

Forms of Investigatory Inquiry & the Scott Inquiry

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The Scott Inquiry, which is expected to report on 15 February, has raised once again the question of the most appropriate methods of investigation of controversial aspects of public policy, especially those involving the conduct of Ministers and/or officials. This Paper explores these arguments over inquiry formats and procedural models which arose during the Scott Inquiry. *It does not discuss the substantive issues of the arms-to-Iraq affair which were the subject matter of the Inquiry* (on which see *The Scott Inquiry: approaching publication*, Research Paper 96/16, 25.1.96.)

From time to time Members call for an 'independent public inquiry', and ask about the various sort of inquiry/tribunal procedures available, to examine particular issues. This Paper sets out the forms of such bodies that have been used in the past, such as royal commissions, *ad hoc* inquiries and tribunals of inquiry. This section updates and replaces the equivalent section of Research Note 80, *The Falkland Islands Inquiry*, 7.7.82.

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Summary

The inquiry device is much used by Government (and other public agencies) for a variety of purposes. This Paper is solely concerned with inquiries into controversial or complex public issues, events or 'scandals'; it is *not* concerned with routine administrative inquiries and tribunals into, say, planning, social security or tax or the range of statutory inquiries available to examine, say, transport accidents or sudden deaths.

The variety of inquiry forms, based on the analysis of the 1966 Salmon royal commission report, is examined. In particular tribunals of inquiry, royal commissions, Parliamentary committees of inquiry and departmental inquiries are considered, as well as committees of Privy Counsellors, and 'follow-up' inquiries.

The membership of inquiries is also considered, as this will reflect the form and operation of an inquiry. Legally qualified people, for example, are often appointed to chair, or be members of inquiries, and, in major issues, an inquiry's membership often includes, or is restricted to, Privy Counsellors.

The Scott Inquiry itself, *as an inquiry*, is considered in this Paper, both as the most recent example of a high-profile (and controversial) inquiry into a major public issue and because of its current topicality. Its appointment as a non-statutory (or *ad hoc*) inquiry, rather than, say, a statutory tribunal of inquiry, had significant implications for its powers and procedures, as these issues became controversial during the course of the Inquiry.

Lord Howe of Aberavon, a former Law Officer and the Foreign Secretary during much of the arms-to-Iraq affair, has articulated concerns about the Scott Inquiry's procedure in relation to what he saw as the lack of adequate legal advice and representation for witnesses and others potentially affected by the Inquiry. Sir Richard Scott has rejected this argument, saying that adversarial, 'court-like' procedures are inappropriate and potentially harmful to the effectiveness and the fairness of procedure of inquisitorial inquiries. This Paper examines this important debate between Lord Howe and Sir Richard over the merits of 'adversarial' and 'inquisitorial' procedures, especially in the context of the Salmon report's 'six cardinal principles', for inquiries such as the Scott Inquiry.

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I Types of Inquiry

"The plain fact is that we have never succeeded in finding the perfect form of inquiry"
Edward Heath, 8 July 1982¹

A. Introduction

From time to time there is a demand in Parliament or the media for an 'independent public inquiry' of some form into a particular and controversial event or series of events, or complex public policy issue. 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 some public issue or a 'scandal'.

The Salmon Royal Commission on tribunals of inquiry -- 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 seek to enable some or all of these

¹ During the debate to approve the appointment of Falkland Islands Review, HC Deb vol 27 c494, 8.7.82.

functions to be achieved, balancing 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. Put in these terms, the issue is often 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 it². 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, as the controversy over the Scott Inquiry has demonstrated, this need not necessarily imply all or any of the attributes of a 'court-like' adversarial procedure.

Diana Woodhouse, a legal academic, has suggested recently that "typically a judicial inquiry is set up when the standing of, or confidence in the body politic is affected In practice where the matter under investigation concerns the governing process, a judge or senior lawyer is usually appointed to chair it." She explains the reasons for this, and possible counter-arguments, as follows:³

Whether established under prerogative or statutory power, there is no constitutional or legal requirement for an inquiry to be judicial, although this was a recommendation made in 1966 by Lord Salmon in the report of the Royal Commission on Inquiries held under the Tribunal of Inquiries (Evidence) Act. In practice, where the matter under investigation concerns the governing process, a judge or senior lawyer is usually appointed to chair it. However, the choice is not so much in deference to Lord Salmon's recommendation as a recognition of the need to restore public confidence. A judicial appointment, presumed to be apolitical, acts to reinforce the independence and impartiality of the inquiry and to enhance its credibility and legitimacy. Judges also lend dignity and authority to the proceedings and symbolise the serious nature of the investigation. Moreover, they are credited with possessing the skills necessary for chairing such proceedings and with being expert at sifting and evaluating evidence.

However, these expectations may not always be realised. The presumption that judges are apolitical can be countered by suggestions that, whilst members of the judiciary may not favour a particular political party, they are nevertheless part of the establishment. As such, they have vested interests to protect and these interests may be shared with those who are under scrutiny. In addition, the training of judges within an adversarial system does not necessarily fit them for an inquisitorial role. Indeed, it may make them unsuitable for the investigative work required of an inquiry of this nature. In any case, the skills they possess are by no means unique but

² See the findings of the Salmon report and the discussion on adversarial and inquisitorial models (below) and the remarks of Taylor LJ in the introduction to his report on the Hillsborough Stadium disaster about the constitutional aspects of a judge being asked to consider the football membership scheme provisions of what became the *Football Spectators Act 1989*: Cm 962, Jan 1990, paras 15-17.

³ D Woodhouse, "Matrix Churchill: a case study in judicial inquiries", (1995) 48 *Parliamentary Affairs* 24-39, pp24, 25.

held by many professionals. Nevertheless, judicial inquiries have the advantage of appearing objective and of transforming the disorder of partisan political debate into the order and impartiality associated with the courtroom.

She suggested that judicial inquiries "provide a relatively effective mechanism of investigation ... Their success in determining the truth rests, at least in part, on the extent to which the government is prepared to be held accountable (or recognises that it has no option), and on the pressure exerted by the chairperson ... Yet however successful the investigation of an inquiry might be, it may fail to satisfy as a mechanism for accountability." This depends on its being held in open session, to avoid accusations of a whitewash, and to encourage the sustained media attention that keeps the issue alive in the public and political mind. "The judicial inquiry is not an ideal mechanism for investigating matters of public concern which affect the body politic" because they can be slow, expensive, raise constitutional difficulties (such as ministerial responsibility, as in the Vehicle & General tribunal which named and blamed individual officials⁴) and have procedural ambiguities.⁵ This last point is considered in more detail later in this Paper, in the section on the Scott Inquiry's procedure.

In this section we are concerned with the various forms of investigatory or inquisitorial inquiries. Statutory inquiries, like those into transport safety or accidents, or routine administrative inquiries into, say, planning or development proposals are not considered here. Neither are the investigative aspects of standing bodies such as the various Ombudsmen; official complaints machinery; committees like the Political Honours Scrutiny Committee; coroners' inquests or fatal accident inquiries; *ad hoc* bodies of the Speaker's Conference form, or statutory tribunals dealing with aspects of social security and the like. Ministers may also establish an *ad hoc* (or non-statutory) committee to produce proposals for a reform of the law or practice in a controversial or novel area of public policy (such as those involving social or moral issues), where they need or wish the assistance of independent expert advice or hope that they will receive independent support for existing government thinking. It is perhaps easier to recognise than to define the distinction between the types of inquiries which are the subject of this Paper and those, in this paragraph, which are not.

The range of subjects of investigatory inquiries can be vast, covering the whole area of public policy from child abuse in institutions to arms sales to foreign countries. The people involved can range from relatively junior care workers or employees of private companies to senior public officials and Ministers of the Crown. The subject-matter may be appropriate for full public disclosure, or there may be a need for some degree of secrecy or confidentiality on personal privacy, non-incrimination or public interest grounds. In addition, the potential for later disciplinary or legal action (civil and/or criminal) against those involved in the particular episode may influence the form and procedure of an inquiry. The subject-matter, as noted

⁴ HC 133, 1971-72, 1972; HC Deb vol 835 cc33-161, 1.5.72. See G Drewry, "Passing the buck", (1972) *New Law Journal* 312.

⁵ p38.

already, may or may not be a matter of political controversy. If it is a partisan issue, it may influence the form and procedure of the inquiry, as well as the parties' attitude to its proceedings and report. The membership of such inquiries may be, in part, nominated by the main parties, or at least following consultation with the major party leaders.

Different Governments and Ministers may prefer different forms of inquiry for particular subjects or for various reasons. This may be due in part to governmental style, especially that of the Prime Minister (the virtual demise of the royal commission since the 1970s, and the use of internal departmental policy reviews in the 1980s being obvious examples), and possibly also to political circumstances, or even the nature of advice from senior officials or other relevant people. Less than two weeks after the announcement of the Scott Inquiry, a non-statutory inquiry, the Government indicated that if Lord Justice Scott asked for it to be converted to a 1921 Act tribunal of inquiry to give it extra powers, ministers would agree to that request.⁶ When announcing the appointment of the Nolan Committee into standards of conduct in public life in 1994, the Prime Minister considered the various forms of inquiry available to undertake such a task:⁷

I have considered the nature of the body to be established. A royal commission tends to be cumbersome, and would probably take too long; a committee composed solely of Privy Councillors might be seen as being too narrowly drawn; a Speaker's Conference traditionally deals only with electoral law; and a formal board of inquiry or judicial inquiry tends to carry out specific investigations rather than considering broader issues and making recommendations to the Government. Arguments can be made for any of those bodies, but I believe that a better way ahead exists.

The body needs to be able to respond quickly and to be sufficiently flexible to deal with the wide range of issues I have outlined. I have, therefore, decided to establish standing machinery to examine the conduct of public life and to make recommendations on how best to ensure that standards of propriety are upheld. It will contain prominent individuals who have practical experience of Parliament and public life, but also others with expertise and knowledge of our principal institutions. Lord Nolan, a Lord of Appeal in Ordinary, has accepted my invitation to chair this committee.

The political scientist, A H Birch, provides a realistic or even perhaps cynical analysis of the some of the reasons for the establishment of inquiries. "Sometimes a department realizes that

⁶ HC Deb vol 214 c651, 23.11.92 (Michael Heseltine). See footnote 3, p.35 of this Paper.

⁷ HC Deb vol 248 c758, 25.10.94.

something has to be done and appoints a committee as the best way of getting informed advice about what is needed. Sometimes a department has a delicate problem on its hands and wants a committee, for whose work the department takes no responsibility, to examine the alternatives and make recommendations ... Sometimes a department wants to prepare Parliament and public opinion for a reform that officials and the minister consider desirable and appoints a committee partly so that the evidence in favour of the reform can be mustered and the need for the reform can be endorsed by an independent body ... Sometimes committees of inquiry are appointed without any serious expectation that their reports will be acted upon. They are appointed to pacify critics .. to buy time [or] to kill a proposal by demonstrating its disadvantages or by taking it out of the public eye But it is probably fair to say that most committees of inquiry lead to some kind of action sooner or later, even though it is unusual for a committee's recommendations to be adopted *in toto*."⁸

Wade & Bradley notes that the appointment of a royal commission or departmental committee "is an act of the executive which requires no specific parliamentary approval, although often it may be a response to political demands."⁹ The creation of the Security Commission in 1964 provided an established means of investigating security lapses and has been used frequently, especially in the 1980s. It was intended to be a politically bipartisan procedure, in that the Leader of the Opposition was consulted over its establishment and over particular cases referred to it.¹⁰ Perhaps the most obvious shift in use of a particular inquiry format is that of the royal commission. Ten were established in the 1950s, ten in the 1960s (four in 1966 alone) and seven in the 1970s. However there has only been one since the Philips Royal Commission on criminal procedure was established in December 1977¹¹, that on criminal justice set up in June 1991 under Lord Runciman.¹² While there were 13 royal commissions set up under the Wilson/Callaghan Governments of the 1960s and 1970s, only one was established during the Heath Government, none during the Thatcher Government and one to date under John Major.¹³

Woodhouse sets the appointment of inquiries in the context of ministerial responsibility:¹⁴

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

⁸ *The British system of government*, 9th ed., 1993, pp160-1. This is considered in more detail in Charles J Hanser, *Guide to decision: the royal commission*, 1965, chap 8.

⁹ *Constitutional and administrative law*, 11th ed.by Bradley & Ewing, 1993, p321.

¹⁰ Further details of the Security Commission are contained in a number of Library Papers, especially Background Paper 114, *Security*, 30.3.83.

¹¹ It reported in January 1981, Cmnd 8092.

¹² It reported in July 1993, Cm 2263.

¹³ The figures in this paragraph exclude permanent/standing royal commissions. For a list of royal commissions in this century see *British political facts 1900-1994*, pp291-5.

¹⁴ Op cit, pp25-6

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 setting up of an inquiry therefore fulfils the constitutional requirement for amendatory action and satisfies the political need for the removal of the issue from the political agenda. Yet the ability of the inquiry to determine and make public the truth may be limited by its terms of reference, by its powers and by its resources. Much depends on the ability, persistence and determination of the chairperson. It is against this background that the inquiry into Matrix Churchill needs to be seen.

B. The various types of inquiry

The 1966 report of the *Royal Commission on Tribunals of Inquiry* ('Salmon Report')¹⁵ examined various alternative forms of inquiry to the tribunal of inquiry set up under the *Tribunals of Inquiry (Evidence) Act 1921*. These were:¹⁶

- Royal Commission
- Departmental Inquiry
- Parliamentary Select Committee of Inquiry
- Lord Denning's Profumo Inquiry
- Transport Accident Inquiry
- Security Commission Inquiry.

In addition one could add forms such as an *ad hoc* Committee of Privy Counsellors (as in the Falklands Islands Inquiry under Lord Franks).¹⁷

¹⁵ Cmnd 3121, November 1966.

¹⁶ Paras 33-47.

¹⁷ Which reported in January 1983, Cmnd 8787. *British political facts 1990-1994* places it in its list of departmental committees, p300. The House of Commons resolved to approve the Government's decision to set up the inquiry (HC Deb vol 27 cc469-508, 8.7.82).

1. Tribunal of Inquiry

A list of such inquiries is set out in the latest edition of *British political facts*:¹⁸

Title	Members of Tribunal	Year	Command Number
Destruction of documents by Ministry of Munitions officials	Ld Cave Ld Inchape Sir W. Plender	1921	1340
Royal Commission on Lunacy and Mental Disorder given powers under the Act	H. Macmillan (Ch)	1924	2700
Arrest of R Sheppard, RAOC. Inquiry into conduct of Metropolitan Police	J. Rawlinson	1925	2497
Allegations made against the Chief Constable of Kilmarnock in connection with the dismissal of Constables Hill and Moore from the Burgh Police Force	W. Mackenzie	1925	2659
Conditions with regard to mining and drainage in an area around the County Borough of Doncaster	Sir H. Monro (Ch)	1926/8	
Charges against the Chief Constable of St Helens by the Watch Committee	C. Parry T. Walker	1928	3103
Interrogation of Miss Irene Savidge by Metropolitan Police at New Scotland Yard	Sir J.E. Banks H. Lees-Smith J. Withers	1928	3147
Allegations of bribery and corruption in the letting and allocation of stances and other premises under the control of the Corporation of Glasgow	Ld Anderson Sir R. Boothby J. Hunter	1933	4361
Unauthorised disclosure of information relating to the Budget	Sir J. Porter G. Simonds R. Oliver	1936	5184
The circumstances surrounding the loss of H.M. Submarine 'Thetis'	Sir J. Bucknill	1939	6190
The conduct before the Hereford Juvenile Court Justices of the proceedings against Craddock and others	Ld Goddard	1943	6485

¹⁸ p301.

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Title	Members of Tribunal	Year	Command Number
The administration of the Newcastle upon Tyne Fire Police and Civil Defence Services	R. Burrows	1944	6522
Bribery of Ministers of the Crown or other public servants in connection with the grant of licences, etc.	Sir J. Lynskey G. Russell Vick G. Upjohn	1948	7616
Allegations of improper disclosure of information relating to the raising of the Bank Rate	Ld Parker E. Holland G. Veale	1957	350
Allegations that John Waters was assaulted on 7th December 1957, at Thurso and the action taken by Caithness Police in connection therewith	Ld Sorn Sir J. Robertson J. Dandie	1959	718
The circumstances in which offences under the Official Secrets Act were committed by William Vassall	Ld Radcliffe Sir J. Barry Sir E. Milner Holland	1962	2009
The disaster at Aberfan	Sir E. Davies H. Harding V. Lawrence	1967	H.C.553
The events on Sunday, 30th January 1972 which led to loss of life in connection with the procession in Londonderry on that day	Ld Widgery	1972	HC22072
The circumstances leading to the cessation of trading by the Vehicle and General Insurance Co. Ltd	Sir A. James M. Kerr S. Templeman	1972	H.C.133
The extent to which the Crown Agents lapsed from accepted standards of commercial or professional conduct or of public administration as financiers on their own account in the years 1967-74	Sir D. Croom-Johnson Sir W. Slimmings Ld Allen	1982	H.C.364

To this list should be added the one tribunal appointed by resolution of both Houses of the Parliament of Northern Ireland, and by Warrant of the Governor of Northern Ireland, which was chaired by Lord Scarman on the violence and disturbances in 1969.¹⁹

¹⁹ It reported in April 1972, Cmd 566. See the debates on the resolutions in the NI House of Commons [vol 73 cc2338-63] and in the NI Senate [vol 53 cc1027-40] on 27 August 1969. Both Houses were recalled during the summer recess for this purpose. Stormont was empowered to use the 1921 Act by virtue of the *General Adaptation of Enactments (Northern Ireland) Order 1921* [SR&O no. 1804], esp. article 3.

Tribunals of inquiry are set up under the *Tribunals of Inquiry (Evidence) Act 1921*²⁰ where both Houses of Parliament resolve "that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance," and appointed by Her Majesty or a Secretary of State. A 1921 Act tribunal "shall have all such powers, rights and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court", in particular, for enforcing the attendance of witnesses, and examining them on oath, affirmation or otherwise, and compelling the production of documents.²¹ Failure to attend, take an oath, produce documents, answer questions or otherwise act in a way which, in a court, would amount to contempt of court lays a witness or other person open to punishment, as if guilty of contempt of court, by the High Court or Court of Session if so certified by the chairman of the tribunal.²² Witnesses are "entitled to the same immunities and privileges" as if they were before the High Court or Court of Session in civil proceedings."²³ A tribunal cannot exclude attendance of the public (or any part of it) "unless in the opinion of the tribunal it is in the public interest expedient to do so for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given", and it can allow any person "appearing to them to be interested" to be represented (legally or otherwise) "or to refuse to allow such representation."²⁴

1921 Act tribunals of inquiry may well fall under Parliament's sub judice rule, (which is in any case subject to the Speaker's discretion), thereby restricting debate on the issues under investigation, a point made by ministers when the Opposition sought such a tribunal into the arms-for-Iraq affair instead of the non-statutory Scott Inquiry²⁵, although some commentators have claimed that ministers thereafter cited the existence of the Scott Inquiry as a reason not to answer fully PQs on these matters.

Wade & Bradley's *Constitutional and administrative law* states that tribunals "are appointed to investigate serious allegations of corruption or improper conduct in the public service, or to investigate a matter of public concern which requires thorough and impartial investigation to allay public anxiety and may not be dealt with by ordinary civil or criminal processes ... The task of a tribunal of inquiry is to investigate certain allegations or events with a view to producing an authoritative or impartial account of the facts, attributing responsibility or blame where it is necessary to do so. It is not the duty of tribunals of inquiry to make decisions as to what action should be taken in the light of their findings of fact."²⁶

²⁰ The enactment of which itself has been criticised. See, for example G W Keeton, "Parliamentary tribunals of inquiry", (1959) 12 *Current Legal Problems* 12, 13-15.

²¹ S1(1)

²² S1(2). Two journalists were imprisoned in 1963 in connection with the Vassall tribunal for refusing to disclose their sources: *Att-Gen v Mulholland and Foster* [1963] 2 QB 477, [1963] 1 All ER 767, C.A.

²³ S1(3). The phrase 'in civil proceedings' was inserted by the *Civil Evidence Act 1968*, and the equivalent NI Act of 1971. The Salmon Report noted that neither the members of the tribunal nor witnesses' representatives have such immunity.

²⁴ S2(a) and (b) respectively.

²⁵ See, for example, Mr Heseltine in the Opposition Day debate on arms exports to Iraq on 23 November 1992, HC Deb vol 214 c645.

²⁶ Op cit, pp659-60. See the Salmon Report's examination of tribunals' terms of reference, op cit, paras 77-9

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The setting-up of the Salmon Royal Commission was announced by the Prime Minister in July 1965 (although its membership was not appointed until the following February) because, in his words, "in recent years anxiety about the working of the [1921 Act] has been expressed on every occasion on which the report of a tribunal set up under the Act has been debated in this House."²⁷ Mr Wilson said that, although alternative procedures had developed recently (such as the Security Commission and Lord Denning's Profumo inquiry), "I do not think we are quite satisfied that we have yet found the right answer."²⁸ Significantly, he expressed the hope that the Royal Commission would examine alternatives, and their procedures, "so that recourse to the tribunals may be as rare as possible."²⁹

It is perhaps interesting to note in passing, in the context of the overall subject of this Paper, that, when Jo Grimond, the Liberal leader, raised the unique Parliamentary role in such tribunals, the Prime Minister admitted that "there has been great difficulty about whether to suggest a Select Committee. After all, there is Parliamentary responsibility here. But so much is involved in the procedure of the Commission and there is so much natural justice in its functioning that we have thought it right to have a Royal Commission."³⁰

The Salmon Report considered whether the inquisitorial nature of tribunals "is so objectionable in principle that the [1921] Act should be repealed".³¹ The commission recognised the dangers inherent in the statutory procedures:

27. The exceptional inquisitorial powers conferred upon a Tribunal of Inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation. For these reasons, we are strongly of the opinion that the inquisitorial machinery set up under the Act of 1921 should never be used for matters of local or minor public importance but always be confined to matters of vital public importance concerning which there is something in the nature of a nation-wide crisis of confidence. In such cases we consider that no other method of investigation would be adequate.

²⁷ HC Deb vol 716 c1842, 22.7.65. Earlier that year Leslie Hale had introduced a ten minute rule bill to repeal the 1921 Act. He described the Act as "a bastard Bill, which provides a method of procedure never known to the law of England since we have had our present system of justice;" an Act "which was born in sin, passed without due consideration and is continuing to live in iniquity." [HC Deb vol 709 cc1402-3, 1404, 30.3.65].

²⁸ See the speech of Michael Foot during the debate on the establishment of the Falkland Islands Review, HC Deb vol 27 c475, 8.7.82.

²⁹ c1843

³⁰ c1843

³¹ Cmnd 3121, para 24.

The report's detailed procedural analysis, and its six cardinal principles³², will be discussed below in the context of the Scott Inquiry's procedures, and the criticisms made by Lord Howe of Aberavon among others. Suffice to say, Salmon decided that "it is essential in the national interest to retain the Tribunals of Inquiry (Evidence) Act 1921, albeit with the amendments and safeguards recommended in this Report."³³ The report asserted that it was "of the highest importance that the six cardinal principles ... should always be strictly observed."³⁴ In particular more time should be available: "a few weeks more in preparing the material for arriving at the truth is a small price to pay in order to avoid injustice."³⁵ Anyone called as a witness should have the right of legal representation, but a tribunal's discretion should remain in respect of the representation of non-witnesses. Tribunals should have power to order that witnesses be paid their costs. However the commission thought that statutory rules of procedures would be inflexible and undesirable. The report gave advice on the ministerial and Parliamentary role in the appointment of tribunals:

71. The power to set up a Tribunal under the Act of 1921 can be exercised only on a resolution of both Houses of Parliament that it is expedient that a Tribunal be established for inquiring into a "definite matter" described in the resolution as of urgent public importance. We consider that this power to set up a Tribunal should not be extended. We do not agree with a suggestion which has been made to us that the power should be vested in some high officer of State. Because of the inquisitorial nature of the proceedings and the consequent pain which they may cause to individuals, Tribunals should be set up as sparingly as possible. Any temptation there may be to stifle awkward questions in either House by stating that a Tribunal of Inquiry will be appointed to look into the matter should be resisted. The fact that a resolution of both Houses of Parliament is required before a Tribunal can be set up affords some safeguard against this procedure being too readily invoked. Parliamentary time has to be given in both Houses to consider the desirability of appointing a Tribunal. Parliamentary time is in short supply, and unless a matter is really of great public importance-as it should be before it is inquired into by a Tribunal under the Act-it is unlikely that Parliamentary time will be spared. Moreover, before the necessary resolution can be passed, questions have to be answered and the matter fully debated on the floor of both Houses of Parliament. 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.

³² See para 32; reproduced at Appendix 1 of this Paper.

³³ Para 47.

³⁴ Para 48.

³⁵ Para 49.

The report noted that the Act said nothing about the composition of a tribunal, and believed that it should be amended so that the chairman would be "a person holding high judicial office:"

72. The Act of 1921 lays down no requirements as to the composition of the Tribunal. Since 1948, however, it has been the practice for Tribunals to consist of members of the judiciary and eminent leading counsel. In our view the Act should be amended so that the chairman of any Tribunal set up under the Act shall be a person holding high judicial office. Apart from the assurance that having a judge as chairman gives to the public that the inquiry is being conducted impartially and efficiently, it offers the following advantages. It ensures that the powers of the Tribunal will be exercised judicially to compel the attendance of witnesses, the answer to questions and the production of documents, and to deal with anyone who disobeys its orders. We appreciate that the present practice of appointing a chairman from amongst the judiciary is unlikely to be departed from. We consider however that this practice is of such importance that legislative steps should be taken to ensure that it shall always be followed. Without a judge of high standing as chairman we think it unlikely that the findings of Tribunals would achieve the same measures of public confidence and acceptance as they have in the past. The Act should not however lay down any requirement as to the qualifications of the other members of the Tribunal. These may or may not be lawyers, but none of them should have any close association with any political party. Counsel and solicitors of high standing are experienced in sifting and assessing evidence and exercising sound and impartial judgment. There may however well be cases in which it would be appropriate to appoint a layman as a member of the Tribunal. Much must depend upon the nature of the inquiry.

The Commission also considered at great length the question of representation for the tribunal itself, and in particular the role of the Attorney-General, in view of the variety of functions undertaken by that officer. They recommended that the Attorney's role, as it had grown up since the war, be discontinued (the same to apply to the Scottish law officers in Scottish tribunals), and that tribunals appoint their own counsel.³⁶ They were anxious that tribunal proceedings should be held in public, and its views were set out in chapters XI and XII of their report. They also agonised over the powers to compel evidence, and the necessity for committal for contempt.³⁷ Note that they unreservedly rejected a proposal that questions of committal to prison should be referred to Parliament:

³⁶ There was some adverse comment about the Attorney's statements on the role of the press when the Aberfan tribunal was established in 1966 (HC Deb vol 734 cc1315-20, 27.10.66). See also the Prime Minister's statement, HC Deb vol 735 cc 254-64, 1.11.66. Commentators have noted, in the context of the Scott Inquiry's investigation, that a 1921 Act tribunal involving the Attorney as its counsel would have caused difficulties because of his role in the subject-matter of the Inquiry.

³⁷ See chap 13. There was concern in 1966 at the time of the Aberfan tribunal about extensive press comment in the context of the application of *sub judice* to the tribunal, and in 1969 a committee, also chaired by Salmon LJ, reported on the application of the laws of contempt to such tribunals (Cmnd 4078, June 1969). See now the *Contempt of Court Act 1981*.

132. We unreservedly reject one suggestion which has been made, namely, that the question of committing to prison should be referred to Parliament. This would involve a cumbersome and long drawn out process with little to commend it. Parliament would have to find time which it can ill afford to deal with the matter; nor would it be easy for Parliament to inform itself of all the relevant facts. There is, moreover, no reason to suppose that the offender would fare any better before Parliament than he would before the courts or the Tribunal.

Finally they considered the utility of an appeal from tribunal findings but were clear that "in matters of the kind with which Tribunals are concerned, it is of the utmost importance that finality should be reached and confidence restored with the publication of the report."³⁸

The (by then Conservative) Government published its response to the two Salmon reports in 1973. Generally it supported Salmon's views on the use of tribunals of inquiry (taking into account the role of investigating maladministration of the Parliamentary Ombudsman, which did not exist in 1966), and their procedure. "The Government considers that with the Report of the Royal Commission and this White Paper to guide them, Tribunals can be relied upon to follow acceptable procedures without being bound by any rigid and detailed code of procedure."³⁹ It accepted Salmon's six cardinal principles, but noted (in a comment perhaps relevant to the Scott Inquiry) that the related recommendations "should be used as guide-lines to be followed wherever it is practicable to do so; but it considers that there will be circumstances in which certain of the principles will be capable of being observed only in the spirit and not in the letter ..."⁴⁰

Keeton, a legal academic, considered two aspects of the tribunal system in his 1959 study. He noted that, although they have no power to grant a remedy or inflict punishment as such, tribunal reports were usually accepted without debate (unlike the reports of many Parliamentary committees.) Like Salmon he considered the possibility of an appeal mechanism and believed that "so long as Tribunals do not investigate specific charges it is difficult to see how any provision for appeal could be made, and so long as witnesses whose conduct may be the subject of inquiry are legally represented at the outset, or at an early stage of the inquiry, there does not seem to be any risk of a miscarriage of justice."⁴¹ He concluded saying that "the Government alone can decide, in its discretion, when a Tribunal is necessary. The Tribunal has not replaced the Parliamentary Committee of Inquiry, and there may be occasions when this procedure is preferable to setting up a Tribunal. Generally, however, the procedure under the Act of 1921 has now developed to the point where it can be asserted that it has clearly demonstrated its superiority where 'a definite matter of urgent public importance' requires investigation."⁴²

³⁸ Para 134.

³⁹ Cmnd 5313, May 1973, para 12.

⁴⁰ Para 17. See also paras 18-28.

⁴¹ Op cit, p30.

⁴² p32.

2. Royal Commission

In 1910 a committee inquiring into royal commissions made the following statement: "We are unanimous in believing that the appointment of Royal Commissions is useful for the elucidation of difficult subjects which are attracting publicity, but in regard to which the information is not sufficiently accurate to form a preliminary to legislation ... and we are disposed to deprecate the appointment of Royal Commissions on subjects as to which there is no reasonable prospect of early legislation."⁴³ When announcing the appointment of the most recent royal commission in 1991, the then Home Secretary, Kenneth Baker, said that "The review [into criminal procedures, following the release of the 'Birmingham Six'] .. is of such importance that we believe that it should be undertaken by a royal commission The Government's decision to establish a royal commission is an indication of the importance that we attach to the work of the review."⁴⁴

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.⁴⁵ There may be differences between the two inquiry forms in terms of how evidence is taken or whether all the evidence (or the report itself) is published. *Wade & Bradley* suggests 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"⁴⁶ although there will inevitably be exceptions in both cases. The Salmon Report commented:

34. 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. For these reasons, we consider that it does not afford any practicable alternative to the procedure under the Act of 1921.

⁴³ Report of the (Balfour) departmental committee on the procedure of royal commissions, Cd 5235, 1910, para 15, written, as the report itself notes, at a time when such commissions were common. On which see the interesting 1982 article by Lords Benson and Rothschild, both of whom chaired royal commissions, "Royal commissions: a memorial" (1982) 60 *Public Administration* 339-48.

⁴⁴ HC Deb vol 187 c1110, 14.3.91.

⁴⁵ The warrant, setting out the terms of reference and membership, will generally be reproduced at the beginning of the commission's report.

⁴⁶ Op cit, p321.

Hanser, concluding his study of royal commissions, was very supportive of the technique: "From experience with single rulers, democratic assemblies, and elites of all kinds, history combines with modern knowledge to point the superiority of the processes embodied in the Royal Commission to achieve year after year and generation after generation trustworthy solutions to difficult social problems."⁴⁷

In an interesting 1982 article, Lords Rothschild and Benson (both of whom had chaired royal commissions in the 1970s) set out their proposal for the future effective use of royal commissions. They said that the decision to appoint one "often appears to be random or haphazard" and that in the mind of some of the public Governments establish them to shelve an awkward problem, delay a difficult decision or to avoid taking any decision at all. They suggested four conditions precedent before a royal commission is set up:⁴⁸

- (a) A subject or problem of significant public interest has arisen about which a decision or decisions need to be taken. The decisions must not be urgently required because a Royal Commission takes so long to complete its task.
- (b) The government department or departments concerned have not got, and cannot readily get, enough information to enable them to collate all the relevant facts and to present them to ministers (or to the public) with a summary of the courses open.
- (c) Evidence of fact, or informed opinion based on fact and experience, has to be ascertained either by research or by evidence. Also the views of a large number of people and organizations need to be obtained so that in due course the Commission can make a judgement on the basis of informed opinion over a wide area.
- (d) There should be a publicly stated wish and an intention at the time the Royal Commission is set up to take action soon after the report is published.

and continued:⁴⁹

Whatever the conditions which ought to prevail before a Commission is set up, there can surely be no possible disagreement that its purpose is first to ascertain all the relevant facts; next to assemble the facts fairly and impartially; and finally to form balanced conclusions. If all the facts are assembled impartially, the conclusions are usually inevitable.

⁴⁷ Charles J Hanser, *Guide to decision: the royal commission*, 1965, p214.

⁴⁸ Op cit, p340.

⁴⁹ p341.

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They considered the composition of a royal commission:⁵⁰

The characteristics required of Commissioners are these:

- (1) Wide general experience; above average or at least average intelligence;
- (2) Integrity; capacity or 'grasp'; and a predetermined intention to arrive at a balanced judgement;
- (3) A moderate political outlook.

The characteristics which Commissioners must *not* have are:

- (4) Intense political or doctrinaire views;
- (5) Prior commitment to a stated point of view;
- (6) Commitment to the stated views of an organization or pressure group, whether or not the Commissioner is employed by or associated with that organization or group.

They were puzzled by some of the characteristics of members of some commissions:⁵¹

It is common, in relation to Commissions and Committees of Inquiry, for the public to refer openly to 'the statutory woman' or 'the statutory trade unionist'. Women or trade unionists are invariably appointed and the public sometimes appears to believe that they are there by statute, which is not the case. Other classes of person which appear to be thought essential by reason of their occupation rather than their personal qualities are journalists, economists and academics. Why they as a class should be thought better fitted to sit on Commissions than business men, engineers, managers, accountants, industrialists, lawyers or a host of other occupations is difficult to understand.

The quality of commissioners was essential to a commission's success; for example the ability to distinguish between different classes of evidence, such as 'matters of fact', 'matters of opinion based on knowledge and experience', and 'assertions based on neither of these'.

The authors also made suggestions about a commission's secretariat and the conduct of the inquiry. They were keen to warn against unnecessary proposals for change: "nothing is more foolish than to propose change for change's sake." Their conclusions are as follows:⁵²

- (1) A review of the Royal Commissions appointed in the last 20 years should be made in order to prevent a waste of public monies in the future.

⁵⁰ p341.

⁵¹ p343.

⁵² c348.

- (2) The quality of Commissioners appointed is crucial to success. The characteristics needed for Commissioners are set out.
- (3) The number of Commissioners should be small and should not exceed ten. The Chairman should be consulted before appointments are made.
- (4) Guidelines for the use of prospective Commissioners should be prepared. They should include instructions on the best methods available for conducting the work of a Commission. Commissioners should undertake to give up the necessary time before being appointed.
- (5) A nucleus of experienced staff of a sufficiently high grade should be appointed to the Secretariat. The present *ad hoc* appointments are not satisfactory. Alternatively, they should undergo a training course before appointment to the staff of a Royal Commission.

3. Parliamentary inquiry

Describing the traditional use of Parliamentary committees for investigating the need for legislation in particular policy areas, Redlich noted that "the importance of parliamentary committees in this particular direction has, however, been materially lessened during the nineteenth century by the growing popularity of *royal commissions* as a means of conducting enquiries" and listed the advantages of such commissions:⁵³

A royal commission has many advantages over a parliamentary committee; it can, while a parliamentary committee cannot, prolong its work beyond the limits of a session, if necessary even for years; and it is possible to appoint scientific experts as members so as to secure a completely impartial treatment of the subject; the consequence is that commissions have largely superseded parliamentary committees when elaborate enquiries have to be made.

He then turned to the form of Parliamentary committees directly relevant to this Paper:⁵⁴

In addition to work of this nature, which, so far as legislation is concerned, is merely preliminary, select committees have a no less important sphere of usefulness in the investigation of grievances of a public nature, raised either by public opinion, or by some definite motion in Parliament. Chief among these are complaints as to particular branches of administration; but there are also, from time to time, special public occurrences to be studied, either in the interests of the state or in compliance with the wishes of the House. At the present day this is the main function of select

⁵³ *The procedure of the House of Commons*, vol II, 190, 1903, p.193.

⁵⁴ p194.

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committees if we leave out of consideration those upon private bills.¹ When making their enquiries select committees act in a quasi-judicial manner, and their right to summon witnesses, administer oaths and call for papers is therefore, in such cases, of the highest importance. They are also empowered, for such objects, to hear advocates on behalf of persons whose interests may be affected by their investigations.

¹ The following are instances:- Select Committee on the Imprisonment of a Member, 1902; Select Committee on the Sale of Intoxicating Liquors to Children Bill, 1901; Select Committee on the Future Civil List of the Sovereign, 1901; Select Committee on the Cottage Homes Bill, 1899; Select Committee on the Aged Deserving Poor, 1899, &c., &c.

The Salmon report dealt in some detail with Parliamentary inquiries, as it was the discrediting of such inquiries which led to the form of tribunal which was the subject of its report. Noting that "from the middle of the 17th century until 1921, the usual method of investigating events giving rise to public disquiet about the alleged misconduct of ministers or other public servants was by a Select Parliamentary Committee or Commission of Inquiry"⁵⁵ the report then gave some examples of such committees illustrating "some of the serious disadvantages of this procedure", such as that into the Marconi scandal.⁵⁶ Salmon believed that to resurrect this form of inquiry would be "a retrograde step". Select committees are suitable for many purposes "but the investigation of allegations of public misconduct is not one of them. Such matters should be entirely removed from political influences:"

35. The record of such Committees appointed to investigate allegations of public misconduct is, to say the least, unfortunate, as we have shown in Chapter 11. The Marconi scandal for this purpose sounded the death knell of this form of investigation, and because it was wholly discredited, the Act of 1921 was passed. To go back to it would, in our view, be a retrograde step. We of course recognise that there are many purposes for which Select Parliamentary Committees are most useful and indeed indispensable-but the investigation of allegations of public misconduct is not one of them. Such matters should be entirely removed from political influences. A Select Parliamentary Committee is constituted of members representing the relative strength of the parties in the House. Accordingly it may tend in its report to reflect the views of the party having the majority of members, or indeed, as in the Marconi case, it may produce two reports and when these are debated in the House, the House may divide along party lines. On the other hand the reports of Tribunals under the Act of 1921, no doubt because of their excellence and the standing and political impartiality of their members, have invariably been accepted by Parliament without question. A further defect of a Select Parliamentary Committee is that it does not normally hear counsel and some if not all of its members will have had no experience of taking evidence or of cross-examining witnesses. Finally, witnesses who give evidence before a Select Parliamentary Committee may not be entitled to the same absolute privilege as they would enjoy before a Tribunal under

⁵⁵ Cmnd 3121, para 6.

⁵⁶ See paras 7-13. See, for example, G R Searle, *Corruption in British politics 1895-1930*, 1987, chap. 8.

the Act of 1921.

36. The procedure in the United States of America for investigating allegations of public misconduct is by Congressional Committees of Investigation consisting of the representatives of the majority and minority parties. These Committees insofar as they are constituted on a political basis are closely akin to our Select Parliamentary Committees. There are permanent Congressional standing committees of investigation for these matters and they seem to be constantly employed. No doubt this system of investigation is effective in the United States of America, but in our view it would not be appropriate in the United Kingdom. Moreover, the evidence shows that although on some occasions the reports of such Committees have been generally accepted by the American public, on others they have been received with considerable scepticism and have failed to allay public disquiet. Indeed, when any matter of vital importance with a political background arises for investigation, an *ad hoc* tribunal is not infrequently appointed to avoid the matter being referred to the Congressional Committee. An example of this practice is to be found in the appointment of the Warren Commission appointed by President Johnson to investigate the assassination of President Kennedy. There is no evidence from the United States or elsewhere that does anything but support our conclusion that in the United Kingdom investigations of the kind with which we are concerned should be by Tribunals free from political influences.

The departmental select committee system, established in 1979, provides obvious opportunities for Parliament to reassert its role in the investigation of 'allegations of public misconduct', not least because it is 'permanent' rather than *ad hoc*⁵⁷. Much of what Salmon saw as inherent structural flaws with Parliamentary committees as arenas of inquiry into misconduct or scandal exists with the present departmental committees, especially in terms of its party political composition (notwithstanding the stated desire for the greatest possible degree of consensus within committees) and its powers and procedures. During the 1982 debate on the appointment of the Falkland Islands inquiry, George Foulkes wondered why the (then relatively new) Commons departmental select committees -- especially Foreign Affairs and Defence -- should not be dealing with the investigation of the relevant issues, although a fellow member of the Foreign Affairs Committee, Anthony Grant, claimed that, not only would a select committee not have full access to all material, but also that "any inquiry by the select committee would inevitably go off at half-cock and would be much more second rate than what is proposed."⁵⁸

⁵⁷ Other Parliamentary devices, such as the Public Accounts Committee (assisted by the Comptroller and Auditor General and the National Audit Office); the new Committee on Standards and Privileges and the Parliamentary Commissioner for Standards, and the Parliamentary Commissioner for Administration and Health Service Commissioner and their supporting select committee, are also available, in appropriate situations.

⁵⁸ HC Deb vol 27 c492, 8.7.82.

Woodhouse, in her study of judicial inquiries, considered the select committee⁵⁹ as a possible alternative. In theory they are "very powerful and well-equipped to undertake inquiries into the workings of government and the actions of ministers" because they decide their terms of reference and have power to send for persons, papers and records. But they "have frequently proved to be inadequate when investigating matters at the heart of government. In practice their power is limited by both Parliament and the government."⁶⁰ She cited the Foreign Affairs Committee and Public Accounts Committee Pergau Dam investigations as examples of their practical and political limitations, and also listed structural limitations such as inadequate staffing (including expert inquisitors) and resources. While they "have undoubtedly improved routine accountability and made government more transparent ... so far they have failed to provide an effective mechanism for investigating matters of great public concern which are of embarrassment to the government"⁶¹ This is due to to a reliance on government cooperation, preoccupation with party loyalties, 'short-term' political considerations and limitations on the gathering of evidence. She concluded that "any advantage in retaining accountability within the political arena is overridden by the ineffectiveness of this accountability."⁶² See also Leigh's critical analysis of the Trade and Industry Committee's investigation on the Iraq/'Supergun' affair (on which some of Woodhouse's conclusions, quoted above, are based).⁶³

In common with a number of commentators, Pythian and Little were critical of the success of the select committees' investigation of the arms-to-Iraq affair. Indeed they were critical of Parliament's role altogether in the matter: "Clearly, Parliament failed in this case to exercise any kind of effective check on the executive. That some of the facts have emerged is largely accidental and the result of involvement of the courts and the media. But the question remains whether Parliament's failure matters?"⁶⁴

4. An inquiry of the Lord Denning/Profumo type

The Salmon Commission was very critical of the format of Lord Denning's inquiry⁶⁵, although not of the judge himself. "Lord Denning had in effect to act as detective, solicitor, counsel and judge. In spite of the many defects in this procedure, [his] Report was generally accepted by the public. But this was only because of Lord Denning's rare qualities and high reputation. Even so the public acceptance of the Report may be regarded as a brilliant exception to what would normally occur when a inquiry is carried out under such conditions."⁶⁶ The

⁵⁹ And other Parliamentary mechanisms, already mentioned, not considered in detail here.

⁶⁰ Op cit pp34, 35.

⁶¹ p37.

⁶² p38.

⁶³ Ian Leigh, "Matrix Churchill, Supergun and the Scott Inquiry", 1993 *Public Law* 630, 635-41.

⁶⁴ M Pythian and W Little, "Parliament and arms sales: lessons of the Matrix Churchill affair", (1993) 46 *Parliamentary Affairs* 293, 307.

⁶⁵ Cmnd 2152, Sept 1963.

⁶⁶ Cmnd 3121, para 21.

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."⁶⁷ 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.

5. Departmental inquiry

Little need be said about such inquiries, as, other than the obvious formalities of appointment, they are often similar to royal commissions in their potential composition, subject-matter and procedures. To that extent the general discussion in the introductory section of this part of the Paper, and the consideration of the Scott Inquiry itself, deal with this form of inquiry. Wraith and Lamb's study remarked:⁶⁸

Non-statutory inquiries are relatively infrequent, but are often of unusual interest. There is no common factor running through them, except perhaps that their subject matter is exceptionally important or controversial. They are ordered by Ministers without specific statutory authority, so that on the one hand they are not bound by procedural rules, but on the other hand they have no power to compel the attendance of witnesses or the production of documents. Even their non-statutory nature stems from different reasons; in most cases they are non-statutory because no inquiry powers are provided in law which precisely cover the matter in hand; in other cases (such as the siting of prisons) it may be ministerial policy to hold an inquiry even where one is not required; in yet another set of inquiries (those by Regional Hospital Boards) they are non-statutory because the Minister chooses to arrange matters so.

The Salmon report summed them up briefly:

⁶⁷ Para 39.

⁶⁸ R E Wraith and G B Lamb, *Public inquiries as an instrument of government*, 1971, p202.

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43. These are normally used to investigate matters which are causing public concern, but which are not of such importance as to justify the appointment of a Tribunal under the Act of 1921. A Departmental inquiry is usually appointed by the responsible Minister to be conducted by an eminent lawyer alone or as chairman with others. These inquiries have no power to compel the attendance of witnesses or the production of documents and are not in our view suitable for dealing with the special type of case for which the Act of 1921 was framed.

Wade and Bradley's *Constitutional and administrative law*, having considered the 'judicial' nature of *ad hoc* inquiries such as those by Denning and by Scott, in that they are conducted by a judge but without court-like powers, commented that "a government that chooses to appoint them must consider that the advantages of informality make up for lack of powers."⁶⁹

6. Accident inquiry

This form of inquiry is not considered in detail in this Paper. 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 *lis*; 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.

7. Security Commission

Again, this form of inquiry is not considered in detail in this Paper. There is now a number of bodies that can deal with security-related issues, such as the Interception of Communications Commissioner (and Tribunal) and the Security Service Commissioner (and Tribunal).⁷⁰ The Salmon report had the following analysis:

45. It seems to us that an inquiry by the Security Commission could never be a suitable alternative to an inquiry by a Tribunal appointed under the Act of 1921. The respective purposes of the two forms of inquiry are wholly different. The purpose of inquiries by the Security Commission is

⁶⁹ p661. See the discussion on inquiry procedures in the Scott Inquiry section, below.

⁷⁰ See the *Interception of Communications Act 1985*, *Security Service Act 1989*, *Intelligence Service Act 1994*, and Background Paper 113, March 1983.

to report to and advise the Prime Minister upon security arrangements within the public service. The subject matter of such inquiries may have caused no public concern and indeed may well be entirely unknown to the public. In the public interest these inquiries are of necessity held in private. The purpose of inquiries under the Act of 1921, as we have already pointed out, is publicly to establish the truth when there is a nation-wide crisis of confidence about matters of urgent public importance. It is of the essence of these inquiries that they should be held in public although most exceptionally some part of them may be held in private. The only way in which the two types of inquiries may overlap is that some aspect of a matter referred to a Tribunal of Inquiry might (as in the Vassall case) by itself have been appropriate for reference to the Security Commission.

46. Although it is not within our province to advise on such a topic, we can readily appreciate that the vital importance to the nation of maintaining efficient security arrangements may require the arming of the Security Commission with powers to compel evidence similar to those enjoyed by a Tribunal of Inquiry. If such powers are conferred upon the Security Commission, we recommend that this should be done by a separate enactment and not by turning members of the Security Commission into a Tribunal of Inquiry for the purpose of any particular case. We do not consider that the Act of 1921 should be invoked for the purpose of giving teeth to the Security Commission or any other body. We consider that it should be used only for the purposes which we have stated. Whenever a Tribunal of Inquiry is appointed then, whatever its composition, it should in our view follow the principles which we recommend.

8. Committee of Privy Counsellors⁷¹

This is probably best regarded as a special, and often more formally prestigious, form of departmental committee. The nature of such a body and its advantages and disadvantages in terms of procedure and operation was discussed in some detail in the Commons debate on 8 July 1982 on the Falkland Islands Review,⁷² which highlighted a number of issues relevant to such committees and to inquiries in general, such as access to departmental and Cabinet papers, with the consent of former Prime Ministers for papers of previous administrations.

The 1982 Falklands crisis was one of the most controversial episodes of the 1979-83 Parliament, and a review of the Government's actions in the period up to the Argentine takeover of the Falklands in April 1982 so soon after the war itself was clearly a major political issue, generating strong feelings inside and outside Parliament, often cutting across party lines, as can happen when British troops are involved in active service. Mrs Thatcher

⁷¹ In this Paper the term 'Privy Counsellor', the spelling generally used in official sources, is preferred to 'Privy Councillor', although the latter appears in many of the extracts cited.

⁷² The debate was itself a relatively rare occurrence.

announced the establishment of the Inquiry in written answers of 6 July⁷³ and this was approved by the Commons. The committee had the first of its 42 meetings on 26 July, and reported on 31 December, its report published the following month. The way in which the committee proceeded is explained in the report's introduction⁷⁴, and the list of those who gave oral evidence⁷⁵ is impressive, including the then present as well as the three immediately preceding Prime Ministers, and other then current and former senior ministers.

Opening the 8 July debate, the Prime Minister set out the reasons why the Privy Counsellor form of inquiry was appropriate:⁷⁶

I wish to deal in turn with the nature of the review, its scope and its composition. As to its nature, the overriding considerations are that it should be independent, that it should command confidence, that its members should have access to all relevant papers and persons and that it should complete its work speedily. Those four considerations taken together led naturally to a Committee of Privy Councillors. Such a Committee has one great advantage over other forms of inquiry. As it conducts its deliberations in private and its members are all Privy Councillors, there need be no reservations about providing it with all the relevant evidence - including much that is highly sensitive - subject to safeguards upon its use and publication.

A Committee of Privy Councillors can be authorised to see relevant departmental documents, Cabinet and Cabinet Committee memoranda and minutes, and intelligence assessments and reports, all on Privy Counsellor terms. Many of these documents could not be made available to a tribunal of inquiry, a Select Committee or a Royal Commission.

The Committee will also be able to take evidence from any Ministers or officials whom it wishes to see, and I hope that former Ministers or officials and others who may be invited to assist the Committee will think it right to do so.

There are several precedents for a Government setting up a Committee of Privy Councillors to look into matters where the functioning of the Government has been called in question and

sensitive information and issues are involved.

I will refer to just one. A conference of Privy Councillors was established in November 1955 to examine security procedures in the public services as a result of the defection of Burgess and Maclean. The results of the inquiry were reported to the House by the then Prime Minister on 8 March 1956, although he stated that it would not be in the public interest to publish the full text of the report or to make known all its recommendations.

In the case of the present review, information made available to the Committee whose disclosure would be prejudicial to national security or damaging to the international relations of the United Kingdom will need to be protected. The Government will therefore suggest to the Committee that it should seek to avoid including any such information in its main report which is to be published, and that, if it needs to draw conclusions or make recommendations which, if published, would entail the disclosure of such information, it should submit them to the Government in a confidential annex which will not be published.

In the last resort the Government must retain the right to delete from the Committee's report before publication any material whose disclosure would be prejudicial to national security or damaging to the international relations of the United Kingdom. But I very much hope that the arrangements that I have just described will make it unnecessary for the Government to do that. However, should it be necessary I can give the House the following

⁷³ Much of the background to the Inquiry is considered in Research Note 80, *The Falkland Islands Inquiry*, 7.7.82, and is not reproduced here.

⁷⁴ Cmnd 8787, Jan 1983, paras 1-14.

⁷⁵ Annex E.

⁷⁶ HC Deb vol 27 cc469-70, 8.7.82.

assurances.

First, the Government will make no deletions save strictly on the grounds of protecting national security or international relations. Secondly, Ministers will consider any proposals for deletions individually and critically and will accept such proposals only on the grounds I have specified. Thirdly, the Chairman of the Committee will be consulted if any deletions have to be proposed. The fact that the Committee would know what deletions had been made from its report offers the best assurance to those who might believe that the Government would try to make unjustified deletions.

Nevertheless, I repeat that it is the Government's aim to present to Parliament the report of the Committee in full.

She also considered the difficult constitutional issue of access to the papers of previous Administrations, and made a procedural point perhaps of some relevance to the Scott Inquiry:⁷⁷

There is one other procedural matter on which I should say a few words. Although it will be for the Committee itself to determine its own procedure, it will be suggested to the Chairman that should the Committee wish to criticise any individual it should, before incorporating that criticism in its report, give the person concerned details of the criticism, and an opportunity to make representations, orally or in writing. At that stage the Committee would have to decide whether to allow the individual concerned to be legally represented.

Even though the review will be conducted in private, it is important that individuals should not be inhibited in giving evidence to the Committee through fears of making themselves vulnerable to criticism which they may think unjustified and which they might not be given an opportunity of rebutting before the Committee.

An issue which is, almost by definition, central to this form of inquiry is its composition, especially the fact that all members were Privy Counsellors (or, as with Sir Patrick Nairne in that Inquiry, made a member of the Privy Council in order to be on the Inquiry). The Leader of the Opposition nominated two of the six members. Mrs Thatcher hoped that "the House will share my view that a Committee with this membership gives us the best possible

⁷⁷ c471.

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assurance that the review will be carried out with independence and integrity."⁷⁸ This was immediately challenged by an intervention by Dick Douglas who suggested that "there might be an outside impression that this coterie is comfortable, conservative and clubbable, as there is no female member on the committee." Tam Dalyell asked for a senior lawyer as a member, and also suggested "having someone representing the the view of what one might call the awkward squad."⁷⁹

The Opposition Leader, Michael Foot, supported the membership, believing that it was a guarantee that the inquiry would be carried out as the House would wish. As for the members being Privy Counsellors.⁸⁰

I am not making any reflection upon those who are not Privy Councillors..... Until the convention is changed, there are certain qualifications that Privy Councillors have to sustain and to which they must subscribe. That is why I believe that in these circumstances it is wise to choose them, but I repudiate entirely any suggestion that the two spokesmen who will be there on behalf of the Labour Party will not prosecute these matters with sufficient zeal and independence. Of course they will. Moreover, as I understand it, in a case such as this they retain the right to make their own independent assessment and to produce their own report if they so wish. It does no service to the country to suggest that the inquiry will in any sense be conducted by a coterie. It will be conducted on behalf of the House of Commons. That is why I ask the House to vote for it now. I believe that it is the right course to take and that the House should give its confident support for it.

Roy Jenkins (SDP) was pleased with the choice of a Liberal, Lord Franks as chairman and said that he could "see no way of avoiding the fact that under a whipping system the representatives of the two major parties are chosen by the Government and Opposition Front Bench. I make no point about that." However, when considering Sir Patrick Nairne's elevation, he warned that "there is a danger of making a fetish of Privy Councillorhood. It does not make great sense to pretend that a man's discretion and sense of secrecy cannot be trusted if he is not a member of the Privy Council, but if he is made one it is absolute." He pointed out that permanent secretaries and others who are not Privy Counsellors are trusted with state secrets, and thought that part of the Privy Counsellor's oath is often more honoured in the breach.⁸¹

⁷⁸ c472.

⁷⁹ cc472, 473 respectively.

⁸⁰ c477. But see, for example, George Foulkes (cc491-2) and Alex Lyon (cc497-9).

⁸¹ cc485, 486.

On the other hand, Humphrey Atkins, one of the Foreign Office ministers who resigned at the outset of the Falklands crisis, was happy to rely on an inquiry of Privy Counsellors, because of the oath they have taken: "the fact that somebody has become a Privy Councillor and is known to have taken the oath means that outsiders can place reliance upon him ... It is my belief .. that Privy Councillors, bound by the Privy Council oath, will have the necessary credibility outside the House." Interestingly from the point of view of the Scott Inquiry, he was pleased that a judge was not appointed to the inquiry: "this is not an inquiry for a judge. There is no justiciable issue. There is a great need for an understanding based on experience of how the Government machine works. Without such knowledge it would be difficult, perhaps impossible, to know the right questions to ask. If the right questions are not asked, the right conclusions will not be drawn and the right lessons will not be learnt."⁸²

Replying to the debate the Prime Minister said that she had to consider not only the integrity of Privy Counsellors and others but also the attitude and confidence of the intelligence community and of other countries, as members of an inquiry need not necessarily have been bound by the Official Secrets Act. A committee of Privy Counsellors "makes it easier to secure the consent of those who have to give such consent if Cabinet minutes and documents are to be revealed to the members of the inquiry."⁸³

9. Follow up inquiries

From time to time Government or Parliament may propose a further inquiry of some form to follow up some issue raised by an inquiry report. This may be to pursue in greater detail, and with a new and appropriate membership, some specific aspect of the subject area of the initial inquiry (perhaps at the suggestion of the report itself), or to advise on the implementation of a recommendation of the initial report. A recent example of the latter is perhaps the work of the Select Committee on Standards in Public Life last session to implement the Nolan Report's proposals for the regulation of Members' standards and interests.⁸⁴

However, in certain cases, there may be suspicions that ministers propose a further inquiry in order to put off a decision on the initial report, or to dilute or overturn its findings or recommendations.⁸⁵ An interesting illustration (not least because of the Parliamentary aspect of the affair) is the 1978 Bingham Report on Rhodesian oil sanctions.⁸⁶

⁸² c490. On the latter point see Lord Howe's argument, considered below.

⁸³ cc506-7.

⁸⁴ See *The Nolan resolutions*, Research Paper 95/118, 23.11.95.

⁸⁵ There were some suggestions to this effect during the Nolan debates, for example.

⁸⁶ Deposited Paper 7788, Sept 1978.

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The report caused difficulties for Ministers because of revelations of previous administrations' knowledge of sanctions-busting arrangements by the oil companies, and because of the inquiry's access to certain Cabinet papers⁸⁷, although not directly used in the report. When the House debated the report during two days of the Queen's Speech debate in November 1978, the Foreign Secretary, David Owen, said that the Government would listen to Parliament before deciding how to proceed.⁸⁸ For the Opposition, Francis Pym said that they too would listen to the House, but "we think that a tribunal under the 1921 Act would be quite inappropriate. How much more any further inquisition of any kind would reveal is uncertain. However, if such is thought necessary, as well it may be, our preliminary view is that it should be of a parliamentary kind, because the issue is wholly political and the buck stops in this House. It is a parliamentary matter because it is concerned essentially with the relationship between Ministers and this House. We therefore think that it should be confined to this House."⁸⁹

Ministers decided to establish a Parliamentary inquiry,⁹⁰ and the Prime Minister, James Callaghan, informed the House on 15 December 1978 that because of the "exceptional nature of the events" and the "importance of the questions raised by hon. Members" there should be a further inquiry. "Such an inquiry will largely be a matter of political judgement." He proposed the following format:⁹¹

The resolution that we shall put before the House will provide that this Special Commission will have powers to send for persons, papers and records; it will also have power, if it judges it necessary, to hear counsel and to call upon the assistance of the Attorney-General; and it will sit in private. It will publish its finding but not its evidence.

It would be unprecedented to make Cabinet papers available in this way. Nevertheless, given the special circumstances, the Government are prepared to make Cabinet papers available, subject to certain conditions. Provided I have the agreement of the former Prime Ministers concerned, I shall be ready to recommend to the

⁸⁷ An issue which, as already noted in the Falkland Islands Review context, can cause difficulties for the composition and operation of an inquiry.

⁸⁸ HC Deb vol 957 cc704, 706, 7.11.78, and the Attorney-General's important speech the following day, discussing the relationship between a further inquiry and possible criminal proceedings, and setting out the pros and cons of the various forms of follow-up inquiry, including a 1921 Act tribunal and a Parliamentary inquiry, cc972-990, 8.11.78.

⁸⁹ c724. Similar points were made by Douglas Hurd, opening the following day's debate, c962, 8.11.78.

⁹⁰ See David Owen, *Time to declare*, 1992, chap 13 and Tony Benn, *Conflicts of interest: diaries 1977-80*, 1991, chap 4.

⁹¹ HC Deb vol 960 cc1183-4, 15.12.78.

Queen that Cabinet papers, as well as other Government papers, should be made available through the Chairman of the Special Commission. He if necessary in consultation with the other members of the Commission, and with the assistance of the Treasury Solicitor, will judge which of the great volume of papers relating to Rhodesia should be seen by the members of the Commission or by witnesses appearing before them, and these papers will be made available. He will similarly be free to decide whether it is essential to publish or refer to any of these papers in the report of the inquiry.

Thus the test of relevance of a Cabinet paper to the Commission's inquiry will be applied not by the Government themselves but by the Chairman of the Commission, who, as I have said, would be a Lord of Appeal.

The Leader of the Opposition said her party would reserve their judgment on the proposal, but said that any further inquiry had to be concluded speedily. A former Prime Minister during the relevant period, Edward Heath, was strongly critical, calling the proposal "the worst of all possible worlds", a 1921 Act-type body without its procedural safeguards.⁹²

The Commons debated the proposal on 1 February 1979 for a Joint Committee of both Houses to be called the 'Special Commission on Oil Sanctions'.⁹³ Significantly the Opposition had by then decided to oppose the idea of a Parliamentary inquiry. Norman St John Stevas said that since December "opinion on the Opposition Benches has tended to harden against it The more I reflect upon the matter, the more I am driven to the conclusion that the course that the Government are advocating is unnecessary, untimely, likely to prove ineffective, and contains grave dangers both for the reputation of this country in the world and to our tradition of constitutional government."⁹⁴ The House approved the proposal after a long debate and a series of divisions. However the House of Lords, when it debated the proposal on 8 February, rejected it 58-102.⁹⁵ Lord Hailsham, for example, described it as "a wholly unacceptable proposal ... a constitutional enormity."⁹⁶

On 19 December 1979, the Conservative Attorney-General, Sir Michael Havers, told the House that he agreed with the DPP's view, in relation to possible criminal proceedings following the Bingham Report, that "further investigation and public expenditure would not be justified and the matter should proceed no further."⁹⁷ When asked for his view on a further inquiry following the the Houses' vote in the previous February, he said that "an

⁹² cc1186-7.

⁹³ HC Deb vol 961 cc 1709-1826, 1.2.79.

⁹⁴ c1731.

⁹⁵ HL Deb 398 cc849-894, 8.2.79.

⁹⁶ c859.

⁹⁷ HC Deb vol976 cc627-44, 19.12.79.

inquiry is a matter for my right hon. Friends. I am unable to give the House any information."

II The Scott Inquiry

This section considers the Scott Inquiry as an inquiry, including its establishment, composition and procedure. It does **not** consider the subject-matter of the Inquiry, or the related substantive legal issues such as PII certificates. Detailed references are given to statements by ministers and the Inquiry both because of the current interest in the Inquiry and the general application of this instance to the overall subject of this Paper.

A. Appointment: the Attorney-General's statement of 10 November 1992

During Question Time on 10 November 1992 the Prime Minister, in answer to John Smith's request for "an inquiry under the Tribunal and Inquiries Act 1992"⁹⁸ said that the Attorney-General would be making a statement that afternoon to "tell the House that the Government will be setting up an independent judicial inquiry, which will have full access to all the papers and will be able to take evidence from all the Departments and all the agencies concerned."⁹⁹

The Attorney-General announced the establishment of an inquiry into the arms-to-Iraq affair following the outcome of the Matrix Churchill court case.¹⁰⁰ He described it as "a full and independent inquiry ... undertaken by a judge" and explained Lord Justice Scott's role:¹

This will encompass the operations of all relevant departments and agencies. I am glad to tell the House that Lord Justice Scott has agreed to undertake that task. The precise terms of reference will need to be discussed with the judge. It is hoped to make them available to the House later this week. The judge will have access to all relevant papers and will be able to invite evidence from anyone he thinks fit. It will be for him to decide the extent to which he sits in public. His report and evidence will be published except insofar as, in the light of his advice, publication is contrary to the public interest.

The inquiry will be set up and conducted as speedily as possible, having regard to the need not to prejudice any further criminal inquiries or proceedings. On that aspect, I should say that the Commissioners have referred the

⁹⁸ It is not clear whether Mr Smith meant the 1921 Act.

⁹⁹ HC Deb vol 213 c738, 10.11.92.

¹⁰⁰ cc743-758.

¹ c743.

papers in the case to the Director of Public Prosecutions.
Any further action is a matter for them.

In response to questions from John Morris, for the Opposition, Sir Nicholas Lyell said that the inquiry would "not be limited to policy: it will be able to look into all relevant aspects of the matter, and to invite such witnesses as it thinks fit to appear before it." PII certificates could be examined by the inquiry "if it thinks it appropriate."²

Menzies Campbell (Liberal Democrat) called for a 1921 Act tribunal of inquiry in order that it could compel the attendance of witnesses and exercise contempt powers if necessary: "An inquiry with the powers which the Attorney-General has spelt out will be toothless and unlikely to get to the truth of the matter." Sir Nicholas replied that a 1921 Act tribunal "can have compensating disadvantages as well as the advantages that he pointed out" and claimed that there was no reason to believe that any relevant witness would fail to attend the inquiry. He believed that the experience of recent inquiries, such as that into BCCI, showed that "it is nonsense to suggest that Lord Justice Scott's inquiry is likely to be toothless."³

In response to further questions, the Attorney-General said that the inquiry would have power to summon ministers, and that "there can be no question of any Minister who has been requested to appear before the inquiry not appearing." He agreed with Bill Cash's comment that one disadvantage of a 1921 Act tribunal was the difficulty of mounting a prosecution after such an inquiry. He said that "the question of form and procedure in the holding of the inquiry is, to a considerable extent, a matter for the learned judge who will undertake it, and I will not comment further."⁴

As for the appointment of a judge, Sir Nicholas said that "it is because of the importance and complexity of the issue that this type of inquiry has been set up, and that it is because it is someone who can set aside time and apply a judicial mind to these issues that a very senior judge has been invited to hold it."⁵ Responding to John Morris's final questions, he said that "the point of having an independent inquiry by a learned Lord Justice is so that the Lord Justice will decide the issues."⁶

Sir Nicholas said that that Lord Justice Scott would no doubt be motivated by the law of

² c744.

³ c745. Note that Michael Heseltine, responding to an Opposition Day debate two weeks later, said that "Lord Justice Scott knows that if he feels unable to obtain satisfactory attendance or answers, he is free to ask the Government to convert the inquiry into a 1921 Act inquiry. If he asks, the Government will agree to his request": HC Deb vol 214 c651, 23.11.92.

⁴ c748

⁵ c749

⁶ c754. Tony Benn, in the 23 November 1992 debate, argued that the House, through a select committee, should be the forum of investigation to hold the Executive to account in such cases: HC Deb vol 214 cc673-5.

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public interest immunity in a court case "when he makes his detailed inquiry and gives his advice as to what should be published," but added that he "should be surprised in the extreme if [the judge] did not publish something simply because it was thought to be of political embarrassment."⁷ When asked about ministerial responsibility, the Attorney-General said "there could be no better way of examining whether ministerial responsibility should be pinned in any particular area than to have a detailed and independent inquiry."⁸

The Inquiry's terms of reference⁹ were published in a written answer by the Prime Minister on 16 November:¹⁰

All relevant issues will be covered by Lord Justice Scott's inquiry whose terms of reference will be:

"Having examined the facts in relation to the export from the United Kingdom of defence equipment and dual use goods to Iraq between December 1984 and August 1990 and the decisions reached on the export licence applications for such goods and the basis for them, to report on whether the relevant Departments, Agencies, and responsible Ministers operated in accordance with the policies of Her Majesty's Government; to examine and report on decisions taken by the prosecuting authority and by those signing public interest immunity certificates in *R v Henderson* and any other similar cases that he considers relevant to the issues of the inquiry; and to make recommendations".

The terms of reference have not been restricted to Matrix Churchill. They include the supergun and other defence and dual-use sales.

The terms of reference relate not just to arms questions but to decisions taken on the prosecution of companies and on public interest immunity.

All Ministers who are called will give evidence.

All civil servants who are called will be instructed to co-operate.

All papers that the inquiry calls for will be made available.

Lord Justice Scott will be entirely free to decide on the publication of his report and of the evidence he takes.

If Lord Justice Scott finds that, his powers are in any way insufficient, he can invite the Government to alter the basis of his inquiry and the Government would agree to do

⁷ cc749, 750. Mr Heseltine, in the 23 November 1992 Opposition Day debate, said that "Lord Justice Scott will have unfettered discretion as to what to publish and whether, or what parts of, his inquiry will be in public.": HC Deb vol 214 c651.

⁸ c750

⁹ Which the Attorney-General, in his 10 November statement, had said would be "widely drawn": c750. In the 23 November 1992 Opposition Day debate, Sir David Steel said that the fact that the Government laid down the terms of reference compromised the Inquiry's independence, and suggested that they should have been agreed with the Opposition parties: HC Deb vol 214 c657.

¹⁰ HC Deb vol 214 cc74-75, 16.11.92.

so.

The inquiry will report to my right hon. Friend the President of the Board of Trade.

B. Procedure

1. The Inquiry's procedure

During a press conference on 31 March 1993, Lord Justice Scott set out the procedure his Inquiry would follow when taking oral evidence (most of the Inquiry's evidence would be by written representations and documents):¹¹

May I now turn to procedure. The procedures I will in general be using while taking oral evidence are set out in the paper that I believe has been supplied to you. The vast bulk of the relevant evidence in this Inquiry (unlike many others) will be contained in the documents and written statements. So, not all persons from whom written evidence has been requested will be invited to give oral evidence. My purpose in inviting witnesses to give oral evidence will normally be one or other of the following:

- i) to obtain oral confirmation of some important point or points which have emerged from the written evidence or the documents;
- ii) to fill in evidential gaps that seem not to be covered by the documents or the written evidence;
- iii) to enable individuals to explain documents, or passages in documents, from which, in the absence of explanation, certain inferences might be drawn;
- iv) to enable witnesses to meet criticisms of their conduct which might otherwise be made;
- v) to explain or expand upon written evidence which they have submitted or to comment on written evidence submitted by others.

I must make it clear that if any witness, or potential witness, feels that his or her interests will be prejudiced by the procedure I propose adopting, he or she may make representations to me explaining the concern. I am quite prepared, if I think it necessary, to make ad hoc adjustments to the proposed procedure. My overriding criteria in resolving procedural questions will be fairness to witnesses and the efficiency of the Inquiry.

The note on procedure (and its annex setting out Lord Justice Scott's correspondence with the Cabinet Secretary, Sir Robin Butler, on disclosure of official information) included the points

¹¹ Inquiry press notice 4, 31.3.93. See Appendix 2 of this Paper. The DTI reproduced a note on the Inquiry's procedure in response to a PQ in January 1994, HC Deb vol 235 c725W, Deposited Paper 10160.

that all hearings would be in public unless there were good reasons otherwise; witnesses could be accompanied by a legal or other adviser, and consult them before answering questions, although "it is not anticipated that those accompanying witnesses (whether or not legal advisers) will be invited to address the Inquiry or to question witnesses"; questions would be put on behalf of the Inquiry mainly by its counsel (Presiley Baxendale QC); witnesses would receive a transcript of their evidence and have an opportunity to make further points, and Lord Justice Scott would, if he thought it necessary, invite one witness to comment in writing on the evidence of another; witnesses may be asked to give further evidence. The Attorney-General had given an undertaking of immunity for those participating in the inquiry as witnesses in relation to contravention of any relevant legislation, including the *Official Secrets Acts* (for which the Government would give lawful authority for any disclosure of official information). Before making a criticism of a witness in a Report, the Inquiry would give that witness to make written comments. Arrangements for the payment of costs were also set out.

2. 'Adversarial' and 'inquisitorial' procedure models

It will have been seen from this Paper thus far that a crucial aspect of any investigatory inquiry is the procedure it adopts (itself a function of the powers it is given). As is said in the Parliamentary context, procedure is often the crucial element in the operation and effectiveness of a body. Procedure, properly adopted and utilised, provides a framework for the achievement of an inquiry's purposes and objectives (within an appropriate timescale) while ensuring that it is done in a way which accords with accepted principles of justice, fairness, accountability and equity. The extent of the acceptability of an inquiry's procedure will be relevant to the credibility and legitimacy of its proceedings and its report and findings.

Woodhouse discusses these issues in terms of the concepts of 'efficiency' and 'fairness' in relation to an inquiry's task:¹²

The expectations of a judicial inquiry are high and are not easily met. Indeed, it is perhaps almost certain to disappoint. There is a danger that if it fails to identify those at fault, or appears to minimise the extent and consequence of culpability, or does not express sufficient indignation at government misconduct, it will be dismissed as a whitewash. On the other hand, if it names individuals as being culpable, it will be criticised for making them scapegoats, particularly if those identified are officials who have had no opportunity to defend themselves in public or to contest the evidence against them. The difficulty in satisfying public expectations arises from the awkward constitutional position. The inquiry is charged with determining what happened and who was responsible. Yet if it fulfils this requirement and reports accordingly, it is likely, unless ministers alone were found to have been culpable, to undermine the convention of ministerial responsibility upon which British government rests. Its choice, therefore, is

¹² Op cit, p29.

to make a bland final report, which requires careful reading and interpretation to determine blame, or to attribute culpability directly, even if this contravenes the constitutional relationship between officials and ministers. Either way, it is open to criticism.

The criticisms appear to be opposing - either the inquiry is inefficient or it is unfair. However, both have a bearing on the acceptability of its conclusions, the validity of which will be undermined if the process is perceived as having been unfair. Moreover, the fairness of an inquiry is linked with its ability to determine the truth, a link that was made by Lord Howe in his criticisms of the Matrix Churchill inquiry.

She was cautious about the effectiveness of inquiries as mechanisms for public accountability:¹³

Thus no matter how efficient an inquiry may be in determining the truth, its effectiveness as a mechanism for public accountability, is limited. It is separate from the political process which holds ministers to account and, rather than being responsible to Parliament, the main arena of public accountability, it works for government, by whom it is appointed and to whom it reports. It is with ministers that it has to agree its terms of reference and negotiate its powers not Parliament. Moreover, the fact that its powers are decided on an ad hoc basis inevitably causes delay - to the advantage of government - and increases costs - to the disadvantage of the taxpayer. Yet a brief review of alternative mechanisms of investigation indicates that their effectiveness or suitability is even more open to question.

She concluded that a judicial inquiry (discussed generally in the introductory section of this Paper) "is an awkward mechanism in danger of falling between two stools and of being criticised, on the one hand, for imposing a legal formality which is inappropriate for an investigation into the body politic and, on the other, for not providing the legal safeguards necessary for the protection of individuals appearing before it."¹⁴

There are, broadly speaking, two models of inquiry procedure, which will be adopted in this Paper for the purposes of this discussion, namely the 'adversarial' and 'inquisitorial' approaches. Simply put, an adversarial system is one that corresponds to some degree to a court's procedure, where two (or more) cases are put before a 'judge', normally by legal representatives, through argument and the examination and cross-examination of witnesses under oath by the legal representatives. An inquisitorial model suggests that the 'judge', the Inquiry itself, takes a more activist role in the gathering of information, the questioning of witnesses and generally determining the progress and direction of the Inquiry's proceedings.

¹³ pp32-3.

¹⁴ p38.

The suitability of one or other of these models (which is not to suggest that they are mutually exclusive in all respects) depends to a large extent on the purposes and functions of a particular inquiry. Inquiries may, for example, be established to discover facts or a course of events, or to evaluate actions and conduct of Ministers, officials and others, and any relevant policy or law, with a view to making recommendations. In many inquiries into controversial issues or 'scandals', many of those involved may feel that they are open to critical comment, disciplinary action or even civil or criminal proceedings, and, for that reason, may wish legal or other professional assistance to protect and defend their interests. Inquiries which are, for some reason, subject to some form of imposed or self-imposed time constraint (eg where proposals or recommendations are required in relation to a current difficulty or policy problem) may feel that a 'full' adversarial procedure would be too time-consuming. Issues of official secrecy for security or other reasons, in relation to officials and papers, may influence the form of procedure, and whether inquiry proceedings should be held wholly or partly in public. In practice the procedure of an inquiry may well be influenced by its composition, especially if legally-qualified people, including judges, are appointed as members. In addition, many inquiries have some or all of their procedures laid down by statute (such as the *Tribunals of Inquiry (Evidence) Act 1921* itself) or by their terms of reference, and they will have to adhere, to an appropriate degree, to accepted rules of natural justice and procedural fairness, a requirement potentially enforceable by judicial review.¹⁵

Blom-Cooper, a veteran of such inquiries, has neatly encapsulated the procedural issues: "The need to incorporate into the inquisitorial procedure adequate safeguards to protect individuals liable to be criticised in any report, with consequential adverse action, has been central to contemporary debate over public inquiries. The overriding public interest in establishing the truth through a thorough investigation, unimpeded by rules of evidence, must not unnecessarily imperil the rights and interests of individuals whose conduct is under public scrutiny." He noted that Lord Justice Scott's motive in setting out his procedural model was "to establish a procedure which would ensure an efficient and speedy inquiry while paying full regard to the need to safeguard the interests of individuals."¹⁶ He did, however, question "the proposition that legal representation equals prolixity and protracted proceedings", and suggested the options of collective, rather than individual representation, and of limiting the extent of cross-examination. Legal representatives "should recognise that their primary duty is to the Inquiry and only secondarily to their client," as representation was not a right.¹⁷ He did criticise the timing of Lord Howe's criticism (see below) as "illegitimate" although "doubtless .. genuine enough," and suggested the Inquiry's procedure could be tested by judicial review."¹⁸

¹⁵ See Sir Louis Blom-Cooper, "Witnesses and the Scott Inquiry", 1994 *Public Law* 1-3.

¹⁶ p1.

¹⁷ p2

¹⁸ p3

The 'adversarial' vs. 'inquisitorial' debate over the Scott Inquiry's procedure will be examined here through the arguments of the two chief protagonists, Lord Howe of Aberavon and Sir Richard Scott himself.

3. Lord Howe of Aberavon's 'adversarial' view¹⁹

Lord Howe of Aberavon QC, a former Solicitor General, who was Foreign Secretary during much of the arms-to-Iraq affair, took as his text of procedural fairness, in relation to the Scott Inquiry, the 1966 Salmon royal commission's 'six cardinal principles':²⁰

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.

He claimed that "ever since Salmon reported in 1966, those conducting this kind of inquiry, statutory or not, have sought to respect these principles. Inevitably they do so, as the Scott enquiry is doing, 'pragmatically'. Danger can arise, however unintentionally, if pragmatism comes to override the principle that justice must be done and be seen to be done."

He recounted his experiences of chairing the Ely Hospital inquiry in 1969,²¹ and appearing

¹⁹ This section is based on Lord Howe, "Scott's salami tactics", *Times*, 1.3.94. See also his recent *Spectator* article, "A judge's long contest with reality", 27.1.96; Sir Bernard Ingham's *Daily Express* column on 25.1.96 and the letters by Lord Rawlinson of Ewell, a former Conservative Attorney-General, in the *Daily Telegraph* of 6.2.96 and by Sir David Croom-Johnson, a former Lord Justice of Appeal who chaired the Crown Agents Tribunal, in the *Spectator* of 3.2.96.

²⁰ Cmnd 3121 para 32. Also reproduced as Appendix 1 to this Paper.

²¹ Cmnd 3975, March 1969.

before the Aberfan Tribunal²² representing NCB management whose conduct was under investigation. He said both inquiries benefitted from having members expert in the relevant field, whereas the Scott Inquiry had no such direct assistance "although the realms [it] is exploring -- of parliamentary and administrative practice, security and foreign policy -- are no less specialised than those of colliery and hospital management. My Ely colleagues provided expert insights and advice. This greatly enhanced the chairman's understanding of the issues -- and hugely shortened the proceedings as well." The Ely inquiry was also helped by the legal representatives of those under scrutiny, where informal discussions between the panel and the lawyers also helped to shorten proceedings.

However the Ely report complained of the absence of a counsel or solicitor to the inquiry itself, as such assistance would help the inquiry panel to act in a neutral and independent stance in relation to the parties. Without this independent help an inquiry panel would be in the unhappy position of attempting to combine the roles of judge and prosecutor. This, as Lord Howe noted, echoes Lord Denning's comment in the Profumo report that "I have had to be detective, inquisitor, advocate and judge, and it has been difficult to combine them."²³ Lord Howe remarked that Lord Denning's comment "was less a complaint than an appreciation of his difficulties." The Scott Inquiry had a counsel (Presiley Baxendale) but one who "sits alongside the judge, like a fellow member of the Divisional Court. So far from the distanced neutrality .. the impression gained by witnesses is of an inquisition in double-barrelled form."

He said that this difficulty was compounded "by the fact that this is an enquiry at which defence lawyers may be seen but not heard" (save possibly on PII certificates, a question of law). He believed that active legal representation would not only help to ensure justice for the individuals concerned but also assist the inquiry itself. "Even on questions of fact, it would be surprising if any judge sitting alone could have total confidence in his own unaided ability to avoid significant error in analysing the mountain of evidence that has now piled up." Submissions could be made on these specialist matters of public administration and policy he had already cited.

He wrote that he had acted in the interests of the witnesses who were officials under him in government, who felt that "their case has so far been heard only in their own replies to inevitably hostile-seeming cross-examination" and warned that "if the enquiry is already being seen in this way by some who have appeared before it, its report will to be remarkably detached if it is to be seen to achieve justice for all concerned." He urged that the Scott Inquiry's procedures would be "hugely improved" if legal (or other) representatives could address the Inquiry " on behalf of those whose reputations now rest with Lord Justice Scott

²² HC 553 of 1966-67, July 1967.

²³ Quoted in Salmon, Cmnd 3121, para 37, 1966. See also para 21 and the brief description in the first part of this Paper (above).

alone." He concluded by writing "it is my belief that if the Scott report is to be -- and to be seen to be -- well-founded, respected, useful and above all just, then this suggestion does deserve the most serious consideration."

Lord Howe had sought to deploy a similar argument when giving evidence before the Scott Inquiry on 12 January 1994.²⁴ He reminded the Inquiry of what he regarded as the key Salmon principles of "advance notice of any allegations, opportunity of being examined by one's advocate ... and stating their own case in public ... to give evidence-in-chief through one's own counsel and the opportunity to cross-examine what evidence might affect them." He called them the "most important of the six governable principles." He expressed the anxiety of some witnesses that these principles had not been applied in the Inquiry, and linked this with the role of Lord Justice Scott, and of Ms Baxendale, being Lord Denning's 'detective, inquisitor, advocate and judge', especially as the Inquiry was being held in public. "People are bound to feel, whenever you make your announcements, anxiety that they may not have enjoyed all the safeguards that have come to be regarded as habitual." He warned that many witnesses as well as outsiders following the Inquiry's proceedings "are bound to be less enthusiastic to accept the conclusions in so far as any of the cardinal principles have not been complied with."

Lord Justice Scott appeared to have little sympathy with Lord Howe's line of argument, and several times asked him what the purpose was of his statement. He said that the purpose of Salmon was to lay down broad principles to ensure fairness, but it was not a blueprint for every inquiry, adding that if he had followed Salmon "the conclusion of this Inquiry would have been postponed by a number of years." His procedures had been designed to ensure fairness to all witnesses.

4. Sir Richard Scott's 'inquisitorial' approach²⁵

It will be seen from the previous section that Sir Richard did not believe that his Inquiry could or should have, through strict application of the 'six Salmon cardinal principles', replicated a court-type tribunal. He set out his views at length in the Chancery Bar Association spring lecture on 2 May 1995.²⁶

He said there were three objects for procedures at an inquiry as in litigation: to be fair and be seen to be fair to those potentially adversely affected by the proceedings; to conduct the proceedings with efficiency and as much expedition as is practicable, the need for the Inquiry's cost to be kept within reasonable bounds. While the first need must not be

²⁴ evidence transcript.

²⁵ See also his interviews on Channel Four's *Dispatches* and BBC 2's *Newsnight*, 7.2.96

²⁶ "Proceedings at inquiries: the duty to be fair", transcript.

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submerged by the others, there was inevitable tension (even in civil litigation) between fairness and efficiency. However there was "a significant and fundamental difference" between inquiries and litigation which made comparisons unsafe. Civil and criminal litigation is adversarial, "the nature of an inquiry on the other hand is, with very rare exceptions, investigative or inquisitorial."

Sir Richard said that "fairness in an adversarial system requires that each side should be able to formulate and place before the court the most favourable case that the available evidence permits," and an opportunity to challenge and demolish the opposing case. These and related procedures are so well known to lawyers that there is a danger "of assuming that the familiar procedures ... have some universal validity and are as necessary for fairness in an inquisitorial inquiry as they are in adversarial litigation."

In an inquisitorial inquiry there are no litigants, and there is no 'case' for or against witnesses and others, although there is a need to protect and defend their interests, actions and reputations. While it was "generally accepted" that inquiry procedures must include the need to be fair to witnesses, he reminded his audience that this did not apply in general in adversarial litigation.

Sir Richard then turned to the 1966 report of the Salmon Royal Commission, noting that, although it referred to 1921 Act tribunals of inquires, procedurally there was little difference between them and *ad hoc* inquiries such as his own. He pointed out and agreed with the report's own distinction between inquisitorial inquiries and litigation. He cited the Salmon Report's six cardinal principles²⁷ which since 1966 have been "regarded as constituting a procedural framework for inquiries." He examined each of the six principles, applying them, where appropriate to his own Inquiry.

The first Salmon principle, that a person should only be involved in an inquiry when relevant and necessary, is not central to the topic of this Paper. The second principle requires witnesses to be informed in advance of allegations against them and the substance of any supporting evidence. Sir Richard said that this may be appropriate to some inquiries, "but it really makes very little sense when applied to an inquisitorial inquiry" such as his own, where there may be no allegations initially in the mind of the inquiry "The point of inquisitorial inquiries is to investigate and, at the end of the investigation, to draw such conclusions as the evidence allows." He argued that the principle should mean that witnesses who have had allegations against them during previous evidence should have access to them, and any background material. But, if applied in the Salmon sense, it is "inappropriate to inquisitorial proceedings," and he cited the 1982 report of the Crown Agents tribunal in support."²⁸

The third principle relates to legal assistance, especially in the preparation of witnesses' cases.

²⁷ Reproduced in Appendix 1 to this Paper.

²⁸ See HC 364 of 1981-82, 1982.

Sir Richard again queried the appropriateness of the word 'case', as incorporating adversarial elements "alien to an inquisitorial inquiry, at least at the investigative stage. It may arise later when an inquiry reaches (draft) conclusions. He pointed out that, in his inquiry, "the opportunity of legal assistance, at Government expense, was made available" when witnesses prepared their evidence and when making a response to any conclusions.

The fourth principle concerns witnesses' ability to state their own case in public and be examined by their own counsel. Again Sir Richard regarded this as an 'adversarial' importation into inquisitorial proceedings, because "every witness, as the Salmon Report had earlier observed, is the inquiry's witness. But distinction between examination-in-chief, cross-examination and re-examination is "meaningless." Witnesses should be given the opportunity to make preliminary or supplementary statements, but this need not be in a question and answer session with lawyers. In his Inquiry he followed this procedure by giving witnesses advance notice of the initial questions and background evidence; some witnesses read out statements to the Inquiry, and witnesses were sent a transcript of their sessions and offered an opportunity to make corrections and add supplementary answers.

The fifth principle relates to the ability of witnesses to call their own witnesses. Sir Richard thought every inquiry would accept this, subject to the option of written instead of oral evidence, as assisting its progress.

The final principle concerns witnesses' right to test potentially adverse evidence by cross-examination by legal representatives. Sir Richard said he would "unhesitantly reject" this as an automatic requirement, because it would be "wholly inimical to, perhaps destructive of, the efficient conduct of the inquiry." Full rights of cross-examination by legal representatives was not only unnecessary in his Inquiry; it would "at best have extended the oral hearings by years rather than months and, at worst, might have prevented the Inquiry from completing its task at all." Adoption of the sixth principle, if at all, should be decided on a pragmatic, inquiry by inquiry basis. His Inquiry's procedures allowed for the possibility of cross-examination, but it was neither sought nor found necessary.

In general Sir Richard said that the Salmon principles "are too heavily based on procedural requirements of fairness in an adversarial system," and cited in support Lord Scarman's "pragmatic approach" in his Red Lion Square inquiry report.²⁹ The adoption of adversarial procedures "that translate an inquisitorial inquiry into a series of adversarial issues, with the inquiry on one side and a shifting collection of individuals on the other side of the issue" could be "a grave impediment to the proper functioning of the inquiry." This could be avoided in most cases, and "an insistence on an essential role for witnesses' lawyers in oral hearings is, in my view, unnecessary." He regarded as a good procedural guide for inquisitorial inquiries the Court of Appeal's judgments (especially that of Lord Denning MR)

²⁹ Cmnd 5919, February 1975

in *Re Pergamon Press* [1971] Ch 388, concerning the late Robert Maxwell's complaint against the procedure adopted by DTI inspectors investigating his company.

Sir Richard said that "the inflexible and literal application of the six Salmon principles to each and every inquiry would produce in many cases 'procedures unsuitable to the object in hand'",³⁰ as it would have done in his Inquiry. *Re Pergamon Press* supported a pragmatic approach: "the procedures to be adopted in order to achieve fairness at an inquiry must be designed to fit the circumstances and requirements of the particular inquiry." "The golden rule, in my opinion, is that there should be procedural flexibility, with procedures to achieve fairness tailored to suit the circumstances of each inquiry."

Finally Sir Richard considered the issue of public hearings. Litigation should generally be in public. But the on-going investigative nature of an inquiry is different, as are police or DTI inspectors' investigation. "There is no general principle of public interest applicable to inquiries, unlike civil or criminal litigation ... that hearings should be in public." Public hearings in a controversial case can impose considerable pressures on witnesses, even those whose contribution may turn out to be minimal. Fairness to witnesses requires that they should not be subject to such pressures "unless the public interest factors that favour public hearings are clearly apparent and of evident weight." In his Inquiry this was not a difficult decision because it dealt with ministers and officials in the discharge of their official duties. The public would expect that inquiries into "the propriety of acts of government" should be in public "unless some overriding and countervailing public interest requires the contrary." One purpose of some inquiries, such as his own, was to allay public disquiet and this required public hearings. In his Inquiry, he said, this would allow the public to be reassured if any or all allegations or suspicions of governmental impropriety were held to unfounded.

³⁰ Quoting Sachs LJ in *Re Pergamon Press*.

Appendix 1: The Salmon Report's 'Six Cardinal Principles'³¹

(ii) The six cardinal principles

32. The difficulty and injustice with which persons involved in an inquiry may be faced can however be largely removed if the following cardinal principles which we discuss in Chapter IV are strictly observed: -

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.

³¹ Cmnd 3121 para 32.

Appendix 2: Proposed procedure for Scott Inquiry hearings³²

1 Lord Justice Scott intends to hear evidence in public. If a witness considers that for any reason his/her evidence should not be given in public he/she will have to satisfy Lord Justice Scott that there are good reasons for the evidence to be given in private.

2 It is likely that the Inquiry will begin taking oral evidence at the beginning of May 1993.

3 In general the proposed procedure will be as follows:

a) Each witness will be invited by letter to provide a written statement for Lord Justice Scott. The letter will set out briefly the matters which the Judge would like the witness to deal with;

b) Not all witnesses will be asked to give oral evidence, but where the Judge considers it necessary, witnesses will be invited to attend the Inquiry at 1 Buckingham Gate, London, SW1 for that purpose;

c) i) If a witness considers that part or all of his or her oral evidence should be given in private, written submissions should be made as soon as possible identifying the reasons;

ii) The test which Lord Justice Scott will apply in deciding whether a hearing should be held in private is set out in the exchange of letters contained in Annex A to this note;

d) A witness attending the Inquiry to give oral evidence may be accompanied by a legal or other adviser. It is not anticipated that those accompanying witnesses (whether or not legal advisers) will be invited to address the Inquiry or to question witnesses. Witnesses may, however, consult the person accompanying them before answering questions;

e) Questions will be put to the witness primarily by Miss Presley Baxendale QC, Counsel to the Inquiry. Questions may also be put by Lord Justice Scott or by Mr Christopher Muttukumar, the Secretary to the Inquiry;

f) After a witness has given oral evidence, he/she will be provided with a copy of a transcript of that evidence and will have the opportunity of making in writing any further points he/she wishes to make;

g) If the Judge considers it necessary, he will invite the comments in writing of one witness upon the evidence of another. For that purpose, a transcript of that evidence will be provided;

h) If it becomes necessary a witness who has already given evidence may be asked to give further evidence.

4 a) The Attorney General has given Lord Justice Scott the following undertaking:

³² Inquiry press notice 4, 31.3.93.

"For the purpose of the Inquiry conducted by the Rt.Hon. Lord Justice Scott, I give the following undertaking in respect of any person specifically asked to assist the Inquiry:

"neither his evidence before the Inquiry, nor his statement provided to the Inquiry, nor any documents he is required to produce to the Inquiry, shall be used against him or against any company he may represent in any subsequent criminal proceedings relating to conduct within the period covered by the terms of reference of the Inquiry for contravention of:

- a) the Customs and Excise Management Act 1979 or related Customs legislation;
- b) any relevant Export of Goods (Control) Orders;
- c) section 106 of the Magistrates' Courts Act 1980 and the Perjury Act 1911;
- d) the Official Secrets Acts 1911-89, or for any attempt or conspiracy to commit any such offence or for inciting, aiding, abetting, counselling or procuring any such offence."

b) The Government will, for the purposes of the Official Secrets Acts, give lawful authority to any witness to disclose official information to Lord Justice Scott and the Inquiry team (see Annex A).

5 Before making a criticism of a witness in his Report, Lord Justice Scott will give that witness an opportunity to make in writing any comment he/she wishes on the proposed criticism.

6 Costs of witnesses:

- a) The reasonable costs of a witness, attendance will be met by the Inquiry;
- b) A witness may apply in writing in advance of the hearing, or at the conclusion of the hearing, for his or her legal costs to be met by the Inquiry. Legal costs will be met if Lord Justice Scott decides that they were necessary in the interests of justice;
- c) Where Lord Justice Scott decides that legal costs should be met by 'the Inquiry, the costs will be assessed on the standard basis (as defined in order 62: 12(1) of the Rules of the Supreme Court) by the Costs Branch of the Treasury Solicitor's Department. Where feasible, it is recommended that the rates of remuneration be agreed with the Costs Branch in advance;
- d) The legal costs of Government witnesses, whether Ministers or ex-Ministers, officials or ex-officials, will be met by the Department in which they were serving at the relevant time.

INQUIRY INTO EXPORTS OF DEFENCE EQUIPMENT
AND DUAL USE GOODS TO IRAQ

THE RIGHT HONOURABLE LORD JUSTICE SCOTT

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Sir Robin Butler GCB CVO
The Secretary of the Cabinet
and Head of the Home Civil Service
Cabinet Office
70 Whitehall
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22 March 1993

Dear Sir Robin,

1 Thank you for your letter dated 17 March.

2 I am most grateful for the Prime Minister's assurance, which will undoubtedly facilitate the conduct of my Inquiry.

3 As to your proposals, I appreciate the efforts which you are making to ensure that a consistent and responsible approach is adopted by Government Departments to the question of openness of hearings. As you know, the starting point is that as much oral evidence as possible should be taken in public. I recognise, however, that there are circumstances in which it will be necessary to move into closed session.

4 The test which I intend to apply in order to decide whether a hearing should be in closed session is whether the public disclosure of the documents or information in question would cause serious injury to the interests of the nation. I shall of course consider representations from Departments or witnesses who wish to submit that the hearings should move into closed session in other circumstances. But I shall not direct that hearings be held in closed session unless I feel able to conclude that the public interest in an open hearing is outweighed by the public interest in protecting from disclosure in public the documents or information in question.

5 As to the specific point about consultation with originating Departments before sensitive material submitted to the Inquiry by non-Government witnesses is referred to or included in the final report, it is my intention, where appropriate and feasible, to invite the relevant Department's views in advance.

Yours sincerely,
Richard Scott

SIR RICHARD SCOTT



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From the Secretary of the Cabinet and Head of the Home Civil Service
Sir Robin Butler GCB CVO

Ref: A093/852

17 March 1993

Dear Lord Justice,

I have been asked to reply to the fourth paragraph of your letter of 3 March to the Attorney General concerning authorisation of disclosure of information to your Inquiry for the purposes of the Official Secrets Act.

I have consulted the Prime Minister on your proposal. He has confirmed that he would not wish any witness you call to be deterred from giving evidence to the Inquiry. On this basis he is content for the Government to give lawful authority to any witness to disclose official information to you and your Inquiry Team but sees the need to reach agreement on satisfactory arrangements to protect sensitive material which might otherwise be disclosed at public hearings. This calls for guidelines covering the need for in camera hearings which we agreed at our meeting on 12 February would be appropriate in certain cases.

Our proposal is that you should direct that hearings go into closed session when in your view disclosure in public would be damaging to the public interest and that in other cases Government witnesses should be instructed to request a closed session on occasions when, in their view, the disclosure of information in public might be damaging. In practice we would generally envisage witnesses making such a request only for material whose disclosure would cause serious injury to the interests of the nation. We will also instruct them to make such requests sparingly and apply a rigid test as to whether the information to be disclosed is still sensitive in today's circumstances. We appreciate that it is for you to decide whether or not to grant a request for an in camera hearing but it is our hope that the ground rules for each session can be agreed with the appropriate Departments well in advance to avoid last minute or ad hoc requests which may give rise to presentational problems.

/We would hope

Lord Justice Scott
1 Palace Street

We would hope that the same ground rules on disclosure would be applied to non-Government witnesses as to Ministers and officials. We would assume that lawful authority had been given to disclose official information without restriction but we would expect that you would direct the Inquiry to move into closed session if the Inquiry wished to discuss more sensitive information whose disclosure might, in your view, cause serious injury to the national interest or, in other cases, would give witnesses the opportunity to request such a closed session. We would also request that the originating Department be consulted before any such material submitted to the Inquiry by non-Government witnesses was referred to or included in the final report of the Inquiry.

I hope you will agree that these proposals, which the Prime Minister has endorsed, strike a reasonable balance between the need to hear as much evidence as possible in public but retain essential safeguards over sensitive information whose disclosure might be particularly damaging.

Your sincerely,

Robin Butler

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