Written evidence from Dr Stuart Wallace (STI0010)

Summary

This submission addresses a specific problem with public inquiries, namely the lack of independent control over the establishment of public inquiries. It sets out the State's obligations to investigate deaths and life-threatening injuries under Article 2 of the European Convention on Human Rights. It then looks at how these relate to establishing public inquiries in the UK, noting a central problem with the process of initiating public inquiries is that it rests exclusively with the ministers of the Westminster Parliament or devolved governments. It then explores two instances where public inquiries were not established for significant periods of time, despite them being the only viable option to discharge the state's legal obligations to investigate under Article 2, namely the infected blood scandal and the murder of Pat Finucane. It notes how the failure to establish inquiries potentially violates human rights law in different ways. The absence of formal barriers preventing parties implicated in an investigation from determining its terms of reference, chairperson etc is extremely problematic. While the exclusive power that the government ministers possess to establish a public inquiry is clearly creating a barrier to the State discharging its legal obligations. A central problem is that matters beyond the State's legal obligations get taken into account in ministerial decisions to establish public inquiries, meaning the decision to establish an inquiry should be taken by a more independent party. In essence, it is argued that the power to initiate public inquiries must be taken away from individual ministers, otherwise the state is at risk of violating its legal obligations to investigate deaths under international law. The submission also considers potential alternatives to vesting the power in individual ministers considering the role the judiciary or parliament could play in the process.

The State's obligation to investigate under Article 2 European Convention on Human Rights

Under Article 2 ECHR (given effect in domestic law via the Human Rights Act 1998), the State has an obligation to protect people within its jurisdiction from avoidable loss of life resulting from any activity, whether public or not, in which the right to life may be at stake.[1] There is a distinct and separate procedural obligation to carry out an effective investigation once a violation of Article 2 has been alleged.[2]The purpose of the obligation to investigate is to secure the effective implementation of the domestic regulations safeguarding the right to life and, in cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.[3] The standards of investigation required are clearly established. The authorities must act of their own volition in investigating once a death or life-threatening injury is brought to their attention.[4] Those investigating must be institutionally, hierarchically and practically independent from those under investigation.[5] The form of the investigation may vary,[6] but it must be effective in the sense that it is capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.[7] The authorities are obliged to take "reasonable steps available to them" to secure evidence e.g. witness statements, forensic evidence, autopsy, records of injury etc.[8] The investigation must be carried out expeditiously and the next of kin must be involved to the "extent necessary to safeguard their interests".[9] There must be sufficient public scrutiny of the investigation or its results, although the scope of this obligation will vary from case to case.[10]

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[1] *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [71].
[2] *Armani da Silva v United Kingdom* (2016) 63 EHRR 12 at [229].
[3] *Nachova v Bulgaria* (2006) 42 EHRR 43 at [110].
[4] *Ergi v Turkey* (2001) 32 EHRR 18 at [82].
[5] *Jordan v United Kingdom* (2003) 37 EHRR 2 at [106].
[6] *Kelly and Others v United Kingdom* (App No 30054/96) ECtHR 4 May 2001.
[7] *Ogur v Turkey* (2001) 31 EHRR 40 at [88].
[8] *Edwards v United Kingdom* (2002) 35 EHRR 19 at [71].
[9] Ibid at [73].
[10] *Slimani v France* (2006) 43 EHRR 49 at [32].

Independence and Establishing an Inquiry

In order for the State to conduct a human rights-compliant investigation, the State's authorities must independently initiate an investigation. The general rule, as described in *Oneryildiz v UK*, is that "the competent authorities must act with exemplary diligence and promptness and must of their own motion initiate investigations".[11] In the case of *Finucane v United Kingdom*, the ECtHR stated the obligation as follows:

> "The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. What form of investigation will achieve those purposes may vary in different circumstances. However, whatever mode is employed, the authorities must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures".[12]

It is worth quoting at length because it makes several important points. Firstly, the ECtHR does not specify what form an investigation should take, this is a matter normally left to the State under the principle of subsidiarity.[13] Thus, the ECtHR is agnostic as to the type of investigation, provided it discharges the requirements of Article 2.

Secondly, the ECtHR emphasises the obligatory nature of the action, the State *must* act. There is no scope for discretion here. The requirement for the State to act of their own motion means that the State must be the initiators and initiation must occur independently of the victim or the next of kin. This element of the obligation can vary depending on the circumstances as the ECtHR observed in *Lopes de Sousa Fernandes v Portugal*:

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[11] *Oneryildiz v Turkey* (2005) 41 EHRR 20 at [94].
[12] *Finucane v United Kingdom* (2003) 37 EHRR 29 at [67].
[13] *Kelly and Others v United Kingdom* (App No 30054/96) ECtHR 4 May 2001 at [94].

> "Unlike in cases concerning the lethal use of force by State agents, where the competent authorities must of their own motion initiate investigations, in cases concerning medical negligence where the death is caused unintentionally, the States' procedural obligations may come into play upon the institution of proceedings by the deceased's relatives".[14]

Thus, the State may have a legal obligation to investigate death or life-threatening injury, which it must act upon independently of the victims or next of kin.

A central problem with the process of initiating public inquiries is that it rests exclusively with the ministers of the Westminster Parliament or devolved governments.[15] This is problematic because there have been instances where the State needed to discharge its Article 2 obligations, the case for establishing a public inquiry as the best means of doing so was compelling, but the government has either not acted to establish one or dragged its heels on establishing one until its hand was forced. This creates a risk that the UK will violate its obligations under Article 2 where it fails to establish an inquiry when it is clearly necessary. Two examples clearly illustrate this: the infected blood scandal and the death of Pat Finucane.

Infected Blood Scandal

Before we look at the establishment of a public inquiry into infected blood, it is important to provide some background context. During the 1970s and 1980s, thousands of people contracted viruses, including HIV and Hepatitis C, from contaminated blood products used in hospitals across the UK. Hundreds of people died as a result of these infections and the State's obligations under Article 2 ECHR to effectively investigate the loss of life were clearly engaged. The case for establishing a public inquiry into this scandal was compelling for three key reasons.

First, the infected blood scandal was cross-jurisdictional and had given rise to unique devolution problems. Health policy is now a devolved power,[16]

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[14] *Lopes de Sousa Fernandes v Portugal* (2018) 66 EHRR 28 at [220].
[15] Inquiries Act 2005, s.1.

but the devolution of this policy area only began in 1998. At the time of the scandal, health policy across the UK was controlled by Westminster. This meant that when an inquiry was established into infected blood exclusively in Scotland, the Penrose Inquiry,[17] it encountered difficulties because it did not have the power to summon witnesses from outside Scotland.[18] Given the cross-jurisdictional nature of the issue, a pan-UK public inquiry appeared necessary.

Second, there was a strong need for an investigation to be undertaken with the aim of learning lessons so that such scandals would not occur again in the future. As other types of investigation may lack this focus, a public inquiry is an obvious choice.

Finally, the scale of the scandal was significant. When a public inquiry was eventually ordered into the matter, over 2000 people were granted core participant status at the public inquiry.[19] There were thousands of victims and a scandal that ran over a number of years. The case for establishing a public inquiry was compelling and it is difficult to see how another investigation would satisfy the requirements of Article 2, which begs the question, why was a public inquiry not initially established into the matter?

Despite the government being aware of the scandal for decades and being under a legal obligation under Article 2 to investigate it, it failed to establish a public inquiry until 2017. In advance of that decision, victims and next of kin campaigned for years urging the government to establish a public inquiry. A "private public inquiry", funded by private donations, was even established independently of the government to investigate the infected blood scandal.[20] It was not until July 2017, when the government was facing significant political pressure from opponents to establish the

[16] Scotland Act 1998 Schedule 5; Government of Wales Act 2006, Schedule 7; Northern Ireland Act 1998.

[17] The Penrose Inquiry https://www.penroseinquiry.org.uk/

[18] Eleanor Bradford, 'Penrose Inquiry: The key questions over contaminated blood' https://www.bbc.co.uk/news/uk-scotland-32033246 (BBC News, 25 March 2015).

[19] https://www.infectedbloodinquiry.org.uk/about/core-participants

[20] Mark Elliott and Robert Thomas, *Public Law* (Oxford: OUP, 2020) 751.

investigation that any serious action was taken. Diana Johnson MP tabled a motion for an emergency debate on the need for the Government to establish an independent public inquiry into the use of infected blood in NHS hospitals.[21] The motion for the debate was passed and a debate was due to take place on 11 July 2017. The government feared it would lose a vote on the motion and announced that it would be holding a public inquiry into the issue before the debate commenced.[22] Political pressure to establish an inquiry was, eventually, successful.

This incident is emblematic of the struggle that victims can face in seeking to establish a public inquiry, but it also highlights several problems from the standpoint of Article 2.

1. States are not supposed to leave it to the initiative of the next-of-kin to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures,[23] which clearly occurred in the case of the infected blood scandal. This adds unnecessarily to the stress and trauma the next of kin already face in this situation.
2. The investigation was not established expeditiously as required under Article 2 once the alleged violations were brought to the attention of the authorities. Delay can be the death of accurate fact-finding as over time memories become less clear, witnesses pass away and documentary evidence can be lost.
3. This incident highlights a recurring problem with the establishment of public inquiries, namely the role that potentially culpable parties can play in the establishment of inquiries.[24]

The saga surrounding the establishment of the infected blood inquiry reveals a culture of defensiveness in government, where political

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[21] Hansard HC Deb vol 627 col 62 (10 July 2017).

[22] Peter Walker and Alexandra Topping, 'Theresa May orders contaminated blood scandal inquiry' https://www.theguardian.com/society/2017/jul/11/contaminated-blood-scandal-theresa-may-orders-inquiry (The Guardian, 11 July 2017).

[23] *Finucane v United Kingdom* (2003) 37 EHRR 29 at [67].

[24] Emma Ireton, "The Ministerial Power to set up a Public Inquiry: Issues of Transparency and Accountability" (2016) 67(2) Northern Ireland Legal Quarterly 209, 213.

appearances and institutional self-interest prevail over the interests of the victims or the wider society. The Department of Health, for example, is alleged to have destroyed documentary evidence concerning the infected blood scandal and falsified patients' records.[25] Yet in spite of these allegations, the department was initially responsible for the creation of the inquiry into the scandal and setting its terms of reference.[26] The conflict of interest is glaringly obvious, but it was only following a huge backlash from victims' groups that the Minister for the Cabinet Office announced that "responsibility for setting up the independent inquiry will transfer from the Department of Health to the Cabinet Office".[27] The absence of formal barriers preventing parties implicated in an investigation from determining its terms of reference, chairperson etc is extremely problematic. It reveals a conspicuous absence of safeguards in the legislation to prevent such conflicts of interest arising. The legislation should ensure both independence and the appearance of independence.[28]

The question of whether this failure, in itself, is sufficient to breach the obligation to investigate is worth exploring. Whether the participation of suspected parties in the creation of an investigation breaches human rights law will depend on the circumstances. In *Edwards v UK*, for example, the European Court of Human Rights held that the participation of statutory bodies with responsibility for the deceased in the establishment of the inquiry into his death did not breach Article 2 because the chairperson was independent and there were no hierarchical links between the members of inquiry and the bodies responsible.[29] However, more recent jurisprudence from the ECtHR holds that while the bodies responsible for investigation

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[25] Owen Bowcott, 'Contaminated blood scandal: many medical records disappeared, inquiry hears' https://www.theguardian.com/uk-news/2018/sep/25/contaminated-blood-scandal-many-medical-records-disappeared-inquiry-hears (The Guardian, 25 September 2018).

[26] Rowena Mason, 'Lack of trust in health department could derail blood contamination inquiry' https://www.theguardian.com/society/2017/jul/19/lack-of-trust-in-health-department-could-derail-blood-contamination-inquiry (The Guardian, 19 July 2017).

[27] Hansard HC Deb vol 630 col 35 (3 November 2017).

[28] See *R (Mousa) v Secretary of State for Defence & Anr* [2011] EWCA Civ 1334 at [35].

[29] *Edwards v United Kingdom* (2002) 35 EHRR 19 at [80]

need not enjoy absolute independence, they must be sufficiently independent of the persons and structures whose responsibility is likely to be engaged.[30] This was clearly not the case in respect of the Department of Health whose responsibility was clearly engaged.

The infected blood scandal reveals a series of problems with the establishment of public inquiries and the State's obligations under Article 2. There was a clear lack of initiative and speed in establishing the investigation and the possibility that potential perpetrators of wrongdoing could set the terms of reference raises significant questions about its independence and the State's compliance with Article 2.

The Murder of Pat Finucane

The case of Pat Finucane is another salient example, this time of a situation where a public inquiry is likely needed, but at the time of writing has not yet been established. Pat Finucane was a prominent solicitor in Northern Ireland who was murdered in front of his family by paramilitaries in 1989. John Stevens investigated the events surrounding the murder and found evidence of collusion between the UK government and paramilitaries responsible for his killing.[31] The Canadian judge investigating this collusion determined that a public inquiry into these allegations of collusion was required.[32]

The next of kin took a case to the European Court of Human Rights alleging that the State had failed to properly investigate the murder. In 2003, the ECtHR held that the State had failed to discharge its obligation to conduct an independent investigation under Article 2.[33] In 2009, the Committee of

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[30] *Tunc and Tunc v Turkey* (App No 24014/05) ECtHR 14 April 2015 at [223].
[31] John Stevens, 'Stevens Enquiry: Overview and Recommendations' (CAIN, 17 April 2003) <https://cain.ulster.ac.uk/issues/collusion/stevens3/stevens3summary.htm> accessed 13 October 2022.
[32] Peter Cory, *Cory Collusion Inquiry Report: Chief Superintendent Breen and Superintendent Buchanan* (December 2003) at [2.169] https://cain.ulster.ac.uk/issues/collusion/cory/cory03breenbuchanan.pdf accessed 17 March 2021.
[33] *Finucane v United Kingdom* (2003) 37 EHRR 29.

Ministers at the Council of Europe, which is charged with supervising implementation of ECtHR judgments, suspended its supervision of the Finucane case because the UK had submitted information "on the possibility of holding a statutory inquiry into the death" and "the United Kingdom authorities are currently in correspondence with the Finucane family on the basis on which any inquiry would be established".[34] It is worth noting that the Finucane family initially opposed the creation of a public inquiry under the Inquiries Act 2005, arguing it would not be independent due to the control exercised over the process by ministers.[35] They later changed their mind after seeing how the legislation functioned in practice. Despite the UK government's communication to the Council of Europe, a decision not to hold a public inquiry in this case was made in July 2011. Minutes from the meeting at which the decision was taken indicated that the then Prime Minister, David Cameron, considered that there were "strong reasons" to conclude that the public interest in finding out the truth would be better served by "a speedier, paper-based review of all existing material by an independent person".[36] This review was then carried out by Desmond de Silva. The wife of Pat Finucane later sought judicial review of the decision not to hold a public inquiry into the death of her husband. In 2019, the Supreme Court ultimately concluded that the de Silva's review "was not an in-depth, probing investigation with all the tools that would normally be available to someone tasked with uncovering the truth of what had actually happened".[37] As a result, it was not an Article 2-compliant investigation and an Article 2-compliant investigation was still required in the case.[38] Notwithstanding the judgment, the government again declined to hold a public inquiry into the death in November 2020.[39]

[34] *McKerr and Five Other Cases against the United Kingdom*, Committee of Ministers Interim Resolution CM/ResDH(2009)44 (19 March 2009).
[35] https://www.theguardian.com/uk/2005/jun/03/northernireland.northernireland
[36] *Re Finucane* [2019] UKSC 7 at [42]
[37] *Re Finucane* [2019] UKSC 7 at [134].
[38] *Re Finucane* [2019] UKSC 7 at [153].
[39] BBC News, 'Pat Finucane: No public inquiry into Belfast lawyer's murder' <https://www.bbc.co.uk/news/uk-northern-ireland-55138030> (BBC News, 30 November 2020).

Article 2 does not demand a specific type of investigation be undertaken and the UKSC did not specify that the government had to establish a public inquiry into the death. However, the case for establishing a public inquiry is compelling for several reasons.

1. the Committee of Ministers dropped its supervision of the case on the expectation that a public inquiry would be established, but has reopened its supervision of the implementation of the judgment after learning of the decision not to hold a public inquiry.[40] These are clearly related and the implication is that Committee of Ministers expects a public inquiry to be established.
2. The Supreme Court stated there needed to be an in-depth, probing investigation with an array of investigative tools to test the evidence and it specifically criticised the de Silva review's inability to compel witnesses to give evidence.[41] Public inquiries clearly possess these crucial tools, but other types of investigation do not.
3. Given the involvement of the intelligence services in the alleged collusion, it is likely that public interest immunity will be relied upon extensively in any proceedings and public inquiries have been used in the past to circumvent the issues this creates with investigations e.g. in the case of Anthony Grainger.

In these circumstances, with the recommencement of scrutiny by the Committee of Ministers prompted by the failure to establish a public inquiry, the ongoing need to discharge the Article 2 obligation and the need to have capacity to compel witnesses and hear evidence subject to public interest immunity, the case for establishing a public inquiry is compelling.

The UK has been in breach of its Article 2 obligations in respect of this case for some time now. The European Court of Human Rights has observed on a number of occasions that:

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[40] *McKerr and Five Other Cases against the United Kingdom*, Committee of Ministers Decision CM/Del/Dec(2020)1377bis/H46-44 (3 September 2020).
[41] *Re Finucane* [2019] UKSC 7 at [134].

> "a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts"[42]

Despite the UK being aware of the Article 2 breach for decades and how compelling the case to establish a public inquiry is in this instance, it has, at the time of writing, failed to create one. It is worth emphasising that this is a legal obligation, not a matter of discretion. The exclusive power that the government ministers possesses to establish an public inquiry is clearly creating a barrier to the State discharging its legal obligations. In other words, the lack of independence over the initiation of investigations is contributing to a breach of Article 2.

Increasing Independence of Initiation

Each of the examples in the preceding section highlight the lack of independence underpinning the establishment of public inquiries. A central problem is that matters beyond the State's legal obligations get taken into account in ministerial decisions to establish public inquiries. Ministers weigh up media reactions, financial costs, voter perceptions, the interests of their department, the potential political fallout and whether the public interest will be served by an inquiry rather than another form of investigation.[43] As the Public Administration Committee observed this "may result in a failure to set up an inquiry when there is a strong, but perhaps politically inconvenient, case for doing so".[44] The rights of victims and the State's legal obligations in this context appear to be secondary to the political calculations of the day and, as the post-legislative scrutiny committee observes "establishing an inquiry should not be a matter of politics".[45] It is

[42] *Varnava v Turkey* (2010) 50 EHRR 21 at [191].
[43] Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp.21.
[44] Public Administration Select Committee, *Government by Inquiry* (HMSO 2005) HC51-I (Session 2003-04) pp.77.
[45] Select Committee on the Inquiries Act 2005, *The Inquiries Act 2005: post-legislative scrutiny* (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp.22.

clear that the decision on whether to establish a public inquiry needs greater objectivity and independence with a greater focus on the UK's legal obligations than political expediency. But how can such decisions be re-balanced?

Judicial Intervention

One possible solution is for the judiciary to play a role in determining when a public inquiry is established. Victims have increasingly resorted to judicial review to challenge failures/refusals to establish public inquiries, but such actions have met with limited success. There are several reasons for this, both legal and constitutional.

On the legal front, the courts in the UK have been hesitant to demand the establishment of public inquiries in several cases.[46] The reticence stems in part from the absence of prescriptive rules from Strasbourg on this subject. As noted above Strasbourg's agnosticism toward the type of investigation used by States is a contributing factor here. The principle of subsidiarity comes into play and the State must determine for itself how to discharge the obligation to investigate. As such, courts have declined to order public inquiries to avoid being too prescriptive where the Convention does not demand a specific type of investigation.[47] In *R (JL) v Secretary of State for Justice* the House of Lords observed that:

> "to satisfy the basic requirements of any article 2 investigation, besides being independent and involving the family, they must in addition be initiated by the state, be promptly and reasonably expeditiously carried out, and provide for a sufficient element of public scrutiny. Beyond this, however, it is impossible to be prescriptive".[48]

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[46] See, for example, *Re Finucane* [2019] UKSC 7; *Re Hoy* [2016] NICA 23; *R (Mousa) v Secretary of State for Defence & Anr* [2011] EWCA Civ 1334; *R (K) v Secretary of State for the Home Department* [2009] EWCA Civ 219.

[47] See, for example, *P v United Kingdom* (2014) 58 EHRR SE9 at [70] in respect of Article 3 "once the ordinary mechanisms provided adequate scrutiny of the impugned ill-treatment, there was no requirement in art.3 to provide, in addition, an inquiry into the wider public policy issues which constituted the background to that alleged ill-treatment".

[48] *R. (JL) v Secretary of State for the Home Department* [2008] UKHL 68 at [107].

This is consistent with the courts' role under the HRA to keep step with the ECtHR, but not necessarily exceed their rulings.[49]

The UK courts' reticence is also driven in part by a desire not to rule out the possibility that a combination of different investigations might discharge the State's obligations.[50] As the Court observed in *Re Hoy*:

> "the requirements of the procedural obligation are fact sensitive, that they may be satisfied compendiously and … there may be a number of different ways of so doing".[51]

The decision over whether to establish a public inquiry also creates a separation of powers conundrum for the judiciary. The decision carries potentially significant economic and political consequences and the legislature has specifically conferred the power to initiate inquiries on the executive via legislation. The judiciary, as the keepers of parliamentary sovereignty,[52] are more likely to be deferential here.

It is also arguable that this judicial deference fuels political inertia. We saw several cases above where the State needed to discharge its Article 2 obligations and the case for establishing a public inquiry for this purpose was compelling, but the courts have declined to specifically order the creation of one. In *Re Finucane*, for example, the court ruled that "It is for the state to decide … what form of investigation, if indeed any is now feasible, is required" to meet the requirements of Article 2.[53] In the absence of an express demand to create a public inquiry from the judiciary, it is possible for an executive unwilling to establish an inquiry that could be politically damaging to drag its heels further. The obvious alternative here is to involve parliament in decisions on whether an inquiry should be established.

[49] *R (Ullah) v Special Adjudicator* [2004] UKHL 26 at [20].
[50] *R (K) v Secretary of State for the Home Department* [2009] EWCA Civ 219.
[51] *Re Hoy* [2016] NICA 23 at [35]
[52] Henry Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) Cambridge Law Journal 172, 189.
[53] *Re Finucane* [2019] UKSC 7 at [153].

Parliamentary Intervention

In light of the difficulties identified above with independence in the establishment of public inquiries, it has been suggested that parliament should be permitted to initiate inquiries in cases where Ministers may be unwilling to do so. Professor Anthony Barker has argued it is more "constitutionally proper" for the House of Commons to be seen as the source of official public inquiries.[54] Others have advanced opposing views, arguing that it was the executive's role to recognise and respond to public concern.[55] Views in Parliament also differed. The Select Committee on the Inquiries Act 2005 concluded that the power to establish a public inquiry should be held by a minister and that executive accountability to Parliament and their broader ability to call for an inquiry to be set up provided adequate involvement for Parliament in the process.[56] While the Public Administration Committee in its report on the subject, contended that "in those inquiries where public concern is centred on the conduct, actions or inactions of government and ministers, Parliament should be directly involved"[57].

Exactly how Parliament could be involved has also been the subject of debate. One option would be to create a power to establish a public inquiry via a motion in either of the houses of parliament,[58] it has been suggested that a minister would be unlikely to decline to comply with such a motion.[59] Select committees could also be involved in the process of establishing public inquiries. The Liaison Committee, which comprises all of the other select committee chairs, could "provide a suitable forum for arriving at a

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[54] Public Administration Select Committee, *Government by Inquiry* (HMSO 2005) HC51-I (Session 2003-04) pp.78.
[55] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp. 37.
[56] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp. 38.
[57] Public Administration Select Committee, *Government by Inquiry* (HMSO 2005) HC51-I (Session 2003-04) pp.70.
[58] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp. 37.
[59] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp. 37.

considered view on the need for an inquiry into matters of public concern".[60] Conferring the power to initiate on the parliament would also arguably make it more accessible to victims and less costly than pursuing speculative litigation to bypass the current problems with the executive dominant approach.

While this could potentially diversify initiation, it is far from a panacea. Any power conferred on parliament would need to be carefully calibrated to avoid further politicising decisions to create public inquiries. There would be a delicate balance to strike between giving sufficient power to minority parties to initiate inquiries, while avoiding inquiries becoming a tool utilised with the sole intention of embarrassing the government. Further, if the executive is determined to avoid establishing an inquiry, the involvement of the parliament may be of little benefit. The executive will, by definition, have a majority within the House of Commons and could simply whip votes to vote down a motion to create a public inquiry. The government of the day also exercises significant control over how parliamentary time is divided,[61] meaning they can place practical barriers in the way of bringing forward a motion to establish a public inquiry. The political fallout from such acts may have the desired effect of exerting pressure on the government to initiate a public inquiry, as we saw similarly with the infected blood inquiry, but the parliamentary route still arguably fails to inject the requisite independence into the initiation of public inquiries.

Others have suggested that the power to establish a public inquiry should be independent of all branches of government and should reside with a completely independent body on a permanent basis, such as a permanent commission of inquiry or a disasters ombudsman.[62]

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[60] Public Administration Select Committee, *Government by Inquiry* (HMSO 2005) HC51-I (Session 2003-04) pp.79.
[61] Standing Order 14, 'Standing Orders: Public Business 2021' HC 804. Under this order government business takes precedence at every sitting with a few exceptions e.g. opposition day debates.
[62] Select Committee on the Inquiries Act 2005, The Inquiries Act 2005: post-legislative scrutiny (HMSO, 2014), HL Paper No.143 (Session 2013–14) pp.38.

There is clearly a need for greater independence and impartiality in the initiation of public inquiries and for this to be taken away from actors with a vested interest in ensuring inquiries do not occur. However, it is less clear who should take on the role instead, whether that be the judiciary, parliament or another body independent of the government. It seems parliament would be the most likely candidate, but ensuring the process is not further politicised will be a tricky balancing act. Overall, having clearer guidelines on when an inquiry must be established and a body overseeing the enforcement of those guidelines is an important step in ensuring greater objectivity and should be pursued.

Conclusion

Public inquiries fill a unique gap in the UK's investigation architecture. The flexibility and array of powers that public inquiries have make them an attractive investigatory option. However, it is also clear that the regulations surrounding them raise serious concerns over their compatibility with Article 2. There is a clear lack of independence in the initiation of public inquiries, which has a number of knock-on effects for Article 2. The lack of independence in initiation appears to contribute to significant delays in establishing investigations and other problems, particularly where the investigations may be controversial or politically damaging.

21st March 2024