed. They concluded:

> 42. We recommend that no Government in the future should ever in any circumstances whatsoever set up a Tribunal of the type adopted in the Profumo case to investigate any matter causing nation-wide public concern. For the reasons we have stated, we are satisfied that such a method of inquiry is inferior to, and certainly no acceptable substitute for, an inquiry under the Act of 1921.

e. Transport Accident Inquiry

Salmon commented:

> 44. These are formal inquiries into air accidents and shipping casualties and are carried out respectively under Regulation 9 of the Civil Aviation (Investigation of Accidents) Regulations, 1951 and the Shipping Casualties and Appeal and Re-hearing Rules of 1923. These inquiries are highly technical and usually include something in the nature of a *list;* there is not the same degree of urgency about them and they are certainly not concerned with a nation-wide crisis of confidence in the integrity of any public persons. They deal with wholly different matters from those dealt with by Tribunals of Inquiry and could not be any substitute for such Tribunals.

f. The Intelligence and Security Committee

The Intelligence and Security Committee (ISC) is not a select committee as, whilst it is a committee of parliamentarians, it is established under statute than Standing Orders, and it reports to the Prime Minister. It is covered more fully in Library Standard Note SN/HA/2178.[139]

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[138] Cmnd 2152, September 1963

[139] 8 December 2003, available at http://hcl1.hclibrary.parliament.uk/notes/has/snha-02178.pdf