

**DEPARTMENT FOR TRANSPORT / RAIL ACCIDENT INVESTIGATION
BRANCH (RAIB)**

RAIL ACCIDENT INVESTIGATION AND REPORTING REGULATIONS

**A RESPONSE BY THE ASSOCIATION OF PERSONAL INJURY LAWYERS
(APIL25/04)**

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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 members 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:

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RAIL ACCIDENT INVESTIGATION AND REPORTING REGULATIONS

Introduction

1. APIL welcomes this opportunity to respond to the Department for Transport's (DfT) and Rail Accident Investigation Branch's (RAIB) consultation paper on proposals for new rail accident investigation and reporting regulations.
2. In addressing the issues surrounding the operational parameters of the RAIB, it should be noted that many of the questions detailed in the DfT consultation are not necessarily aimed at claimant organisations such as APIL. As a result, we do not seek to answer all the questions, but will respond to those which are relevant to the victims of personal injury and to solicitors and barristers undertaking personal injury work. In addition, APIL will address more general issues not covered within the consultation questions.

The creation of a Director of National Safety

3. While the establishment of the Rail Accident Investigation Branch (RAIB) is a huge step forward in relation to rail safety, APIL feels that the way disasters are handled is still fragmented and there is need for co-ordination. In addition there are gaps in the system, where none of the accident investigation branches offer adequate cover – e.g. the Hillsborough Stadium disaster or the Kings Cross station fire. APIL therefore proposes the creation of a Director of National Safety. This role would draw the current investigative bodies together - i.e. Rail Accident Investigation Branch [RAIB], Marine Accident Investigation Branch [MAIB], Aviation Accident Investigation Branch [AAIB], and HSE/C - and allow a single co-ordinator to oversee the response to major disasters.

4. The creation of a Director for National Safety would allow for the safety recommendations which often come out of major disaster investigations to be placed firmly on the political agenda. This is particularly important as recent safety lessons have not been learnt because of a failure to implement these recommendations. The Government is not duty bound to implement recommendations of an inquiry and may choose for political or financial reasons not to do so. There is, however, little or no public scrutiny of such decisions. For example, the Hidden report, published after the Clapham train crash, recommended the installation of the automatic train protection system (ATP). This was not done. It has been argued that ATP would have prevented the Southall and Paddington train crashes. Generally, each inquiry produces a long list of recommendations designed to prevent further recurrence of the accident. This list is not publicly reviewed at regular intervals. Nor is there any transparency in relation to actions taken following an accident.

5. In essence, by drawing the various investigation bodies together and overseeing the responses to major disasters the presence of a Director of National Safety would mean the stress caused to the injured and bereaved would be reduced and important safety lessons would not be lost within a fragmented system. The public could also feel more confident that the Government would be putting public safety firmly on the agenda. Such a director would, of course, have to be accountable. We suggest that he should produce an annual report for the relevant minister. The report should deal with the progress of implementation of safety recommendations submitted to the minister by any inquiry report and detail ways of securing improvements in public safety within the rail, air, marine and other sectors. The director should also address the appropriate select committee of the House of Commons. Accountability for safety issues could not, however, stop there. Where the director had made safety recommendations to a minister, that minister would have a duty to make a statement within a set time limit to Parliament outlining progress made on implementation and explaining why any of those recommendations had not been followed, where that was the case.

Consultation Questions

Chapter 1 - What will RAIB investigate? (Regulations 2 & 3)

The definition of serious accident includes derailment or collision of rolling stock that has resulted in extensive damage to rolling stock, the infrastructure or the environment.

Q2 *Do consultees foresee any significant practical problems in the interpretation or application of the proposed definitions and exclusions? If so, how might they be improved?*

6. APIL proposes that the definition of ‘serious injury’¹ should include post-traumatic reactions, such as post-traumatic stress disorder (PTSD). This is particularly important considering that the RAIB has a mandate to investigate ‘near misses’. For example, an APIL member reports that he had a client who was working as an engineer on a train line, after being told that it was free from traffic. This was, however, not the case and a high speed train narrowly missed him. As a consequence of this near miss the claimant developed a post-traumatic reactive illness. Within the current definition of serious injury this illness would not be defined as a serious injury, even though it had occurred due to a near miss, which is part of the RAIB’s remit.

7. APIL is concerned that the exclusion of psychiatric injury in the initial remit of the RAIB may cause difficulties later. For example, the recently ratified international Montreal Convention on air travel failed to include psychiatric injury within its original drafting. This subsequently led to considerable debate and protracted discussions as interested parties – including APIL – attempted to have changes made to the finalised document. By including psychiatric injury early in the development of the RAIB, APIL anticipates that a similar situation to that detailed above will

¹ Consultation document, paragraph 34, page 17

be avoided, and there will be no need for similar protracted discussions and debate.

8. APIL feels that the definition of 'serious accident' is being overly prescriptive by being restricted to incidents which involve 'serious injuries to five or more persons'. The five person figure appears to be completely arbitrary. For example, if a car were trapped on a level crossing with five people inside, their psychiatric injuries would be no different from the same situation but with only two people in the car. APIL considers that because both of these incidents would lead to serious psychiatric injuries for the people in the car, both should therefore come under the definition of serious accident. APIL proposes that the definition of 'serious accident' should remove the requirement for the serious injury to have happened to five or more people, and replace it with a simple requirement that there is only a need for serious injury – such as psychiatric injury – to have occurred.

Q3 *Do consultees agree that the Regulations set appropriate boundaries for RAIB investigations?*

9. APIL is encouraged that the RAIB is committed to investigating 'near misses', as well as serious accidents. What is unclear, however, is whether signals passed at danger (SPADs) are included within the RAIB's consideration of what constitutes a near miss. There are probably numerous SPADs which do not involve any sort of injury, but which constitute a near miss and a cause for concern in terms of train safety. APIL would like to see the specific inclusion of SPADs in the RAIB's remit, possibly in reference to the duty to investigate near misses.
10. APIL is strongly supportive of the RAIB's flexibility to "*investigate any railway accident or incident when it considers there are lessons to be learnt for the safe operation of the railways*"². Yet we are concerned that

² Consultation document paragraph 37, page 17

this flexibility is restrained by the fact that the RAIB is unlikely to investigate accidents or incidents taking place at level crossings. While the consultation document defines accidents or incidents at level crossings as being “*not peculiar to the operation of a railway, even if they occurred on railway property*”, APIL suggests that the recent Berkshire rail crossing disaster³ illustrates the potential danger to trains of incidents at rail crossings. APIL would like to see the RAIB’s discretion to investigate rail accidents and incidents unhindered by any such restrictions. We believe that the primary instigator for any RAIB investigation should be to ensure the continued safe operation of the railways, regardless of the location of the incident.

Railways which cross boundaries with other Member States

Q4 *Will the proposed provisions establish an appropriate framework for the effective investigation of accidents and the improvement of railway safety in the cross-border and international context?*

Q5 *Will this proposal enable RAIB to bring benefits to railway safety in respect of the Belfast - Dublin link?*

11. APIL believes that the RAIB needs to have clearly defined structures and protocols in place to deal with the investigation of accidents which take place across country boundaries. In addition there is a need for the RAIB to have similar structures in place in relation to railway accidents in which UK nationals are injured. With the advent of the Channel Tunnel, the English railway system has now become directly linked with that of mainland Europe. APIL therefore believes that it would worthwhile to establish a European, if not international, agreement to detail how rail investigations are to be handled for cross border accidents. For example, there is currently an international convention for air travel which details the necessary procedures for cross-border investigation of air accidents.

³ On the 6 November 2004, due to a car obstructing the tracks at a railway level crossing at Ufton Neveret, a train derailed killing six people - including the driver of the vehicle Bryan Drysdale - and injuring about 150.

APIL feels that the suggestion that the RAIB should “*do its best to agree with its counterpart*”⁴ the parameters of any investigation fails to provide a clear enough structure for cross-border co-operation. It is essential to establish the cause, and possibly fault, of an accident as soon as possible, and protracted discussions about who should lead an investigation would only hinder the necessary preservation of evidence. Sadly, in a major disaster, investigators do not have the luxury of time to decide such things.

12. The lack of a co-ordinating agreement in relation to the Channel Tunnel is another example of where a rail disaster investigation could be needlessly delayed. The document states that the RAIB will be able to investigate accidents and incidents which occur in “*the UK half of the Channel Tunnel System*”⁵. APIL is concerned that this may lead to disagreements concerning what constitutes the UK “half” of the tunnel. The establishment of an international accord concerning investigatory powers for rail disasters will allow fast and effective investigation to be undertaken by the countries and agencies involved.

Chapter 2 - Duty to notify RAIB of accidents and incidents (Regulation 4)

Rail industry bodies whose property or staffs are involved in a railway accident or incident will be required to notify RAIB of the occurrence. The notification must contain as much of the information listed in Regulation 4(4) as is available at the time of the notification.

Q7 *Is the list of required information in Regulation 4(3) appropriate? Do you consider that any other information should be provided?*

13. APIL feels that the list of required information in Regulation 4 (3) is comprehensive, and does not wish to add any further items.

⁴ Consultation document – paragraph 45, page 19

⁵ Ibid – paragraph 57, page 20

Q8 *RIDDOR requires the notification of incidents as soon as possible and in any case within 10 days, but it would be advantageous to RAIB to receive more expedient notification of Schedule 2 accidents and incidents. What are the practical implications of this for railway industry bodies? Would a requirement to notify within 3 days cause significant problems?*

14. As APIL does not represent railway industry bodies, it is outside our remit to comment widely on this issue. Obviously, the more expedient the notification of an incident, the quicker an investigation can take place.

Q9 *Do you agree that the range of accidents and incidents in Schedule 1 corresponds with the types of accidents and incidents that consultees will expect RAIB to investigate in order to achieve its general aims of improving railway safety and preventing railway accidents and incidents?*

15. In response to this question APIL reiterates its concern about the current exclusion of psychiatric illnesses within the definition of 'serious injury' as well as the use of 'five or more persons' to define a 'serious accident'. In order to fully achieve the aim of "*improving railway safety and preventing railway accidents and injury and incidents*⁶" the RAIB needs to include psychiatric injury into the definition of serious injury and remove the 'five or more persons' provision in the definition of serious accident.

Q11 *Do consultees see Schedule 2(17) as an adequate means of RAIB becoming aware of precursor overcrowding events that could lead to an accident or incident?*

16. APIL agrees with the RAIB's definition of what constitutes a precursor to overcrowding on a railway stations which could cause an accident or incident, and has nothing further to add at this time.

⁶ Consultation document – paragraph 6, page 3

Chapter 3 - Conduct of Investigation (Regulation 5)

Q13 *Do you agree that the proposed Regulation 5 delivers the benefits that are sought from the establishment of an independent Rail Accident Investigation Branch and the proposed means by which it seeks to meet its objectives? Do you foresee any problems, and if so, what would be your preferred solutions?*

17. APIL welcomes many of the powers which the regulations provide the RAIB, including the ability of the Chief Inspector to appoint “*a person to conduct or participate in an investigation*”⁷ and the ability of the Chief Inspector to request assistance from “*a constable, the safety authority, any public body, any person acting under a duty conferred by an enactment, an accident investigating body of another Member State or the European Railway Agency*”⁸. APIL does, however, feel that the RAIB’s primary duty should be to act as a co-ordinator for the various agencies involved in coping with a rail crash. For example, APIL would anticipate that both the Health and Safety Executive (HSE) and police may be involved in separate investigations following a large train crash. While the RAIB could request assistance from both these bodies, what is needed is an organisation to co-ordinate the collection of evidence for the benefit of all agencies concerned with the investigation process. APIL therefore suggests that the RAIB should fill this role in respect of rail accidents.

18. APIL is also unsure what role the Chief Inspector would play in appointing someone to oversee any subsequent inquiry into the crash. While the initial investigation of an incident is vital, there will often follow an independent inquiry into the causes of the accident. APIL feels the regulations need to make it more explicit the mechanism by which an inquiry chairman is appointed – if via the RAIB regulations – or detail the intersection between the RAIB regulations and the corresponding inquiry legislation.

⁷ Consultation Document – paragraph 103, page 27

⁸ Consultation Document, paragraph 105, page 27

Q14 *Do you have any suggestions that would influence the proposed approach to use accredited agents for RAIB as the 'first response' for serious accidents? Can industry confirm its commitment to the provision of personnel to be trained and act as accredited agents?*

19. APIL has concerns over the use of 'accredited agents', as there may be issues concerning conflict of interest between their duties as an agent of the RAIB and their role within, potentially, one of the train companies involved in the crash being investigated. The RAIB states that it will *"address conflict of interest issues by ensuring that, once on site, personnel will normally be accompanied while making a record of perishable evidence and preserving other evidence until the arrival of a RAIB inspector"*. APIL feels, however, that it is unrealistic to expect, especially during the potential chaos that often surrounds a major disaster, that a single figure will be able to be appropriately accompanied at all times. APIL proposes that in order to avoid potential conflicts of interest the RAIB should be granted additional funding to supplement its current number of frontline inspectors. An increase in the number of RAIB inspectors will allow them to attend the scene quickly, so combating any potential conflict of interest issues which may arise with the use of accredited agents. A subsequent by-product of more RAIB inspectors is that more safety investigations can be conducted on the railways.

Chapter 4 - Access to the site of an accident or incident (Regulation 6)

Access to the site of an accident or incident, and to other sites and to witnesses, must be controlled and managed effectively if evidence as to the cause of the accident is to be preserved and gathered effectively.

Q15 *Within the boundaries of the powers given by the Act and the Directive do you agree that this approach is the most appropriate for availing RAIB the necessary primacy to improve the investigation process?*

20. APIL fully supports the ability of the RAIB inspector to restrict access to the disaster site so that *“no-one may access the site, or remove or interfere with any of the railway equipment involved in the accident without [his] consent.”*⁹ APIL would, however, like this power to be part of a wider general co-ordination role allocated to RAIB inspectors.

Chapter 5 - Preservation of evidence (Regulation 7)

Q17 *Do the proposals secure appropriate arrangements for the lead in investigations?*

21. APIL believes that the RAIB inspector on site should always take the lead role in the ensuing investigation. While the regulations allow for aspects of co-ordination by the RAIB inspector, APIL would like to see these aspects made more explicit and clear. The need for co-ordination is especially important considering the fact that both criminal and civil prosecutions may follow a large train crash. In order to ensure that there is not a duplication, or over looking of relevant items, a single point of co-ordination is essential.

22. Furthermore, APIL considers that an important part of RAIB’s co-ordination duty should include making recommendations in respect of fault and/or blame. APIL would like to see the current aims of the RAIB

slightly re-drafted so as to make its co-ordination role more visible and also to move away slightly from its current “*obligation to seek out cause as opposed to apportion blame*”¹⁰. By empowering the RAIB to make recommendations in relation to fault to either the police (in terms of criminal liability) or the HSE (in terms of civil liability) it is hoped this will lead to appropriate sanctions being levelled against offending companies.

Chapter 8 - Reports of accidents and incidents investigated by RAIB (Regulation 10)

Q21 *Do consultees agree that the proposed arrangements will provide them with appropriate visibility of and access to RAIB's report preparation process?*

Q22 *Do consultees agree that these proposals will enable RAIB and its stakeholders to see how the learning from the investigation of accidents and incidents is enabling the industry to improve its safety performance and to prevent accidents and incidents, and is supporting the safety authorities in their enforcement role?*

23. As already discussed in reference to the role of a Director of National Safety, APIL feels that any recommendations which arise out of a disaster investigation should be presented to Parliament. We concur with the consultation paper that the recommendations generated by a RAIB investigation are “*the key means by which the aims of accident investigation as set out in the Directive and in the act ... can be achieved.*”¹¹ In order to ensure these recommendations are considered fully, however, the minister responsible should have to comment on them and detail – within a set time limit – whether or not the recommendations have been implemented, and if they have not, why not.

⁹ Consultation document - paragraph 125, page 31

¹⁰ Section 7(5) of the Act – Consultation document, paragraph 107, page 27

¹¹ Consultation document - paragraph 202, page 45

Chapter 9 - Annual report of the Chief Inspector (Regulation 11)

The annual report will contain a summary of the investigations conducted by the Branch, a list of the recommendations issued, and details of the measures that have been reported to the Branch as having been taken in response to its recommendations.

Q23 *Should anything else be contained in the annual report?*

24. APIL suggests that a further addition to the annual report should be a section detailing best practice from around the world, as well as new and effective safety technology. In order for the RAIB to fulfill its remit to “improve the safety of railways and to prevent railway accidents and railway incidents”¹² it is essential that they are proactive in considering and highlighting emerging safety technology. By considering developments outside of the UK, the RAIB meets this remit by fully considering the wider picture in terms of rail safety. APIL proposes that the House of Commons Transport Select Committee should have a duty to consider the recommendations highlighted within this section and their applicability to the UK railway system. For items that the select committee believes will significantly improve train safety, a further recommendation can be made to the appropriate government minister. The minister will have to respond, in a similar fashion to disaster recommendations, detailing the reasons for not implementing any recommended new safety technology.

25. APIL believes that the consideration of new technology will also aid in the linking of the UK rail network with the mainland European network, as what works in, for example Germany, may well be implemented over here.

¹² Consultation document – paragraph 6, page 3