13 APR 1983

E.R

1. Mr Bullo
2. Mr McMillan

CONFIDENTIAL

MR ANGEL

We spoke. I shall dpk to Mr B-S explaining why a S. Supp. might be difficult RJB 13/4.

cc: PS/Sir Philip Woodfield (L&B)
PS/Sir Ewart Bell
Mr Brennan
Mr Bourn
Mr Dugdale
Mr Merifield
Mr Gilliland
Miss Davies
Mr Buxton
Mr Norris
Mr Doyne Ditmas
Mr Erskine
Mr P N Bell
Mr Coulson
Mr Reeve

KINCORA: THE NEXT STEPS

1. As you are aware, the Secretary of State told Assembly party leaders on 28 March that the DPP's considerations and the Terry Report would probably be completed within the next few weeks and that in the meantime he would consult his Ministerial colleagues about the form and substance of the public inquiry to which the Government is committed.

2. For the immediate purposes of oral Questions on 14 April it has been agreed that the Secretary of State should say, if asked, that he has set consultations in hand. We had originally thought he would have had to have written if only briefly to his colleagues in order not to appear to be going back on his undertaking. But this line seems adequate in the circumstances and avoids hasty Ministerial correspondence for form's sake which might, by being somewhat premature, only serve to muddy the waters for later and more substantive exchanges.

3. We need now to consider how things should be taken forward. I attach a note setting out the main issues. It is couched in a form which could be the core of a submission to the Secretary of State if that was judged appropriate. It covers ground which was gone over pretty thoroughly about a year ago, and it reaches no very fresh conclusions. But it seemed to me that we needed comprehensively to set things out so we could the better judge how to move forward.

CONFIDENTIAL/...

The conclusion about an 1921 Act enquiry, though unwelcome for many well understood reasons, seems to me unavoidable, given the undertakings given and the Secretary of State's remarks last year and recently. A very different approach would be required if we were to argue another conclusion (whether of a different inquiry or none at all), but I do not think that is practicable.

4. You or others may feel that in the first instance there should be a meeting to bring all these issues together. Whether or not we first discuss matters, I think that our next steps might be:

(i) to submit to the Secretary of State on the basis of the attached note; he has not had all these matters put to him on paper and I think needs to have the whole picture before him at this stage;

(ii) if the Secretary of State agrees, to write at official level to interested Departments warning them of where we now stand; indicating the main conclusions which the Secretary of State is likely to put to their Ministers when he receives the results of the two sets of enquiries; and inviting their views so that later Ministerial exchanges are set against the background of views which are as widely agreed as possible;

(iii) in the meantime, and notwithstanding the difficulty of working in the absence of the DPP's decision and Sir George Terry's report, to give more detailed thought to terms of reference.

5. I should be glad to know if this course of action is acceptable.

S. W. Boys Smith

S W BOYS SMITH

11 April 1983

E.R 5

CONFIDENTIAL

KINCORA: THE NEXT STEPS

Background

1. On 18 February 1982 the Secretary of State made a statement following the collapse, amid some recrimination, of the administrative enquiry set up under Article 54 of the Health and Personal Social Services (Northern Ireland) Order 1972 and chaired by Mr Stephen McGonagle. Inter alia, he said that:-

> "I do not propose to reconstitute the existing inquiry into homes and hostels for children and young persons, but the need remains to investigate the failure to identify earlier malpractices in some of them and to examine and assess present policies, procedures and practices for their administration. In the circumstances, after the current police investigations and any consequent criminal proceedings are complete, I intend to appoint a committee, with a High Court Judge as Chairman, sitting in public. The terms of reference of such an inquiry and the powers it might need cannot be determined until the results of the present investigations are known".

He then went on to refer to the wide powers of tribunals set up under the 1921 Act and said that in considering whether such a tribunal should be established, he would take into account both the widespread concern about the affair and also views of the House and the recommendations of the Royal Commission on Tribunals of Inquiry of 1966. Since that statement, the police investigations have been continuing and the atmosphere of suspicion has remained.

Possible Forms of Inquiry

2. This note assumes that the Government will stand by its undertaking to set up a committee under a High Court Judge sitting in public. It does not therefore explore the possibility of an inquiry by a Commons Select Committee. Against that background, there are three ways in which an inquiry could be established:

(i) A non-statutory inquiry could be established - precedents in Northern Ireland are the Compton inquiry into allegations of physical brutality during the initial internment swoops of August 1971; or, more recently, the Bennett enquiry of 1979 into police interrogation procedures in the Province.

(ii) A fresh inquiry under the Health and Personal Social Services (Northern Ireland) Order 1972; this would be somewhat more restricted in scope and would replace the abortive investigation which collapsed over a year ago.

(iii) An inquiry under the Tribunals of Inquiry (Evidence) Act 1921; this would require a Parliamentary resolution and/be the most wide-ranging in powers and scope.

Whichever option were chosen, the terms of reference would have to be carefully drafted so as to cover matters of legitimate public concern while not providing an entrée for those who are interested only in scandal-mongering and in smearing the reputation of political and other public figures. There are however drawbacks in all three options and these are examined in greater detail below.

4. A non-statutory inquiry could be directed to consider any subject the Secretary of State chose, and would in theory be the easiest to set up and service. However it would have no powers to take evidence on oath, nor to enforce the attendance of witnesses or the production of documents. Both Compton and Bennett, to take the examples mentioned above, found this a handicap and mentioned it as such in their reports, since, although these were inquiries into allegations against soldiers and policemen, who would have been required to give evidence, the lack of contributions from civilians was a major flaw. Bennett found it "a matter of regret" that some

persons and organisations who might have had relevant information did not come forward, while Compton considered that the non-appearance of certain potential witnesses "limited to some extent our ability to reach conclusions about the validity of their allegations". Given the atmosphere that surrounds the Kincora affair, the fact that most of those who would be required to give evidence are civilians, and the fact that the primary aim of an inquiry must be to allay public concern about its ramifications, it is doubtful that the Secretary of State could risk sentiments such as these appearing in the final report. Indeed, there would be little real benefit in the appointment of a serving judge to chair such an inquiry given that he would have no real powers but would be expected to investigate administrative and criminal malpractices in an affair with alleged Army intelligence and paramilitary dimensions. Moreover, for the reasons mentioned above, a non-statutory inquiry could not hope to command public confidence from the start, and so, ipso facto, its primary purpose would not be fulfilled. It would seem that a non-statutory inquiry must be ruled out.

5. An inquiry under the Health and Personal Social Services (Northern Ireland) Order 1972 would in practice be limited to management issues within the Health Boards and the DHSS(NI) itself, areas which to a certain extent have already been covered by the team from DHSS in London which reported in August 1982. Non-management matters, such as allegations of 'cover ups' involving senior NIO officials, prominent Unionists and top businessmen, and the extent of military intelligence and paramilitary involvement, would almost certainly be ultra vires, and such an inquiry could not therefore deal with all aspects of the affair. It was in part because of its limited terms of reference and powers that the McGonagle enquiry collapsed. Moreover, a 1972 Order inquiry would have powers of sub-peona only in relation to witnesses in Northern Ireland, and could not compel the attendance of anyone (such as former soldiers) now resident on the mainland. An attempt to go down this same route again, notwithstanding the fact that police investigations would have been completed, would not command public confidence and cannot be regarded as a satisfactory response to public concern.

6. This leaves the possibility of an inquiry under the Tribunals of Enquiry (Evidence) Act 1921; this is what public opinion is expecting, although that in itself cannot be the only determinant. The main argument in favour of an inquiry under the 1921 Act is that it could look into all areas of concern and compel the attendance of witnesses from any part of the United Kingdom and to require the production of documents. The procedure also attracts a strong degree of public confidence and would reflect the Government's recognition of the concern expressed by the Assembly (and indeed by the Official Opposition). There are precedents for using the legislation to investigate Northern Ireland affairs: the Scarman and Widgery Tribunals in 1969 and 1972 respectively were established under the 1921 provisions.

7. Against this, there are a number of disadvantages. 1921 Act inquiries are extremely cumbersome, lengthy and expensive. Although there is great pressure in the Province for a 'judicial' inquiry, many of those advocating this course will not have absorbed the fact that immunity from prosecution is usually granted to all who are called to give evidence. The establishment of an inquiry involves resolutions of both Houses of Parliament and it is the convention for the Prime Minister to make the announcement in the House. In the case of a Northern Ireland inquiry, one could expect to tie up a proportion of the Northern Irish Bar. Finally, and most importantly, the 1921 Act specifies that such inquiries should only investigate matters of "urgent public importance"; and the Salmon Report of 1966 and the Government of the day's response in 1973 (delayed by various legal impediments) both emphasised this point. The 1973 White Paper went out of its way to emphasise that tribunals should be set up "only sparingly and in very special circumstances" and that they should be limited to "matters of vital public importance concerning which there is something of a nationwide crisis of confidence". It is open to question whether Kincora falls within these criteria, both in view of its mainly local interest and also because the events in question took place some time ago. It could/however be argued that, because some aspects of the affair have yet to be examined to the point where all doubt is dispelled, there could be people still in positions

of power and influence who were involved in the scandal in some way: the matter could therefore be held to be urgent. The question of whether the Kincora allegations come within the terms of the 1921 Act, regardless of the political pressures, would have to be put to the Secretary of State's colleagues, and the Attorney General in particular.

Mechanics of a 1921 Act Inquiry

... 8. A copy of the 1921 Act is attached at Annex A. The main points are that resolutions of both Houses of Parliament are needed; that the tribunal has all the powers, rights and privileges of the High Court, and that it sits in public unless there are compelling reasons to the contrary. In practice, there is a two-stage Parliamentary process; the Prime Minister first makes a statement saying that a motion to set up a tribunal will be moved in both Houses the next day, and then at the appropriate time the Secretary of State in the Commons, and the Government spokesman in the Lords, move the motion. The length of debate varies but it will almost certainly provide an opportunity for Northern Ireland members to make tendentious speeches. The Secretary of State himself could in his own opening speech discuss how, in his view, the inquiry could be conducted and why the terms of reference had been drafted in any particular way. Once the Parliamentary stage is over and the inquiry is in progress, all witnesses are of course entitled to legal representation, and cross-examination can therefore be a lengthy process. In addition, if allegations have been made against any witness, he is entitled to receive details of them from the tribunal and be given adequate opportunity to prepare his case before his appearance.

9. In short, while detailed procedure is for each tribunal to decide, the safe-guards to minimise the risks of hurt and injustice to witnesses and to arrive at the truth inevitably means that the proceedings are time-consuming and tie up a large number of lawyers and support staff. These aspects are dealt with in Chapter III of
... the 1973 White Paper (attached at Annex B). Tribunals ordinarily, though not invariably, sit in public and press reporting is on a day-to-day basis. This would mean that one could expect to see lurid

allegations and revelations across the front page of newspapers on a frequent and regular basis over a period of some months, and possibly even for a year or more.

Immunities

10. Witnesses appearing before the inquiry would have absolute privilege in respect of defamation and other privileges available to witnesses appearing before the High Court. Otherwise there is no general immunity in respect of civil actions such as claims for negligence. So far as immunity from criminal prosecution is concerned, it is normal practice for this to be granted by the Attorney-General to those giving evidence before the inquiry. Since the police investigations would by that time have finished and the DPP would have given a decision on whether or not to prosecute, this would cause few problems in practice (although there could of course be new allegations of criminal conduct). As regards internal disciplinary proceedings, it would not be right to offer immunity as a matter of course to serving civil servants as a result of anything which might be established by the tribunal. Staff whose conduct was shown to be incompatible with their duties should be liable to the appropriate disciplinary action.

Terms of Reference

11. Careful thought will have to be given to suitable terms of reference, although this could not easily be done until the outcome of Sir George Terry's investigations is known. The remit will clearly have to permit an investigation of all matters that are a cause for legitimate public concern. It should therefore relate to the activities of all public agencies in relation to allegation of homo-sexual practices at any children's home or hostel in Northern Ireland, but it may need to go wider and needs the most careful drafting to avoid unnecessary expenditure of time and effort (and damage to reputations) but at the same time to avoid criticisms of yet another cover up.

Members of the Inquiry

12. It is open to question whether the Chairman should be a Northern Ireland Judge or a member of the judiciary in Great Britain. On the one hand, given the nature of the inquiry, there might not be so much confidence in a Chairman of Northern Ireland origin as one from outside; and if the proceedings prove contentious from the political angle, a Northern Ireland Judge might have difficulties in returning to court work in the Province afterwards. On the other hand, Judges in the Province have shown no difficulty in dealing with many highly contentious criminal cases and the Lord Chief Justice himself experienced no problems after having presided at the Convention in 1975. From a practical angle, it would be best to work on the basis that a Northern Ireland Judge would chair the inquiry; the appointment of a member of the judiciary from Great Britain could be interpreted as a slur on the Province's legal profession and, in any case, the Lord Chancellor said early in 1982 that he could not provide an English Judge. If the Secretary of State is content, therefore, we can proceed on the basis that a Northern Ireland Judge should be appointed.

13. In an inquiry of this nature and complexity, the Chairman could not be expected to work alone. He would need one or more partners and there would be merit in appointing a practicing or academic social worker, preferably from outside Northern Ireland, and a layman of some standing. Needless to say, it would be helpful if one of the Inquiry members had practical experience of administration of a service; if the Secretary of State is content, officials will set in hand the preparation of a contingency list of candidates.

Cost and Servicing

14. Given the nature of legal representation, and the principle that witnesses should not be expected to bear their own costs, an inquiry under the 1921 Act could be expected to cost upwards of £1 million. It seems certain that this would have to be borne on the Northern

Ireland Office Vote. (Although the costs of the comparatively recent Crown Agents Inquiry were borne on the Law Charges Vote, which is the responsibility of the Treasury Solicitor, this Vote only covers proceedings in England and Wales). Provision would have to be sought in a supplementary estimate at an appropriate time, probably in the Summer Supplementaries. An inquiry would need considerable legal and administrative backing. From soundings taken last year, we understand that the Treasury Solicitor would be prepared to provide the legal support, possibly with the assistance of a lawyer from the Crown Solicitor's Office. It would be best for the Secretary to the inquiry to be an administrator, perhaps from DHSS(NI).

15. Counsel to the inquiry would also have to be appointed. Leading Counsel would play a key part, sharing the burden of ensuring that the scope was kept within reasonable bounds. The Attorney-General the Lord Chief Justice and the DPP might expect to be involved in the choice, as would the Chairman of the Inquiry. It seems likely that an inquiry might place a considerable strain on the resources of the Northern Irish Bar, which might have adverse implications for the conduct of other legal business in Northern Ireland. For this reason, there might be a case for looking to the English Bar for leading Counsel. The Secretary of State has already corresponded with the Attorney-General on these points, and copies are attached ... at Annex C.