

THE DEPARTMENT FOR CONSTITUTIONAL AFFAIRS (DCA)

EFFECTIVE INQUIRIES

CODE NO CP 12/04

A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS

(APIL18/04)

JULY 2004

The Association of Personal Injury Lawyers (APIL) was formed by claimant lawyers with a view to representing the interests of personal injury victims. APIL currently has around 5,000 in the UK and abroad. Membership comprises solicitors, barristers, legal executives and academics whose interest in personal injury work is predominantly on behalf of injured claimants.

The aims of the Association of Personal Injury Lawyers (APIL) are:

- To promote full and prompt compensation for all types of personal injury;
- To improve access to our legal system by all means including education, the exchange of information and enhancement of law reform;
- To alert the public to dangers in society such as harmful products and dangerous drugs;
- To provide a communication network exchanging views formally and informally;
- To promote health and safety.

APIL's executive committee would like to acknowledge the assistance of the following in preparing this response:

Allan Gore QC
Frances Swaine

Vice-President, APIL
Executive committee member, APIL

Any enquiries in respect of this response should be addressed, in the first instance, to:

Miles Burger
Policy Research Officer
APIL
11 Castle Quay
Nottingham
NG7 1FW

Tel: 0115 958 0585
Fax: 0115 958 0885

E-mail: miles.burger@apil.com

EFFECTIVE INQUIRIES

Introduction

1. APIL welcomes the opportunity to put forward its comments to the Department for Constitutional Affairs (DCA) in response to the consultation paper on effective inquiries. Please note, however, that APIL represents the interests of negligently injured claimants and so will tackle the consultation questions from the viewpoint of victims of accidents and diseases. Consequently APIL's responses will not be applicable to non-personal injury related inquiries – for example the Equitable Life Inquiry.
2. In summary, APIL believes that inquiries are in need of reconsideration as they currently take too long, cost too much and leave numerous important issues undetermined. Regardless of these problems, inquiries provide an essential opportunity to address issues of wider public relevance, particularly in relation to health and safety matters. We propose that a new Tribunals and Inquiries Act should be enacted in order that all inquiries are convened on the same statutory basis. The new Act, however, would retain many of the statutory devices that are currently available such as the use of the oath, powers to compel witnesses to appear and the ability to refer those obstructing the inquiry to the courts for contempt.
3. Within this proposed Act APIL feels that a new body should be established to co-ordinate health and safety inquiries. This new agency - the Accident and Disaster Investigation Bureau (ADIB) - would be headed by a Director of National Safety and provide a single contact point for interested parties to make representations concerning inquiries. Responsibility for this new agency would reside with the minister of the sponsoring Government department.

4. APIL believes that it is important that a Government minister is responsible for the proposed ADIB as this will allow his actions to be accountable to parliament and reviewable by the courts. The minister would be responsible for the establishment of a dedicated website to detail the proceedings of the inquiry as well as the timely publication and dissemination of the final report and recommendations. In addition APIL proposes that the minister would be required to report back to parliament periodically to detail compliance with the inquiry's recommendations.

5. Finally, APIL proposes that inquiries should consist of a central all-encompassing inquiry, sitting in public, with side investigations running concurrently. These side investigations would be able to decide issues of liability via adversarial proceedings. The inquiry would also have the ability to recommend criminal proceedings against those parties it felt had been criminally negligent.

Consultation Questions

General

*Q1. Have the largely **ad hoc** inquiries into matters of public concern functioned adequately over recent years or is a reconsideration of their use now necessary?*

6. APIL believes that there needs to be a full reconsideration of the functioning and operation of public inquiries, *ad hoc* or otherwise, as they currently take too long; cost too much; and leave numerous important issues undetermined. For example, an inquiry will not deal with issues of liability even though interested parties may want to see this determination made.

Q2. In what circumstances should an inquiry be called?

7. APIL believes that inquiries currently function, and should continue to function, as a means of examining issues that are in the wider public interest. It is vital that the determining factor for the establishment of an inquiry should be that it is in the public interest. Within APIL's remit, this primarily means the examination of matters surrounding accountability for health and safety and the people charged with these responsibilities. Due to the wider public risk implications involved it is vital that there is a platform for examining the actions of people with health and safety responsibilities; if these duties have not been discharged adequately, recommendations should be made about how to ensure they will discharge these responsibilities in the future.
8. APIL considers that the remit of an inquiry should be broadened to allow for a decision, or at least a partial decision, on liability. In addition APIL proposes to allow for the inquiry to recommend to a prosecuting authority criminal sanction against people, or companies, found liable for possible criminal acts or omissions.

Q3. Who should take the decisions on a) calling an inquiry b) the form it should take c) its terms of reference and d) the appointment of chairmen and members?

9. APIL has repeatedly proposed¹ that a single body – an Accident and Disaster Investigation Bureau headed by a Director of National Safety - should be established to deal with health and safety issues which involve a wider public interest. APIL believes that it should be this body, possibly in conjunction with the head of the inquiry, which establishes an inquiry and sets the parameters under which it should

¹ See APIL's responses to: The Department of the Environment, Transport and the Regions (DETR) consultation – 'Transport safety' (June 1999); The Department of Transport consultation – 'Establishing a Rail Accident Investigation Branch' (October 2002); and the Health and Safety Commission (HSC) consultation – 'Safety on the railway-Shaping the future' (December 2003)

operate. APIL is fully aware, however, that such an agency will not be equipped to deal with inquiries outside of its health and safety remit. As such APIL proposes that either the relevant existing Government departments, or newly created departments, should be given responsibility for inquiries within their own specialist fields – for example, the Financial Services Authority could deal with finance related inquiries.

10. The Accident and Disaster Investigation Bureau (ADIB) would be created in order to carry out urgent inquiries into disasters and accidents causing injury and loss of life to members of the public and monitoring the implementation of measures to improve public safety. The Bureau would subsume the investigatory elements of the various accident branches² and the Health and Safety Executive (HSE) in relation to specified accidents and disasters. This Bureau would be headed by a Director of National Safety, who would in turn be answerable to the minister of the sponsoring Government department. In relation to the ADIB, and its health and safety focus, the most appropriate Government department sponsor would be the Department for Work and Pensions (DWP) as it currently sponsors the other main organisations that deal with health and safety; the Health and Safety Executive (HSE) and Health and Safety Commission (HSC).

11. APIL believes that it is important to have a minister ultimately responsible for the ADIB, as this will allow effective review of its decisions and provide accountability. These requirements are very important in relation to decisions about a) whether to have an inquiry, b) the terms of reference of the inquiry and c) the people hearing the inquiry. While APIL considers that the overriding factor is that the inquiry powers should be aggregated into a single office.

² The Rail Accident Investigation Branch (RAIB), Marine Accident Investigation Branch (MAIB) and the Air Accident Investigation Branch (AAIB).

12. Furthermore, APIL believes that the establishment of the ADIB is vital as it would provide a single contact point for interested parties to make their representations. One of the current difficulties with inquiries is that there appears to be no distinct route for parties to follow in order to appeal for an inquiry to be constituted. The responsibility for establishing an inquiry is spread across numerous people and departments. For example, this difficulty can be seen in the Gulf War Syndrome inquiry currently being conducted by Lord Lloyd. The initial inquiry had to be setup privately, with a letter being written to the Minister of Defence inviting his department to fully and openly co-operate. The problem is, however, that the Ministry of Defence has no obligation to do so and the inquiry cannot compel them to do so either. By providing a single Governmental entrance to the inquiry process the current ad-hoc and haphazard methods of establishing an inquiry would be effectively and efficiently superseded.

Q4. Should there always be a single, all encompassing inquiry into an issue or is it inevitable that other "side" inquiries will need to be conducted on certain specific aspects e.g. into professional conduct?

13. APIL believes that there should always be an all encompassing central inquiry. It does, however, accept that there may be a need for side investigations to take place within the all encompassing inquiry itself. For example, in the Kings Cross inquiry, Lord Fennel and the inquiry team sat with scientific assessors in order to understand the exact mechanics of how the fire spread. This subsequently involved some discrete research. The findings from this study, and the advice offered by the scientific assessors, proved to be invaluable. If such contributions were restricted to a side inquiry, APIL is concerned that the findings and recommendations would not be seen and fully considered within the full inquiry. APIL proposes that all findings and recommendations produced via a side investigation should be brought back into the domain of the all encompassing inquiry so that

all interested parties can gain access to the product and the material, and can make representations about them.

14. APIL also believes that side investigations, efficiently conducted, help maintain the speed and efficiency of the main inquiry. This is due to the fact that they can be held concurrently to the main inquiry and be results driven, so that the main inquiry is not overly burdened with technical discussions or delay. The prime requirement of any side investigation should be that the results and recommendations it produces should not be private, and should be used within the all encompassing inquiry to help formulate the official report.

Membership

Q5. Is it appropriate for judges to chair inquiries? If not should the subject of the inquiry determine the characteristics of the chair? What qualities should they have?

15. While APIL believes that judges are appropriate people to chair inquiries, APIL would like to emphasise that there are also many other equally qualified and suitable individuals capable of chairing an inquiry. There has been some recent debate about whether judges should conduct public inquiries³, but APIL feels that judges should continue to be considered due to the fact that they give the public the assurance that *“the inquiry is being conducted impartially and efficiently”* and it also *“ensures that the powers of the Tribunal will be exercised judicially”*⁴. Yet senior academics and retired judges also have the ability to referee large scale fact management in a sensitive and impartial way.

16. APIL does believe, however, that the subject of an inquiry should determine the characteristics of the chair, particularly where the remit

³ Jack Beatson – 51st Lionel Cohen lecture on ‘Should judges conduct public inquiries?’ (1 June 2004)

⁴ Sir Cyril Salmon – Lionel Cohen lecture on ‘Tribunals of Inquiry’ (1967) 2 Israel Law Review, at page 323

of an inquiry will include decisions concerning liability. In these instances - to be discussed in greater depth later in the paper - the adversarial legal nature of proceedings requires that a senior legal figure is involved in order to hear the subsequent legal arguments.

Q6. Is the use of expert assessors necessary for every inquiry? Should inquiries always ensure lay participation? If so what form should it take?

17. APIL does not believe that there should be a requirement for expert assessors to be involved in all inquiries. It feels that the involvement of expert assessors should be on a needs basis, dependent on the necessities of the particular matter being discussed. Furthermore, APIL fully supports lay participation within any process as this allows for a level of unbiased common sense to be introduced into proceedings. As with expert assessors, APIL believes that lay participation should be dependent on the needs of the inquiry rather than compulsory. If the inquiry team are suitably well-informed and skilled there may well be no need for lay participation. APIL would prefer to see lay participation reflected in the involvement of interested parties to the inquiry, and the appropriate funding of their representation and attendance.

18. APIL believes that it is essential that significant consideration be given to interested parties who wish to participate in the inquiry, and as such appropriate funding should be made available to them. APIL fully supports the cost of participation for victims' families being met out of the public purse, but feel that funding for interested parties should also be provided. Representational costs within current inquiries are assessed at the conclusion of the inquiry. This means that an interested party may participate with no knowledge of whether the costs of their representation will be covered until the inquiry's conclusion. Naturally this may affect an interested parties decision whether to continue to participate in the inquiry at all. APIL proposes that the funding decision concerning interested parties should form

part of the initial remit of an inquiry. This certainty will allow all parties to have full access to justice without fear of funding issues.

Q7. Is there value in having a trained panel from which members of an inquiry can be drawn when necessary?

19. Unless there is going to be considerably more inquiries, APIL believes that the utility of a specialist trained panel will be minimal. Admittedly the new streamlined system, as proposed by APIL, may lead to more inquiries, but by their very nature inquiries are brought into being in response to an extraordinary event that may not occur very often. In addition, due to the unique nature of each individual inquiry – reflected in the differing terms of reference – the composition of the panel would need to be so wide and diverse as to be unworkable.

Procedures

*Q8. Should the Tribunals of Inquiry (Evidence) Act 1921 (or other specific legislation) invariably form the basis for Ministers calling such inquiries or is there a continuing need for non-statutory, **ad hoc** inquiries?*

20. APIL proposes that all governance regarding inquiries should be incorporated into a single unified Tribunal and Inquiries Act – much in the same way that an inquiry appeal should be directed to a single organisation, such as the ADIB – and that this Act should supersede all other legislation and non-statutory provisions for inquiries. This would allow for uniformity of procedure and actions across all inquiries, and effectively detail the circumstances under which an inquiry should be convened.

21. Furthermore, APIL believes that the enactment of a Tribunals and Inquiries Act would present a perfect opportunity to establish the

aforementioned Accident and Disaster Investigation Bureau and a Director for National Safety within statute.

Q9. Is the Tribunals of Inquiry (Evidence) Act 1921 effectively redundant? If so are there any of its features, such as use of the oath or powers to the power to compel witnesses to appear, which should be retained for the conduct of inquiries?

22.APIL proposes that any new legislative framework – as detailed above - should retain many of the provisions included in the Tribunals of Inquiry (Evidence) Act 1921 including the use of the oath, powers to compel witnesses to appear and the ability to refer those obstructing the inquiry to the courts for contempt. These statutory devices are also necessary for any side proceedings maybe set in order to ascertain liability – this is fully discussed in APIL’s response to question 10 below. Indeed the more legalistic aspects of the 1921 legislation should be retained so as to further aid the running of such liability-deciding proceedings.

Immunity for the panel

Q10. Should inquiries be investigatory or is there scope for an adversarial element in the procedures?

23.APIL believes that there is scope for there to be adversarial proceedings within the inquiry process, but only with regard to ascertaining liability. Any decision to include an adversarial element within the inquiry in order to establish liability should, however, be made as part of the initial discussions concerning the inquiry parameters. Ideally the minister responsible, or the chairman, should set the parameters of the inquiry. For inquiries where there is the possibility of adversarial submissions within its remit, there also needs to be consultation with a senior judicial figure. If, subsequently, the decision is made that a judicial figure should chair the inquiry,

then it is essential for the chair and minister to discuss the inquiry remit.

24. APIL would like to see a procedure whereby representations advocating the use of adversarial submissions are made in advance by interested parties. If the minister assesses that there is a need – in public interest terms – to consider liability within the remit of the inquiry, a sitting judge should be appointed to chair the inquiry. Subsequently, so as not to delay the all encompassing inquiry, decisions concerning liability should form a small side investigation running concurrently with the main inquiry.

Q11. What are the main elements necessary for the conduct of an effective inquiry, for example access to witnesses and documents? Is the implementation of the Freedom of Information Act likely to affect this?

25. APIL firmly believes that any inquiry should be able to gain access to all possible relevant material, within the constraints of confidentiality and contempt of court. There are already many rules controlling the material which is collected for inquiries. APIL sees no reason for these rules to be significantly altered. While there are instances where national security may be compromised by the release of some documents, restrictions should only be imposed sparingly and as a last resort.

Costs of Inquiries

Q12. Should inquiries always sit in public or are there circumstances when it is right to conduct an investigation in private?

26. From the perspective of injured claimants – on whose behalf APIL is responding – we believe inquiries should always sit in public so as to allow for appropriate scrutiny by all interested parties. APIL recognises that different arguments might apply to different inquiries

that have nothing to do with personal injury issues: for example the national security aspects of the Hutton Inquiry.

Parliamentary Accountability

Q13. Are independent inquiries an appropriate investigatory device within a parliamentary democracy? Do they undermine the principle of ministerial accountability to Parliament?

27. APIL feels that independent inquiries are an appropriate investigatory device within a parliamentary democracy and do not in any way undermine ministerial responsibility to parliament. APIL notes that not all inquiries relate to issues and matters in which there will ultimately be a minister responsible. For example, in a privatised rail industry, it is questionable whether safety on the railways is a ministerial responsibility but regardless of ministerial responsibility it is in the public interest to have inquiries about major train crashes.

28. A further difficulty is that numerous inquiries are established on a non-statutory and ad-hoc basis. This precludes ministerial involvement being required or compelled. APIL's proposal is to establish a statutory basis for all inquiries within a new Act which will lead to less confusion concerning the responsibilities of those ministers involved.

Q14. Should there be greater parliamentary involvement in the setting up of such inquiries? If so what form should this take? For example should it be a 'minimalist' approach involving use of parliamentary resolutions to agree terms of reference, membership and procedures or a more 'maximalist' option which could see parliamentary committees undertaking inquiries of this nature themselves?

29. APIL believes that the presence of a minister, accountable in parliament, means there is no need for wider parliamentary

involvement in the inquiry process. Indeed further accountability is provided by the ministers' decisions being open to judicial review and the courts. APIL feels that further parliamentary involvement, including the undertaking of inquiries by parliamentary select committees, would add significantly to both the cost and speed of any inquiry.

30. APIL further believes that political participation in respect of inquiries should be kept to a minimum as it is difficult for cross-party committees, such as those suggested in the maximalist approach, to *"put aside political considerations when conducting inquiries"*⁶.

Q15. If the maximalist approach were to be pursued what should be done to address the limitations which many believe are inherent in select committees taking forward such inquiries?

31. Please refer to APIL's answer to question 14 above.

32. In addition, however, while APIL accepts that parliamentary select committees perform an important role in their ability to question civil servants, their powers are more limited than those of an inquiry and their remit tends to be wider – i.e. an inquiry will look at a specific incident, while a select committee will consider a more general question or topic. APIL believes that the advantages of a select committee do not outweigh those of a full inquiry.

Q16. Would the use of privy counsellors or senior parliamentarians, and the use of counsel or other experts suffice or is a more permanent machinery such as a parliamentary commission or perhaps extended powers for the Ombudsman more appropriate and effective?

33. Please refer to APIL's answer to question 14 above.

Q17. What powers should such a committee of inquiry or parliamentary commission have in relation to witnesses and papers which select committees do not already enjoy?

34. Please refer to APIL's answer to question 14 above.

Q18. What considerations, if any, arise concerning parliamentary privilege in the event of potential criminal, civil or disciplinary proceedings which might result from the evidence?

35. APIL believes that the inquiry should have the ability, in addition to determining issues of liability, to make recommendations to a prosecuting authority as to any possible criminal proceedings that it may consider appropriate. While an inquiry does not have the legal status to act as a court, and cannot act as a legal prosecutor itself, there would be procedural means by which recommendations could be made – for example to the Department of Public Prosecutions (DPP) or the HSE – concerning people or organisations which the inquiry felt should have criminal charges brought against them. It would then be up to those authorities to decide whether there is enough evidence to pursue a criminal prosecution.

36. APIL feels that regardless of the person or institution involved, including state agencies such as the NHS or the Ministry of Defence, if a party's actions have been negligent, an inquiry should be able to recommend criminal proceedings – i.e. crown immunity would not apply to an inquiry's criminal proceedings recommendations.

⁵ Jack Beatson – 51st Lionel Cohen lecture on 'Should judges conduct public inquiries?' (1 June 2004), page 21

Value of an Inquiry

Q19. How should the publication of the eventual report be handled? Who should be responsible for this?

37. APIL applauds the recent decision by several inquiries⁶ to publish all the material from the inquiry on a dedicated web-site, and we would like to see this initiative applied to all subsequent inquiries. In terms of which Government office or department should handle the publication of the report and maintain the dedicated web-site, APIL proposes that the Accident and Disaster Investigation Bureau should have these responsibilities.

38. It is vitally important that one of the terms of reference which the presiding minister sets on any inquiry should be to establish a time-limit for the production of the final report and its recommendations. Naturally this decision will depend on the type of inquiry being conducted and the other terms of reference within the inquiry. APIL is concerned that without specified time limits - particularly in relation to those reports which are critical of or unfavourable to the Government or a department - may be left unpublished until it is a 'good day to bury bad news'. APIL sees no reason for there being any delay in releasing an inquiry's final report into the public domain after it has been completed by the inquiry team.

Q20. Has the conduct of inquiries over the years ensured that lessons giving rise to the matter under investigation have been learnt?

39. APIL strongly believes that the lessons from past inquiries have not been learnt, and that many recommendations have still not been appropriately implemented. One such example upon which APIL has actively campaigned over the years relates to the recommendations

⁶ Such as the Hutton inquiry and Shipman inquiry.

arising out of the *Hidden* report⁷, published after the Clapham train crash. The report recommended the installation of the automatic train protection system (ATP) on all trains. *Hidden* recommended that such a system be introduced within five years. APIL is dismayed that 15 years after the original recommendation ATP is still not available on British railways. If ATP had been installed it may have prevented both the Southall and Paddington train crashes. In fact, both inquiries resulting from these subsequent train crashes again recommended ATP.

40. APIL proposes that the minister who establishes the inquiry should be compelled to report to parliament on its recommendations and their current progress. In APIL's proposal, the minister whose department is responsible for the Director for National Safety and the Accident and Disaster Investigation Bureau, would be required to report back to parliament periodically to detail compliance with the inquiry's recommendations. It should be noted, however, that the minister would not necessarily be responsible for implementing the recommendations, as they may be out of his ministerial remit – i.e. privatised rail companies – but he would be expected to indicate the actions he has taken to influence and support the introduction of the recommendations.

41. This responsibility would allow the progress of an inquiry's recommendations to be effectively monitored, and would also indicate the steps which the Government is taking to promote the recommendations. For example, if the minister failed to promote the recommendations appropriately, he could be held publicly accountable.

⁷ Published in 1989.

Q21. Has the outcome of inquiries made any discernible difference to the conduct of public life?

42. It is not within APIL's remit to answer this question.

Q22. Should there be a formal system for following up the recommendations of inquiries and their impact? If so what should this system take and who should be responsible for it?

43. Please see APIL's answer to question 20.

Q23. Is there anything for the UK to learn from other countries about the conduct of investigatory inquiries?

44. APIL has no experience of systems within other countries, and therefore is unable to comment at this time.