The Law Commission

(LAW COM No 289)

IN THE PUBLIC INTEREST: PUBLICATION OF LOCAL AUTHORITY INQUIRY REPORTS

Report on a reference under section 3(1)(e) of the Law Commissions Act 1965

Presented to the Parliament of the United Kingdom by the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty
July 2004

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are: The Honourable Mr Justice Toulson, *Chairman*
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THE LAW COMMISSION

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EXECUTIVE SUMMARY

Local authorities have statutory responsibility for the delivery of many essential social and other services. On occasion, things go seriously wrong. The authority will want to find out why. To do this, it may set up an inquiry. The public will not feel confident that the issue has been properly investigated if the inquiry report cannot be published. In February 2000, when Sir Ronald Waterhouse published his report into abuse of children in care in North Wales, he found that there were situations where a local authority had found itself unable to publish its own inquiry report. Sir Ronald recommended that the Law Commission should be asked to investigate the issue.

The matter was formally referred to the Commission in February 2001. In particular, the Commission was asked to review:

- the law of defamation as it applies and the privilege that local authorities can claim, in such circumstances;

- the possible loss of public interest immunity or privilege against disclosure, and the making of admissions of liability in such circumstances; and

- the way in which existing practices for insuring local authorities against liabilities in relation to defamation, or other torts, may contribute to these problems.

The Commission was also asked to recommend courses of legislative and/or administrative action that would better enable local authorities to take effective action in response to matters of serious public concern revealed by such inquiries, and to do so in as open a way as possible.

Form the outset, the Commission has not limited its work to issues arising in the specific context of the abuse of children. Its analysis covers any serious failure in the delivery of local authority services. The Commission also noted that, increasingly, local authorities deliver their services in partnership with or through other organisations.

The Commission issued a consultation paper in April 2002. In the light of responses to the consultation and further analysis of the issues, the Commission now publishes its final report and draft Bill.

The principal conclusions of the Commission are as follows.

(1) Many of the problems relating to inquiries would not occur if inquiries were properly run and established. New guidance has been issued by the Society of Local Authority Chief Executives (SOLACE). It is essential that careful note is taken of this.

(2) The code of practice issued jointly by the Association of British Insurers (ABI) and the Local Government Association (LGA) should be refined to ensure that local authorities can act in the public interest without putting

their insurance cover at risk. The Commission will provide the ABI and LGA with a note of issues it thinks the code should address.

(3) The law of defamation, in particular the defence of qualified privilege, should be amended. Where there has been an ad hoc inquiry into a failure in the delivery of a local authority function, then so long as the inquiry has been conducted fairly, and neither the inquiry nor the local authority is motivated by 'malice', publication of the report, either in whole or in part, should be privileged. This means that the local authority will have a defence against any action brought by a person alleging that he or she was defamed in the report.

(4) Ad hoc inquiries may be established jointly with another local authority. The new statutory qualified privilege should similarly attach to the report of such an inquiry.

(5) In addition, a joint inquiry may be established by a local authority and another public body. In this case, the new form of qualified privilege will attach only to the local authority. The other public body will continue to rely on the common law defence of qualified privilege.

(6) An inquiry will be treated as having been conducted fairly where: the report's conclusions are based upon findings of fact derived from evidence put before it; those criticised in a report have notice of the criticisms and the opportunity to respond; and any response is fairly represented in the report.

(7) There should be a statutory power to set up a new form of special inquiry. This power should be exercisable where there has been a *serious* failure to deliver a service, and the local authority anticipates that those who have relevant information may not be willing voluntarily to provide that information to the inquiry. Such a special inquiry may be set up jointly with another local authority. The special inquiry will have power to seek an order from the High Court requiring persons to attend the inquiry or to produce documents or other things to the inquiry.

The draft Bill deals with items (3) to (7).

In making these recommendations the Commission has been conscious of the difficult balance that must be struck between enabling local authorities to be open and accountable to the public while at the same time ensuring that officers and others connected with the delivery of services are not unfairly maligned in any report.

In addition, the Commission has taken into account significant developments in Human Rights law, the effect of which is that if the state cannot provide an effective means of investigating serious service failures, in particular where a life has been lost, the United Kingdom may be in breach of its obligations under the European Convention.

THE LAW COMMISSION

Report on a reference to the Law Commission under section 3(1)(e) of the Law Commissions Act 1965

IN THE PUBLIC INTEREST: PUBLICATION OF LOCAL AUTHORITY INQUIRY REPORTS

To the Right Honourable the Lord Falconer of Thoroton, Secretary of State for Constitutional Affairs and Lord Chancellor

PART I
INTRODUCTION

1.1 In February 2000 Sir Ronald Waterhouse published the report of his inquiry into abuse of children in care in North Wales.[1] One feature of the history covered in the report was that the local authorities involved had carried out inquiries into the allegations of abuse, but the reports of those inquiries had not been published. Waterhouse noted that in some circumstances local authorities might be unduly inhibited from acting in the wider public interest by fears about publishing the reports of their inquiries. This could prevent necessary reforms from being implemented. We were asked to examine the legal bases for these fears and to recommend reforms we considered necessary.

1.2 This Part sets out the factual background leading to our terms of reference; the provisional conclusions we reached in our consultation paper (CP) published in 2002;[2] the structure of this report and a summary of our recommendations. We conclude with an assessment of the impact we anticipate our recommendations would have.

THE FACTUAL BACKGROUND

1.3 As Waterhouse states, it had been known for several years that serious sexual and physical abuse of children had taken place in homes managed by the former Clwyd County Council in the 1970s and 1980s. In 1991, criminal investigations were begun by North Wales police. They led to eight prosecutions and seven convictions of former care workers.[3]

1.4 Prior to the Waterhouse inquiry, which was set up by Parliament, ad hoc inquiries had been established by Clwyd County Council ("Clywd") to investigate

[1] *Lost in care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* HC 201 ("the Waterhouse Report"). This inquiry was set up under the Tribunals of Inquiry (Evidence) Act 1921.

[2] Law Commission Consultation Paper No 163, "Publication of Local Authority Reports" (2002).

[3] The Waterhouse Report, para 2.01.

allegations of sexual abuse and related matters. We summarise them and the problems they posed for Clwyd.

The Cartrefle inquiry, 1990-1992

1.5 The Cartrefle inquiry focused upon allegations of abuse at the Cartrefle Community Home. Established in November 1990 on behalf of Clwyd social services department, it was chaired by John F Banham, a retired senior officer of Cheshire social services department. The Clwyd Area Child Protection Committee (ACPC)[4] was informed of the social services inquiry. It decided that parallel inquiries should be set up by the education department and the health authority. The three inquiries were completed in June 1991. The Clwyd ACPC commissioned an overview of the inquiries. This was conducted by a panel of five members. It reported back to Clwyd in February 1992. The conclusions of the overview, and the responses of the Director of Social Services, were placed before the Social Services Committee on 27 October 1992.

1.6 Between February and October 1992, the County Solicitor discussed with their insurers (Municipal Mutual Insurance Limited)[5] and the Crown Prosecution Service the extent to which the report could be published. The insurers intimated that publication, even on a limited scale, could amount to a waiver of public interest immunity or privilege. The Crown Prosecution Service thought that publication might prejudice forthcoming or contemplated criminal proceedings and would constitute contempt of court.

1.7 The County Solicitor agreed with the insurers that extracts of the conclusions and recommendations could be circulated to members of the Social Services Committee and the ACPC. Discussion was to be confined to general principles; there was to be no debate on matters that might be the subject of criminal proceedings or generate claims against Clwyd.

1.8 In the event, dissemination to the public was not possible because of ongoing criminal proceedings. Even publication of the overview would have constituted contempt of court.

The Jillings inquiry, 1994-1996

1.9 Besides preventing publication of the Cartrefle inquiry, continuing police investigations also precluded the establishment of a public inquiry. There was concern that police investigations were becoming increasingly protracted. So Clwyd decided to set up another ad hoc inquiry. The council wanted to review past practice quickly to ascertain whether anything more needed to be done to secure the proper care and protection of children.

1.10 The proposal to set up the inquiry was discussed by the Leader of Clwyd Council and the Chairman of the Social Services Committee with the Chief Executive, the

[4] An ACPC is a multi-agency body which is charged with co-ordinating child protection measures in the area of the local authority. It includes the social services and educational local authorities, health services, the police and probation services. See further para 2.33 below.

[5] Now operating under the name of Zurich Municipal.

Director of Social Services and the County Solicitor. It was approved by the Social Services Committee on 12 January 1994. The inquiry, chaired by John Jillings, retired Director of Social Services for Derbyshire, was instructed to conduct an investigation "into the management of its Social Services child care services from 1974 to date with particular reference to those concerns which prompted the investigation by the North Wales Police."[6] The council's insurers were not consulted about the proposal. It was anticipated that the inquiry would be finished by August 1994; its report would be submitted to the County Solicitor and the Director of Social Services, and would be put before the council's Policy, Finance and Resources Committee. In fact the report was not finished until February 1996, being provided to the County Solicitor on 22 February 1996.

1.11 Significantly, Clwyd was due to be dissolved on 1 April 1996. Thus the authority did not have long to decide how to react to the report. Waterhouse (paragraph 32.43) describes what happened next:

> … [the report] was given very limited circulation. It was seen by the senior officials involved and by the Leader of the Council, who consulted other leading members of the Council nominated by their respective groups. According to Loveridge,[7] "The initial reaction of the Council was one of amazement (at) the number of inaccuracies contained therein and the style and content of the Report". It appears that an effort was made to establish a list of the alleged factual inaccuracies with a view to concurrent publication with the Report and on 7 March 1996 instructions were sent to Leading and Junior Counsel to advise on the question of publication. Supplementary instructions were sent to them shortly afterwards in the light of representations by the North Wales Police and by the Council's insurers and by 20 March 1996 Loveridge had received a Preliminary Joint Opinion, a Joint Opinion and a Supplementary Joint Opinion from Counsel.

1.12 Counsel were asked to advise:

(1) whether publication of the report might avoid Clwyd's insurance policy, bearing in mind the large number of objections raised by the insurers to any publicity attaching to the report;

(2) the potential liability of Clwyd for publication of any defamatory comments contained within the report; and

(3) whether there was any risk to the proper administration of criminal justice through the impact upon any pending trials of publication of the report.

1.13 Counsel's answer to the first question was that publication might indeed avoid the insurance policy. In relation to the second, counsel thought that the council could rely on the common law defence of qualified privilege[8] in relation to publication of the report to members of the council,[9] but not in relation to

[6] The Waterhouse Report, para 32.36.

[7] The County Solicitor to Clwyd.

[8] Qualified privilege is discussed further below Part V.

[9] The report was made available to councillors, but in an extremely restricted way: it was not even circulated to them. It was to be discussed by the relevant committee in private, and

publication to the public at large. On the third issue, counsel advised that if the report was not dealt with thus, there was a risk that publication could adversely affect the administration of criminal justice.

1.14 Waterhouse describes how the council dealt with the report:

> The advice of Counsel was accepted and the Policy, Finance and Resources Committee duly received the report at its meeting on 22 March 1996, ... The committee dealt with the matter by simply noting the report and agreeing to refer it to the Secretary of State for Wales to assist him in considering whether or not a public inquiry should be instituted. The ... evidence is that neither members of the committee nor other members of the council read the report. It may have been available in an office for them to read if they wished to do so. The decisions of the committee were approved by the Council at its last meeting on 26 March 1996.
>
> The Welsh Office also had sought advice about the feasibility of publishing the Jillings Report and had consulted Treasury Counsel. We have not seen any written opinion given by the latter but in a letter to Loveridge (as Director of Legal and Administration for Flintshire County Council, the designated successor authority to Clwyd in respect of insurance matters), dated 14 May 1996, the Welsh Office did state:
>
> > It is not normal practice for Treasury Counsel's advice to be made available or divulged to third parties in the way that you have suggested. However, I can advise you that while in our discussions with Counsel he has generally endorsed [the opinion of the counsel instructed by Clwyd] on this matter he has indicated that it should be possible to publish an edited version of the Report's recommendations. This could be accompanied by some newly-drafted contextual passages which would explain the basis on which the recommendations are made.
>
> At this time the Welsh Office was encouraging the successor authorities to produce an edited version of the Jillings recommendations but was unwilling to publish such a document itself. The successor authorities did not, at first, reject the idea of publication and discussed with Jillings the possibility of preparing a "safe" version but they concluded by 6 June 1996 that they could not publish the report and the Secretary of State was so informed. The problem then receded, however, with the Prime Minister's preliminary announcement on 13 June 1996 of the Secretary of State's intention to institute a public inquiry.[10]

1.15 This was the Waterhouse inquiry. It reported in February 2000.

there was to be no discussion of its contents with the media or the public. There would then be no adverse impact on any pending criminal trials.

[10] The Waterhouse Report, paras 32.49 – 32.51.

The Waterhouse Report, 1996-2000

1.16 Waterhouse noted that the legal problems surrounding the Jillings report were "more complex but essentially similar"[11] to those arising out of the Cartrefle report. The criminal proceedings had been concluded by the time Jillings reported, so there was no danger of contempt of court by prejudicing a prosecution. But Jillings' report gave rise to serious legal questions about defamation, admissions of liability and waiver of privilege. It was also feared that, on publication, councillors might make statements which would themselves amount to admissions of liability and waiver of legal rights. Thus Jillings' inquiry failed to produce any changes in practice or to increase general understanding, inside or outside the council, of what had gone wrong.

1.17 Clwyd found not only that it might expose itself to legal actions if it published the Jillings report, but also that it might jeopardise its insurance cover. Waterhouse concluded that the insurers were right actively to alert the council to these dangers:

> Looking at the part played by the insurers' representatives in this history as a whole, we accept that they acted throughout with the honourable intention of preventing Clwyd County Council, its officers and members from acting in such a way that the insurers would be compelled to repudiate liability for claims by victims of abuse or by persons who alleged that they had been libelled by either report. The insurers' representatives adopted an interventionist role with this objective so that Clwyd knew where it stood in the matter; and, in our judgement, that was strongly preferable to a passive role that might well have led to repudiation, with grave consequences for the Council and many others.[12]

1.18 The insurers' representative to the Waterhouse inquiry accepted that the insurers had gone too far:

> [I]n hindsight, they accept that, at times, the tone of the correspondence on their behalf was intemperate and went too far in the demands made of the Council. They accept also that their approach to the dilemma of striking a balance between the duty of a council to seek the truth and identify reforms on one hand and its duty to protect its financial interests on the other may be open to criticism.[13]

Waterhouse did not make any further criticism of the insurers. Instead he referred to steps being taken to produce guidelines for local authorities,[14] and enumerated the following legal questions:

> Firstly, in relation to the law of defamation, the following questions arise:
>
> (1) Should there not be a general statutory provision enabling local authorities to institute inquiries into matters of wide public concern

[11] The Waterhouse Report, para 32.58.

[12] The Waterhouse Report, para 32.60.

[13] The Waterhouse Report, para 32.60.

[14] See paras 4.4 – 4.16 below.

and to publish the reports of such inquiries to the public at large with the protection of qualified privilege, whether or not the public has a sufficient interest in receiving the report within the terms of present legislation?

(2) If not, should not the limits of legitimate publication of such reports be defined in order to safeguard the position of elected members and officers in discharging their public duty?

(3) If the issues are not considered suitable for legislation, should there not be central government guidance to local authorities on them, including guidance as to the format of inquiries and the content of reports?

(4) Is similar legislation or guidance desirable for other public authorities that may need to institute inquiries into matters of wide concern?

We consider that the problems underlying these issues are likely to recur quite frequently and that they are suitable for consideration by the Law Commission.[15]

1.19 These questions crystallised into our terms of reference.

Terms of reference

1.20 On 19 February 2001, the Commission was asked:

> [t]o consider the concerns raised in paragraphs 32.44 – 32.62 of the Waterhouse Report that in some circumstances local authorities may be unduly constrained by threat of actions or loss of insurance cover from making public, acting upon, and identifying necessary reforms in the light of the results of inquiries conducted by them, or on their behalf.
>
> Having regard to the matters of tort and contract raised in those paragraphs, to review:
>
> (a) the law of defamation as it applies, and the privilege that such authorities can claim, in such circumstances;
>
> (b) the possible loss of public interest immunity or privilege against disclosure, and the making of admissions of liability, in such circumstances;
>
> (c) the way in which existing practices for insuring local authorities against liabilities in relation to defamation**,** or other torts, may contribute to these problems.
>
> To recommend courses of legislative and/or administrative action that would better enable local authorities to take effective action in response to matters of serious public concern contained in such inquiries, and to do so in as open a way as appropriate.

1.21 Though our terms of reference are restricted to local authorities,[16] in principle the same issues can arise in relation to any public body providing a public service, other than central government.

[15] The Waterhouse Report, para 32.61.

[16] We define "local authority" at paras 2.2 – 2.5 below.

THE CONSULTATION PAPER (CP)

1.22 We published our CP "Publication of local authority reports" on 23 April 2002. There we provisionally concluded that there were legal difficulties which inhibited local authorities responding to matters of serious public concern as openly as they should, especially in relation to the publication of reports of ad hoc inquiries, namely inquiries established on a one-off basis.

1.23 We suggested that these difficulties might be resolved by:

(1) an effective Agreement to be drawn up by the insurers and the local authorities (overseen by Government if appropriate) to promote better insurance practice;

(2) a Code of Practice for the conduct of local authority ad hoc inquiries, and

(3) possible reform of the law of defamation.

1.24 We concluded that only the third of these was suitable for further detailed work by the Law Commission. We also asked whether current powers relating to the holding of inquiries were adequate.

1.25 We received 53 substantive responses. We also benefited from responses to questionnaires sent out by the Society of Local Authority Chief Executives (SOLACE) to Chief Executives of local authorities and to Chairs of inquiries which the SOLACE Review Group[17] copied to us. We were also assisted by a seminar arranged on our behalf by the Local Government Association, and by a special meeting held with representatives of local authority insurers.

STRUCTURE OF THIS REPORT

1.26 Part II answers the following basic questions: what constitutes a local authority in this context? what is an ad hoc inquiry? and what are the legal bases for a local authority to set up an ad hoc inquiry?

1.27 Most of the problems we identified related to the liability insurance position of local authorities; we analyse those problems in Part III. Some of those problems we conclude have non-legislative solutions. We set these out in Part IV.

1.28 The area of law where there did seem to be a problem amenable to legal reform was that of defamation and in particular the defence of qualified privilege. We describe the law and analyse its deficiencies in Part V; and set out our recommended reforms in Part VI.

1.29 The CP also asked whether the powers of inquiry currently available to a local authority were adequate. Response to the consultation suggested this was an issue to be taken further. Part VII argues the case for a new statutory power of inquiry; Part VIII describes the new power we recommend.

1.30 Our recommendations are brought together in Part IX.

[17] SOLACE set up a Group to review guidance on the conduct of local authority ad hoc inquiries. See para 4.2 below.

1.31 A draft Bill, with Explanatory Notes, for giving effect to our recommendations is in Appendix A. Appendices B and C are documents produced by others which we think contain useful and practical guidance. Appendix B is guidance produced by the SOLACE Review Group. Appendix C is advice issued by the Department of Health in 2002 to those conducting investigations and inquiries in the Health Service. In particular it addresses the precautions which should be taken to avoid losing the protection of qualified privilege. We are grateful to both bodies for their permission to reproduce those documents. Appendix D provides background information about powers of inquiry open to bodies other than local authorities. Appendix E lists those who responded to the Consultation, and who advised or attended meetings relating to the Consultation.

SUMMARY OF THE RECOMMENDATIONS

1.32 Underpinning our report is the proposition that local authorities must act in the public interest. It is also in the public interest that local authorities are accountable when things go wrong. To enhance this accountability we make two principal recommendations for reform of the law: first to amend the law of qualified privilege; second to create a new power of inquiry.

Qualified privilege

1.33 We recommend that the law on qualified privilege be statutorily amended in order to clarify the circumstances in which it is available to local authorities as a defence in defamation actions. Where a local authority publishes a report of an ad hoc inquiry (or of an Overview and Scrutiny Committee inquiry) into a failure in its provision of services, either to the general public or to a section of it, the authority should be able to rely on the defence of qualified privilege so long as either the publishing authority is satisfied that the inquiry and report were fair, or they were in fact fair.

1.34 If the authority is not satisfied that the inquiry and report were fair, or it fails to take reasonable steps to check whether they were fair and in fact they were not fair, the new statutory privilege should not be available. Nor should the common law privilege which would otherwise be available.

Local authority special inquiries

1.35 Currently there is a gap in the system. If witnesses will not co-operate with a local authority ad hoc inquiry, and no inquiry is established by central government, those immediately affected and the public in general will never have a full account of how things went wrong.

1.36 We recommend that principal local authorities should have a new statutory power to establish an inquiry which would itself have power to apply to the High Court for an order compelling a witness to give evidence to the inquiry. While the initiative would lie with the local authority in setting up the inquiry, and with the inquiry in asking the court for an order, whether the order was made would be decided by the Court. This will achieve a balance between enabling democratically elected bodies to account for failures in performance through an effective inquiry, but without putting powers of compulsion in the hands of a non-judicial body.

1.37 Such special inquiries will also help government fulfil its obligations under the European Convention on Human Rights and Fundamental Freedoms ("ECHR"), and under the European Charter of Local Self-Government. The ECHR requires effective investigation into deaths or serious harm in certain circumstances. Under the Charter, the Government is committed to principles of local government through the European Charter of Local Self-Government.[18]

1.38 Such special inquiries would also allow deaths of people for whom local authorities have a responsibility to be investigated as effectively as deaths of people in custody which currently require an inquiry by the Prisons and Probation Ombudsman.

THE IMPACT OF OUR RECOMMENDATIONS

1.39 A full cost-benefit analysis of our recommendations lies outside the expertise of the Commission. Some of the benefits are, by their nature, unquantifiable; others are quantifiable – at least, they could be estimated. Here we outline what we see as being the probable benefits and costs.

Recommendations in Part VI: qualified privilege

1.40 The recommendations to make qualified privilege a more certain defence will have the effect of making publication of inquiry reports (either in full or in part) more likely. This has benefits in terms of local accountability and transparency. These are benefits for the complainants in individual cases, for the inhabitants of local authority areas who are consequently better informed, and for the public interest at large.

1.41 Greater certainty in knowing whether a report may be published without provoking a realistic claim in defamation should give greater confidence to local authorities and their insurers about their potential liabilities.

1.42 If a report which makes recommendations for future changes in practice can be published widely then it is more likely that the recommendations will bear fruit, so that errors of the past are not repeated. This is another benefit.

1.43 The recommended new statutory qualified privilege depends on the fairness of the inquiry and the report. Thus reports which contain defamatory and unsustainable statements are less likely to be published. This will benefit those who would otherwise be unfairly publicly criticised. Similarly, the need for an inquiry to be fair should promote higher quality inquiries.

1.44 Many local authorities already scrutinise inquiry reports before publishing them. Increasingly, they obtain legal advice on the contents of reports before publication. If our recommendations are adopted, all principal local authorities will be prompted to review reports before publishing them. Publication of reports which lead to proceedings should be less likely. This should reduce litigation costs. While inquiry reports are not currently a frequent source of litigation, if a

[18] The UK signed the treaty on the 3/06/1997 and ratified it on the 24/04/1998 with the date of entry into force on the 1/08/1998. The Charter commits the parties to applying basic rules guaranteeing the political, administrative and financial independence of local authorities.

defamation action can be avoided, this will represent a substantial saving in litigation costs to the local authority.

1.45 Local authorities which do not already scrutinise inquiry reports or obtain legal advice on them, may need to increase expenditure to ensure this happens.

1.46 There is no public funding for claimants in defamation proceedings. Thus our recommendations have no impact on the public purse in this respect.

Recommendations in Part VIII: special inquiries

1.47 Our recommendations for a local authority special inquiry would allow a local authority to initiate an inquiry into a serious service failure, in the expectation that the inquiry will be able to obtain the evidence it needs. This cannot always be achieved at present.

1.48 Effective local inquiries will answer questions about why the service failure happened. This can mean finding out why a person died or suffered, or how public funds were misspent. “Knowing what happened” may be an unquantifiable benefit, but is, we think, very important.

1.49 Increased transparency also promotes better practice; thus standards of public services should improve. It would also promote local accountability and confidence in local democratic institutions.

1.50 Such inquiries will facilitate compliance with the State’s obligations for effective investigations under the ECHR.

1.51 The fact that a local authority special inquiry can apply to the High Court for an order compelling a witness to attend and to answer questions or produce items to it, will lead to costs additional to those of a normal ad hoc inquiry. The costs of running a special inquiry may be higher than those for an ad hoc inquiry.

1.52 Persons required to attend a special inquiry who might otherwise have avoided attending may also face additional costs.

1.53 If a special inquiry makes an application to the High Court for a witness order, that has costs implications for the inquiry (and the local authority commissioning the inquiry) and for the court. The costs incurred by a witness appearing before the court to resist an application by the inquiry may have to be borne by the witness, or by the inquiry. Public funding should be available on a means and merit-tested basis to the witness, via the Community Legal Fund administered by the Legal Services Commission.

1.54 If a witness did not comply with an order from the High Court, civil contempt proceedings could ensue, with attendant costs implications for the court service, the inquiry and public funding for litigants.

1.55 While costs may be significant in the particular case, it does not follow that the overall impact will be large. There is unlikely to be a very large number of local authority special inquiries each year. Even where such an inquiry was established, it would not necessarily follow that any applications to the court

would be needed at all. Civil contempt proceedings resulting from a special inquiry would, we anticipate, be rare.

IMPLICATIONS OF OUR RECOMMENDATIONS

1.56 There are three implications of our recommendations to which we draw attention, which the Government may need to consider.

Inquiries other than ad hoc inquiries

1.57 First, it may be asked why our proposals are limited to ad hoc inquiries. We took the view that the principal difficulties for local authorities arose where inquiries were established under general powers, rather than under specific powers or duties to establish inquiries. In the latter cases, there could well be prescribed rules of procedure which could cut across our recommendations. We did not have the authority to review all such inquiry powers.

1.58 Of course, it may be that the approach we have adopted in relation to ad hoc inquiries is one that is found to be sensible and practical, and one which could be extended to other contexts. But this would be a matter for Government, not this project.

Inquiries by other public bodies

1.59 Second, the effect of our recommendations is to put inquiries established by local authorities into a special category. We think this is fully justified, not just because that was what our terms of reference asked us to consider, but - more importantly - because local authorities hold a particular place in our system of government that makes it important that they can fully account for their actions to their electorate.

1.60 However, it may well be the case that other public bodies (outside central government[19]) may think that they are not so different from local authorities. They may therefore argue that they too should be subject to the same rules that are now proposed for local authority inquiries.

1.61 This issue will be particularly obvious where, as may often happen, a local authority establishes an inquiry jointly with another public body, such as the National Health Service or the Police or Probation services.

1.62 The recent indication by the Department of Constitutional Affairs that they are considering the possibility of new legislation relating to inquiries[20] may provide an opportunity for this matter to be considered as part of that review.

[19] Inquiries established by central government are in a different position as their reports will usually be published by Parliament and thus attract absolute privilege.

[20] See *Effective Inquiries: A Consultation Paper from the DCA* CP 12/04, May 2004. See in particular paras 64 and 75. Although the focus of this paper is on ad hoc and other inquiries established by Ministers, there seems no reason in principle why the position of local authority inquiries could not be considered in the context of this review.

Review of the law of defamation?

1.63 Third, there may be concern that making adjustments to the law of defamation by the creation of a new form of statutory qualified privilege may have consequences for the law of defamation in general.

1.64 We have been careful to ensure that our proposals are confined to the position of the local authority as publisher of the inquiry report. It may be asked why the actual members of the inquiry team should also not be able to take advantage of the new qualified privilege. We have taken the view that when they publish to the local authority, they will be able to assert the ordinary common law of qualified privilege, and they are already adequately protected. We do not think it right to extend our proposals beyond the narrow boundaries set by our terms of reference. Again, it is a matter for Government to consider whether there should be a wider review of the law of defamation.

PART II
LOCAL AUTHORITIES, AD HOC INQUIRIES AND POWERS OF INQUIRY

2.1 This report does not deal with all types of local authority, nor all types of inquiry they may hold. This Part sets out how we have defined the scope of our report. We consider first the definition of local authority, second the definition of ad hoc inquiry and third the powers of local authorities to establish ad hoc inquiries.

THE DEFINITION AND ORGANISATION OF LOCAL AUTHORITIES

General

2.2 Local Government Act 1972 ("the 1972 Act"), section 270 defines a local authority as:

> a county council, … a district council, a London borough council or a parish council but, in relation to Wales … a county council, county borough council or community council...[1]

Principal local authorities

2.3 In this project we are only concerned with "principal" local authorities: those responsible for the vast majority of services that are provided by local government. Principal local authorities include:

(1) county councils, district councils, unitary councils and London boroughs in England; and

(2) county and county borough councils in Wales.[2]

2.4 The functions of principal local authorities include: education, housing, planning, social services, transport, environmental health, waste collection, leisure and sports services.[3] It is failures in these services which are most likely to be the subject of an ad hoc inquiry.

2.5 We do not address inquiries established by either parish or community councils. The functions that they exercise are not conspicuously amenable to the type of inquiry we have in mind.[4] Nor are we concerned with Regional Development

[1] The 1972 Act, s 270 as amended by Local Government Act 1985, s 102, Sched 16 para 8, Sched 17 and by the Local Government (Wales) Act 1994, s 1(5).

[2] See Draft Bill, cl 18(1). By virtue of s 270(1) of the 1972 Act, as amended by the Local Government Act 1985, s 102, Sched 16, para 8 and the Local Government (Wales) Act 1994, s 1(8), "'principal council' means a council elected for a principal area", and "'principal area' means a non-metropolitan county, a district or a London borough but, in relation to Wales, means a county or county borough".

[3] A complete list of the functions of principal local authorities is reproduced in the loose-leaf work *Cross on Local Government Law* Appendix A. See also *Cross on Principles of Local Government Law* (2nd ed 1997) which lists the Allocation of Principal Functions at Appendix A.

[4] Parish and Community councils are only subject to one duty – the duty to consider the provision of allotments on the written demand of six parliamentary electors resident in the

Agencies.[5] They differ from the principal local authorities listed in paragraph 2.3 above as their powers and functions relate to economic development rather than the provision of specific "front line" services. For similar reasons, we are not concerned with the Greater London Authority.

The organisation of local authorities

2.6 Until the Local Government Act 2000 ("LGA 2000") was enacted, decision-taking by local authorities was largely done by the council working with a series of council committees. The LGA 2000 introduced new models of executive arrangements for local authorities.[6] A variety of executive arrangements therefore now exists.

2.7 The LGA 2000 provided for three new models:

(1) authorities with an elected mayor, with two or more councillors of the authority appointed by the elected mayor to be the executive of the authority;[7]

(2) a councillor of the authority ("executive leader") elected as leader of the executive by the authority, and two or more councillors of the authority appointed to the executive either by the executive leader, or by the authority (referred to as the "leader-cabinet" model);[8]

(3) an elected mayor, and an officer of the authority ("the council manager") appointed by the executive of the authority.[9]

2.8 Any of these models must take the form prescribed in regulations issued by the Secretary of State.[10]

parish (Small Holdings and Allotments Act 1908, s 23). The powers that they possess relate to baths and wash-houses, cemeteries, community centres, maintenance of the highways, provision of public conveniences, village greens etc. A complete list of the powers and duties of parish and community councils is reproduced in *Cross on Principles of Local Government Law* (2nd ed 1997) Appendix B.

5 Regional Development Agencies (RDAs) were established by the Regional Development Agencies Act 1998 with the purposes of promoting economic development and investment in the regions.

6 LGA 2000, s 10. The *Local Government Act 2000: Guidance to English Local Authorities* (March 2001) provides details on the way in which executive arrangements operate in practice. The executive is responsible for implementing the authority's policies in accordance with the policy framework established by the full council (*Guidance* Ch 2, para 2.26 – 2.27). Overview and Scrutiny Committees hold the executive to account after they are implemented and assist in the development of future policy options (*Guidance* Ch 3, paras 3.15 and 3.54).

7 LGA 2000, s 11(2)(a)and (b).

8 *Ibid*, s 11(3)(a)and (b).

9 *Ibid*, s 11 (4)(a) and (b).

10 *Ibid*, s 11(5) and (6).

2.9 The functions which are the responsibility of the executive are defined in LGA 2000, section 13.[11] Where a function falls to the executive, the LGA 2000 prescribes how it is to be discharged within each of the new possible structures. Executive arrangements must include the appointment of Overview and Scrutiny Committees.[12]

THE DEFINITION OF AD HOC[13] INQUIRY

2.10 Local authorities have a number of specific statutory powers or duties to establish inquiries. The focus of this project is on ad hoc inquiries, that is, those which are not specifically provided for in legislation.

2.11 We have two reasons for focusing on ad hoc inquiries. First, not being the subject of specific statutory provisions, they are essentially unregulated, in other words subject to no formal procedural rules. It is this lack of regulation that, in our judgment, leads to the kinds of difficulty identified by Waterhouse.

2.12 Second, the issues in relation to which ad hoc inquiries are used - in particular those arising out of performance failure - are those which raise the problems considered by Waterhouse, especially relating to the liabilities of local authorities.

2.13 There is no single definition of 'ad hoc inquiry'. We have arrived at a definition by a process of eliminating those classes of inquiry with which we are not concerned.

Exclusions

2.14 In CP 163, we developed a typology of inquiries in which local authorities may be involved.[14] We excluded two types of inquiry - inquiries established by Government Minister,[15] and an inquiry set up under the Tribunals of Inquiry (Evidence) Act 1921 - on the basis that, while local authorities may be involved in such inquiries, they are not inquiries set up *by* the local authority. For similar reasons, we excluded investigations into allegations of maladministration

[11] The allocation of functions between the executive and full council is set out in the Local Authorities (Functions and Responsibilities) (England) Regulations 2000 (SI 2000 No 2853). Those functions which are not the responsibility of the executive remain subject to the same legislative framework as they were before the Act was passed so that the authority may delegate them to committees, sub-committees and officers in accordance with the 1972 Act, s 101. Except for the functions expressly mentioned, all other functions remain the responsibility of the executive.

A number of regulations have been passed under s 13 of the LGA 2000 and are described in detail in para 3.999.2297 of the *Encyclopaedia of Local Government Law*.

[12] *Ibid*, s 21.

[13] The dictionary definition of "ad hoc" is "for a particular, usually exclusive purpose." Concise Oxford Dictionary, 1990

[14] CP 163, Part II, paras 2.9-2.48.

[15] Legislation currently before Parliament will, if passed, allow the Secretary of State to direct a local authority, alone or with other specified bodies, to establish or participate in a "domestic homicide review": Domestic Violence, Crime and Victims Bill, cl 7(2) (Bill 83, 29 March 2004). Such a review would be ad hoc but, because it would be instigated by the Secretary of State and not by the local authority, it is not the type of ad hoc inquiry with which we are concerned.

conducted by the Local Commissioner for Administration (Ombudsman) and investigations conducted by the Standards Board for England.[16]

2.15 We also excluded "routine statutory inquiries". These were inquiries that have to be established as a matter of routine in relation to certain classes of decision, for example planning, or education, or licensing. These were excluded for two reasons: first, the nature of the inquiry is not into past service failure, but is designed to gather evidence in the light of which decisions about the future are to be taken; second, the inquiry process is subject to specific procedural regulation.

Inclusions

2.16 We conclude that the types of inquiry that this report should cover should be ad hoc inquiries, established by a principal local authority which are not already governed by other statutory powers, and which involve complaints against the authority or a failure in its services.[17] In addition, given the fact that responsibility for the delivery of many services is now jointly divided between local authorities and other public agencies (for example the National Health Service) we include in the scope of ad hoc inquiries those inquiries jointly set up by a local authority and another public body.

2.17 This definition of ad hoc inquiry therefore extends to:

(1) inquiries by Overview and Scrutiny Committees;

(2) independent inquiries;

(3) internal inquiries; and

(4) ad hoc inter-agency inquiries.

Inquiries by Overview and Scrutiny Committees

2.18 One consequence of the LGA 2000 has been the creation of Overview and Scrutiny Committees (OSCs). OSCs make reports or recommendations to the authority or the executive on matters which affect the authority's area or the inhabitants of that area.[18] OSCs are comprised of members who are not part of the executive.[19] OSCs are designed to allow members without direct executive

[16] Established under the LGA 2000; allegations of breach of ethical standards in Wales are investigated by the Local Commissioner for Wales.

[17] This is a wider definition than that adopted by SOLACE which, in 1978, defined ad hoc inquiries as "inquiries into exceptional circumstances, either involving substantial complaints against the authority or a substantial failure in its services." SOLACE and RIPA, "Ad hoc Inquiries in Local Government" (1978), para 1.23. See para 4. 17 below.

[18] LGA 2000, s 21(2)(e).

[19] A report by ELG gives some sense of how OSCs are comprised, initially:

> Overview and scrutiny arrangements show considerable variation between councils in terms of the basic structural arrangements such as the number, name, composition and organisation given to such committees. The committees were largely responsible for setting their own agendas based on advice given by the full council and officers. Two thirds were chaired by a member of the majority

power to scrutinise decisions taken by the executive. Lord Harris of Haringey, speaking in the House of Lords, described them thus:

> In the same way as the Select Committee of your Lordships' House and of another place can raise issues, can challenge orthodoxy, can perhaps criticise the majority party of government and can certainly recommend improvement, so, too, can the overview and scrutiny committees clarify the position and explore the implications of proposals within a local authority.[20]

2.19 Their role is wide and includes: review and development of policy; making policy and budget proposals to the council; conducting best value reviews; reviewing executive decisions; call-in decisions prior to implementation;[21] performance monitoring; and review and scrutiny of other organisations.[22]

2.20 Research does not yet give a clear picture of the actual work of OSCs. In 2002 one report found that most OSCs were investigating the provision of services by the local authority;[23] later research found that most OSCs tended to focus on "policy development and review in preference to holding the executive to account".[24]

2.21 There is no time restriction on what an OSC may look into: it may review a matter where something has allegedly gone wrong; it may review an executive decision which has been taken but not yet been put into effect; or it may take a prospective view of a matter on which an executive decision might be anticipated, or on any matter falling within the functions of the local authority. While the primary function might have been conceived as holding the executive to account in public, there is nothing to prevent the scrutiny being more wide-ranging.

2.22 OSCs also now have the power to review health functions in their area.[25] Regulations have been made to provide for local authorities to band together to

> party. Party pre-meetings before overview and scrutiny meetings were a common practice in just under 40 per cent of councils but only 9 per cent of councils reported that decision-making in these committees was subject to a party whip. Non-elected co-opted members of overview and scrutiny committees were widespread.
>
> "Report of ELG survey findings for ODPM advisory group" (Nov. 2002), p 5. Evaluating Local Governance: New Constitutions and Ethics (ELG) is the name of a research project which is conducting a five year evaluation of the new council constitutions and ethical frameworks for the Office of the Deputy Prime Minister. The project involves a collaboration between the Department of Government, University of Manchester with Birkbeck College, Goldsmiths College and the SURF Centre at Salford University.

[20] *Hansard* (HL) 6 Dec. 1999, vol. 607, col. 1055.

[21] Where a planning application is made to a local planning authority the Secretary of State may, under Town and Country Planning Act 1990, s 77, call-in the application for his own determination. Similar arrangements apply to listed building consent applications.

[22] Local Government Information Unit, "The Effective Executive" Jan 2003, p 10.

[23] "Report of ELG survey findings for ODPM advisory group" (Nov. 2002), p 6.

[24] R Ashworth, "Evaluating the effectiveness of local scrutiny committees" (Economic and Social Research Council, Dec. 2003), p 17. See too M Sandford and L Maer *Old Habits die Hard? Overview and Scrutiny in English Local Authorities* (Constitution Unit, 2004).

[25] LGA 2000, s 21(2)(f) as inserted by Health and Social Care Act 2001, s 7. This power is given to the OSC of any county council, any county borough council, the council of any

make joint reviews.[26] As with non-health powers of OSCs, there is nothing in the primary legislation to prevent the OSC deciding to conduct an inquiry into a complaint about a serious failure in the provision of services in its local area.

2.23 OSCs have power to require members and officers to attend the committee to answer questions.[27] It is the duty of members or officers to comply with these requirements.[28] However, members and officers can refuse to answer questions that they would be entitled to refuse to answer in court.[29] The committee cannot compel other witnesses to attend; they may merely invite them to attend.[30]

2.24 Where an OSC is reviewing health functions, it may be appropriate for it to hear from employees of a part of the NHS. Regulations make provision which, amongst other things, require any officer of a local NHS body to attend before the committee to answer questions. This puts them in the same position as officers of the local authority.[31]

2.25 Although OSCs are standing bodies of statutory creation, each of its reviews is one-off. OSCs are largely free to determine their own procedures. We therefore conclude that they should fall within the scope of ad hoc inquiries.

Independent inquiries

2.26 These are inquiries established by the local authority but conducted by an independent chairperson who may work alone or with a team of investigators or assessors to assist him or her. The inquiry may sit in private or in public, although the sensitive nature of these inquiries means most are conducted in private. [32] The chair of an inquiry, subject to his or her terms of reference, directs the inquiry and its subsequent report.

district comprised in an area for which there is no county council, and any London borough council, i.e., not all local authorities. These are the authorities that are responsible for social services. "The health service" in this context, means the same as in the National Health Service Act 1977: See s 1(1) of that Act: NHSA 1977, s 128. It also includes social care services provided through arrangements between NHS bodies and local authorities: Health and Social Care Act 2001, s 7(5). Some local authorities are already working in partnership with health bodies: L Cramp (Health Development Agency) "Changing partners: local government and health in the 21st century" (2002). See also Local Authority (Overview and Scrutiny Committees Health Scrutiny Functions) Regulations 2002 SI 2002 No 3048. Regulation 2 requires the OSC to follow guidance issued by the Secretary of State, to invite comment from interested parties, and to take account of relevant information available to it, but the OSC is otherwise free to follow its own procedure.

[26] *Ibid*, s 8(2)(a) and reg. 7 of SI 2002 No 3048.

[27] LGA 2000, s 21(13)(a).

[28] LGA 2000, s 21(13).

[29] LGA 2000, s 21(15).

[30] LGA 2000, s 21(13)(b). A recent inquiry which has used this power is the Bedfordshire County Council inquiry into the fire at Yarl's Wood Detention Centre. Bedfordshire County Council, "Special Report of the Resource Stewardship Select Committee to the County Council on 18 July 2002 on Yarl's Wood Detention Centre".

[31] Health and Social Care Act 2001, s 7(3)(f). See SI 2002 No 3048, reg. 6.

[32] The two pre-Waterhouse inquiries into abuse of children in local authority care in North Wales (the Cartrefle and Jillings inquiries) were of this type. See paras 1.5 – 1.14 above.

2.27 The inquiry will still be independent if members or officers of the authority are co-opted to form part of the investigative panel. For example, the Devon Foot and Mouth Inquiry panel included councillors serving on Devon County Council.[33] However, if the chair is a councillor or an officer of the authority, the fact that there are independent persons participating in the inquiry will not make it an independent inquiry.

Internal inquiries

2.28 This is another type of ad hoc inquiry set up by the local authority. In contrast to an independent inquiry, it is chaired by a person connected to the authority, such as the Chief Executive Officer, or a Head of Department. Equally it may be undertaken on behalf of an officer of the authority by officers from within the commissioning department or from another department of the authority. This kind of inquiry is not usually open to the public.

2.29 The type of inquiry to be established, whether internal or external, may depend on a number of factors, including: speed, costs, the availability of witnesses and documents, and public and media pressure.[34] The fact that such inquiries are ad hoc means the authority can respond flexibly to tailor the inquiry to fit its needs best.

2.30 Similarly, the decision whether to hold the inquiry in public may be affected by pending criminal trials, the subject-matter of the inquiry, the need for transparency, the likelihood that information will be disclosed to the inquiry about confidential matters, or issues of cost and speed.

Ad hoc inter-agency inquiries

2.31 These can be undertaken by one or more statutory bodies. They may involve local authorities, health authorities, the police or other public bodies. They may be subject to standing procedures or other procedural rules, or ad hoc.

2.32 Ad hoc inquiries will be established in response to a particular situation. Where child abuse, deaths or other child protection issues are likely to attract major public concern, a procedure, colloquially known as a Part 8 review,[35] is invoked. Guidelines laid down by the Department of Health, Home Office, and Department for Education and Employment[36] require each agency which was involved in the issue to review its own conduct. These reviews are then compiled by the Area

[33] Devon County Council, "Devon Foot and Mouth Inquiry 2001 Into the outbreak and its effects, their handling now and in the future and the recovery and sustaining of the well-being of Devon's countryside", p 14.

[34] Beyond broad public and media pressure, families, relatives and local politicians can bring pressure to bear on the local authority: see B Corby, A Doig and V Roberts, "Inquiries into Child Abuse" (1998) 20(4) Journal of Social Welfare and Family Law 377–395.

[35] They are known as Part 8 reviews, as the guidelines for such reviews are set out in Part 8 of the document cited in the following footnote. Local Authorities are required to take note of this guidance: Local Authority Social Services Act 1970, s 7.

[36] Department of Health, Home Office and the Department for Education and Employment, "Working Together to Safeguard Children" (1999) ("Working Together"). See below, paras 6.29 – 6.35.

Child Protection Committee (ACPC) into one report. The guidelines are currently non-statutory.[37]

POWERS TO ESTABLISH LOCAL AUTHORITY AD HOC INQUIRIES

2.33 It is a general principle of local government law that a council cannot act unless Parliament has conferred power upon it to act.[38] If a local authority wishes to establish an ad hoc inquiry, it must show it has the necessary statutory power. At present, there is no power which specifically enables local authorities to set up an ad hoc inquiry. The power to do this has to be inferred from other, broader, powers.

2.34 Two powers are of particular relevance. As neither of these makes specific provision for establishing inquiries, it follows that neither of them make any provision for how an inquiry is to be run. Inquiries established under these provisions fall within the definition of ad hoc inquiry.

Local Government Act 1972 (LGA 1972)

2.35 Section 111(1) of the LGA 1972 states:

> (1) Without prejudice to any powers exercisable apart from this section but subject to the provisions of this Act and any other enactment passed before or after this Act, a local authority shall have power to do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the discharge of any of their functions. …

2.36 In the interpretation and application of section 111(1), the following key points emerge.

> (1) The powers conferred by it must be ancillary to a "function" of the local authority conferred by some other provision. The function exercised must be clearly *intra vires* the local authority. It is not sufficient that it was reasonable for the local authority to have done what it did.[39]
>
> (2) To rely on section 111(1) it is not necessary for the local authority to link the claimed ancillary power to another expressly conferred power. It is sufficient to link it to a function of the local authority.[40]

[37] ACPCs are likely to be put on a statutory footing as Local Safeguarding Children Boards. See Green Paper "Every Child Matters" (Sept. 2003) Cm 5860, paras 5.25 – 5.26. If this happens, such inquiries would no longer fall within our definition of ad hoc inquiry. Below, para 6.35.

[38] *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473, 478; *Baroness Wenlock v River Dee Co* (1885) 10 App Cas 354. See generally I Leigh, *Law Politics and Local Democracy* (2000) pp 41–46, A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 2.2.1 – 2.2.22. For recent confirmation of this principle, see *Local Authority v Health Authority and another* [2003] EWHC 2746 (Fam), [2004] 1 All ER 480.

[39] *Allsop v North Tyneside MBC* (1992) 90 LGR 462, 472 *per* Watkins LJ relying on *Hazell v Hammersmith LBC* [1992] 2 AC 1, 31 *per* Lord Templeman.

[40] *R v DPP ex parte Duckenfield* [2000] 1 WLR 55.

(3) It is unclear whether the function must be expressly conferred by statute or can be impliedly conferred. The broad view, of Lord Justice Woolf (as he then was), was that section 111 can extend to functions which the authority is impliedly authorised to perform.[41] Lord Justice Parker[42] took a narrower approach suggesting that the term functions is "plainly referring to the functions set out in Part IX of the Act". However, this is inconsistent with Woolf LJ's view and the fact that many functions of local authorities are conferred by other Acts.

(4) The powers conferred by section 111 are subject to any restriction or requirement imposed by the LGA 1972 or any other enactment.

(5) It is unclear whether the common law[43] doctrine of incidental powers has been superseded by section 111(1), LGA 1972.[44]

2.37 Thus the inquiry needs to be ancillary to the statutory functions of the authority. Where the inquiry relates to a function, such as housing, social services, or education the section provides adequate authority. If an inquiry is not ancillary to a function, the council might lack the necessary *vires*. For example, an authority, not being a health authority, which conducted an inquiry into health provision in its area, might be acting beyond its powers. (Such problems may now be avoided, given that OSCs now have powers to investigate health functions.)

Local Government Act 2000 (LGA 2000)[45]

2.38 Section 2(1) of the LGA 2000 Act introduced a new power which enables principal local authorities to do anything[46] which they consider likely to promote or

[41] *Hazell v Hammersmith LBC* [1990] 2 QB 697, CA. See also *R v Eden District Council ex parte Moffat, The Times* 24 November 1988 *per* Nourse LJ and *Allsop v North Tyneside MBC* (1992) 90 LGR 462, 480–481 *per* Watkins LJ in the Divisional Court.

[42] *R v DPP ex parte Duckenfield* [2000] 1 WLR 55.

[43] *A-G v Great Eastern Railway Co* (1880) 5 App Cas 473, 481 *per* Lord Blackburn "that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it [the Act of Parliament] does not expressly or impliedly authorise is to be taken to be prohibited;[but]that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited".

[44] See *R v Richmond upon Thames London Borough Council ex parte McCarthy & Stone (Developments) Ltd* [1992] 2 AC 48, 56 *per* Slade LJ, but see also J Bennett and S Cirell, *Municipal Trading* (1992) p 61; *Encyclopedia of Local Government Law* (2002) para 2–249:

> the common law rule is arguably wider … as it permits activities which are "consequential upon" other activities and which may not be reflected in "calculated to facilitate, conducive or incidental to".

However, it is likely that adopting the test of "ordinary meaning" of the words of the statute and the "purpose" of the statute from *Cross on Statutory Interpretation* (3rd ed 1995) ch 2 and following Slade LJ *McCarthy* that the common law rule has been superseded by the statute. Nevertheless, resolution of this point would require a judicial interpretation.

[45] Prior to the LGA 2000 the statutory powers to establish and fund an inquiry were found in ss 111(1) and 137 of the 1972 Act. Section 137 was repealed for principal local authorities by the LGA 2000, s 8.

[46] Subject to certain restrictions, contained in LGA 2000, s 3. The importance of this power is discussed in Local Government Association *Powering up: making the most of the power of well-being* (London, LGA, December, 2003).

improve the economic, social and environmental well-being of their areas.[47] This came into force on 18 October 2000[48] for English local authorities, and 9 April 2001 for Welsh local authorities.[49]

2.39 Where the establishment of an ad hoc inquiry will improve or promote these objectives, this power provides the necessary legal authority. Arguably, the wide drafting of section 2(1) means that the authority can use it both to establish and fund the inquiry,[50] in furtherance of the well-being of the community. Even if this interpretation is wrong, the authority can continue to invoke section 111 of the LGA 1972 to authorise the necessary expenditure on any inquiry established under section 2(1).

2.40 Any inquiry conducted by an Overview and Scrutiny Committee is conducted pursuant to section 21 of the LGA 2000.

[47] LGA 2000, s 2(1).

[48] The Local Government Act 2000 (Commencement No 3) Order 2000 SI 2000 No 2836.

[49] The Local Government Act 2000 (Commencement) (No 2) (Wales) Order 2001 SI 2001 No 1471 (W 97).

[50] The authority has the power to incur expenditure (s 2(4)(a)) and to provide staff, goods, services or accommodation to any person (s 2(4)(f)) in the exercise of its powers under Local Government Act 2000, s 2(1).

PART III
THE INSURANCE PROBLEMS

INTRODUCTION

3.1 Our terms of reference asked us to:

> consider the concerns raised in paragraphs 32.44 – 32.62 of the Waterhouse Report that in some circumstances local authorities may be unduly constrained by threat of actions or loss of insurance cover from making public, acting upon, and identifying necessary reforms in the light of the results of inquiries conducted by them, or on their behalf. …

3.2 In the consultation paper we stated that we were keen to find out whether in practice local authorities were inhibited by fear of loss of insurance cover and, if so, why. The principal concerns appeared to be loss of cover:

(1) if admissions of liability were made without the insurer's consent, or

(2) if publication of a report might provoke an action in defamation against the local authority.

3.3 Our terms of reference also referred to "the possible loss of public interest immunity or privilege against disclosure." So we also examined these issues in the consultation paper.

3.4 This Part starts by providing some general information about the insurance background against which local authorities operate. We then consider: admissions of liability; defamation; waiver of rights, including the right to confidentiality, legal professional privilege and public interest immunity; and the duty of confidentiality. We state our conclusions at paragraphs 3.76 – 3.77 below.

THE INSURANCE BACKGROUND

3.5 Prior to Waterhouse there had been two inquiries into abuse of children in local authority care in North Wales (the Cartrefle inquiry[1] and the Jillings inquiry[2]). Neither of these reports had been made publicly available. Irrespective of whether they should have been published, Waterhouse expressed concern about the role played by the local authorities' insurers in decisions by the authorities on how to handle the reports.[3]

Insurance arrangements

3.6 Some large local authorities self-insure against their legal liabilities; others have liability insurance. Even self-insurers may purchase partial cover for unexpected liabilities. Any independent person appointed by an authority to conduct an

[1] See para 1.5 above.

[2] See para 1.9 above.

[3] See para 1.18 above.

inquiry will probably have his or her own professional indemnity insurance, but their insurance company might seek an indemnity from the authority or the authority's insurers.

3.7 A local authority must act prudently because it is a public body, and accountable for its use of public funds. It should operate in "a fairly business-like manner".[4] It could also be said to be in a position akin to that of a trustee.[5] It should not, therefore, deliberately or recklessly vitiate its insurance cover. Moreover, its accounts will be audited. The Audit Commission will look to see whether the authority has conducted itself with "economy, efficiency and effectiveness."[6] When an authority sets up an ad hoc inquiry, or contemplates doing so, it will wish to know how its obligations under its contract of insurance affect the authority's relationship to the inquiry: what the authority ought to do, may do or should not do. In particular, it will wish to know how it may or should respond to the inquiry report, and whether it may publish it, in full or in some partial or anonymised form.

3.8 Local authorities operate rather differently from private companies. For example, elected councillors may be subject to political or media pressures even if officers are not. In addition, authorities are accountable to the electorate at large, as well as service users, complainants and victims of malpractice. This is essential background to the relationship between local authorities and their insurers.

The express term

3.9 Contracts of liability insurance may be expected to contain, as an express standard term, a clause in the following terms: "No admission of liability, waiver of rights or promise of payment shall be made without the company's written consent".[7]

3.10 On its face, the authority must not make any admission of liability, promise any payment, or waive any rights. A minor breach of this term entitles the insurer to claim damages. A breach which has very serious consequences for the insurer entitles the insurer not to pay out at all under the contract.[8]

[4] As explained by Lord Atkinson in *Roberts v Hopwood* [1925] AC 578, 595–596:

> A body charged with the administration for definite purposes of funds contributed in whole or in part by persons other than the members of that body owes, in my view, a duty to those latter persons to conduct that administration in a fairly businesslike manner with reasonable care, skill and caution, and with a due and alert regard to the interest of those contributors who are not members of the body.

[5] See *Prescott v Birmingham Corpn* [1955] Ch 210 in which Jenkins LJ said at p 235 that local authorities owed "an analogous fiduciary duty" to their ratepayers.

[6] Audit Commission Act 1998, s 5(1)(e).

[7] The contract between Clwyd and Zurich Municipal included such a term.

[8] See *Alfred McAlpine v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437 cf. *Virk v Gan Life Holdings* [2000] Lloyds Rep IR 159.

An implied limitation on the express term

3.11 Nevertheless, although the express term may forbid an admission of liability, waiver of rights, or promise of payment without the insurer's consent, this does not necessarily give the insurer unfettered discretion to give or withhold consent. While a term will only be implied into a contract where it "represents the obvious though unexpressed intention of the parties or is necessary for the business efficacy of the contract"[9] and the context and purpose of the approval must be identified in each case, it is likely that a limitation to the express term can be implied. It is highly arguable that an insurer should not "withhold approval arbitrarily, or … [should] not do so in circumstances so extreme that no reasonable company in its position could possibly withhold approval."[10]

Implied terms

3.12 In the case of the Jillings report the insurer went beyond the express term and instructed the local authority that it should not do anything which would prejudice the interests of the insurer. One of the problems for Clwyd was therefore that, if it published the Jillings report, it might jeopardise its insurance cover. Waterhouse concluded that the insurers were right actively to alert the council to these dangers.[11] The insurers' representative to the Waterhouse inquiry accepted that the insurers had gone too far.[12]

3.13 In the consultation paper we revisited the issue to see whether there was any basis for an insurer to stipulate that its insured should not act to the insurer's prejudice. We also considered what would be the effect of terms that could be implied. We concluded that the authority may take steps which might expose it to liability – it can hardly avoid doing so. In that sense it must be able to insure against its own deliberate act. But it may not court liability, and must act as a prudent, reasonable, authority would act. It owes a duty of utmost good faith to the insurer, and duties of co-operation and to minimise loss may also be implied. These duties do not extend so far as to inhibit it from doing or saying anything prejudicial to the interests of its insurers, when its own functions as a public body so require. Indeed, we believe that the doctrine of good faith should not inhibit any local authority from acting in a manner which it believes to be responsible.

[9] *Gan Ins Co Ltd v Tai Pin Ins Co Ltd* [2001] EWCA Civ 1047; [2002] Lloyd's Rep IR 667, para 46, *per* Mance LJ, citing *The Moorcock* (1889) 14 PD 64; *Liverpool CC v Irwin* [1977] AC 239; and cf. *Chitty on Contracts* (28th ed 2003) Vol. 1 General Principles, paras 13–004 – 13–009.

[10] *Gan Ins Co Ltd v Tai Pin Ins Co Ltd* [2001] EWCA Civ 1047; [2002] Lloyd's Rep IR 667, para 73, *per* Mance LJ. Mance LJ continued, "This will not ordinarily add materially to the requirement that the reinsurer should form a genuine view as to the appropriateness of settlement or compromise without taking into account considerations extraneous to the subject-matter of the reinsurance."

See also *Abu Dhabi National Tanker Co v Product Star Shipping Ltd (The Product Star) (No 2)* [1993] 1 Lloyd's Rep 397 and *Nash v Paragon* [2001] EWCA Civ 1466; [2002] 1 WLR 683.

[11] The Waterhouse Report, para 32.60 cited at para 1.17 above.

[12] The Waterhouse Report, para 32.60 and quotation at para 1.18 above.

3.14 Comments from respondents (Professors Malcolm A Clarke and Birds) tended to support our views.[13] Nevertheless, while some respondents said that their insurers had been helpful, and that "the authority's public responsibilities are recognised and respected", this was not always the case.

3.15 The fundamental point is that local authorities are in the business of providing services to the public. In the course of so doing, things will go wrong. It ill befits an insurance company to take the premium from a body which is in the public service business, and refuse to pay out when the act against which insurance has been taken out occurs. It is not obvious that the approach taken by all insurers of local authorities have fully absorbed the nature of their clients' business. This emerges from the responses we received to the consultation questions we put, as set out below.

ADMISSIONS OF LIABILITY

3.16 In relation to the first issue, admissions of liability, the problems may be summarised as follows:

- The local authority's co-operation with the inquiry may be impeded if there is a risk that evidence given to the inquiry panel will amount to an admission of liability in breach of the insurance contract.
- It is not sufficiently clear what kind of admission will be treated as an admission of liability within the terms of the insurance contract.
- It is not sufficiently clear what kind of act by the council will amount to an admission of liability, especially in relation to its response to an inquiry report.
- The lack of clarity might either result in a breach of the insurance contract, or lead an authority to make less full disclosure than it could to an inquiry panel, or to hold back from publishing the inquiry report for fear of invalidating the insurance contract. None of these results serves the public interest.
- The interests of the insurer and the local authority may conflict: if the insurer withholds consent to publish, publication of a report could be impeded where it ought not to be. Again, this result is not in the public interest.

Consultation

3.17 The CP asked: Is it the experience of consultees that, even though liability may be inferred from an admission of fact, witnesses to local authority non-statutory inquiries are free to give all relevant facts to an inquiry (subject to requirements of confidentiality)?[14]

3.18 Responses were divided. Three respondents answered this question in the negative. (One gave the example of an inquiry into the loss of water supply where those giving evidence to the inquiry had not been free to answer fully.) Nine either responded positively that witnesses were free to answer (subject in

[13] However a discussion of recent case law on the doctrine of good faith concludes that it "appears to be in a state of flux": HY Yeo, "Post-contractual good faith– Change in judicial attitude?" [2003] MLR 425, 440.

[14] Question 1: see para 7.26 of the CP.

two cases to confidentiality requirements) or that they would expect them to be so.

3.19 We then asked: Is it the experience of consultees that publication of an inquiry report, whether internal or independent, is treated in practice as amounting to acceptance of any findings of fact and conclusions reached in that report, and thus to an admission of liability?[15]

3.20 Again, responses were mixed. One respondent thought the publication of the report was "definitive", and others also thought it amounted to acceptance of liability. By contrast, yet others thought publication was merely an influential factor in the acceptance (or non-acceptance) of liability.[16] One respondent answered in the negative.

3.21 We wanted to know how insurers acted in relation to admissions of liability, and so we asked: Is it the experience of consultees that consent to an admission of liability is ever withheld by an insurer in circumstances where the local authority would have wanted to make that admission? If so, we should be interested to know the circumstances.

3.22 One respondent said the insurer had helped facilitate publication rather than the reverse. Six respondents said consent had never been withheld. But three respondents answered our question in the affirmative. One said it was likely that the insurer would withhold consent, but this seemed to be a general view rather than a specific experience. One of the examples given seemed especially serious:

> The first case involved a teacher […] who allegedly buggered or otherwise sexually assaulted up to 20 pupils who all suffered learning disabilities. The authority considered the evidence overwhelming and wanted to admit liability to the families at an early stage as part of the apology process. It could not do so due to refusal of the insurer to give the requisite consent. The teacher was subsequently convicted on a number of counts of attempted buggery and other indecent assaults. In the second case, allegations had been made in 1984 of physical and sexual abuse by the head of a children's home. That had been investigated by social services at the time but social services had not involved the police nor had they informed the parents. Evidence had been found to substantiate the allegations. This highly unsatisfactory investigation came to light in 1992 when the allegations were repeated. Apart from the fact there was evidence to substantiate the allegations, there was also the fact that the authority had failed to discharge its duties appropriately in 1984 by not involving the police or the families. The authority wanted to accept liability to some of the families involved but again was prevented from doing so by its insurers. This included accepting responsibility for failing to conduct an appropriate investigation in 1984. Proceedings for some claimants in relation to this case are still continuing although liability has now been accepted in the majority of cases and the issue is one of quantum.

[15] Question 2: see para 7.27 of the CP.

[16] One respondent noted that it could assist potential claimants against the authority.

3.23 The tension between the interests of the insurers and those of the authority is resolved in some areas, but very real in others. One respondent wrote: "As the Law Commission's Report has indicated, there is a tension between, for example, a Local Authority deciding to admit liability and the attitude of its insurers, this tension is bound to increase depending on the seriousness of the case and the amount of liability". The same respondent thought the tension was likely to increase as councils become more focused on meeting local needs, and work increasingly in partnership with other bodies.

3.24 It is worth noting that the tension can have the opposite effect: sometimes the insurer may want a case to settle (an economic decision) where the authority wishes to defend itself on principle.

3.25 If it is the case that publication might amount to acceptance of liability, then it seemed possible that publication might be withheld for that reason. We therefore asked: Is it the experience of consultees that inquiry reports are ever withheld from publication for fear that statements in them will amount to admissions of liability?[17]

3.26 While for some respondents this had not arisen as a problem, others thought it could occur; in one case the authority's lawyers tried to persuade the inquiry team to be less forthright.[18] Andrew Arden QC (who has conducted inquiries himself) wrote:

> It does, however, cause me concern that insurance companies enjoy such power over the decision whether or not to publish a report. Insurance companies will invariably opt for the safest course, which is confidentiality. In broad terms, reports which identify individuals in terms which adversely affect them are likely to be "exempt information",[19] which permits insurance companies effectively to prevent publication (even where other considerations, e.g. disciplinary proceedings, do not), by denying cover for it.

DEFAMATION

3.27 Similar issues arose from the law of defamation, namely fear of actions in defamation, and whether that fear inhibited publication.

Consultation

3.28 We asked: In consultees' experience, are inquiry reports ever withheld from publication because of defamatory statements in them? If this has occurred, was

[17] Question 3: see para 7.28 of the CP.

[18] In one case reported to us, the local authority's Social Services Department and the Legal Department stood to be criticised in the inquiry report. The author of the report said, "I had to fend off a succession of requests for amendments". It does not seem that these requests for amendments were prompted by the insurers.

[19] See, in particular, 1972 Act, Sched 12A, paras 1, 3–9 and (on occasion) 14 (footnote in original response).

it because of fear of an action in defamation, or because of the risk of invalidating the insurance cover, or both?[20]

3.29 Again, experience was mixed. One respondent who had conducted inquiries was confident that if his conclusions were sustainable, then there was nothing to fear in defamation. On the other hand, it was clear that a cautious approach is adopted in some cases – on occasion very cautious: "Moreover, as a recent development, the Insurers are now requiring, prior to publication and at Clients' own expense, that they seek to have the draft report reviewed by Defamation Counsel and that publication be restricted to the absolute number of interested parties who are required to receive the report and to no one else".

3.30 This nervousness can occasionally affect the evidence given to the inquiry itself even though this would be protected by qualified privilege. One authority reported "some evidence that individuals intended to give to scrutiny panels was not taken from fear that it might contain defamatory statements".

3.31 In the consultation paper our provisional view was that, without clarification or change in the law, authorities and insurers can only avoid the risk of publishing, being sued, and finding that the defence of qualified privilege is not applicable, by adopting a very cautious approach to publication. We did not think this was in the public interest. We concluded that legislative reform in relation to the defence of qualified privilege was therefore desirable. We asked whether consultees agreed.[21] Twenty two of the twenty three respondents who answered agreed.

3.32 A lone dissentient, with significant experience of conducting inquiries, did not:

> … I think a fairly robust managerial attitude is needed to override too cautious legal advice here. If an insurance company wants a local authority's business, it should calculate the effect of the authority's representative function, and compete with other companies on its premiums. The nature of a local authority is so obvious that I would have argued, had I been the chief executive of an authority that was obstructed by an insurance company, that the very circumstances of being a local authority implied the likelihood of both of publication and (as in e.g. child abuse) the need to provide appropriate care to injured clients. Marine insurers don't disclaim just because a ship sinks! If insurers want local authority business, they must take up the essential circumstances involved. A local authority is not a plc.

3.33 The practical difficulty with this approach is that insurers and local authorities are in a market. If the risk for insurers becomes too great, they might either raise premiums so that it is uneconomic for authorities to pay them, or they might walk away from the business altogether.

WAIVER OF RIGHTS

3.34 The standard insurance term also prohibits "waiver of rights" without the consent of the insurer. In Part V of the CP we discussed the rights that a local authority

[20] See para 7.39 of the CP.

[21] Question 10; see para 7.55 in the CP.

might be waived in the context of publishing the report of an inquiry. There were three issues we considered in particular:

(1) the right to confidentiality;

(2) legal professional privilege; and

(3) public interest immunity.

3.35 These issues could adversely affect an inquiry in a number of ways. For example,

(1) documents may be withheld from an inquiry on the grounds that not to withhold them would waive legal professional privilege;

(2) documents may be withheld from an inquiry on the grounds that not to withhold them could breach a duty of confidentiality owed by the authority to others.

The right to confidentiality

3.36 Confidentiality can attach to documents created specifically for the authority, for example, communications between the director of social services and the legal department. This confidentiality is not owed to a third person, but is owed internally within the authority. The right to confidentiality also means that the local authority has the right to decide whether this information should be made public. However, placing such material in the public domain may amount to a waiver of that right.

3.37 Confidentiality also underpins the legal issues discussed next because claims to legal professional privilege and public interest immunity are precluded if the information in question is not confidential.

3.38 We asked: In consultees' experience, does the need not to waive the right to confidentiality which may be claimed by the authority lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries.

3.39 Most respondents said this was not a problem. One said this may occur "in sensitive cases"; one referred to it occurring where a third party's consent could not be obtained to the release of information; and one said it had occurred because of the loss of legal professional privilege which would have resulted.

Legal professional privilege

3.40 Privilege entitles a litigant or his or her successor in title[22] to withhold documents from production during the course of legal proceedings. Privilege is fundamentally a rule of evidence which applies to adversarial proceedings in courts.[23] It may also be claimed in certain investigative non-adversarial

[22] Including the insurer.

[23] *Phipson on Evidence* (15th ed 2000) para 20–01. Privilege was described by the Law Reform Committee in its 16th report as "the right of a person to insist on there being withheld from a judicial tribunal information which might assist it to ascertain facts relevant

proceedings.[24] Once privilege is established, the right to withhold the document is absolute.[25] This means that if a document from the local authority is privileged then it is protected from being produced. But the fact that a document may be privileged does not mean it is not admissible, because privilege may be waived.[26]

3.41 The type of privilege that will arise most often in local authority reports is legal professional privilege. Legal professional privilege covers communications between the client and the adviser whether or not proceedings are in existence or contemplated (legal advice privilege) and communications between the adviser and the client, or between either and a third party, where litigation is pending or in prospect, if the dominant purpose of the communication is getting evidence or advice for the litigation (litigation privilege).[27]

3.42 The concern raised in Waterhouse was whether legal advice privilege may be waived by publication of the information in the inquiry report, thus potentially prejudicing the authority (and its insurer) in *subsequent* trials and negotiations for favourable settlement.

3.43 Communications between the legal advisers to the authority and the council will benefit from legal advice privilege if that communication is reasonably necessary to the giving or receiving of legal advice.[28] This privilege will extend to communications passing between the authority's departments and local authority lawyers, statements from the officers involved and other witnesses in the pre-inquiry stage.

3.44 There is recent authority to the effect that litigation privilege is a creature of adversarial proceedings and thus cannot exist in the context of non-adversarial proceedings such as an inquiry. In such circumstances the party seeking privilege can only rely on advice privilege.[29]

to an issue upon which it is adjudicating": Privilege in Civil Proceedings (1967) Cmnd 3472, para 1.

24 Such as regulatory investigations: *Price Waterhouse v BCCI Holdings* [1992] BCLC 583.

25 In this respect, privilege differs from public interest immunity. The court will ultimately decide whether public interest immunity is applicable in an individual case. The distinction was pointed out by Scott VC in *Secretary of State for Trade and Industry v Baker (Re Barings)* [1998] Ch 356. In *R v Derby Magistrates' Court, ex p B* [1996] 1 AC 487, the House of Lords firmly rejected the notion that privilege involved any form of balancing act in the particular case.

26 *Phipson on Evidence*, (15th ed 2000), para 20–03.

27 *Re L (A Minor)(Police Investigation Privilege)* [1997] AC 16, 33 *per* Lord Nicholls.

28 *Wheeler v Le Marchant* (1881) 17 Ch D 675.

29 See *Re L* [1997] 1 AC 16 and *Three Rivers District Council v Bank of England* (No 7) [2003] EWCA Civ 474; [2003] 3 WLR 667 para 2, an appeal from *Three Rivers (No 7)* [2002] EWHC 2730 (Comm). The litigation in *Three Rivers District Council and others v Governor and Company of the Bank of England* concerned proceedings commenced by former depositors of the failed BCCI against the Bank of England alleging that the bank was liable in the tort of misfeasance in public office. This concerned the bank's capacity as the supervisory authority for United Kingdom deposit-takers under the Banking Act 1979. Shortly after the collapse of BCCI Lord Justice Bingham was invited to conduct a non-statutory private inquiry into the supervision of BCCI under the Banking Acts. The Bank claimed legal professional privilege for numerous documents that came into existence

3.45 As mentioned above, a communication can only be privileged if it is also confidential. If an otherwise privileged document has lost its confidentiality, there can be no claim for privilege. In *Goldstone v Williams*[30] depositions had been read into a compromise settlement in a previous trial. The defendant sought disclosure of the depositions. Disclosure was granted because the depositions were freely available to be inspected by anyone who had proper grounds for doing so. Privilege could no longer attach to the documents as they were no longer confidential.[31]

3.46 If a privileged document, or statement, is communicated during the course of the inquiry, the local authority cannot claim privilege in any legal proceedings following from the report's publication if publication is to the world at large. Confidentiality might be preserved if the report is circulated in a limited fashion but if the distribution is not tightly controlled confidentiality will be lost.[32] Confidentiality might also be preserved if the documents are supplied to an inquiry conducted in private on the understanding that they will be kept confidential. This limits the use the inquiry can make of them.

3.47 We asked: Does the fear of waiving legal professional privilege lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?

3.48 The responses generally disclosed that, although not very common, this can happen. One respondent cautioned, "The use of the word "fear" is probably misplaced. These are proper safeguards which professionals and responsible public bodies do not abandon lightly at all." (We note that one respondent said that although legal professional privilege had been relied on to withhold information, that had not prevented the person conducting the inquiry getting hold of all the evidence.)

3.49 It seems to us that if an authority is going to spend public money by having an inquiry, then it should do what it can to make the inquiry effective. This means giving the inquiry access to documents except where there are very good reasons not to, rather than the reverse. What is essential is that any privileged document should not lose its confidentiality.

Public interest immunity

3.50 Waterhouse makes a number of assertions that evidence presented to panels and panel reports fell within the scope of public interest immunity. For example,

between the time when BCCI collapsed and the time when they made final submissions to the inquiry. In *Three Rivers District Council and others v Governor and Company of the Bank of England (No 10)* [2004] EWCA Civ 218, the Court of Appeal held that legal professional privilege covers communications between solicitor and client that is focused on the provision of advice and assistance in relation to legal rights and obligations; it does not extend to all the work that a solicitor may undertake on behalf of his client, even where such work was in the ordinary course of business of the solicitor.

30 [1899] 1 Ch 47.

31 See also *Nederlandse Reassurantie Groep Holding NV v Bacon and Woodrow* [1995] 1 All ER 976; *Bourns Inc v Raychem Corpn* [1999] 3 All ER 154.

32 In the case of the Jillings report, distribution was successfully restricted.

in relation to the Cartrefle report,[33] Waterhouse states at paragraph 32.57: "A major concern of the insurers at that stage was that the Council should not be seen to waive public interest immunity that would otherwise attach to the report, or to important parts of it, and to many background documents." Counsel's opinion on the Jillings report also refers to waiver of public interest immunity, but it is not given any separate treatment.

3.51 Public interest immunity permits certain information to be withheld from public disclosure. It is a general rule of law founded on public policy and recognised by Parliament[34] that any document may be withheld or an answer to any question may be refused on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.[35]

3.52 Public interest immunity is normally claimed by the body in possession of the confidential information. Here, we are concerned with whether, by publication of an inquiry report, the local authority is placing into the public domain documents which might be subject to a claim of public interest immunity.

3.53 Although public interest immunity can only be claimed by authority of the Crown it is open to any person to raise the objection that the production of documents for inspection will be injurious to the public interest.[36]

3.54 In litigation between private individuals it is the duty of the parties to draw the attention of the Crown to the possibility that disclosure or production of documents would or might be injurious to the public interest. If the Crown learns, either from a party or otherwise, that such documents may be disclosed or produced, the appropriate legal officer, such as the Treasury Solicitor or the solicitor for the appropriate Government department, will direct the party who may make the disclosure that the documents should not be disclosed on the grounds that it would be harmful to the public interest. On this direction it will become that party's duty to raise the objection.[37] If the opposing party applies for an order for production of the documents the Crown may be allowed to intervene in order to be heard in relation to the objection to disclosure. Also a court may raise this objection by its own motion.

3.55 In the consultation paper we provisionally concluded that[38] a local authority, as a public body, is under a duty to assert public interest immunity when it considers it necessary to do so. Public interest immunity, once asserted, cannot be waived. It is not a privilege from disclosure available to be used by a local authority as a private litigant, akin to legal professional privilege, but a public law duty. We do not consider that it can, therefore, be described as a "right to be waived". We conclude that an express term forbidding waiver of any right will not bite on it. We also do not consider that it would be proper for an insurance company to seek to

[33] See paras 1.9 - 1.14 above.

[34] See the Crown Proceedings Act 1947, s 28(1).

[35] *Conway v Rimmer* [1968] AC 910.

[36] *Rogers v Secretary of State for the Home Department* [1973] AC 388, 400 *per* Lord Reid.

[37] See *Duncan v Cammel Laird & Co Ltd* [1942] AC 624, 626 – 627.

[38] Para 5.42.

influence an authority's conduct in relation to the assertion or otherwise of public interest immunity.

3.56 Our preliminary consultations with local authorities and their insurers suggested that, in fact, it is not the practice of insurance companies to seek to do so. Accordingly, our provisional view was that public interest immunity did not contribute to the potential problems for local authorities identified in the Waterhouse Report and our terms of reference.

3.57 We asked: Does the fear of disclosing a document which might be subject to public interest immunity lead to the withholding of documents (and other evidence) from local authority ad hoc inquiries?

3.58 There was a small, mixed response to this question. Some did not see it as a problem. By contrast, one respondent wrote, "[p]ublic interest immunity is always asserted". The views of insurers on the matter did not feature in the responses.

3.59 We conclude that while an authority may seek to claim public interest immunity as a reason for not disclosing a document to an inquiry, as such it is acting on behalf of the general public interest and not in its own interest.[39] Insurers have no part in this kind of claim which is, ultimately, overseen by the courts.

The position of third parties

3.60 Following our consultation, one new matter emerged as giving concern. From the viewpoint of those outside the authority, such as the complainant or a complainant's family, they may not find out that there has been a decision to withhold documents from the inquiry for reasons of confidentiality or legal professional privilege. In such cases, they will not then be able to challenge the contents of those documents.

3.61 In relation to this concern we note that, if an investigative duty lies on the State as a result of a complaint (see paragraphs 7.45 – 7.74 below), then one aspect of that duty is the need for the complainant or family of the complainant to be sufficiently informed and involved in any inquiry. If a local authority undertakes an inquiry (whether ad hoc or required by statute) as part of the State's discharge of that duty, it is required to have regard to the involvement of the complainant's family. Good practice would suggest that the complainant and/or his or her family should be kept informed whether or not the State has a legal duty to investigate. Part of the information provided could include an account of whether the inquiry has succeeded in obtaining all the evidence it sought.

3.62 We note that, in the case of an ad hoc inquiry, the inquiry team might protest if it is aware that items are being withheld from it. In an extreme case it could challenge a decision to withhold material. However, at present it cannot ultimately

[39] See *Three Rivers District Council (No 6)* [2002] EWHC 2309 (Comm) which concerned the claimant's application to obtain access to the records of the Bingham report and issues of confidentiality. The court held that it was settled law that where confidentiality was raised in the context of disclosure of documents it was not a ground for public interest immunity in itself. However, confidentiality could be an ingredient of or relevant to a claim for public interest immunity.

compel someone to attend before it. In the case of the new special inquiries that we recommend in Part VIII below, the inquiry will, subject to the court's view, be able to compel production of documents to it.

BREACH OF CONFIDENCE AND A DUTY TO DISCLOSE?

3.63 A couple of respondents suggested that the issues arising in relation to confidentiality and legal professional privilege could be addressed by a statutory duty placed on the authorities to disclose all evidence to ad hoc inquiries. Such a duty would also meet concerns about whether an authority was in breach of any duty of confidence owed to others.

3.64 Our consultation question was put in terms of the *right* to confidentiality which a local authority may claim in relation to documents held within the authority. However the issue is evidently sometimes thought about by local authorities in terms of the *duty* of confidence owed by them to others.

3.65 An authority may owe a duty of confidence to another party, for example, where it holds personal information about recipients of its services,[40] or where the local authority is in a special relationship with the communicator of the material.[41] Similarly, the information may have been imparted to the authority on the understanding that it was being provided subject to confidentiality.[42] In this instance no question of a waiver of a right will arise. In the case law, where confidentiality has been lost in a document this is referred to as a "breach" of the duty of confidence owed to others, not a "waiver" of the authority's own right of confidentiality in the information held by it.[43]

3.66 It is clear that unauthorised use of confidential material can be classed as a breach of the duty of confidence. Breach of confidence is defined as unjustified disclosure or use, or the unjustified putting at risk, of confidential information.[44] Disclosure may also occur if there is partial unauthorised use of the material,

[40] The duty of confidence may arise out of a transaction or relationship between the communicator and the recipient of the information, but it may also arise independently of any transaction or relationship: *Venables v News Group Newspapers Ltd* [2001] Fam 430, para 81, *per* Butler-Sloss P.

[41] Special relationships may cover, e.g. co-operation with police authorities under the Crime and Disorder Act 1998, s 115; communications between teachers and educational psychologists in respect of personal information relating to pupils (see *Phelps v Hillingdon BC* [2001] 2 AC 619); and inter-agency communications under the Working Together guidelines, paras 7.27 – 7.46. The provenance of these guidelines is described at para 2.32 above.

[42] This may include complaints made to the authority by "whistleblowers": see *D v NSPCC* [1978] AC 171.

[43] See, e.g., *A-G v Blake (Jonathan Cape Ltd third party)* [2001] 1 AC 268.

[44] *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd* [1960] RPC 128, CA *Churchill Gear Machines Ltd v National Broach and Machine Co* [1967] 1 WLR 384; *Seager v Copydex Ltd* [1967] 1 WLR 923. Note that disclosure of material in respect of which a duty of confidence is owed may be justified.

where such use is significant and substantial.[45] Breach can also occur where subsidiary or ancillary material is disclosed to the public.[46]

3.67 An authority will wish to avoid exposing itself to an action for breach of confidence, just as it will wish to avoid an action in negligence or breach of statutory duty.

3.68 One way of achieving this may be for the authority to release material to an inquiry on the express understanding that it is not to be further disclosed. Material that has been shared with other professionals or agencies[47] but is still restricted from public access will still benefit from the quality of confidence, as material can be confidential between some persons and not others.[48]

A statutory duty to disclose material to inquiries?

3.69 One respondent thought: "It would be helpful if the law were clear that documents should be produced to a local authority inquiry. This is particularly so given the Data Protection Act 1998 as well as common law on confidentiality. A statutory authority to disclose would be useful, perhaps similar to section 115 of the Crime and Disorder Act 1998."[49] The Adoption Forum also urged us to recommend a statutory *duty* to disclose material to an inquiry.

3.70 We have considered whether a comparable provision might help local authorities to disclose documents to inquiries they have themselves established. We have concluded that it could not. Such a duty would amount to a statutory defence to an action for breach of confidence. The statutory duty would have to be based on a statutory requirement to disclose under very specific circumstances.[50] The language of the statute would have to be unambiguous. Also there would be the competing interests arising from public interest immunity, the Data Protection Act 1998, legal professional privilege and protection of the interests and

[45] *Amber Size and Chemical Co Ltd v Menzel* [1913] 2 Ch 239.

[46] *Prince Albert v Strange* (1829) 2 De G & Sm 652; 64 ER 293.

[47] Such as the police, under the Working Together guidelines: see para 2.32 above.

[48] *Gotha City v Sotheby's* [1998] 1 WLR 114. In this case, the claimant sought sight of documents disclosed by one defendant in the action to the other. The court did not accept the claimant's contention that confidentiality in the documents was lost by virtue of having disclosed them to someone.

[49] CDA 1998, s 115(1) creates a power to disclose information as necessary and expedient for the provisions of the Act. The purpose of the Act is to tackle crime and disorder and it introduced, among other things, anti-social behaviour orders, sex offender orders, parenting orders, child safety orders, provisions for dealing with truancy, noise and nuisance, racially and religiously aggravated offences, and youth offending. The scheme facilitating disclosure appears linked to the sharing of information to enable the use of these various orders. A "relevant authority" is limited to divisions of the police, local authorities, probation boards, health authorities and primary care trusts (s 115(2)). However, s 115 only creates a power to disclose; it does not give an absolute defence to a claim of breach of confidence. Even if the power is exercised in a manner in which a local authority officer considers necessary and expedient it is still possible they may be liable for breach of confidence. Moreover, there may be additional liability under the Data Protection Act 1998 for unlawful disclosure.

[50] See, eg, *Hunter v Mann* [1974] 1 QB 767.

confidentiality of third parties which would have to be taken into account in defining any statutory duty of disclosure.

3.71 Personal information which is held in confidence is protected by Article 8(1) of the ECHR as an aspect of an individual's "right of respect for his private and family life".[51] Any disclosure of confidential information must be justified under Article 8(2) as being:

(1) in accordance with the law;

(2) necessary in a democratic society (proportionate);

(3) for a stated purpose: in the interests of public safety, for economic well-being of the country, for the prevention of crime and disorder, for the protection of health or morals or for the protection of rights and freedoms of others.

3.72 The ECHR gives a form of codification to the nature of the public interest authorising breach of confidence by public bodies. Under the Human Rights Act ("HRA") 1998, disclosure of confidential information held within the control of a local authority will have to comply with Article 8 of the ECHR. Section 6(1) of the HRA 1998 requires a local authority to act compatibly with the ECHR.[52]

3.73 We do not think it would be appropriate to recommend a defence for breach of confidence in terms which did not refer to the public interest; the issues are far too subtle for that. There is nothing to be gained by recommending a provision which is cast in terms of the public interest, because this is the effect of the common law on public interest immunity. The ultimate arbiter of where the public interest lies[53] will always be the court, which will take into account all the circumstances of each case.[54]

3.74 The court can order disclosure of documents, determine where the public interest lies and make orders limiting the extent of disclosure necessary for determination of the issues before the inquiry. The court can take account of issues raised by the Data Protection Act 1998, legal professional privilege and public interest

[51] *Z v Finland* (1997) 25 EHRR 371 and *MS v Sweden* (1997) 28 EHRR 313.

[52] Article 8 and the Strasbourg case law was considered in *A Health Authority v X* [2001] Lloyd's Rep Med 349. Munby J held that disclosure of patient records to a health authority for disciplinary and regulatory purposes was justified under Article 8 provided that they remained confidential and that there were express conditions to prevent abuse.

[53] Or, strictly speaking, whether the public interest in a particular document being disclosed to particular people or bodies overrides the public interest in a system where confidentiality is respected.

[54] For example, the Family Law Bar Association referred to the "wider problem that the rules which are designed to protect the privacy and confidence of those who use social services, especially children, also protect the identity of their abusers and the institutions where the abuse occurred. There may be conflicting claims to confidentiality involved. Claims to confidentiality of some material may also conflict with the attempt by the inquiry to arrive at the truth". Munby J's judgement in *A Health Authority v X* illustrates the kind of considered approach a court might take. *A Health Authority v X* [2001] Lloyd's Rep Med 349 (confirmed by the CA in *A Health Authority v X* [2002] EWCA Civ 2014 [2002] 2 All ER 780).

immunity. Also such hearings can be held out of the public eye and appropriate remedies given.

3.75 If our recommendations in relation to a new power of inquiry are enacted (see Part VIII), and if a local authority declines to provide documents requested by an inquiry, in certain circumstances the inquiry could apply to the court for an order that the document be supplied by the authority.[55]

Conclusions

3.76 In the light of responses to the questions asked in the CP, we have reached the following conclusions.

(1) From our respondents, we received no evidence of insurance cover actually being withdrawn.

(2) There was some evidence of threats of loss of insurance cover.

(3) More generally there was an underlying fear that insurance cover might be withdrawn or invalidated if an authority acted contrary to the insurers' interests, whether by admitting liability or by publishing an inquiry report.

(4) Such threats and fears are significant, as loss of cover would be a very serious matter. As one respondent said, "past experience shows that Members and Officers treat very seriously the risk that their actions might result in the breach of the contract of insurance thereby putting the authority in a position of having no cover."

(5) In relation to admissions of liability, we think that a clearer agreement between local authorities and their insurers should resolve what uncertainties there are about the circumstances in which insurance cover may be lost by such an admission. We discuss this further in Part IV.

(6) In relation to the law of defamation, we are persuaded in the light of responses to the consultation that some amendment of the law is desirable, in particular that relating to qualified privilege. We discuss the arguments and our recommendations more fully in Parts V and VI.

(7) As regards waiver of rights, in particular the waiving of the right to confidentiality and legal professional privilege, we think this can be addressed by clearer guidelines on the conduct on inquiries. We discuss this further in Part IV.

(8) The issue of public interest immunity is a matter of public law, and is not affected by the contract of insurance between the local authority and the insurance company.

(9) It may be possible to balance rights of confidence and the needs of the inquiry to arrive at the truth by evidence being given in confidence.

[55] See para 8.66 below.

(10) A statutory duty to disclose confidential material would not be helpful, but there is a case for a new power of inquiry in relation to which a court might order the disclosure of particular evidence. We discuss this further in Parts VII and VIII.

3.77 Our hope is that the combined effect of the legislative reforms we recommend and the non-legislative remedies we suggest will lead to greater confidence on the part of local authorities in the handling of ad hoc inquiries with regard to their insurance obligations, and the facilitation of publication of well-conducted inquiry reports. These outcomes would be in the public interest.

PART IV
NON-LEGISLATIVE SOLUTIONS

INTRODUCTION

4.1 In the CP, we provisionally concluded that, with the exception of qualified privilege in defamation, the problems we identified would best be tackled non-legislatively:

(1) by an agreement between the local authorities and their insurers, and

(2) by a Code of Practice on the conduct of inquiries.[1]

4.2 Waterhouse said: "The contractual issues that arise are less suitable for legislation because insurers cannot be compelled to underwrite liabilities and will make their own assessments of risk when they do agree to provide cover." The Report continued, "It is highly desirable, however, that there should be an agreed code of practice to guide local authorities in their response to situations of the kind that arose in Clwyd."[2]

4.3 In this Part we describe the responses to those proposals, and what has taken place since publication of the CP.

LGA/ABI GUIDANCE

4.4 Following completion of the Jillings report, the Local Government Association (LGA) and the Association of British Insurer Insurers (ABI) issued a Guidance Circular to local authorities on how to approach inquiries concerned with reviewing statutory responsibilities which are subject to indemnity insurance cover: "Ad Hoc Inquiries in Local Government – Insurance Aspects".[3] It was circulated on 30 September 1999. We reproduced it as Appendix A to our CP.

4.5 The Guidance "sets out principles which the LGA recommends local authorities apply when considering arrangements for an inquiry concerned with reviewing statutory responsibilities which are subject to indemnity insurance cover."[4]

4.6 Waterhouse recommended that this Guidance be reviewed.[5] The ABI accepted that recommendation in its response to the Waterhouse Report.[6]

1 Para 7.47.

2 The Waterhouse Report, para 32.62.

3 Referred to here as "the LGA/ABI Guidance" or "the Guidance".

4 LGA Circular 631/99, covering note to the LGA/ABI Guidance, p 1.

5 Recommendation 72, at para 56.05 of the Waterhouse Report:

> Subject to the preceding recommendation, [that the Law Commission look at the legal issues, recommendation 71] guidance to local authorities on the setting up and conduct of inquiries and the dissemination of reports thereon should be up-dated and re-issued.

4.7 We concluded in the consultation paper that the LGA/ABI Guidance and the ABI response had addressed to an important degree the practical matters on which agreement between local authorities and insurers is needed. We thought they provided a good basis for developing a further statement of agreed principles. We think it essential that agreement is negotiated by the local authorities and their insurers, so that an authority knows what steps it ought to take at each stage of a local authority inquiry.

4.8 Whether such an agreement is cast in the form of revised joint LGA/ABI Guidance, or a Statement of Practice such as might be issued by insurers,[7] is not a matter for us. What is important is that any such agreement is observed in practice, is clear, and is known and understood by all involved.

4.9 We suggested that any revised document might usefully include the following points.

- It is highly desirable to obtain legal advice on the terms of reference, or, if the inquiry is to be independent of the authority, for the person who will be chairing the inquiry panel to be consulted on the terms of reference.
- The terms of reference of an inquiry should allow for the drawing of inferences and the expression of judgments and opinions in the inquiry report only where they are supported by evidence.
- The presumption that publication of the report or some version of it will take place.
- There should be an agreed procedure for the handling of a report by the council, which should include steps the council should take to satisfy itself of the fairness of the inquiry and the report.
- Whether an admission of fact from which an admission of liability may be inferred will be a breach of any term of the contract of insurance if made without the insurer's consent.
- The need for the authority to respect duties of confidentiality owed to others.

4.10 We asked consultees: Given our description of how an agreement between the local authorities and their insurers could be developed, do consultees agree that this would be the right way forward? If not, what additional points would

[6] ABI, "The Waterhouse Report Supplementary Matters – recommendations 71 and 72: A Response by the Association of British Insurers" (December 2000) ("The ABI Response").

[7] Such as the ABI Statement of General Insurance Practice (L 249 August 1997, first issued 1977) which states that the code "shall be taken into account in arbitration and any other referral procedures which may apply in the event of disputes between policyholders and insurers": p 2. No mention is made of its legal status beyond this. Birds comments that although not legally binding, a large majority of insurers generally observe the terms of the Statement of General Practice: *Birds*' *Modern Insurance Law* (5th ed 2001), p 4.

consultees say should be included, or what alternative would consultees propose?[8]

4.11 Twenty respondents commented on this question. None has caused us to think that legislative action is the way forward. Most were supportive of our suggestion of an agreement. There was some concern that the details of such an agreement would have to be fully worked through, and that it would not be a complete answer to the problem.

4.12 One academic respondent considered that an agreement between individual authorities and insurers could work, given the limited number of insurers in the market and the record of good compliance with a similar "code" not to pursue subrogation rights for employers' liability insurance. On the other hand, another academic commentator argued that a "code" is unnecessary, because if an inquiry report is published which indicates that the authority bears some responsibility, but the authority is not authorised by the insurer to settle the claim, then adverse publicity will discourage insurers and authorities from resisting claims. We do not think that the possibility of media pressure is a good or sufficient substitute for a statement of agreed principles.

4.13 We have reached this view for three principal reasons:

(1) the decision to refuse the claim will often be made known, initially at least, to a small group of officers and members. It will not be in their best interests to publicise the attitude of their insurer. Whether or not backbench councillors or members of the Overview and Scrutiny Committee wish to consider the decision will only arise at a later stage;

(2) insurers do in practice "lean" in some way on authorities to prevent publication when reports may reveal admissions of liability. One Head of Legal Services wrote: "It is certainly the experience of this authority that the inquiry reports have been withheld for a variety of reasons, not solely because of admissions of liability, although this was an issue." Similarly, the Corporate Standards Officer at another authority wrote: "Our insurers have been very reluctant to permit the dissemination of a report, despite the fact that its publication was necessary in order to prevent a recurrence of the problems identified in it";

(3) any media pressure may not reflect the justice of the case.

4.14 We have concluded that a Statement of Agreed Principles would leave the underlying framework of responsibilities shared between insurers and authorities intact, yet recognise the democratic and multi-functional nature of local authorities. The LGA and the ABI indicated a willingness to work together to draw up such a Statement. The ABI thought this was best pursued once the SOLACE guidance was drafted – on which, see paragraphs 4.14 below.

[8] Question 12, para 8.46 of the CP.

4.15 We hope that the ABI and the LGA will collaborate on revising the joint guidance that was issued in 1999 and that a revised document would cover, amongst other things:

(1) recording of information;

(2) inclusion of evidence-based conclusions;

(3) disclosure by the local authority of documents to assist the inquiry, particularly documents to which the right to confidentiality attach and those subject to legal professional privilege;

(4) evidence to the inquiry by council staff;

(5) handling of the inquiry report by the authority;

(6) publication of the inquiry report; and

(7) resolution of disputes between the authority and the insurer.

4.16 Following publication of this report, we shall be convening a meeting between representatives of local authorities and their insurers to start this process. If, as we hope, this reaches a satisfactory conclusion, the new agreement should resolve many of the uncertainties to which the Waterhouse report drew attention. We hope that once the new LGA/ABI code of practice is in place, local authority insurers and local authorities will work to adopt an approach that is fair to both sides, while allowing the authority to function as an accountable public body.

THE CONDUCT OF INQUIRIES

A "Code of practice" and the SOLACE review group

4.17 In 1978, a committee appointed by Society of Local Authority Chief Executives (SOLACE) and the Royal Institute of Public Administration issued recommendations for the attention of local authorities,[9] including (1) that a code of practice should govern the method of appointment, staffing and other related matters, and (2) various procedural rules. Those rules covered rights of hearing, rights to legal and other representation, evidence, rights of persons adversely criticised, rights of observers at private inquiries, reimbursement of witnesses' costs, and reporting.

4.18 The Local Authorities Association published its response to the SOLACE report in August 1980. It "fully endorse[d] the proposition that a code of practice and rules of procedure are needed."[10] It commended its own version of a code of practice and rules of procedure to its member authorities which closely followed the SOLACE recommendations.[11]

[9] SOLACE and RIPA, "Ad hoc Inquiries in Local Government" (1978).

[10] Local Authority Associations, "Ad hoc Inquiries in Local Government: Report of the Local Authority Associations" (1980), para 13.

[11] *Ibid*, para 14.

4.19 Nevertheless, neither the SOLACE, nor the Local Authority Association recommendations were widely known. In the consultation paper, we said (at paragraph 7.50):

> The second strand to the solutions should, in our provisional view, be a Code of Practice for the conduct of local authority ad hoc inquiries. We see this as a distinct, and important, component of the solutions to the problems identified in the Waterhouse Report and in this consultation paper. A Code of Practice would guide those involved in the setting up of and the running of a local authority non-statutory inquiry, and promote best practice. The agreement [between local authorities and insurers] would, by contrast, be a matter of regulating practice between local authorities and their insurers. The two would be connected in that if an inquiry were conducted in accordance with any guidance in a Code of Practice, the kinds of problems we have outlined would be less likely to arise in the first place.[12]

4.20 The ABI stated that it accepted the recommendation "that there should be an agreed code of practice to guide local authorities in their response to situations of [this] kind…"[13] and "fully supports further work towards the development of such a code".[14]

4.21 In the event, the Code of Practice we thought was needed was already being developed by SOLACE, who had set up a Group to review guidance on the conduct of local authority ad hoc inquiries. The review included a questionnaire to local authority chief executives to establish how inquiries are conducted, reports are written and how the inquiries are handled by the local authorities. A Law Commission lawyer was invited to be an Observer of the Group in January 2002. Information and views were shared between the Review Group and the Commission.

4.22 In our CP we asked:

> Given our description of the principles that should underlie a Code of Practice, its content, and who should issue it, what would consultees want to see in a Code of Practice for the conduct of local authority ad hoc inquiries?

4.23 Twenty respondents commented. Nearly all were positive about the idea of a Code of Practice (Guidance, as it now is) and many made suggestions. The Council on Tribunals warmly supported this idea. It expressly agreed with our statement that "While we think it may not be either practicable or desirable to produce guidance which *prescribes* particular ways of conducting inquiries and writing reports, it is nevertheless both possible and desirable to produce guidance which alerts the authority as to the issues to be thought about, the

[12] And the insurers could require a local authority to observe a Code of Practice.

[13] The Waterhouse Report, para 32.62.

[14] The ABI Response, section 2, para 2.8.

options, and the factors to be taken into account when deciding how to progress".[15]

4.24 The Review Group published its Guidance on 5 December 2002: *Getting it Right: Guidance on the conduct of effective and fair ad hoc inquiries*. The Guidance is not prescriptive, but sets out in some detail the various considerations which a local authority and an inquiry panel may need to take into account, and the kinds of decisions they will need to make. We are grateful to SOLACE for permission to reproduce substantial extracts from the main body of the Guidance as Appendix B to this Report. Copies of the Guidance itself can be obtained from SOLACE.[16]

4.25 We also commend the succinct guidelines produced by the Department of Health, which are appended to the Guidance, and reproduced, with the kind permission of the Department, as Appendix C to this report.

4.26 It is obviously essential that these documents are better known and understood by local authorities and their insurers than were the original SOLACE guidance and the Local Authorities Association version.

CONCLUSION

4.27 The evidence, both from the Waterhouse report and from other respondents to our consultation is that many of the problems that arise with ad hoc inquiries arise when basic principles of fair procedure are not followed. While not creating a procedural strait-jacket for those conducting ad hoc inquiries, we think that the principles set out in the SOLACE Guidance serve a most useful purpose in identifying the ways in which inquiries can be conducted fairly. These will be invaluable to those running inquiries, particularly those without much experience of such a process.

4.28 Further, where local authorities need to satisfy themselves that inquiries have been conducted fairly,[17] the guidance provides a practical checklist of items against which local authorities can reach an informed judgment.

[15] Para 8.48 of the CP.

[16] http://publications.solace.org.uk/acatalog/adhoc.htm; SOLACE Hope House, 45 Great Peter Street, London, SW1P 3LT.

[17] Which is an important feature of our proposals relating to the amendment of the law on qualified privilege, discussed below in Parts V to VI.

PART V
DEFAMATION AND MALICE

INTRODUCTION

5.1 In this Part we consider the law relating to defamation, in particular the defence of qualified privilege and the doctrine of malice, and explain what we think is wrong with the current law as it applies to ad hoc local authority inquiries. We describe the reforms we propose in Part VI.

THE ELEMENTS OF DEFAMATION

5.2 To succeed in an action for defamation, a claimant must demonstrate that a statement made by the defendant:

is defamatory (defamation)

refers to the claimant (identification) and

has been published to a third person (publication).[1]

5.3 Gatley states, "the difficulty of producing a comprehensive definition of the meaning of 'defamatory' has often been remarked."[2] Definitions in the case law have referred to exposing the claimant to hatred, contempt or ridicule,[3] causing a person to be shunned or avoided,[4] or lowered "in the estimation of right-thinking members of society generally".[5] Once a judge decides that the statement is capable of having a defamatory meaning, a jury[6] decides whether the statement was defamatory in fact.

5.4 Some local authority ad hoc reports will inevitably contain defamatory statements. The joint guidelines issued by the Local Government Association and the Association of British Insurers recommend that inquiries limit themselves to findings of fact.[7] Even so, findings of fact may contain defamatory statements, for example if the report casts doubts on the professional capacity of officers of the authority.[8]

1 *Carter-Ruck on Libel and Slander* (5th ed 1997) p 35.

2 *Gatley on Libel and Slander* (10th ed 2004), para 2.1.

3 *Parmiter v Coupland* (1840) 6 M & W 105,108; 151 ER 340, 342.

4 *Youssoupoff v Metro-Goldwyn-Mayer* (1934) 50 TLR 581, 587, CA.

5 *Sim v Stretch* [1936] All ER 1237, 1240 *per* Lord Atkin, confirmed in *Skuse v Granada TV* [1996] EMLR 278, 286 *per* Sir Thomas Bingham MR.

6 The relative functions of judge and jury are described in *Gatley on Libel and Slander* (10th ed 2004), para 2.1.

7 The LGA/ABI Guidance, "Ad hoc inquiries : Insurance Aspects", para 4.

8 Where a defence is available to the local authority, a person who claims to have been libelled will not succeed even though the report is "defamatory". The defences are described at paras 5.6 – 5.8 below.

5.5 Publication occurs whenever the statement is communicated to a person other than the claimant.[9] Thus publication includes the moment when an ad hoc inquiry report is communicated to the members of the council, as well as when the authority makes it more publicly available.[10] Publication may arise where the report is made available for public inspection three clear days before the council is due to debate it.[11] Publication of the report may also arise where the information has been communicated to an individual in accordance with the Freedom of Information Act 2000.[12]

Defences

5.6 Even though a statement may be "defamatory", defences to an action in defamation are available. The onus is on the defendant to sustain the defence.

5.7 Five broad defences are available.

(1) *Truth or "justification".* It is a defence for the publisher of the report to establish that the defamatory statement is in fact true.[13] The danger of relying on justification is that the defendant authority must discharge the burden of proving that the statement was true.[14] In the context of ad hoc inquiries, this may be particularly onerous given that findings of fact in the report may have derived from hearsay, rather than direct, evidence. The authority will have to establish these facts for itself before justification is made out. Moreover, such a plea will involve a full court hearing, usually before a jury. This will add uncertainty and delay as well as cost.

(2) *Fair comment*. It is a defence to a defamation action that the statement is fair comment on a matter of public interest.[15] This defence is likely to be less relevant for local authority inquiry reports than justification or qualified privilege, as it attaches to opinion rather than facts. Ad hoc inquiries, although drawing conclusions, are primarily means for discovering facts. While some parts of reports may benefit from this defence, it will not provide cover for the whole of the report.

9 *Pullman v Walter Hill & Co* [1891] 1 QB 524.

10 The defence of qualified privilege may attach to publication in this instance: see para 5.13 below.

11 See para 5.20 below.

12 Note that statutory qualified privilege may be available where information is supplied under the Freedom of Information Act 2000: see below, para 5.22.

13 There is one exception to this rule: by virtue of s 8 of the Rehabilitation of Offenders Act 1974, if a person's conviction for an offence is "spent" by the lapse of the appropriate period, a malicious reference to it is actionable despite its truth.

14 *Belt v Lawes* (1882) 51 LJQB 359, 361.

15 *Lyon v Daily Telegraph* [1943] KB 746; *Slim v Daily Telegraph* [1968] 2 QB 157.

(3) *Offer of amends*. This defence obliges the defendant to pay compensation and/or damages to the aggrieved party, and publish an apology to the person defamed.[16]

(4) *Absolute privilege* (discussed below).

(5) *Qualified privilege* (discussed below).

5.8 Defences (1) and (4) are absolute: they cannot be defeated by malice, which arises where a person makes a statement knowing it to be untrue, recklessly (without considering or caring whether or not it was true), or with some indirect or improper motive.[17] However, the claimant who can show that the defendant was motivated by malice will defeat the defences of qualified privilege, and fair comment. The offer of amends defence can apply unless the claimant can show that the defendant (a) knew or had reason to believe that it was likely to be understood as referring to the claimant and (b) knew or had reason to believe that it was false and (c) knew or had reason to believe that it was defamatory of him.[18]

PRIVILEGE

5.9 Privilege arises where it is in the public interest that a statement, though defamatory, should be published. Privilege overrides the protection normally afforded to a person's reputation. There are two kinds of privilege: absolute and qualified.

Absolute privilege

5.10 Absolute privilege is the highest form of protection. It attaches to matters of the highest public interest and the institutions of democratic power. Thus absolute privilege attaches to defamatory statements made in the course of Parliamentary proceedings,[19] and in the course of judicial proceedings before a court. It also applies to statements made in the course of any proceedings before a tribunal (including a commission or inquiry) recognised by law which, though not a court in the ordinary sense, acts judicially.[20]

5.11 Specific statutory provisions confer absolute privilege upon reports, statements and determinations from those performing investigative or regulatory functions

[16] Defamation Act 1996, s 2. An offer of amends cannot be run in conjunction with any other defence, although a qualified offer of amends may be.

[17] *Horrocks v Lowe* [1975] AC 135. See further para 5.56 below.

[18] The burden on the claimant is higher than proving mere negligence: *Milne v Express Newspapers* [2002] EWHC 2564 (QB), [2003] 1 WLR 927.

[19] See Article 9 of the Bill of Rights (1688) and Defamation Act 1996, ss 13(4) and 13(5). The European Court of Human Rights has held that Parliamentary privilege does not breach the European Convention on Human Rights: *A v UK* [2002] ECHR 35373/97 and *Zollmann v UK* [2003] Application 62902/00 decided 27 November 2003.

[20] *Royal Aquarium and Summer and Winter Garden Society v Parkinson* [1892] 1 QB 431, 442, *per* Lord Esher MR, which is said to state the law on this subject accurately: *O'Connor v Waldron* [1935] AC 76, 81, *per* Lord Atkin (PC).

which would not (or might not) otherwise be regarded as of a judicial nature.[21] No specific statutory provision grants absolute privilege to local authority ad hoc inquiry reports.

5.12 Were local authority ad hoc inquiries judicial in nature, they would benefit from absolute privilege, but this would be rare. The authority does not carry out ad hoc inquiries under an express statutory power, still less a statutory duty; an inquisitorial, rather than adversarial, procedure will usually be adopted; the terms of reference will involve a retrospective and prospective element, rather than simply reaching a verdict on (for instance) legal liability. Following guidance in *Trapp v Mackie*,[22] these factors point towards ad hoc inquiries being classified as administrative, rather than judicial or quasi-judicial, in nature.

Qualified privilege

5.13 Qualified privilege provides a defence against liability in defamation for a broader range of situations than does absolute privilege. The publisher of a report to which qualified privilege attaches will be protected unless it is shown that any defamatory statement contained in it was made with malice.

5.14 The rationale for the defence of qualified privilege is that it is in the public interest for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. The protection afforded to the maker of the statement is the means by which the law seeks to achieve that end.[23] There are two classes of qualified privilege: statutory and common law.

Statutory qualified privilege

THE DEFAMATION ACT 1996

5.15 Section 15 of the Defamation Act 1996 provides qualified privilege for the publication of "any report or other statement" listed in Schedule 1 to the Act.[24] Statutory qualified privilege is designed to protect the fair and accurate reporting of a variety of public documents, publication of which is not otherwise prohibited

[21] For example, Local Government Act 1974, s 32(1) confers absolute privilege on matters published by a Local Government Ombudsman. Among others, statute has granted absolute privilege to certain documents connected with the Parliamentary Commissioner for Administration, the Commissioner for Local Administration in Scotland, the Health Service Commissioner, the Monopolies and Mergers Commission, the Children's Commissioner for Wales and the Pensions Ombudsman. For a detailed list of these provisions, see *Gatley on Libel and Slander* (10th ed 2004) para 13.49.

[22] [1979] 1 WLR 377.

[23] See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 195, *per* Lord Nicholls.

[24] The Defamation Act 1996 modified and rationalised the Schedule to the Defamation Act 1952, and extended the situations to which qualified privilege could attach. The Defamation Act 1952 had in turn replaced and repealed earlier legislation that granted statutory qualified privilege. Earlier statutes, for example section 4 of the Law of Libel Amendments Act 1888, spelled out the categories of public meetings where reports of the meeting were granted statutory qualified privilege. In the earlier statutes there was a requirement that the defendant was to publish, if required, a letter or statement of explanation or contradiction as a condition of the privilege. See *Gatley on Libel and Slander* (10th ed 2004), para 15.2.

by law[25] and where the subject matter is of public concern. The Act does not protect the original publication of the defamatory material, but rather the repetition by the media of that material.[26] A local authority, as originator of the material, could not rely on this privilege.

5.16 Part I of Schedule 1 extends qualified privilege to fair and accurate reports of proceedings at various kinds of public meeting or sitting in the UK, including "a fair and accurate report of proceedings in public of a person appointed to hold a public inquiry by a government or legislature anywhere in the world".[27] This does not, however, apply to local authority ad hoc reports as they are not commissioned by a legislature or a government but by a local council.[28]

5.17 In relation to matters listed in Part II of Schedule 1 - which include proceedings at any public meeting of a local authority or local authority committee - qualified privilege will not attach where the defendant was asked by the claimant to publish a letter or statement of explanation or contradiction of any defamatory statement and they failed to do so.

5.18 As to publication of the inquiry report itself, there is no category in Schedule 1 to the 1996 Act which would cover the reporting of a local authority ad hoc inquiry. Paragraph 15 of the Schedule permits the Lord Chancellor to designate by Statutory Instrument bodies whose reports will also benefit from the defence of qualified privilege, but none has been designated.[29]

ACCESS TO INFORMATION

5.19 The law governing access to information, whereby reports must be open to inspection in accordance with the public's right of access to local authority papers,[30] provides that the supply of that information attracts statutory qualified privilege.[31]

[25] For example because it is an obscene publication.

[26] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 295, *per* Lord Steyn. See also *Gatley on Libel and Slander* (10th ed 2004), para 15.3.

[27] Para 3 of Sched 1.

[28] "A government" is not defined in the Schedule, but the term "local council" is used elsewhere in the Schedule, so it seems reasonable to assume that "a government" does not include a local council in this paragraph of the Schedule.

[29] The Schedule to the Act came into force on 1 April 1999: The Defamation Act 1996 (Commencement No 1) Order 1999 SI 1999 No 817. The former Lord Chancellor's Department did issue a consultation paper in which it included a list of possible bodies for this designation, but the Department has no current plans to issue any SI under para 15 of Sched 1.

[30] The Local Government (Access to Information) Act 1985 inserted a new Part into the Local Government Act 1972 to govern the rights of access of members, the press and public to principal local authority meetings and documents. Under the scheme, meetings of these authorities must be open to public and press; the agenda, reports and background papers must be available to the public and press three clear days before the meeting. Where a local authority discharges its executive functions under the new models, new regulations apply to govern access to information and decisions made by members of the executive. For members of the public, the regulations do little more than transfer the previous arrangements governing access to meetings and documents. There is however increased access to documents for members of OSCs. The public will have a prima facie right to the

5.20 Further, Local Government Act 1972, section 100H(5) grants a defence of qualified privilege to any transmission of an "accessible document." This is defined to include any copy of the whole or part of a report,[32] or background paper[33] for the meeting of a local authority.

5.21 The regulations governing access to information and meetings of local authorities under the new executive arrangements for local authorities provide that, where information is to be open for public inspection, the documents similarly attract qualified privilege.[34]

FREEDOM OF INFORMATION

5.22 Information supplied to a local authority by a third person and disclosed to another person by the authority in accordance with the Freedom of Information Act 2000 will, when section 1 of that Act is in force, benefit from qualified privilege.[35]

MATERIAL NOT OPEN TO INSPECTION

5.23 Some material need not be open to inspection, either because it is subject to the mandatory confidentiality exemption[36] or because an exemption listed in Local Government Act 1972 Schedule 12A applies.[37] These exemptions – including those concerning the personal details of staff, information about recipients of any service provided by the council, legal advice and the identity of whistleblowers – prevent both inspection of the documents and public access to the part of the meeting at which the material is discussed. (All such material is discussed in Part 2 of agendas, from which the public is excluded.) Where material is not open to inspection, the statutory qualified privilege defence does not apply.

5.24 These exemptions are most likely to apply where the subject matter is particularly sensitive – for instance, inquiries into maltreatment of the elderly or allegations of assault by school teachers. But it is exactly these types of reports that are more likely to contain defamatory statements. A report stating that a person has

report and transcripts of evidence if they are to be debated by the council, operating either under the committee structure or the new executive models.

31 Defamation Act 1996, Sched 1, Part I, para 5.

32 1972 Act, s 100H(6)(d).

33 1972 Act, s 100H(6)(e).

34 The Local Authorities (Executive Arrangements) (Access to Information) (England) Regulations 2000 SI 2000 No 3272 reg 22(4)(a); Local Authorities (Executive Arrangements) (Decisions, Documents and Meetings) (Wales) Regulations 2001 SI 2001 No 2290 (W 178) reg 13(4)(a).

35 Freedom of Information Act 2000, s 79. See also other specific statutory provisions listed in *Gatley on Libel and Slander* (10th ed 2004), para 15.23.

36 Set out in Local Government Act 1972, s 100A (2); see CP163 Appendix B paras B.20-B.21.

37 Schedule 12A to the 1972 Act lists the types of material that may be exempt from the requirement to grant the public the right of attendance or access to the information to be discussed at the meeting. The Schedule 12A exemptions are discretionary, whereas the first type of exclusion, based upon confidentiality, is mandatory.

committed a criminal offence, for example assault, is defamatory.[38] Imputations on the character of an employee of the council, or a statement that that person lacks some essential quality to carry on the office, trade or profession successfully, are also defamatory.[39]

5.25 Therefore, in relation to those classes of report most likely to contain defamatory statements, no statutory defence of qualified privilege is available. (The common law qualified privilege, which was not repealed by the 1996 Act,[40] may still be of relevance in some situations; this is discussed at paragraphs 5.33 – 5.35 below.)

Comment

5.26 In the consultation paper, we had not thought that the availability of statutory qualified privilege under the Access to Information provisions would dictate the decision of whether to discuss the matter in public in the first place. The purpose of these provisions is to give the public access to material to be discussed in a public meeting, rather than to give the authority statutory protection from an action which could otherwise be taken against them for defamation.

5.27 This, however, was the approach taken by Newcastle City Council to the report written by the independent inquiry team it appointed to investigate allegations concerning the Shieldfield nursery.[41] The claimants were nursery nurses at the Shieldfield nursery. Allegations that they had sexually abused children in their care were made, and criminal proceedings commenced. Both were acquitted on direction of the judge. The local authority, Newcastle City Council, appointed an ad hoc independent inquiry after the Secretary of State refused to hold a public inquiry under section 81 of the Children Act 1989.

5.28 It might have been expected that the authority would have discussed the report under the confidential Part 2 of the agenda, without the public present.[42] In fact they decided to consider it in the public part of the meeting. This decision was driven by the desire of the local authority to protect itself from an action in defamation.

5.29 If the council had adopted a different procedure and considered the Review Team's report in private, and later decided to publish it, it might not have been able to take advantage of the statutory qualified privilege which attaches to documents discussed at a public meeting.[43]

5.30 A less well-briefed council, or, indeed, one concerned to protect the identities of the adults named in the report from becoming generally known (such as those (other than L and R) who were "smeared" in the Report) would have had to rely on the power to publish contained within section 111 of the 1972 Act (or, now,

[38] *Berry v British Transport Commission* [1962] 1 QB 306.

[39] *Skuse v Granada TV* [1996] EMLR 278.

[40] See s 15(4)(b).

[41] This case is further discussed at paras 5.42 and 5.58 – 5.59 below.

[42] See above para 5.23.

[43] See para 5.23 above.

section 2(1) of the LGA 2000) coupled with common law qualified privilege. It is quite clear from his judgement that Eady J considered that common law qualified privilege would have covered the council in the Newcastle case.[44]

5.31 Of course, the use of the Access to Information provisions simply to secure the defence of statutory qualified privilege might not survive challenge in different circumstances.

5.32 Even if statutory qualified privilege is available to the local authority, it attaches only to publication by the authority, not to the inquiry panel. The authority will almost certainly have indemnified the inquiry panel, and will therefore be concerned about their potential liabilities. The inquiry panel itself would have to rely on common law qualified privilege.

Common law qualified privilege

5.33 In *Adam v Ward* Lord Atkinson said that:

> a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral,[45] to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.[46]

5.34 This reciprocal duty-interest relationship is at the heart of the common law doctrine of qualified privilege.[47] Such a relationship has been found to subsist between a professional body and its members, an employer and employee, police and witnesses, and between a company and its shareholders, amongst others.[48]

[44] *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), para 1450.

[45] While it is clear that this will encompass legal duties to communicate or receive statements, it is less certain how far this extends in the context of moral and social duties. Moral duty was defined by Lindley LJ in *Stuart v Bell*[1891] 2 QB 341, 350. "... to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal …"

[46] [1917] AC 309, 334.

[47] A recent example is *Oliver v Chief Constable of Northumbria*. [2003] EWHC 2417. The claimant (a police officer) alleged that a press release relating to the report of an investigation by officers in the Northumbria police force was defamatory. The claimant argued that the text of the press release meant that he had knowingly, recklessly or negligently made allegations about an investigation and arrest which were not worthy of belief. On the issue of whether the press release was covered by qualified privilege, Gray J at para 10, held that it was an example of the "duty-interest" test. The subject matter was of legitimate public interest (namely the police investigation into apparently suspicious deaths of patients). The media had a social or moral duty to make enquiries, and the police had a moral or social duty, as a public body accountable to the local citizens, to respond to those enquiries. Further, the police were entitled to seek to defend the reputation of their officers.

[48] *Kearns v General Council of the Bar* [2002] EWHC 1681, [2002] 4 All ER 1075 (professional body and its members); *Coxhead v Richards* (1846) 2 CB 569; *Stuart v Bell* [1891] 2 QB 189; *Spring v Guardian Assurance* [1995] 2 AC 296 (employers); *Hunt v Great Northern Railway* [1891] 2 QB 189 (employees' interests in business); *Kine v Sewell* (1838) 3 M & W 297, 302 *per* Parke B; *Cockayne v Hodgkisson* (1833) 5 C & P 542; *Force v Warren* (1864)15 CB (NS) 806; *Nelson v Irivine* (1897) 24 R 1054 (police and witnesses); *Bryanston Finance v De Vries* [1975] QB 703; *Price Waterhouse In Trust v Wee Choo*

5.35 When applying the reciprocal duty-interest test, it is important to consider to whom publication has been made.

(1) The making of a statement by a witness to the inquiry panel itself will clearly attract qualified privilege.

(2) When the inquiry panel makes the inquiry report available to the commissioning authority this will also attract qualified privilege, as there would be a duty on the panel to report its findings, and a corresponding interest on the part of the authority to be informed of the findings. If an officer of an authority, or an insurer, were troubled by the prospect of the report being made available only to the elected members, this would be for the practical reason of fearing that those members might disseminate the information more widely (resulting in a publication to which qualified privilege did not attach), rather than on the legal ground that to do so would be indefensible in law. (In the Newcastle case, it was precisely these practical concerns that led to the Report being confined to a few officers in advance of wide publication on 12 November 1998; no elected members were allowed to read it in advance.[49])

(3) The position is not the same where the report may be made available to a section of the community, or the general public. The question of whether publication in this wider sense would attract qualified privilege under the common law is more difficult. For example, there could well be a reciprocal duty-interest in a report if it were merely distributed to those living, or working in the area of the local authority. In practice it is highly unlikely that an authority could restrict publication to people within a certain area. Too wide a publication, to persons who lack the requisite interest in receiving the information, is not privileged.[50] For example, circulating copies of the report to care staff in another authority may be justifiable in the interests of spreading best practice, but posting the report on the internet may not be. Indeed it will be recalled that it was just this uncertainty that led counsel in his opinion to Clwyd to advise that

Keng [1994] 3 SLR 801 (shareholders); *Horrocks v Lowe* [1975] AC 135, 149–50 (councillors); *Toogood v Spryng* (1834) 1 CM & R 181; *Watt v Longsdon* [1930] 1 KB 130; *Duncan & Neill Defamation Practice* (2nd ed 1983), paras 14.01 – 14.04; *Gatley on Libel and Slander* (10th ed 2004), paras 14.20 – 14.80 (general and further examples).

[49] In *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB) Eady J seems to have accepted that leaks were quite likely, which was the view taken by Council officers: "Past experience showed that the City Council tended to leak like a sieve…" (para 1403). One respondent who has himself chaired inquiries thought, "For both proper and improper purposes, politicians, being public representatives, can never be trusted to observe a protocol on publication."

[50] *Adam v Ward* [1917] AC 309, 321, *per* Earl Loreburn. See also *Watt v Longsdon* [1930] 1 KB 130, in which the claimant succeeded in his action for defamation against his employer for revealing damaging information about him to the claimant's wife, but failed as regards the communication of the same information to the chairman of the company. It was held that while Watt's wife might well have had an interest in the information, there was no reciprocity of interest between her and the defendant.

publication of the Jillings report to the public at large would not be subject to the defence of qualified privilege.[51]

(4) Nevertheless, there are occasions when the publisher can be said to have a duty to publish generally, where the general public can be said to have a genuine interest in being informed. In such cases publication to the world at large should be subject to qualified privilege. However, under the present state of the law, whether a publication is in this wider public interest depends upon the circumstances of the case, including the nature of the matter published and its source or status.[52]

THE *REYNOLDS* DECISION

5.36 A leading authority to be considered in this context is that of the House of Lords in *Reynolds v Times Newspapers Ltd*.[53] This held that there were circumstances in which publication of a story to the general public could nevertheless attract qualified privilege.

5.37 Many commentators have thought that the *Reynolds* decision was limited to the reporting of stories in the press.[54] Indeed in *Bonnick v Morris*[55] (a defamation action brought on appeal to the Privy Council) Lord Nicholls did use the phrase "responsible journalism". However, in *Jameel and another v Wall Street Journal SPRL*,[56] Eady J has recently expressed the view that this comment should be seen in the context of Lord Nicholls' judgement taken as a whole. In his (Eady J's) view, *Reynolds* did not add a new test of "responsible journalism" to the law of defamation, but was better understood as an application of the existing "duty-interest" test albeit in the journalistic context.[57]

5.38 In *Reynolds*,[58] Lord Nicholls set out 10 principles which interpret the "duty-interest" test in the context of publication by the media. We think that similar principles, suitably adapted, might be applied to the publication of local authority

[51] See above, para 1.13.

[52] *Blackshaw v Lord* [1984] QB 1, 26.

[53] [2001] 2 AC 127.

[54] See D Price, *Defamation, Law Practice and Procedure* (2nd ed, 2001),Chapter 13; *Gatley on Libel and Slander* (10th ed, 2004), paras 16.21 ff.

[55] [2002] UKPC 31; [2003]1 AC 300.

[56] [2004] EWHC 37 (QB).

[57] There had been an argument that *Reynolds* had established a new form of privilege for publication by the media, and that this was the correct reading of the Court of Appeal decision in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783. Eady J held:

> if there were any inconsistency between the judgements in that case and the speeches in *Reynolds*, it would plainly be the duty of a judge at first instance to accord priority to the majority speeches in the House of Lords. Equally, however, I must strive to construe the *Loutchansky* judgements as being consistent with *Reynolds* and *Turkington*.

Jameel v Wall Street Journal SPRL, [2004] EWHC 37, para 20.

[58] [2001] 2 AC 127, 205.

ad hoc inquiry reports. We set out Lord Nicholls' principles, with our comments on how they might apply to local authority reports in italics:

(1) The seriousness of the allegation: *The more serious the allegation, the greater the care that should be taken in any inquiry process.*

(2) The nature of the information, and the extent to which the subject matter is a matter of public concern: *This would usually be met in the context of establishing an ad hoc inquiry.*[59]

(3) The source of the information: *The sources of information provided to an inquiry should normally be identified. Hearsay evidence given to an inquiry should be treated with caution. The motives of the source should have been explored and tested.*

(4) The steps taken to verify the information: *Steps to verify information given to the inquiry should be taken.*

(5) The status of the information: *This is tied to the quality of the source of the information. Much will depend on the basis from which the inquiry is working.*

(6) The urgency of the matter: *Urgency is not so likely to be a factor in the context of ad hoc inquiries.*

(7) Whether comment was sought from the plaintiff: *The inquiry should usually approach any person who will be criticised by the inquiry for their comment, except where this would be impracticable.*

(8) Whether the article contained the gist of the plaintiff's side of the story: *The report should contain the version of events put forward by the person criticised, or their response to criticisms made by others.*

(9) The tone of the article: *The tone of the inquiry report should be temperate. An inquiry report should also distinguish carefully between what is accepted as a fact (found proved) and what is not. It should ensure that findings of fact are based on evidence presented to the inquiry.*

(10) The circumstances of the publication, including the timing: *The circumstances of publication of an ad hoc inquiry report should be appropriate to the degree of genuine public concern and need to know. Publication should not be handled in such a way as to inflame public anger nor deliberately to humiliate any person.*

5.39 Helpful though this approach may be, for the purposes of this report, the fundamental question remains: does the local authority owe a legal, moral or social duty to disclose information and, more problematic, does the public, either individual sections of the public, or the public in general, have a reciprocal

[59] Note similar criteria in statutory qualified privilege under s 15 of the 1996 Act, because s 15(3) says that qualified privilege shall not attach to the reports listed in Schedule 1 where the publication is "of matter which is not of public concern and the publication of which is not for the public benefit".

interest in receiving it? The difficulty for the authority, under the present law, lies in knowing where the boundary should be drawn between publication to which qualified privilege attaches, and publication to which it does not.

Critique: the uncertain scope of common law privilege

5.40 Nothing in the older case law supports the proposition that publication to the world *at large* is automatically subject to qualified privilege where publication to *a section* of the public falls clearly within the duty-interest test. In the CP we wrote:

> [w]hether a publication is in the public interest depends upon the circumstances of the case, including the nature of the matter published and its source or status.[60] The question is whether the local authority owes a legal, moral or social duty to disclose the information and whether the public has a reciprocal interest in receiving it. The difficulty for the authority, under the present law, lies in knowing where the boundary lies between permissible and impermissible publication.[61]

5.41 We thought there might be scope for development within the common law:

> The House of Lords in *Reynolds*[62] emphasised that cases should be decided on their individual facts, but applying the principles they enumerated. While *Reynolds* concerns the freedom of expression of the press, in particular in relation to investigative journalism as opposed to reporting,[63] and may not translate simply to the context of local authority inquiry reports (in applying the principles to local authority inquiry reports some of the principles would have to be adapted) there nevertheless seems to be considerable scope for arguing that application of these principles, and a proper balancing of the factors in the individual case, could well result in a defence of qualified privilege applying to the general publication of a [local authority inquiry] report. Whether it is put as an aspect of the duty-interest test, or as a conceptually different approach probably does not matter. *Loutchansky* demonstrates, however, that it might not be a straightforward matter, and it is not, moreover, clear how widely a report might be published with the benefit of common law privilege.[64]

5.42 In the Newcastle case,[65] Eady J did not directly apply Lord Nicholls' principles in *Reynolds* to the situation before him. Rather, he applied the duty-interest test. He took the view that Newcastle City Council may well be said to have

> an obligation to tell the public (and, in particular, its own charge payers and the consumers of its public services) what has gone wrong, to account for it and to explain how matters are going to be

[60] *Blackshaw v Lord* [1984] QB 1, 26.

[61] Para 6.24. See also para 6.33.

[62] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

[63] *McCartan Turkington Breen v Times Newspapers Ltd* [2001] 2 AC 277, 291 *per* Lord Bingham of Cornhill.

[64] Para 6.32.

[65] See para 5.27 above.

> ordered in the future to avoid similar problems: see eg *Alexander v Arts Council of Wales* [2001] 1 WLR 1840 ... That is not to say necessarily that common law protection should be available over and above the very wide privilege accorded by the legislature in the Local Government Act.[66] Nevertheless, I believe the public had a right to know what (if anything) had happened at Shieldfield. Having appointed an independent review team to inquire and report at public expense, it is difficult to see why the Council should not be protected in publishing the results. If the Terms of Reference can be criticised, or the particular Review Team exceeded their terms of reference (if they did), or they made errors, or even if they were malicious, it does not seem to me that the public is any the less entitled to know what has been going on; or the Council under less of a duty to tell them.

Such an approach goes a long way to reassuring local authorities that publication of ad hoc inquiry reports is subject to qualified privilege. However, we think they still have reason to be cautious.

5.43 In practical terms, an authority might adopt a range of approaches to release of an inquiry report.

(1) It might decide not to make it available to any member of the public at all, but merely to circulate it internally, or to other council departments or even other public bodies with an interest in the issue. While safe from the point of view of the law of defamation, such an approach hardly addresses wider issues about meeting the public interest.

(2) If it decides to go public, it might discuss the matter at a meeting open to the public. In such a case statutory privilege will apply.

(3) It might go further than that, and hold a press conference. It might send out copies only to those who ask, or only to those who can show a genuine reason for being interested, or it might, at the other extreme, put it on the authority's website. (In practice ad hoc inquiry reports are not usually accessible on the websites of local authorities, even though they may have been reported in the press on publication.) It is here that the uncertainties that arise from the current state of the law start to show themselves. An authority must consider with care how publication is to be handled, because it will be potentially responsible for publication even by people or bodies to whom the authority has not released the document.[67]

5.44 The reason for this is that it is the *occasion* of publication which attracts privilege, not the document itself.[68] Thus if a publisher (here, a local authority) releases a

[66] Which gives privilege to matters discussed at public council meetings: see paras 5.19 – 5.21 above.

[67] The publisher may be responsible for republication by another, in certain circumstances, which include those where the republication was the natural consequence of the publication by the authority.

[68] While *Reynolds* may have changed matters in relation to investigative media reporting on matters of public interest, what is in issue for us is not publication by the media. Unless the common law develops so as to apply *Reynolds* outside the context within which it arose, the authority has to be handled with care: "*Reynolds* privilege (as we shall call it), although

report to a person with no conceivable interest in it, the authority cannot claim privilege in relation to *that* "publication" simply because there was an earlier publication to members of the public who had a genuine interest in it. Each occasion of publication is looked at afresh.

5.45 Further, qualified privilege under the common law arises only as a result of the existence of a duty on the part of the publisher to communicate it and a reciprocal interest on the part of the receiver in receiving it. In *Watt v Longsdon*,[69] while communication of information to one person was privileged, communication to another was not. (This rule is tempered where there is incidental publication to people who do not have an interest in the matter communicated but "the mode of publication was reasonable bearing in mind the privileged occasion".[70]) If a publisher has a reasonable alternative open to it for limiting communication of the material to genuinely interested parties, then it should make use of that alternative. In short, under the present state of the law a local authority cannot view the public as an undifferentiated mass.

5.46 The immediate availability of world-wide electronic communication through the world wide web of a document was not feasible at the time of *Horrocks v Lowe.* Today, a court might take account of the differing ways in which documents can be published and made available to people. However, we think that the more indiscriminate the mode of publication, the less likely it would be that qualified privilege would apply to the publication.

5.47 A court might take a broader view of who has the required interest in the subject-matter of a report. Local council tax payers clearly have the required interest. In addition, as funds are paid to authorities by central government from general taxation, the general body of tax payers could have an interest. The notion of who has a genuine interest in the functions of local authorities should not be limited to those who pay for them. Recipients of services also have such an interest. For example, a child is neither an elector nor a tax payer, but has an interest in how social services functions are carried out.

5.48 There are several reasons why, if the point arose, a court might find that the common law afforded qualified privilege to the general publication of a local authority inquiry report so long as it was of genuine public interest, and publication had not been indiscriminate. But until the point is decided by a court, it remains uncertain. In any event, such a broad approach would not necessarily be applied to all ad hoc inquiries, but might well be dependent on the nature and scope of the inquiry.

built upon an orthodox foundation, is in reality sui generis": *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783 para 32, *per* Lord Phillips.

69 [1930] 1 KB 130. See n 50 above.

70 D Price, *Defamation: Law, Procedure and Practice* (2001) 12–06, citing *Tench v GW Ry* (1873) 33 UP Can QB 8. Consider also *Cunningham v Essex CC* where, although a reference letter attracted privilege for publication to the Assistant Education Officer, its "casual onward transmission" meant that it lost privilege when passed to someone else. The court took account of the defamatory nature of the contents, and the fact that it was not put in an addressed envelope, nor marked confidential: unreported, 99/NJ/0457, para 97.

What respondents said

5.49 In response to the CP, while some respondents reported that the fear of a defamation action had not given rise to problems, others expressed concern about how far publication would be protected by common law qualified privilege. For example, Elizabeth Lawson QC wrote, on behalf of the Family Law Bar Association, "We endorse all the report says about the lack of clarity in this area of the law in relation to qualified privilege. In our experience it was fear of defamation proceedings rather than invalidation of insurance cover that was the concern."

5.50 Andrew Arden QC took a similar line: "It does, however, cause me concern that insurance companies enjoy such power over the decision whether or not to publish a report. Insurance companies will invariably opt for the safest course, which is confidentiality."

5.51 One respondent specifically referred to restrictions being imposed by the insurance company on the range of recipients: "…as a recent development, the Insurers are now requiring … that publication be restricted to the absolute number of interested parties who are required to receive the report and to no one else."

Conclusion

5.52 While there may be further developments in the common law, it cannot be said with certainty that the common law defence of qualified privilege will be available to the report of a local authority inquiry no matter to whom it is published. The exact nature of the reciprocal duty-interest that must exist between the publisher and the person to whom the document is published is not clear in the existing case law.

MALICE

The doctrine

5.53 The rationale for the defence of qualified privilege lies in the need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. It also arises from the duty or need for the "publisher" to communicate freely on the occasion in question. Qualified privilege is the means by which the law seeks to achieve that end.[71] However, it is only a privilege. Abuse of qualified privilege will result in the loss of the privilege.

5.54 The point is clearly put by Lord Diplock:

> [I]n all cases of qualified privilege there is some special reason of public policy why the law accords immunity from suit – the existence of some public or private duty, whether legal or moral, on the part of the maker of the defamatory statement which justifies his communicating it or of some interest of his own which he is entitled to protect by doing so. If he uses the

[71] See *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 195, *per* Lord Nicholls.

> occasion for some other reason he loses the protection of the privilege.[72]

5.55 Malice denotes the circumstances in which the occasion of publication may be said to have been abused. The defence of qualified privilege is defeated by proof that the defendant published the words complained of maliciously. Express or actual malice is ill will or spite towards the claimant or any indirect or improper motive in the defendant's mind[73] which is their sole or dominant motive for publishing the words complained of.[74] Where the defendant's sole or dominant motive for publication was ill will towards the claimant or some other improper motive, malice may still be proved, notwithstanding that the defendant believed what he or she said was true. The problem here is to know when the concept of malice will apply. Further, the question of whether there is malice is a question to be decided by the jury.

5.56 The leading modern decision is that of the House of Lords in *Horrocks v Lowe*.[75] In his judgment, Lord Diplock emphasised that indifference to the truth was not to be equated with carelessness, impulsiveness or irrationality. He said:

> In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.

5.57 The relationship between the defence of qualified privilege and malice also arose for consideration in *Reynolds*. Lord Nicholls stated:[76]

[72] *Horrocks v Lowe* [1975] AC 135, 149.

[73] See *Angel v HH Bushell & Co Ltd* [1968] 1 QB 813, 831 (where a defamatory letter was motivated by anger, not by duty or any interest, and a defence of qualified privilege was defeated); *Clark v Molyneux* (1877) 3 QBD 237, 247; *Nevill v Fine Arts and General Insurance Co Ltd* [1895] 2 QB 156, 169; *Lewis v Mullaly*, *The Times* 3 December 1953 (using an occasion of qualified privilege for an improper motive); *Suzor v Buckingham* (1914) SC 299 (jealousy); *Horrocks v Lowe* [1975] AC 135, 152 (failure to make any apology or retraction of retraction of the allegation made is not generally good evidence of malice); *Broadway Approvals Ltd v Odhams Press Ltd* [1965] 2 All ER 523, 533 *per* Sellars LJ (nor is persistence in plea of justification by itself evidence of malice). For motives *Royal Aquarium and Summer and Winter Garden Society Ltd v Parkinson* [1892] 1 QB 431, 444 *per* Lord Esher MR; *Stevens v Sampson* (1879) 5 Ex D 53, (where a defendant sent a fair report of legal proceedings to newspapers but was found to have acted maliciously). The decision for the claimant was upheld on appeal; *Turner v Metro-Goldwyn-Mayer Picture Ltd* [1950] 1 All ER 449 (the House of Lords held that being actuated by financial considerations is not necessarily evidence of malice).

[74] *Horrocks v Lowe* [1975] AC 135, 149-151 *per* Lord Diplock dealing with malice in relation to qualified privilege. See also *Cheng v Tse Wai Chun* [2000] HKCFA 86.

[75] [1975] AC 135.

[76] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 194.

> If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not.

5.58 Malice may also arise from a "dominant motive": "For a man who honestly believes what he says may yet be actuated by malice and such malice may be established by other evidence than the inference to be drawn from the falsity of the statement."[77] However, the circumstances in which such a dominant motive can be demonstrated now appear to be very restricted. In the Newcastle case, Eady J observed:

> The traditional approach to malice, at least in the quarter of a century since their Lordships' decision in *Horrocks v. Lowe*, is that it is for the claimant in a libel action to prove the defendant "malicious", in the sense of demonstrating either that he had no honest belief in the words complained of or, at least, that the dominant motive in publishing those words was to damage the claimant's reputation. It was recognised by Lord Diplock that recklessness too had a role to play, as in other areas of law. Thus, malice could be demonstrated if a claimant proved the defendant to have been genuinely indifferent to the truth or falsity of the defamatory allegations.[78]
>
> I am not aware of any example of malice having been found (in a case where the judge or jury concluded that the relevant defendant was honest) simply on the basis that the dominant motive was to injure the claimant. It is, in the light of Lord Diplock's speech, at any rate a theoretical possibility. It may be, however, that it is an increasingly remote one in the light of recent authorities.[79]
>
> It is now clear, for example, in the light of *Albert Cheng v Paul* [2001] EMLR 777 that in the context of fair comment the issue of malice requires to be judged solely by the test of honesty; there is no room to find malice on the basis of "dominant motive" in circumstances where a claimant fails to demonstrate that the comment was not made honestly. Moreover, in the specific context of what is often referred to as "*Reynolds* privilege" the concept of malice has receded somewhat into the background. That is because issues formerly thought to be relevant only to malice now come into play at the stage of determining whether there is a *prima facie* case of qualified privilege (in particular, the application of Lord Nicholls' ten non-exhaustive tests: *Reynolds v Times Newspapers* [2001] 2 AC 127, 205).[80]

[77] *Horrocks v Lowe* [1975] AC 135, 146 *per* Viscount Dilhorne.

[78] *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), para 1090.

[79] *Ibid,* para 1091.

[80] He cites here Lord Phillips MR in *Loutchansky v Times Newspapers Ltd* [2001] EWCA Civ 1805; [2002] QB 783, paras 33 and 34.

> … the argument merely provides an illustration of how "dominant motive" appears to be nowadays more of an endangered species of malice than ever.[81]

5.59 On the facts before him, Eady J found malice proved in its strongest sense: that the Review Team did not have an honest belief in statements made in their report. He did not therefore have to explore in depth whether "dominant motive" still has a role to play in malice in the context of qualified privilege.

5.60 On the basis of the current authorities, the law is that where the defendant did not believe that what he or she said was true[82] this is conclusive evidence of malice to defeat the defence of qualified privilege. (In relation to the defence of fair comment it is usually conclusive evidence of malice to demonstrate that the defendant did not honestly hold the opinion expressed.[83])

5.61 Malice will also be held to exist where a defendant publishes material that is untrue, without considering or caring whether it be true or not, as the defendant is then treated as if he knew the material to be false. Similarly, if a defendant publishes defamatory material recklessly, without considering or caring whether it is true or not, he is similarly to be treated as if he knew it was false. Publication in such circumstances would not attract qualified privilege.

5.62 However, where a publisher has been merely careless or impulsive or indeed irrational, this will not be sufficient to lead to a finding of malice.[84]

Critique of the law

5.63 There are arguments that, as thus defined, malice is too narrow a concept. In particular, it is argued that those who have been defamed in an ad hoc inquiry report that has been carelessly written and published may not have an adequate means of redress. For example, Lord Hobhouse in *Reynolds*, observed:

> The decided cases also show that, anyway in English law, the doctrine of express malice does not provide an adequate safeguard. It is a very narrow doctrine as explained by Lord Diplock in *Horrocks v Lowe* [1975] AC 135. The plaintiff has to prove that the publisher did not have an honest belief in the truth of what he was publishing: "the law demands no more" (p 150E). The subjective character of this criterion makes the plaintiff's burden of proof one which it is difficult to

[81] *Lillie and Reed v Newcastle City Council* (1st Defendants) *and Barker, Jones, Saradjian and Wardell* (2nd–5th Defendants, referred to as "the Review Team") [2002] EWHC 1600 (QB), para 1093.

[82] *Horrocks v Lowe* [1975] AC 135, 150 *per* Lord Diplock. A review of the doctrine by the High Court of Australia in *Roberts v Bass* [2002] HCA 57, 194 ALR 161, makes the argument that the real test is not absence of belief in truth or indifference to truth, but rather awareness of untruth

[83] *Ibid* at p 149–151.

[84] *Horrocks v Lowe* [1975] AC 135 at p 150 and 151 *per* Lord Diplock. The only kind of recklessness that destroys qualified privilege is indifference to the truth or its falsity. This is one explanation of *Royal Aquarium and Summer Winter Garden Society v Parkinson* [1892] 1 QB 431.

discharge in all but the most blatant cases. It is also inadequate to meet the objective requirements of a satisfactory law of privilege.[85]

5.64 In addition, the New Zealand Court of Appeal in *Lange v Atkinson*[86] held:

> What constituted malice was restated in *Horrocks v Lowe* [1975] AC 135, 149–150 by Lord Diplock, in what have since been regarded as authoritative terms. His reference in that restatement to carelessness, impulsiveness or irrationality not being equated to indifference must be read in context. The proposition does not qualify the preceding statements which cover lack of genuine belief and recklessness. Thus while carelessness will not of itself be sufficient to negate the defence, its existence may well support an assertion by the plaintiff of a lack of belief or recklessness. In this way the concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration.
>
> Lord Diplock gave a helpful description of recklessness in the present field when he spoke of someone who publishes defamatory material "without considering or caring" whether it was true or false. Indifference to truth is, of course, not the same thing conceptually as failing to take reasonable care with the truth but in practical terms they tend to shade into each other. It is useful, when considering whether an occasion of qualified privilege has been misused, to ask whether the defendant has exercised the degree of responsibility which the occasion required.
>
> What constitutes recklessness is something which must take its colour from the nature of the occasion, and the nature of the publication. If it is reckless not "to consider or care" whether a statement be true or false, as Lord Diplock indicated, it must be open to the view that a perfunctory level of consideration (against the substance, gravity and width of the publication) can also be reckless. It is within the concept of misusing the occasion to say that the defendant may be regarded as reckless if there has been a failure to give such responsible consideration to the truth or falsity of the statement as the jury considers should have been given in all the circumstances. In essence the privilege may well be lost if the defendant takes what in all the circumstances can fairly be described as a cavalier approach to the truth of the statement.
>
> No consideration and insufficient consideration are equally capable of leading to an inference of misuse of the occasion. The rationale for loss of the privilege in such circumstances is that the privilege is granted on the basis that it will be responsibly used. There is no public interest in allowing defamatory statements to be made irresponsibly – recklessly – under the banner of freedom of expression. What amounts to a reckless statement must depend significantly on what is said and to whom and by whom. It must be accepted that to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended

[85] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127,

[86] [2000] NZCA 95.

> dissemination, may in some circumstances come close to a need for the taking of reasonable care. In others a genuine belief in truth after relatively hasty and incomplete consideration may be sufficient to satisfy the dictates of the occasion and to avoid any inference of taking improper advantage of the occasion.[87]

5.65 This might suggest that the circumstances in which malice might be found to exist in New Zealand are somewhat wider than the English case law allows, with greater focus on the reasonableness or otherwise of the person who published the document. Indeed, in the Newcastle case, it was argued before Eady J that, in assessing the role of carelessness and the standard of care that should properly be expected of the Review Team, he should follow the lead of the New Zealand Court of Appeal.[88] Such an approach might lead to a finding of malice in cases where the inquiry process has been unreasonable, thus leading to unfairness. [89]

5.66 Against this proposition it was argued that the exposition of the law in the New Zealand case was of no application in English law.[90] Eady J accepted that superior authority in England had treated the New Zealand approach as being distinct from that of English law and therefore he was bound to do so too.[91] Eady J also appears to take a narrower view of what the New Zealand Court of Appeal had decided, and that malice (recklessness) could be inferred if the process of investigation was a cavalier one.[92]

5.67 There are other reported cases, decided before *Horrocks*, which suggest the possibility of a broader approach. For example Lord Esher MR gave the issue of malice and whether there was abuse of the occasion of publication careful consideration in *Royal Aquarium v Parkinson*,[93] (a case on fair comment, rather than qualified privilege). There the defendant, who held strong views on music halls, stated in a licensing meeting of the London County Council that he had witnessed an indecent performance at the claimant's premises. In fact the performance had been wholly innocent.

5.68 Lord Esher stated:

> Then comes the question whether this was a privileged occasion. Where, as in this case, a body of persons are engaged in the performance of the duty imposed upon them, of deciding a matter of public administration, which interests not themselves, but the parties concerned and the public, it seems to me clear that the occasion is

87 *Ibid,* paras 44–48.

88 See *Lange v Atkinson* [2000] NZCA 95 and para 5.71 below.

89 In *Loutchansky v Times Newspapers Ltd* (Nos 2 - 5) [2001] EWCA Civ 1805, Lord Phillips MR remarked (para 25) that the New Zealand Court of Appeal had "redefined the concept of actual malice to provide a stronger safeguard against abuse."

90 *Ibid*, para 1293.

91 *Ibid*, para 1295.

92 He states that, in his preliminary view, the New Zealand exposition did not wholly diverge from the English authorities (see, *ibid* para 1294).

93 [1892] 1 QB 431 (CA).

> privileged. Therefore, though what is said amounts to a slander, it is privileged, provided the person who utters it is acting bona fide, in the sense that he is using the privileged occasion for the proper purpose and is not abusing it. It is sometimes said that he must be acting bona fide and not maliciously; but I do not think that that way of expressing the rule is quite exhaustive or correct. I think the question is whether he is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue, no one ever doubted that he would be abusing the occasion. The jury here appear to have thought that the defendant said what was false knowing it to be false. I cannot agree with that view of the case. If the case depended on a finding to that effect, I should be very loth to find it. But there is a state of mind, short of deliberate falsehood, by reason of which a person may properly be held by a jury to have abused the occasion, and in that sense to have spoken maliciously. If a person from anger or some other wrong motive has allowed his mind to get into such a state as to make him cast aspersions on other people, reckless whether they are true or false, it has been held, and I think rightly held, that a jury is justified in finding that he has abused the occasion. ... I think that gross and unreasoning prejudice, not only with regard to particular people, but with regard to a subject-matter in question, would have the same effect.[94]

5.69 It is arguable that, if the foundation of the concept of qualified privilege is properly understood, the defence should fail in circumstances rather wider than lack of honest belief or recklessness/indifference to the truth. We think that there is scope for the common law relating to malice to be developed on lines indicated by the New Zealand Court of Appeal.[95] But, as was made clear by Eady J, this is an exercise that could only be undertaken by the Court of Appeal or the House of Lords, or by statutory amendment to the common law doctrine of malice.

Public policy considerations

5.70 Such an approach would be appropriate, in the context of local authority inquiry reports, for reasons of public policy.

A duty on a person acting in an official capacity

5.71 In *Lange v Atkinson* the New Zealand court referred to the argument that public power should be exercised honestly. This includes not being reckless with the truth. We would submit that an inquiry panel and a local authority are under just such a "duty" in the exercise of their respective powers to investigate and report, and to publish.

5.72 In *Horrocks v Lowe*, Lord Diplock referred to people forming their beliefs in the course of "ordinary life" which dictates the standard of reasoning that might be expected. It is arguable that local authority officers or inquiry panel members act in an official capacity, exercising powers and duties owed to other people. In that

[94] [1892] 1 QB 443, 444 *per* Lord Esher MR. See also *Clark v Molyneux* (1877) 3 QBD 237, 247 *per* Brett LJ.

[95] As we note above, Eady J was dubious about the view that this reasoning is inconsistent with earlier English authority: see para 5.66 above.

capacity they should exercise a *greater* standard of care as they affect the rights and interests of others. If this is correct then it may be argued that in order to satisfy the requirements for the defence of qualified privilege and defeating a claim of malice that a review panel member or local authority officer needs to display a greater degree of care with the truth and even a higher quality of reasoning than the ordinary person leading an "ordinary life".

5.73 The degree of care should, we would submit, shift according to the occasion and the nature of the duty, as described in *Lange v Atkinson*.

The local authority's duty of accountability

5.74 Secondly, as we said in the consultation paper, it is in the public interest that local government is open and accountable. The local authority may have a duty to put information into the public domain, as spelt out by Eady J.[96] Clearly its duty is different from that of the inquiry team. We think that the occasion of publication should require a local authority at least to take care with the truth of the content of the report. This should entail the authority satisfying itself that, as far as it can tell, the inquiry has been conducted fairly, as the circumstances require, and the conclusions are sustainable.

The countervailing need to protect individuals' reputations

5.75 Although openness is very desirable, there is still a need to protect the reputations of individuals. In Lord Hobhouse's words: "No public interest is served by publishing or communicating misinformation. There is no duty to publish what is not true: there is no interest in being misinformed."[97] Eady J hints that the law has not reached the right point of balance between the interests of open communication and the protection of individuals' reputations:

> I am not sure that privilege would have been upheld a few years ago for communications made outside council meetings or which fell outside a specific statutory veil of protection. But now I believe that public policy would be interpreted in such a way as to protect even a general publication as an exercise in open (local) government. Freedom of communication would prevail. It may be argued that public policy has swung too far in that direction against the interests of those whose reputations may have been damaged in the process. It is always important to remember that there is no public interest in misinformation: see e.g. the words of Lord Hobhouse in *Reynolds*. But, in so far as I can gauge public policy as now expounded in recent judicial decisions, I consider that reputation would be regarded as sufficiently protected in circumstances of this kind by the availability of remedies in respect of malicious or, in some cases, negligent mis-statements.[98]

[96] *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), para 1450. See para 5.42 above.

[97] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

[98] *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), para 1451.

The lack of other remedies

5.76 It is our view that negligence is unlikely to offer an adequate remedy. There will be difficulty in establishing a sufficiently proximate relationship between the inquiry panel and the subjects of the inquiry to establish a duty of care.[99] If it is necessary to show that a third party (a reader of the inquiry's report) relied on the report, this might be problematic, because the reader might have done no more than believe its contents. Even if such a legal relationship can be established it is likely in many circumstances that a court would not impose liability, on the grounds that it would be against public policy.[100] Even if a court found it was not contrary to public policy and that an inquiry panel, or a local authority, owed a duty of care to a person criticised in a report and had breached that duty,[101] a person would not be able to claim damages on the same basis as in defamation. The person unfairly criticised might say that their "loss" arose out of the alteration in the opinion that others had of him or her, as a result of the negligence. Such damage might not be directly measurable in pecuniary terms – it is the kind of damage that is addressed in an action in defamation. If the claimant could not prove economic loss, or physical damage, that had been suffered as a result of the negligence, then there would be no compensation to the unfairly defamed individual via an action in negligence.

5.77 As regards negligent misstatement, a claimant must reasonably rely on the statement made by the defendant, to the claimant's detriment. It is unclear this would be generally applicable to an inquiry report published by a local authority.

5.78 Thus a potential claimant is almost certainly going to have to fall back on malice to protect his reputation where otherwise publication would be subject to qualified privilege. We agree with Lord Hobhouse that too much depends on the ability to prove malice. The situation may arise where a report is published, without there being malice in the narrow sense, but where it results from such an unfair process, or is of such poor quality that it ought not to have been made available to the public.

5.79 In *Lillie*, Eady J found that there was malice because the Review Team were dishonest in that they made claims in the Report which they must have known were not true. He also criticised their reasoning powers. Had he found that their reasoning powers and lack of objectivity were seriously wanting, but that there had been no dishonest assertions in the Report, he would not have found

[99] There are cases where it has been argued that a local authority officer, or other inspector, such as a person employed by the Health and Safety Executive, or an auditor, owes a duty of care to the person whose livelihood was affected by the negligence of the officer: *Welton v North Cornwall District Council* [1996] EWCA Civ 516, [1997] 1 WLR 570 (Environmental Health Officer); *West Wiltshire District Council v Garland* [1995] Ch 297 (auditor employed by the Audit Commission); *Harris v Evans* [1998] 3 All ER 522 (HSE inspector). The claimant in the first of these succeeded, but not in the others. See also *Yuen Kun-yeu and other v AG of Hong Kong* [1987] 2 All ER 705 (no duty of care between the Commissioner of Deposit-Taking Companies and depositors).

[100] DeSmith, Woolf and Jowell, *Judicial Review of Administrative Action* (5th ed 1995) para 19–043 endorses this line of reasoning.

[101] By negligently including errors of fact in the case of the inquiry panel, or, in the case of the local authority, by publicising a report without checks on its quality, or in the appointment of the members of the panel.

malice.[102] In that situation, the claimants would have had no redress despite the promulgation of inaccurate allegations, with the imprimatur of an independent inquiry, about extremely grave matters.[103] As regards the position of the local authority, it appears that under the present law, so long as there is an honest belief in the truth of the report, even if the authority barely reads the report or is incapable of taking an objective view of it, qualified privilege will attach.

Maintaining the quality of inquiries

5.80 One respondent, an independent journalist, challenged our view of the adequacy of inquiries. He thought that even without bad faith, there is a likelihood that an inquiry and report will reach unsound conclusions, because the inquiry team will be "cocooned" by privilege:

> they may construe such privilege as a licence to distort or misrepresent the evidence before them in order to bolster conclusions which have been arrived at more by prejudice than by due process.
>
> …
>
> It is in this perspective, I believe, that the Shieldfield libel trial should be viewed. Although some might argue that the approach taken by the members of the Shieldfield inquiry was a complete aberration, my own impression is that they reacted in a way which is not uncommon among educated and highly intelligent people when emotive subjects such as child abuse are at issue. A key factor here is "noble cause corruption". If it is the case that the more noble the cause, the more likely it is to engender dishonesty and deception on the part of normally honest citizens, then allegations of child sexual abuse may be particularly prone to lead to just the kind of untruthfulness which was repeatedly exposed in the Shieldfield libel trial.
>
> It is precisely for this reason that it would be dangerous to increase the legal protection already enjoyed by local authority inquiries.

[102] In *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB), Eady J held: "Yet bias and lack of objectivity are definitely not, in themselves, to be equated to malice (although they can sometimes provide evidence of indifference to truth)" (para 1267) and commented on the Review Team's "prejudice and undisciplined mental processes" but added, "Such matters, standing alone, are not to be equated with the concept of express malice" (para 1303).

[103] The need for redress was argued by a respondent, FACT–North Wales:

> The ability (in theory at least) to sue for defamation is often the only recourse for an individual who has been falsely accused to remedy a wrong. This right should not be discarded lightly or weakened in any way. In the experience of FACT - North Wales the reputations of individuals are very often sacrificed by a system which far too often (although not always) is politically motivated and/or panders to prejudice or vote catching initiatives.

FACT–North Wales is the local branch of a national organisation which campaigns against False Allegations Against Carers and Teachers and has branches throughout England and Wales.

It might be tempting to see the report on the Shieldfield nursery as such a one-off that it can be disregarded. It is certainly very unusual, so far as we are aware, but it does not follow that the Shieldfield report was an aberration in all respects.

5.81 We suggest that there are two separate stages at which matters went wrong, both stemming from the personal conviction of the councillors and the inquiry team that Lillie and Reed had done those things of which they had been acquitted. First, there was the failure of the inquiry team to conduct the inquiry fairly; second was the failure of the council to take an objective view of the report. Where there is such prejudice, it is quite likely that it will infect the inquiry team as well as the body commissioning it, and so the two failures could easily go hand-in-hand.

5.82 The Family Law Bar Association also had serious reservations about the quality of the Part 8 Reviews[104] of which it has experience:

> we recognise that we tend to see only the inquiries where the Part 8 Review has been found to be unsatisfactory. How much that stems from the procedures and how much from the way in which they are applied, is difficult to say. There are certainly problems arising from the conflicting aims of such reviews, the lack of any powers of coercion, and the two tier structure, when a high profile case is involved. One of the main problems is often the most basic – the factual accuracy of what is produced. Errors in chronologies, which may have been produced in haste and on the base of partial information, remain uncorrected. A lot of real injustice can be done in these circumstances.

5.83 If qualified privilege were defeasible not only where the defendant publisher (inquiry team or local authority) does not believe the report to be true or is indifferent as to its truth, but also where the defendant publisher has failed to exercise the degree of responsibility which the occasion of publication required, justice would, in our view, be better served. As with the extent of qualified privilege under the common law, it would be open to the common law to be developed to resolve this problem.

CONCLUSION: THE CASE FOR REFORM OF THE LAW

5.84 The problem presented to us by Waterhouse was how publication of reports of local authority ad hoc inquiries might be facilitated. Our researches suggested that there was no statutory privilege that would apply where a matter was not discussed at a public meeting, and the extent of common law privilege was uncertain. This lack of certainty promoted caution, and made insurance companies nervous. Thus publication was likely to be discouraged. Our provisional proposal was aimed at increasing certainty by making qualified privilege available to an appropriate extent, in a way that was tied to the quality of the inquiry report.

5.85 The Newcastle case and the comments of respondents have, however, prompted us to examine the issue from a different angle: the interaction of common law

[104] Part 8 Reviews are inter-agency reviews. See para 2.32 above.

and statutory privilege with malice. Qualified privilege is only defeated where the "publisher" lacks an honest belief, however blinkered, or acts with an ulterior motive. If the common law "duty-interest" test is satisfied, a report which contains defamatory and unsustainable conclusions, or which has been compiled through a process which breaches principles of natural justice, will benefit from qualified privilege.

5.86 We now see that the issue is not just about facilitating publication. It also relates to concern for the protection of individuals who may be criticised unfairly in public. While different from that of facilitating publication, it is not inconsistent with it. The aim should be to facilitate publication of fair reports, and not to facilitate publication of unfair reports.

5.87 The courts *could* reach the position we think should follow through development of the common law. The circumstances in which local authority ad hoc reports attracted qualified privilege could be more clearly defined. And the doctrine of malice could be developed so as to provide a remedy, not currently available, to those subject to an unfair inquiry process.

5.88 That said, it is relatively unlikely that a case will arise at the necessary level within the court system to bring all these points up for consideration. Neither potential claimants nor local authorities will find it easy to find funds for litigation. Even if an appropriate case arose, we cannot guarantee that the courts would adopt the views we have expressed in this report. So the situation could remain unchanged for years.

5.89 Until the law does evolve, there remain two problems, which our proposals for reform of the law seek to address. The first is the problem of uncertainty. While the law is uncertain, uncertainty will remain a serious disincentive to publication, both for local authorities and their insurers. The second is a question of justice. We are not convinced that the current state of the law of defamation, in particular the law of malice, strikes the correct balance between the interests of the local authority to publish inquiry reports, and the interests of those named in them to be protected from unfounded defamatory statements.

5.90 It is legitimate to propose an alteration of the law limited to local authorities because (a) the report of an inquiry established by a local authority is likely to have a considerable degree of authority in the minds of those members of the public who read it; and (b) a local authority should have some responsibility for satisfying itself that an inquiry conducted on its behalf is conducted properly.

5.91 For both these reasons, we conclude that there should be statutory reform.

PART VI
QUALIFIED PRIVILEGE: OUR PROPOSED REFORMS

INTRODUCTION

6.1 Our analysis of the law in the previous Part led us to two principal conclusions:

(1) to address the issues raised by Waterhouse and reflected in our terms of reference, steps should be taken to enable local authorities to be more confident about their ability to publish reports of ad hoc inquiries, assuming that they had been conducted fairly; and

(2) there were circumstances in which any protection that might otherwise be afforded to the publishers of ad hoc inquiry reports should be lost where the inquiry had not been fairly conducted or where the conclusions were not fairly drawn from the evidence received, but where the current law of malice would not assist the person against whom defamatory allegations had been unfairly made.

6.2 In this Part, we set out our recommendations for dealing these issues. Before we turn to the detail of our recommendations, we must consider two preliminary questions. First, is a statutory solution the right route to take? Second, if the answer to the first question is yes, should the law of defamation be amended in this particularly detailed way by statute, without the whole of the law of defamation being subject to comprehensive review and proposals for reform?

PRELIMINARY QUESTIONS

Is there a need for a statutory solution?

6.3 Our analysis of the law, particularly relating to qualified privilege, reveals that there have been important developments in the case law recent years. The *Reynolds* decision in the House of Lords indicates that, so far as the reporting of stories in the news media is involved, qualified privilege will attach to the general reporting of matters that are in the public interest, where those writing the story have taken proper care in the gathering of the information on which the story is based. We indicated how the 10 criteria advanced by Lord Nicholls might be developed so as to apply to local authority ad hoc inquiries.[1]

6.4 We also noted that, contrary to suggestions made in the relevant text books, the principles set out in the *Reynolds* case should not be seen as limited to the publication of reports in newspapers or other news media. Rather, it should properly be seen as a particular application of the reciprocal duty-interest test that is at the heart of the concept of qualified privilege.

[1] See above para 5.38.

6.5 The High Court could have used the *Lillie* case[2] to lay down some general guidance on the point. However, the decision - which was long and complex, mostly dealing with evidence put before the court - did not take that opportunity. Our conclusion was, therefore, that local authorities and their insurers would still not feel confident about which occasions of publication of an ad hoc inquiry report might attract qualified privilege.

6.6 Our analysis of the law of malice suggested that this is a concept that is currently narrowly conceived in English law. Thus it will be of limited use to the person who has been defamed, and who is seeking to have the defence of qualified privilege lifted. We noted that in other common law jurisdictions the law seemed to be somewhat broader in scope. Indeed, there were cases in English law, decided prior to the decision of the House of Lords in *Horrocks v Lowe*, that suggested ways in which the law in England might be able to develop, which would reflect developments elsewhere, particularly in New Zealand. However this could not be achieved by a decision of the High Court. Such a development would need the authority at least of the Court of Appeal, most probably the House of Lords.

6.7 As noted at the end of Part V, there are two fundamental problems in relying entirely on developments in the common law to address the issues raised by our terms of reference. First, an appropriate case has to come before the courts, and one that squarely raises the issues we have identified will by definition be unpredictable. Second, the judges who dealt with the case would have to share our view of the problems raised and how they might be addressed.

6.8 Thus, although we can see that judicial developments in the common law could provide solutions to the matters we have identified, we conclude that, given our terms of reference, we would not have done what we had been asked to do, were we to let matters await judicial determination.

6.9 There is a related, though different, issue which must also be addressed. Although the present state of the law may be regarded as so unsatisfactory as to justify reform, it may be argued that the statutory reforms that are recommended are such that the scheme proposed would be no better than, and perhaps worse than the current - admittedly unsatisfactory - state of the law. We have taken this argument fully into account in making our recommendations for reform. We think that, if enacted, they will represent a significant improvement on the current state of the law.

Should reforms be proposed in isolation from a general review of the law of defamation?

6.10 It is quite clear, from our analysis of those parts of the law of defamation that we have considered, that there are many aspects of the law that are complex and difficult. The complexity of the law of defamation has been commented upon on many occasions.[3] It has been the subject of review.[4] There are indications that

[2] *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB).

[3] "I have on many occasions heard judges and litigants complain of the law and practice of defamation...[T]he law should not only be available to all, but be capable of being generally understood." Comment by the late George Carman QC in Introduction to David Price, *Defamation: Law Procedure and Practice* (2nd ed) (Sweet and Maxwell, 2000).

the current law fails to take account of modern circumstances, particularly arising from the development of new technologies.[5] At the same time, it is equally clear that our terms of reference preclude us from wholesale review of the law of defamation. We conclude that the recommendations of this report should not await the possibility of such a comprehensive review, which could be some time off.

6.11 We think that the reforms we propose can properly stand on their own. They address the concerns expressed in the Waterhouse report, and reflected in the responses to our consultation paper. They should not await a more comprehensive review of the law of defamation. That would not be in the public interest. Whether or not there should be a more comprehensive review of the law of defamation is a matter for Government to determine.

AN ADDITIONAL FORM OF STATUTORY QUALIFIED PRIVILEGE

6.12 In the CP, we provisionally proposed extending statutory qualified privilege to any local authority inquiry report where

(1) the inquiry had been fairly conducted;

(2) the report

(a) was about a serious matter of genuine public interest

(b) only contained judgements and apportionment of blame where they were supported by the factual findings of the inquiry panel; and

(3) the report only contained criticisms of people which had been put to them in advance of publication, with an opportunity for them to respond and, subject to the requirements of observing confidentiality, those responses were fairly represented in the report.

6.13 The rationale for proposing the additional statutory qualified privilege was founded on two propositions. First is that where a local authority has taken all the steps it reasonably can to ensure that an inquiry is fair, both in terms of the procedures adopted and in terms of the substance of the report, then it is in the public interest that it should have a defence to any action in defamation. (If the authority failed to take those steps, but the inquiry process was in fact fair, it should also have the benefit of the proposed new defence.)

6.14 Secondly, a person who is publicly defamed in a report should not find their defamation claim defeated by the defence of qualified privilege where the authority had not done what it reasonably could to ensure that the inquiry process was fair, and the inquiry had not been conducted fairly.

[4] *Report of the Committee on Defamation* (1975) (Chair: Mr Justice Faulks) (Cmnd 5909, 1975, HMSO).

[5] See Law Commission *Defamation and the Internet: A Preliminary Investigation*, Scoping Study No 2 December 2002.

6.15 In particular, an inquiry should be treated as not having been conducted fairly unless the person holding the inquiry had based his or her conclusions on findings of fact; the person holding the inquiry had, so far as practicable, given every person criticised in the report the chance to respond to those criticisms; and that any such response was fairly reflected in the report or any summary of the report.

6.16 If the local authority was not satisfied as to the fairness of the inquiry and the inquiry was not in fact fair, the new statutory privilege should not be available. Nor should the common law defence of qualified privilege. The authority should not have a further fall-back position of which it could take advantage. We want local authorities to take full responsibility for ensuring the fairness of the inquiry.

Which inquiries are covered?

6.17 In developing our thinking, we came to the view that to limit the new statutory qualified privilege to inquiries into a "serious matter of genuine public interest" would be to invite unnecessary argument about the circumstances in which the proposed defence would apply. In practice local authorities will not in fact contemplate the establishment of an ad hoc inquiry unless there has been a failure of function which clearly justifies further investigation. We have therefore decided to omit the test of "serious matter of genuine public interest". Instead, the test we recommend is the more general one of "a failure in the exercise of a function[6] of theirs".

Ad hoc inquiries

6.18 The definition of a local authority ad hoc inquiry is discussed above.[7] Our objective was to focus on inquiries set up to investigate things that had gone wrong, where the local authority had acted under its general powers,[8] rather than under specific statutory powers or duties to set up inquiries. Our reason for limiting the scope of our proposal to ad hoc inquiries was that it was this class of inquiry which was not already governed by specific statutory provisions.[9]

6.19 We have decided to retain this limitation. Our recommendations do not apply to reports of inquiries established under specific statutory powers. Thus, our recommendations do not extend to inquiries, reviews or investigations established as a result of a direction from a Minister, or an express duty laid on an authority by statute, or an express power (other than the new power to establish a special inquiry which we recommend in Part VIII below).

6.20 In the CP we also provisionally proposed that inquiries held under the standing orders of the local authority, for example into routine complaints or employment

[6] It has been held that "functions" embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions. *Hazell v Hammersmith and Fulham LBC* [1992] 2 AC 1, 29, *per* Lord Templeman.

[7] See above paras 2.10 – 2.32.

[8] Local Government Act 1972, s 111, and Local Government Act 2000 s 2: see above paras 2.35 – 2.40.

[9] See para 1.57 above.

matters, should also be excluded from the scope of our recommendations. The Bill does not in terms exclude these forms of routine inquiry from the scope of our recommendations. In practice, these are unlikely to be the subject of an ad hoc inquiry set up under the general powers available to local authorities, not least because standing procedures are available. If such a routine inquiry revealed more serious issues, they could become the subject of a special ad hoc inquiry.

Overview and Scrutiny Committee Reports

6.21 We recommend that the extension of qualified privilege should also apply to the reports of inquiries conducted by Overview and Scrutiny Committees (OSC).[10] Where an inquiry by an OSC is established because it is thought that there has been, or may have been, a failure in the way one of the authority's functions was carried out, we see no reason why its report should not attract the statutory qualified privilege in the same way and in the same circumstances as if the report was the result of an ad hoc inquiry. The same will apply to sub-committees of OSCs.

Joint inquiries and inter-agency inquiries

6.22 While writing the CP, we were very conscious that the ways in which local authorities carry out the functions they are required by statute to deliver have, over the years, become increasingly complex. For example, local authorities may enter into joint agreements with other local authorities. Or they may contract with service providers in the private sector or in the voluntary sector. We have been anxious to ensure that, in developing our recommendations for reform, they should be sufficiently flexible to enable a local authority to establish an ad hoc inquiry jointly with other public bodies, where that seemed sensible and practical.

6.23 Since writing the CP we have given this matter further thought. We now think that we need to distinguish between those bodies that have the statutory function of providing a particular service to the public, and those bodies which actually deliver the service. While they may be the same, they may not.

6.24 To give some examples:

(1) A local authority has statutory functions relating to the homeless. When accommodation has to be provided, it may come from its own stock of housing. Alternatively it may enter arrangements with a Registered Social Landlord or a private landlord to provide the accommodation. If something goes wrong with the provision of the accommodation (for example, the homeless family is subjected to racist abuse by other residents), the local authority still retains statutory responsibility for ensuring accommodation is provided.

(2) The authority has the statutory function to meet special educational needs. The actual provision may be delivered directly by itself, or

[10] See above paras 2.18 – 2.25.

indirectly though services provided by another local authority or a private educational body.

(3) The authority has the statutory function to provide services to the elderly. The actual provision might be directly by the authority, or indirectly through private sector old people's homes.

6.25 In such cases, the responsibility for establishing any inquiry, where something had gone wrong, should rest with the local authority which has the statutory function to provide the service, whether it delivered the service directly itself, or indirectly through a third-party service provider. It would not be appropriate for the local authority in such a case to establish a joint inquiry with the third-party service provider.

6.26 By contrast, there are services where statutory functions are divided between more than one public authority. For example, a person who needs a period in hospital for surgery followed by a period of convalescence will be subject to the statutory functions of a Health Authority during the first period, and of a Local Authority during the second. During the first period the service might be delivered in NHS premises, but might also be provided in a private hospital. During the second period, the service might be provided directly in a local authority home, or indirectly in a private nursing home.

6.27 If something went wrong in such a case, there would be a need for the local authority to be able to establish an inquiry jointly with the other public body with a related statutory function. An inability to do this would mean that only part of the issue would be subject to the inquiry.

6.28 This would be possible under the current law. Thus, a Primary Care Trust ("PCT") may establish an inquiry because it may do anything which appears to be expedient or necessary for the purpose or in connection with the exercise of its functions.[11] There is no reason to think that the PCT may not combine with a local authority acting under a similar enabling power. The position is similar as regards NHS trusts. Subject to financial provisions relating to NHS trusts, an NHS Trust has the power to do anything which appears necessary or expedient for the purposes of or in connection with the discharge of its functions. [12]

A CASE STUDY: THE "WORKING TOGETHER" GUIDELINES

6.29 A detailed example of the circumstances in which a joint ad hoc inquiry is appropriate is - at the time of writing - found in the Working Together to Safeguard Children guidelines, drawn up by the Department of Health, the Home Office and the Department for Education and Employment.[13] These set out how agencies and professionals should work together to promote the welfare of children and protect them from neglect. It is aimed mainly, but not exclusively, at

[11] NHS Act 1977, s 16A, Sched 5A para 12(1) (amended by Health Act 1999).

[12] NHS and Community Care Act 1990, s 5(8), Sched 2, para 16(1).

[13] Department of Health, Home Office and the Department for Education and Employment, (now the Department for Education and Skills) Working Together to Safeguard Children (1999) ("Working Together").

working under the Children Act 1989, which sets out a comprehensive framework for the care and protection of children. The current version was published in 1999.

6.30 The guidance was issued under section 7 of the Local Authority Social Services Act 1970.[14] Local authorities, according to the guidance, are to comply with its provisions unless local circumstances indicate exceptional reasons which justify a variation.[15]

6.31 Part 8 of Working Together provides for case reviews to be established in certain situations. A case review must be undertaken where a child dies, and abuse or neglect are known or suspected to be a factor in the death.[16] Additionally, a case review may be undertaken where a child has sustained a potentially life-threatening injury through abuse or neglect, serious sexual abuse, or sustained serious and permanent impairment of health or development through abuse or neglect, and the case gives rise to concerns about the way in which local professionals and services work together to safeguard children.[17]

6.32 Part 8 provides for a two-tier review process. Each relevant service that has statutory responsibility for and is involved with the child and the family is to conduct an individual management review.[18] The review should look at individual and organisational practice, with the aim of identifying whether change is necessary, and how those changes can be brought about.[19]

6.33 The Area Child Protection Committee (ACPC) then reviews all these individual reports, along with any other reports commissioned by the ACPC. An overview report is produced, which includes an action plan for the relevant agencies involved.[20] The overview report, the executive summary of the action plan and the individual management reviews are forwarded to the Department of Health.[21] The Working Together guidance provides outline formats for the individual management review and the overview report.[22] Further guidance is given on disclosure of the report, or executive summaries of the report, and dealings with interested parties.[23]

[14] Section 7 states "Local authorities shall, in the exercise of their social services functions, including the exercise of any discretion conferred by any relevant enactment, act under the general guidance of the Secretary of State."

[15] Working Together, p viii. The Working Together Guidance does not have any legal status: *Re G (A Minor)*[1996] 2 All ER 65, 68 *per* Butler-Sloss LJ but is nevertheless widely observed.

[16] Working Together, para 8.5.

[17] *Ibid*, para 8.6.

[18] *Ibid*, para 8.17.

[19] *Ibid*, para 8.21.

[20] *Ibid*, para 8.18.

[21] *Ibid*, para 8.26.

[22] The individual management review format is produced at p 92 of Working Together. The ACPC overview report format is on p 93.

[23] *Ibid*, para 8.29.

6.34 Responsibility for the establishment of the ACPC is lead by the local authority, but they can add other public bodies to the inquiry where appropriate.

6.35 Currently, Part 8 reviews are not established under specific statutory powers. They thus fall within the scope of our definition of ad hoc inquiry.[24] Once put on a statutory footing,[25] they would then no longer come within the scope of our recommendations.

PUBLIC BODIES

6.36 Thus we recommend that where statutory responsibility for the provision of a service to the public is divided between a local authority and one or more other public bodies acting under other statutory duties, it should be possible for the local authority to establish an inquiry jointly with that other body or bodies.

6.37 We do not purport to provide a definitive list of such bodies, but they might include bodies such as:

(1) a police authority;[26]

(2) the prison service;

(3) local probation boards;

(4) other NHS bodies including, Local Health Boards (Wales),[27] health authorities, strategic health authorities, or NHS Foundation Trusts;[28]

(5) a National Park authority;[29] or

(6) the Broads Authority.[30]

[24] In the CP we came to a different conclusion. We now think this was wrong.

[25] As Local Safeguarding Children Boards. This was proposed by the Government: see "Every Child Matters" (Sept. 2003) Cm 5860, paras 5.25 – 5.26, and is included in the Children Bill 2004, at clauses 9 – 12; and, for Wales, clauses 24 – 27 (Version of the Bill ordered to be printed on 3 March 2004).

[26] Local authorities and local police forces are brought together in Crime and Disorder Partnerships: section 5(1) Crime and Disorder Act 1998. The partnership must co-operate with local probation committees and health authorities. Such a partnership is required by s 6 of the Crime and Disorder Act 1998 to formulate and implement a strategy for the reduction of crime and disorder in the area.

[27] Established under Order 2003 No 148 Local Health Boards (Establishment) (Wales) Order 2003 (W 18) for the purposes set out at s 16BA(1) of the NHS Act 1977, namely the exercise of functions of Health Authorities transferred to the NAW. They are coterminous with principal local government areas.

[28] Established by the Health and Social Care (Community Health and Standards) Act 2003, s 1. By virtue of Health and Social Care (Community Health and Standards) Act 2003, s 18(1) a Foundation Trust may "do anything which appears to it to be necessary or desirable for the purposes of or in connection with its functions". Its purpose is "to provide goods and services for the purposes of the health service in England" (s 1). A body may not be both a NHS Trust and a Foundation Trust.

[29] National Park authorities are established under Environment Act 1995, s 63 and, in Wales, s 64.

Special inquiries

6.38 The recommendations in this Part also apply to the new form of "special inquiry" - which is in essence an ad hoc inquiry but with additional powers - which we recommend should be created in Part VIII of this report.

Inquiries not covered

6.39 In one example provided to us, an inquiry was conducted by one individual both in his capacity as Monitoring Officer (which, being required by statute, would not come within the scope of our recommendations), and in his capacity as Chief Executive (which would come within our scheme). It seems undesirable for part of a single report to attract the new statutory qualified privilege while a different part of the same report does not. Therefore, our recommended statutory qualified privilege is only available for reports of ad hoc inquiries which are not combined with a report of an inquiry which a local authority is obliged under a specific statutory provision to carry out.

A limit on the privilege

6.40 If an inquiry ranges more widely than the failure in the exercise of a local authority function, and the report contains material which is not connected with the subject of the inquiry, then we do not think it appropriate that qualified privilege should attach to that extraneous material (other than the qualified privilege currently available under the current law).

Who is to be the publisher?

6.41 Our terms of reference relate solely to local authority reports. Therefore the statutory qualified privilege which we recommend will only attach to a report where it is published by the local authority which commissioned it (whether jointly or on its own). An argument could be made for the statutory qualified privilege which we propose to be extended to inquiry reports by other public bodies. But this is beyond our terms of reference. We have not consulted on the possibility. This must be a matter for others to decide.

Joint inquiries

6.42 As a consequence, where an inquiry is established by a local authority and another public body which is not a local authority, and there is joint publication, the proposed statutory qualified privilege will apply only to the local authority. If a claimant brought a claim in defamation against either or both of the commissioning bodies, the local authority would be able to rely on the new statutory qualified privilege; the other public body would have to rely on qualified privilege at common law.

6.43 Various consequences ensue:

[30] Established by the Norfolk and Suffolk Broads Act 1988, s 1. "Public bodies" are required to have regard to the functions of the Broads Authority when carrying out functions which affect land in the Broads: s 17A(1) of the 1988 Act added by the Countryside and Rights of Way Act 2000, s 97. "Public body" is defined at s 17A(3), and includes a county council, district council or parish council.

(1) As common law qualified privilege can be defeated where the publisher is reckless as to the truth of what is published, then if the other public body also participates in the "fairness check" that the local authority will have to go through,[31] that will tend to show that the other body was not reckless as to the truth of the contents.

(2) Publication by placing the report on the local authority's website is possible. Merely being identified as one of the bodies establishing the inquiry should not, in our view, amount to "publishing" it because the report is that of the inquiry. The local authority would then be the body that is publishing it to the public. The other body is not publishing it.

(3) Nonetheless, for the other public body to place a report which is potentially defamatory on its own website and then to rely on common law privilege would be unwise, because it is unclear how extensive the publication may be to attract the defence of qualified privilege.[32] The result is that while one commissioning body, the local authority, may be able to place it on its website, the other may not. The other body may not even be wise to provide a link from its website to the local authority's.

(4) Publication is not a once and for all event: each communication of the report is a publication of it. If the local authority was not satisfied as to fairness, but the other commissioning body went ahead and published, the authority would have to be very careful to distance itself from any acts of publication by the other public body. For example, the local authority could not arrange matters so that the other body held the press conference but the local authority helped with sending out copies of the report. If it sent out copies of the report that would constitute publication. And if an authority does "publish" where it knows an inquiry has not been fair, it becomes much easier to impute malice to the publisher.

6.44 These factors suggest that further consideration might be given to extending the principles we recommend for local authorities to other public bodies who exercise statutory functions. [33]

Publication of part or of a summary of the report

6.45 If part of the report presented to the authority is unsustainable, for example where the inquiry draws conclusions not justified by the evidence it has received, it may be appropriate for that part to be excised. In such a case, we see no reason why the proposed new qualified privilege should not attach to publication

[31] See paras 6.54 – 6.76 below.

[32] *Hird v Wood* (1894) 38 SJ 234. See Law Commission Scoping Study No 2, *Defamation and the Internet: a Preliminary Investigation* (Dec. 2002), para 2.24ff.

[33] This could be undertaken as part of any review of the law on inquiries. See *Effective Inquiries: A Consultation Paper from the DCA* CP 12/04, May 2004, paras 64 and 75. Although the focus of this paper is on ad hoc and other inquiries established by Ministers, there seems no reason in principle why the position of inquiries established by other public bodies could not be considered in the context of this review.

of the remaining, sustainable, part. What is not possible is for the authority to publish the report in full with a mere disclaimer of belief in its truth.[34]

6.46 Alternatively, the authority may publish a summary of the inquiry report. In that event, the summary must have been prepared or approved by the inquiry.

Application of the statutory qualified privilege - publication to the public

6.47 The statutory privilege only comes into play where "publication" (meaning "communication" in the common law) is to the public or a section of it. For any other "publication", the common law would apply.

Internal publication

6.48 Other disclosure of the report (what might be called "internal" publication) would have to rely on the common law and would not be subject to our proposed "fairness requirements". In these circumstances the publisher will have to rely on the normal duty-interest relationship to establish common law privilege. The "fairness requirements" are not applicable.

6.49 In practice, an inquiry panel clearly has a duty to report to its commissioning authority, and so common law privilege attaches. That privilege may be defeated by "malice".

6.50 Similarly, a member or officer of the authority may need to pass the report to another member or officer for it to be properly considered. Again, common law privilege would cover such "publication". Such a member or officer could find the defence of privilege defeated on proof of malice, such as where he or she disseminated the report for some ulterior motive.

Other forms of private publication

6.51 Although the phrase "internal" publication might be a useful shorthand because most often the kind of pre-publication disclosure of the report will be to a person in the commissioning body, this will not necessarily be the case. For example, where the local authority has commissioned the inquiry jointly with another body it may well need to disclose it to the appropriate people in that other body for them to review it before it is published more widely. Another example might be where the local authority has entered into a contract with a private firm of solicitors for its legal advice and so needs to disclose the report to a person who is neither an officer nor a member. Similarly, counsel's advice might have to be sought, and disclosure for that purpose would be privileged without the fairness requirements which attach to the new statutory privilege.

6.52 Others who are "external" to the commissioning authority, but to whom it may be appropriate for the report to be disclosed, such as the complainant, or his or her representatives, fall somewhere between the "internal" group – who need to see the report before deciding what action is needed – and the public or a section of

[34] *Stern v Piper* [1997] QB 123.

it.[35] Common law privilege may apply to such disclosure, but not the recommended statutory qualified privilege which comes into play only where publication is to the public or a section of it.

THE QUESTION OF FAIRNESS

What makes an inquiry report fair?

6.53 The primary justification for the new statutory qualified privilege is that it is in the public interest that reports on matters of public concern should be published. We do not think it would be right for local authorities to be able to take advantage of the new qualified privilege in all circumstances. Thus a central feature of our recommendations is that the proposed new statutory qualified privilege should only apply where the inquiry and report are fair. There are two aspects to this:

(1) the fairness of the procedure adopted by the inquiry;

(2) the fairness of the substance of the final report.

The inquiry has been fairly conducted

6.54 Fairness is a familiar legal concept, at the heart of our system of administrative law. The fundamental principles of natural justice are:[36] *nemo judex in causa sua* (the decision-maker or tribunal shall not be biased), and *audi alteram partem* (hear the other side). Fairness reflects these principles.

6.55 In the context of an inquiry established by a local authority, it might be suggested that the *nemo judex* principle could not easily apply. The answer to this objection is that this principle is crucial to an adjudicative process in which legal issues of fault and liability are being determined. It is of less significance in the context of an inquiry, where the primary purpose is to learn lessons for the future from failures of the past. Even so, and as a matter of good practice, the more serious the issue, the more likely the local authority will be to appoint an independent inquiry. Without this, the inquiry will lack credibility.[37]

[35] Note that a complainant might be entitled to part of the report under the scheme of the Freedom of Information Act 2000 and the Data Protection Act 1998, but public access to the report may be withheld if the report is intended for future publication where the public interest in withholding the information is greater than the public interest in granting immediate access (Freedom of Information Act 2000, s 2(1)(b) and s 22). Disclosure may also be withheld on other grounds.

[36] As described by the Privy Council in *Mahon v Air New Zealand Ltd*:

> The rules of natural justice … may be reduced to those two that were referred to by the Court of Appeal in England in *R v Deputy Industrial Injuries Commissioner, ex parte Moore* ([1965] 1 QB 456, 488, 490) … . The first rule is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value … The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.

[1984] AC 808, 820 *per* Lord Diplock.

[37] See D. J. Galligan *Due Process and Fair Procedures* (OUP 1996), pp 270 – 273.

6.56 For inquiries, the fundamental procedural principle is "*audi alteram partem*". This affects the way evidence is handled by an inquiry, whether or not there is a hearing. Even though there may not be "parties" in the sense of opponents in litigation, there are likely to be a number of people with differing versions of events. Therefore, in the context of an inquiry, the duty to hear the other side can translate into ensuring that contrary versions of events are considered by the inquiry panel.

6.57 If a person is to be criticised, then it is axiomatic that the person should know what is said against him or her, and with enough advance warning to be able to respond:

> It has frequently been stated that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. … This proposition of common sense will in many instances require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed. Whether such a duty exists, how far it goes and how it should be performed depend so entirely on the circumstances of the individual case that I prefer not to reason from any general proposition on the subject.[38]

6.58 *In re Pergamon Press Ltd* is also of interest.[39] There was an inspection under section 165(b) of the Companies Act 1948 by the Board of Trade, which could result in judicial proceedings, or the winding up of the company, and where the report of the Board might be made public. The directors of the company refused to answer the Board's questions without assurances about how their evidence would be used in associated proceedings. The Board committed itself to giving those who stood to be criticised an opportunity of responding to such criticism, but not the assurances sought, nor agreement that the directors could see the transcripts of evidence. The Court of Appeal held that the Board was not obliged to give such assurances. Although a statutory inquiry, the Court of Appeal confirmed (contrary to the Board's representations) that the rules of natural justice applied.

> It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings … They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings … They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations or careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about the winding up of the company, … When they do make their report, the Board are bound to send a copy of it to the company; and the Board may, in their discretion, publish it, if they think fit, to the public at large.

[38] *Doody v Secretary of State for the Home Department* [1994] 1 AC 531, 563, *per* Lord Mustill.

[39] [1971] Ch 388.

6.59 Lord Denning held:

> Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, nor quasi-judicial, but only administrative … The inspectors can obtain information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice.[40]

6.60 In the context of an Audit Commission report in the public interest[41] (as distinct from an annual statutory audit),[42] the auditor is enjoined to:

> consider the interests of the individuals whose acts or omissions have given rise to the subject matter of the report, and who may be exposed to criticism or other consequences through having been identified in the report. In reporting, the auditor has to strike a balance between those interests and the public interest.[43]
>
> Auditors should allow individuals to answer any criticism that they propose to make. Auditors should consider meeting with relevant individuals during the consultation stages of preparing a report … Auditors will then be in a position to take account of these discussions and, where appropriate, to indicate what action has been agreed.[44]
>
> Auditors should also consider whether copies of draft reports should be provided to the individuals concerned. Where copies of the draft report have been provided and the force of any criticism of any individual is subsequently changed as a result of discussions or further investigation, auditors should consider advising the individuals concerned of the changes and, where appropriate, allowing them a further opportunity to respond to them.[45]

6.61 These examples demonstrate that the extent to which the *audi alteram* principle will apply to an inquiry will, to a degree, depend on the possible consequences

[40] [1971] Ch 388, 399. Applied in *R v Commission for Racial Equality ex parte Hillingdon LBC* [1982] QB 276, 286, *per* Denning MR in relation to an investigation by the Commission; and in *R v Lord Saville of Newdigate and others, ex p A and others* [1999] 4 All ER 860, 872, *per* Lord Woolf MR in relation to the Bloody Sunday Inquiry. *In re Pergamon Press Ltd* distinguished in *Furnell v Whangarei High Schools Board* [1973] AC 660, 680, *per* Lord Morris of Borth-Y-Gest, and 684–685, *per* Viscount Dilhorne with whom Lord Reid concurred (PC). In *In Re Pergamon Press Ltd*, at p 403, Sachs LJ emphasised the flexibility with which procedures should be devised and applied to give effect to the rules of natural justice.

[41] Conducted under Audit Commission Act 1998, s 8.

[42] Audit Commission Act 1998, s 2 and Sched 2, para 1.

[43] Code of Audit Practice issued by the Audit Commission (March 2002), para S1.27.

[44] *Ibid*, para S1.28.

[45] *Ibid*, para S1.29.

that may result from the inquiry when it has completed its work and published its report.

6.62 Similarly, there is no hard and fast rule that the right to be heard entails the right to cross-examine the sources of information against you. In *R v CRE ex parte Cottrell*[46] a firm against whom the Commission for Racial Equality had issued a non-discrimination notice argued that the Commission was bound to allow it to cross-examine the witnesses on whose evidence the Commission had relied. The argument failed.

6.63 But as in the interpretation of any authority on how an inquiry is to conduct itself, one cannot extrapolate from this decision any general rule that cross-examination will never be an essential part of a fair inquiry. It is for the inquiry to test the evidence.

6.64 The Family Law Bar Association pointed out in their response to the CP that inquiries differ according, amongst other things, to whether an inquiry is gathering the facts for itself, or whether it is working from a file in which the facts are recorded. We accept that a different process may well be appropriate where the facts are largely agreed from one where they are being uncovered.

6.65 There may be legitimate reasons for not disclosing all the evidence of one individual to another, but enough must be disclosed to enable a person who stands to be criticised to respond to what is said against him or her. A person should know enough about what others have said about them to give them the opportunity to rebut the criticisms, either by rejecting the inferences drawn, or by challenging the facts on which they are based.

6.66 Although there is a distinction between checking for factual inaccuracy – and one of the ways in which this may be done is by showing a witness a transcript of his or her evidence – and giving a person a fair opportunity to respond to criticisms, affording an opportunity to correct facts may be part of affording an opportunity to rebut criticisms.

6.67 If the person has died or is untraceable, or is suffering from a mental disability which severely affects their understanding, then it will not be practicable to put the draft criticisms to them. It may in some circumstances be appropriate to put them to a person who has responsibility for their affairs.

6.68 Impartiality requires that an inquiry should be even-handed, and not favour one witness in comparison with another, for example, by affording the witness greater opportunities to contradict evidence, or otherwise treating witnesses differently.

6.69 Conflicting versions of facts need to be put to a witness, where reaching a finding on those facts is material to the inquiry. It might be necessary for a witness to be sent a form of "Salmon letter" in advance of attending.[47] This gives the witness

[46] [1980] 1 WLR 1580.

[47] A "Salmon letter" is a letter served on a witness who may be the subject of potential criticism by the Inquiry secretariat, prior to them giving evidence. The letter informs the witness of the areas of concern and the substance of the evidence in support of those areas of concern. Salmon letters are issued in accordance with the second of the six

notice of adverse allegations known to the inquiry even before attending. An inquiry should be aware of the broad outlines of the complaint before it starts (from the terms of reference) but may find it has to examine documents before it can formulate the relevant "Salmon letters". The order in which witnesses are heard may require careful consideration.

6.70 Where the inquiry plans to go beyond findings of fact and proposes to make a criticism that also should be put to the person concerned. That may mean separate communication with the witness (such as by sending a draft section of the report) after having taken evidence from him or her. As the FLBA pointed out, it may be appropriate for this to be done when taking evidence from the person. Thus there may be no need to repeat the procedure at a later stage.

6.71 The precise procedure will depend on the gravity of the allegations, the degree to which the facts are already established, and the breadth of the terms of reference.

6.72 Whether a person is named in the published document is not a determining factor. If individuals are identifiable, although a report only refers to the body or department which employs them, then fairness would require allegations or criticisms to be put to them. The fairness requirement depends on whether the individuals can be identified rather than whether they are named.[48]

6.73 It is the totality of the documents published which constitute the report, which are to be considered, so it could be appropriate for a person's response to be recounted in an accompanying document, such as in an appendix to the report.

GUIDANCE

6.74 The ways in which the requirements of fairness will be satisfied in inquiry procedures will inevitably and should vary from one inquiry to another. What is important is that the person appointed to run the inquiry should have thought about the issue carefully, and taken into account available guidance. Because of this we have not sought to define 'fairness' in the Bill.[49]

6.75 As noted in the preceding paragraphs, there is already guidance in the case law. The Salmon principles[50] will be helpful in relation to some inquiries. Finally, there is the Guidance of the SOLACE Review Group, which includes reference to the principles commended by the Department of Health. These are of such importance that we have attached relevant extracts from both as appendices to this report. In this way, we seek to ensure that they are readily available for

cardinal principles of the Salmon Commission: The Royal Commission on Tribunals of Inquiry, Report of the Commission under the Chairmanship of the Rt. Hon Lord Justice Salmon "The Salmon Report" (1966) Cmnd 3121, para 32.

[48] A person may succeed in a claim for defamation where he or she is identifiable, even though not named: eg, *Morgan v Odhams Press* [1971] 1 WLR 1239; *Hayward v Thompson* [1982] QB 47.

[49] We do recommend that there should be statutory provisions relating to how criticisms to be made in a report should be dealt with; see below, paras 6.77 – 6.79.

[50] *op.cit*., para 32.

reference purposes. [51] Proof that an inquiry had not taken these guidelines into consideration would be a factor of the utmost importance in reaching a decision as to whether an inquiry had been conducted fairly or not.

6.76 Practically speaking, a commissioning local authority must:

- take great care over the terms of reference;
- make clear to the inquiry panel what is expected, from the beginning of the process. Thus it should explicitly draw its attention to the features that would make the inquiry process fair or unfair, and should stress to the inquiry panel that the authority will want to know how the inquiry was carried out and how it reached its conclusions;
- where the inquiry panel does not, for whatever reason, follow the expected approach, and the authority becomes aware of the inquiry's defects, take active steps to remedy the defects identified;[52]
- on receipt of the report, allow sufficient time to satisfy itself that the inquiry process was fair. The more serious the allegations, or the more widely it is intended to publish a report, the more care should be taken. The experience and seniority of the person or people assigned to read the report will be important considerations; and
- generally approach the matter with an open mind throughout the process (as should the inquiry panel itself).

The inquiry's conclusions are based upon findings of fact

6.77 The second aspect of fairness is that the report of the inquiry must itself be fair. The key issue here, and the one which leads to the most difficulties, is that the inquiry must make sure that the conclusions it reaches are based on the evidence it has heard, and findings of fact are not made where evidence is either unconvincing or disputed, or both. The basic proposition must be that those who are to be criticised by the inquiry should have an opportunity to put their version of events to the inquiry and, where they do so, their version should be fairly represented in the published document. Where there are competing versions of events, this aspect of the conditions will be satisfied where the inquiry has heard

[51] SOLACE, "Getting it right: guidance on the conduct of effective and fair ad hoc inquiries" (2002); DoH, "Advice issued by the Department of Health in 2002 to those conducting investigations and inquiries in the Health Service addressing the precautions which should be taken to avoid losing the protection of qualified privilege". For extracts from both documents, see below Appendices B and C. The Central Secretariat of the Cabinet Office also issued *Guidance on Inquiries* in February 2001; though more directed to ad hoc inquiries established by Central Government, this document also contains useful advice which can be applied to local authority ad hoc inquiries. See: www.cabinet-office.gsi.gov.uk/central/inquiries.htm

[52] One authority found that an inquiry report was not shaping up well (there were procedural failings leading to unfairness). They discovered this at a late stage. They may not have received warning as early as they would have wished, but it is surely right that the authority saw its responsibility in terms of considering this aspect and taking action accordingly, rather than merely publishing what they were given.

both sides and the person complained against has had the opportunity to answer the complaints.

6.78 In assuring itself that the report is fair, the inquiry and the local authority must be satisfied of the existence of evidence supporting the conclusions of the inquiry, even if that evidence cannot or is not going to be published. In most cases, the report writer will want to include supporting facts, but to an extent this will be a matter for the author's discretion. If the supporting evidence does not appear on the face of the report, it may be in a supporting document, possibly not intended for publication. There should be no reason why the authority should not see such a document. It may also be that the facts were agreed and the inquiry itself was not engaged in uncovering facts. If it does not appear to the authority that the conclusions are based on fact, then it is hard to see how it could be satisfied it was fair.

6.79 Judgements and expressions of opinion, based on the facts, are not precluded.

CONFIDENTIALITY AND THE PUBLISHED MATERIAL

6.80 There may be considerations of confidence which oblige the inquiry to anonymise the report. We are not recommending that, where the local authority is able to rely upon the statutory qualified privilege as a defence against a claim in defamation, that should have any bearing upon a defence in a claim for breach of confidence.

What if the local authority is not satisfied that inquiry and report were fair?

6.81 If the fairness requirements do not seem to the local authority to have been met, then not only would the new statutory privilege not attach; common law privilege and the existing statutory privilege which attaches to documents made open for public inspection also would not attach.[53] Our reason for recommending this is that the local authority must endeavour to ensure that processes for which it is responsible are fair. We see no reason why, if in their opinion, either the process or its outcome is not fair, they should be able to take advantage of any other rule of privilege.

6.82 If, despite its reservations, the local authority goes ahead and publishes the report and the contents of the report are true, the defence of justification will succeed where the defence of privilege would not. Malice does not defeat justification. This will be a decision that the authority (and its insurers) will have to consider carefully.

Procedure where a claim in defamation is brought

6.83 If a person criticised in an inquiry report which had been published to the general public or a section of the public brought a claim in defamation, the local authority would plead that it was protected by the new statutory qualified privilege.

[53] Cf. statutory privilege which attaches where disclosure must be made pursuant to the Data Protection Act 1998 or the Freedom of Information Act 2000. See paras 6.92 – 6.93 below.

6.84 The judge will consider the publication as a whole in determining whether it bears a defamatory meaning.[54]

6.85 Once it had been shown that the meaning of the sections complained of, when read in context, was defamatory, the onus would be on the local authority to demonstrate that it was entitled to rely on the statutory privilege.

6.86 In the application of the law of defamation, questions of law are for the judge, and questions of fact are for the jury, save in cases where there is no jury trial.[55] Frequently the question of whether there is qualified privilege will be dealt with as a preliminary issue.[56]

6.87 We think that it should be specifically provided that any determination of whether the procedure adopted by an inquiry was or was not fair should be determined by the judge. This is important for two reasons. First, as these issues have been judicially considered in the Administrative Court in the context of the development of the law of judicial review, those same legal principles should be applied by the judges who hear defamation actions. Second, in order to give guidance to assist local authorities for the future, it is important that reasoned decisions are given. These objectives could not be achieved were the matter to be left even in part to a jury.[57]

Malice

6.88 In theory, the defining feature of qualified privilege is that it can be defeated by proof of malice and therefore a claim based on malice is not precluded. In practice, it will not be possible for a publishing authority to be able to claim that it had undertaken the necessary steps to satisfy itself of the fairness of the process *and* for the claimant to be able to show that the authority had been reckless or indifferent as to the truth.

6.89 As for lack of honest belief in the truth of the report, if the authority checked that the report was fair, and believed it to be fair, but had extraneous clear contradictory evidence, then it would not have an honest belief that the inquiry

[54] *Charleston v News Group Newspapers Ltd* [1995] 2 AC 65; applied in *Norman v Future Publishing Ltd* [1999] EMLR 325.

[55] The Supreme Court Act 1981, s 69(1) provides that a libel or slander claim shall be heard by a jury, "unless the court is of opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury". If both parties agree to trial by judge, there will be no jury trial. Similarly, there will be no jury trial where summary disposal takes place under CPR Part 24 or Defamation Act 1996, s 8.

[56] In *MacIntyre v Phillips* [2002] EWCA Civ 1087, [2003] EMLR 194 it was held that there was no rule of practice requiring these matters to be dealt with as a preliminary issue.

[57] In *Kingshott v Kent Newspapers* [1991] 1 QB 88 (CA), Bingham LJ held that the questions raised by section 15(3) of the Defamation Act 1996 - whether the matter is "not of public concern" or its publication is "not for the public benefit" - were factual matters to be determined by the jury, not the judge. Gatley remarks that this judgement was "contrary to the widely held view that these were matters for the judge; *op cit.* para 34.17, note 84. The correctness of the *Kingshott* decision has been doubted by Lord Cooke in the House of Lords decision *McCartan Turkington Breen (a firm) v Times Newspapers Ltd.* [2001] 2 AC 277 at 301.

had reached the right conclusions, and therefore would lose the protection of privilege.

6.90 There would, nevertheless, be scope for malice to be proved where the claimant could prove a dominant motive on the part of the publishing authority. For example, an inquiry might be established into alleged improper behaviour by a councillor. The authority might be able to claim the statutory privilege, having carried out the necessary checks, but lose that defence because it could be shown that the whole process, instituting the inquiry and publishing the report, was primarily motivated by an improper desire to achieve political advantage.

Interaction with other statutory qualified privilege

Privilege under the Access to Information provisions

6.91 There is a possibility that, if there is doubt about whether a defence of common law qualified privilege, or of statutory qualified privilege, applies in a particular case (for example, because there are doubts over the fairness of the conduct of the inquiry) a local authority might protect itself by simply organising its business such that statutory qualified privilege applies, pursuant to the Access to Information provisions inserted into the 1972 Act and the corresponding provisions for the new executive structure.[58] There is thus a danger of creating an anomaly, whereby a report of a poorly-run inquiry which could not rely on the statutory qualified privilege we propose would be published instead so as to attract the qualified privilege under the 1972 Act. The availability of such a course of action would defeat the object of our proposed recommendation. Therefore, the Bill provides that if the new statutory qualified privilege is not available, then neither is that under the Access to Information provisions.

Data Protection Act 1998 and Freedom of Information Act 2000

6.92 We do not propose limiting a person's rights of access under the Data Protection Act 1998, nor do we envisage that a local authority would be able to use the disclosure provisions available under this Act to publish a report which it thought would not attract privilege under our recommendation. We therefore do not propose any provision which would change the effect of the Data Protection Act.

6.93 Similarly, we do not propose limiting any person's statutory rights of access to information, nor interfering with the regime, and therefore do not propose any provision which would change the effect of the Freedom of Information Act.

COMMENCEMENT

6.94 Our recommendations in this Part are to apply only to inquiries concluding after a specified date. The provisions would come into force on a date to be appointed.

Retrospectivity

6.95 A claim in defamation can be brought in relation to any fresh "publication". Thus, even if a provision applies from a specified date, it could be relied upon for

[58] See paras 5.19 – 5.21 above.

matters which had already been published if they were "re-published",[59] unless the statute guards against this.

6.96 Our view is that the proposed reform should only apply to inquiries reporting after the commencement date. The provisions of the attached Bill would not apply to any inquiry which reported before the commencement date, even if the report were published after the Bill came into force.

CONVENTION-COMPATIBILITY OF THESE RECOMMENDATIONS

6.97 A defence of qualified privilege, whether statutory or at common law, protects a person's right to freedom of speech. Therefore any restriction of it must be compatible with the Convention. In brief, any legislative reform must be a proportionate response to the problem, and any interference with Convention rights must be lawful and necessary, as well as proportionate.

The rights in issue

6.98 Any restriction of an individual's right to pursue a defamation claim may risk contravening the European Convention on Human Rights, which protects an individual's right to:

(1) a fair trial,[60]

(2) respect for private life,[61] and

(3) freedom of expression.[62]

6.99 It is unlawful for a public authority (including any court or tribunal) to act in a manner which is incompatible with any Convention right unless it is a legitimate derogation.[63] In relation to defamation claims, conflicting parties are seeking to rely on conflicting rights: respect for private life and freedom of expression. Any claim to privilege by the publisher may impinge on a claimant's right to a fair trial. In such cases, courts must seek to balance the public interest in dissemination of information against the individual's right to access to a court to defend his or her reputation.

Right to a fair trial and access to a court

6.100 The right to institute proceedings and have access to a court is part of the right to a fair trial.[64] Access to the courts is a fundamental constitutional right: "Such a constitutional right … is said to derive from two sources: the common law, and art

[59] Publication is, in this context, communication to a third party. Therefore if a document is put on a website, it is "published" on that website each time it is accessed.

[60] Human Rights Act 1998, Sched 1, Art 6.

[61] Human Rights Act 1998, Sched 1, Art 8.

[62] Human Rights Act 1998, Sched 1, Art 10.

[63] Human Rights Act 1998, s 6(1).

[64] *Golder v UK* Series A Vol. 18 (1975); 1 EHRR 524. See also *Powell v Boladz* [2003] EWHC 2160 (QB) in which Tugendhat J upheld the claimants' Art 6 right and, even taking account of the defendants' right to a fair trial, refused to stay defamation proceedings.

6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms…".[65] This right is not absolute but is subject to limitations.[66] These are permitted by implication, since the right of access by its very nature calls for regulation by the State.[67] Member States also enjoy a "margin of appreciation" in that they are considered to be in the best position to decide on the measures necessary in a particular area. The European Court of Human Rights (and now the domestic courts) must be satisfied that any limitations on the right of access do not reduce it to an extent which impairs its very essence. Most importantly, however, the limitation must be in pursuit of a legitimate aim and be proportionate between the means employed and the aim sought.[68]

6.101 The defence of privilege restricts access to the courts of the person who claims to have been defamed, but thus far has been found to do so with a legitimate aim in a proportionate manner, and as such is compatible with the right to a fair trial and respect for family or private life.[69] In *Fayed v UK* an allegedly defamatory Department of Trade and Industry report was found to have the legitimate aim to report in the public interest. The means employed were held to be proportionate, as the Inspectors and Secretary of State of the Department were bound by rules of rationality, legality and procedural propriety.[70]

6.102 There is thus scope for a proportionate extension of the defence of qualified privilege, with the legitimate aim of facilitating the dissemination of a report which is genuinely in the public interest, to be compatible with Article 6.

Freedom of expression

6.103 Article 10 contains a qualified right in that it is "subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the protection of the reputation or rights of others".[71] Case law suggests that "freedom of expression is the rule, and regulation of speech is the exception requiring justification."[72] Freedom of speech is one of the fundamental principles of a democratic society. Any attempt to curtail it should be both necessary and proportionate.[73]

[65] *R v Lord Chancellor ex p Witham* [1998] QB 575, 580, *per* Laws J.

[66] *Lithgow v UK* Series A Vol. 102 (1986); 8 EHRR 329.

[67] See K Starmer, *European Human Rights Law* (1999) p 354.

[68] *Ashingdane v UK* Series A Vol. 93 (1985); 7 EHRR 528, referring to *Golder v UK* Series A Vol. 18 (1975); 1 EHRR 524.

[69] *Fayed v UK* Series A Vol. 294 case B (1994); 18 EHRR 393. See also *A v UK* (Application number 35373/97; [2002] All ER (D) 264 (Dec.) in which the ECtHR found that the system of Parliamentary privilege is compatible with the Convention; and *Zollmann v UK* (Application number 62902/00, decision dated 27 November 2003).

[70] *Fayed v UK* Series A Vol. 294 case B (1994), 18 EHRR 393; see also K Reid, *A Practitioner's Guide to the European Convention of Human Rights* (3rd ed 1998) pp 174–177.

[71] Human Rights Act 1998, Sched 1, Art 10(2).

[72] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 208 *per* Lord Steyn.

[73] *Ibid*, 200.

6.104 Restrictions on the expression of free speech are required in order to protect character and reputation: freedom of speech does not equate to freedom to circulate libellous statements.[74] The restrictions that follow from the tort of defamation are a necessary derogation from the fundamental right to freedom of speech. In *Loutchansky v Times Newspapers Ltd* Brooke LJ commented:

> The delicate balance between the right to freedom of expression and the individual's right to the protection of his reputation has now been struck by the decision of the House of Lords in *Reynolds'* case. To talk of a public right to know, without more, is misleading. The Convention explicitly states that the right to freedom of expression carries with it duties and responsibilities, and its jurisprudence shows how the right to freedom of expression is circumscribed by what is strictly necessary and proportionate in a democratic society for the protection of individuals' reputations.[75]

6.105 The *Reynolds* case concerned qualified privilege for newspaper reporting of allegations that the claimant had misled the Dáil. The House of Lords held that the correct balance between protection of reputation and freedom of expression was struck in that case, and expounded principles to be applied where similar issues arise.[76] The question is, therefore, whether extending the benefit of qualified privilege to local authority reports which meet particular criteria would be similarly compatible with the Convention.

Necessary, prescribed by law, and proportionate?

6.106 Our view is that our recommended statutory privilege is compatible with the Convention. It might be the case that the availability of the privilege will mean that more local authority inquiry reports are published and that those criticised are deterred from pursuing claims in defamation, but such a reform would be necessary in a democratic society, prescribed by law and proportionate and therefore lawful.

6.107 It would be necessary because it would:

(1) enable local authorities to be accountable in a transparent way for the manner in which they discharge their statutory functions;

(2) improve the way in which local authorities discharge their functions;

(3) encourage the possibility that lessons learned by one local authority can be publicised so that improvements in practice will spread; and

(4) encourage the publication of findings of fact in matters where there is a genuine public interest.

[74] *Ibid*, 201.

[75] [2001] EWCA Civ 536; [2002] QB 321, para 45. Brooke LJ's judgement is on an interlocutory point on which the defendant appealed. The judgement of the Court of Appeal on the substantive appeal was handed down on 5 Dec. 2001 and is reported at [2001] EWCA Civ 1805; [2002] QB 783.

[76] See paras 5.36 – 5.39 above.

6.108 If enacted by Parliament it will be prescribed by law.

6.109 The defence is qualified, and proof of malice will defeat it. It is therefore proportionate. It provides a suitable level of protection, within the margin of appreciation, for the local authority while ensuring that an individual's right to defend his or her reputation will not be unduly restricted.

6.110 Our recommended statutory qualified privilege, where statutory immunity is related directly to the fairness of the inquiry and the report, represents less interference with a person's Article 8 rights than would extending statutory qualified privilege to a new category of inquiry irrespective of its actual quality.[77] We would argue that a blanket extension of the privilege is not "necessary", because there is an alternative which allows for finer balancing of competing rights in individual cases.

6.111 We would also argue that restricting the availability of qualified privilege to those situations where the publishing authority is satisfied that the inquiry process was fair, in this discrete area of local authority inquiry reports, is a necessary interference with Article 10 rights, on a justified basis in the terms of Article 10(2): "for the protection of the reputation or rights of others".

AN ADVANCE RULING?

6.112 In the consultation paper we asked:

> Do consultees think that it would be practicable and useful to have a new procedure whereby a party may obtain an advance ruling on the availability of the defence of qualified privilege, and if not, why not?[78]

Respondents' comments

6.113 Nineteen respondents commented on this issue. Four were in favour; three thought it might be useful in theory but was probably impracticable; eight were against it, and two were doubtful. Two thought it was irrelevant if statutory qualified privilege were to be extended.

Our conclusion

6.114 Our misgivings about this potential new procedure have been borne out by the response on consultation. We have not pursued this possibility.

RECOMMENDATIONS

Recommendation 1

6.115 **Where:**

(1) an Overview and Scrutiny Committee or a local authority, whether acting alone or with another local authority or other public body establishes an ad hoc inquiry because it has reason to believe there

[77] An option we rejected in the consultation paper: see paras 9.15 – 9.31 of the CP.

[78] Para 9.71 of the CP. The full discussion can be found at paras 9.40 – 9.70 of the CP.

was or may have been a failure in the exercise of one of its functions, and

(2) a report, or part of a report, or a summary of a report of the inquiry is "published" to the public or a section of it by a principal local authority, being one which established the inquiry, and

(3) specified fairness requirements are met,

then statutory qualified privilege shall attach to the report, except to the extent that the report relates to matters that have no connection with the subject of the inquiry.

Recommendation 2

6.116 **Statutory qualified privilege shall also attach to the report of a local authority special inquiry.**

Recommendation 3

6.117 **An inquiry (or other review or investigation) is not ad hoc if it is required to be held by or under any enactment.**

Recommendation 4

6.118 **Where the fairness requirements are not satisfied, neither common law privilege nor the statutory qualified privileges which apply where a document shall be open to public inspection shall attach either.**

Recommendation 5

6.119 **The fairness requirements are that:**

(1) the inquiry has been fairly conducted, or the local authority has taken all reasonable steps to check that it has been fairly conducted, *and*

(2) the report meets the following conditions:

(a) it reaches conclusions based on findings of fact, and

(b) it only contains criticisms of people which, where practicable, have been put to them in advance of publication, with an opportunity for them to respond, and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.

Recommendation 6

6.120 **In any proceedings for defamation, any question as to whether or not the fairness requirements have been met shall be determined by the judge.**

PART VII
THE NEED FOR AN ADDITIONAL FORM OF LOCAL AUTHORITY INQUIRY

INTRODUCTION

7.1 Ad hoc inquiries depend on the co-operation of those who appear before them. In some cases, where key witnesses refuse to co-operate, an ad hoc inquiry will not be able to acquire all the information it needs.

7.2 In the CP we asked whether there should be a new form of statutory inquiry for local authorities with powers to compel witness attendance and the production of documents, and to take evidence on oath.[1] A local authority, whether acting alone or jointly with another public body, might establish such an inquiry:

> where there have been serious complaints against the authority or a serious failure in its services,
>
> where it appeared that findings or recommendations would have implications for national practice, and
>
> where no inquiry had been or was going to be established by a Minister.

7.3 As with ad hoc inquiries, the proceedings and the report should benefit from the new statutory qualified privilege we proposed. The procedure for the inquiry should be determined by the inquiry.

7.4 We did not specify the circumstances where such a power might be used, but thought that "because of the degree of formality and the potential costs involved,[2] it would only be made use of in very exceptional situations".[3]

7.5 We did not imagine that such a formal inquiry would suit all local authority inquiries. The present ad hoc inquiry would still be used for less serious matters. Nevertheless, we thought that there may be a category of inquiries, which are not of sufficient national concern to merit a ministerial or Tribunals of Inquiry Act inquiry, but are highly controversial locally. Relying on co-operation alone might not enable a fair and rigorous investigation to be conducted, or to be seen to be conducted.

7.6 This proposal originated with SOLACE and its 1978 report.[4] The Local Authorities Association, in its response to the SOLACE report in 1980, did not

[1] Paras 9.92 – 9.101.

[2] The actual costs would depend on how the inquiry was conducted, unless that was prescribed. For example, if legal representation was permitted, or even required, the costs would be higher than where witnesses were not legally represented.

[3] CP para 9.100.

[4] The report stated:

pursue this proposal, but Waterhouse thought it merited further consideration.[5] The new statutory power would be supplmemental to the power to establish ad hoc inquiries.

7.7 One or two respondents thought it desirable to put the existing powers to establish ad hoc inquiries on a statutory footing.[6] We do not propose to regularise powers to set up ad hoc inquiries. They have great versatility. It is important to preserve this versatile tool of inquiry.

THE CASE AGAINST A LOCAL AUTHORITY HAVING A NEW FORM OF INQUIRY

7.8 In considering the case for a new form of inquiry, we discuss first the arguments against. There are four principal arguments against which have been put to us.

(1) A formal public inquiry, with powers to insist that witnesses attend and that documents are produced, under threat of prosecution for failure to comply, is too heavy-handed. Any inquiry process and report must attain the highest possible standards of fairness; there is the potential for great harm to be done where it is inadequate or unfair.

(2) There is already a large number of tools of investigation available to local authorities for inquiring into wrongdoing or failures in services. It is misguided to think that a formal, public inquiry is the only or even the best way of conducting an inquiry. Given the vast range of inquiries, investigations and other forms of control, both independent and internal, a new form of inquiry is an unnecessary addition.

(3) The costs implications for local authorities (and thus for the public) could be significant.

(4) Giving such a tool to local authorities opens up the possibilities of its being misused for political purposes.

Heavy-handedness

7.9 The first argument, that a new form of inquiry would be a heavy-handed response covers a number of issues.

> In the longer term local authorities should, by a change in the law, be given the power they lack at present to set up formal inquiries empowered, like existing ministerial inquiries under section 250 of the Local Government Act 1972, to summon witnesses, require the production of documents and take evidence on oath. The legislation should also make it possible (as is already possible for ministerial inquiries under section 11 of the Tribunals and Inquiries Act 1971 [this provision has been repealed and replaced by Tribunal and Inquiries Act 1992, s 8]) to prescribe statutory rules of procedure regulating the conduct of these inquiries.
>
> SOLACE and RIPA, "Ad hoc Inquiries in Local Government" (1978) para 4.13.

5 Para 32.63.

6 For example, A Arden QC thought that putting a power of inquiry on a statutory footing would allow a Code of Practice to be incorporated.

The intrusive nature of inquiry powers

7.10 First, as the Salmon Report noted,

> The exceptional inquisitorial powers conferred upon a tribunal of inquiry under the Act of 1921 necessarily expose the ordinary citizen to the risk of having aspects of his private life uncovered which would otherwise remain private, and to the risk of having baseless allegations made against him. This may cause distress and injury to reputation.[7]

7.11 Guidance on Inquiries issued by the Central Secretariat of the Cabinet Office in 2001, which incorporates advice to the Lord Chancellor on procedural issues in the conduct of ministerial inquiries submitted by the Council on Tribunals (July 1996), confirms that they should "always be confined to matters of vital public importance concerning which there is something of a nation-wide crisis in confidence".[8] In *Howard* Scott Baker J noted that the ambit of an inquiry is primarily a political question.[9] If there is no national or state interest in the outcome – the interest being mainly local – it is harder to justify compulsion in the name of the state.[10]

The risk of misuse

7.12 Second is the possibility of misuse of the new form of inquiry by a local authority. There is some ground for saying that the Shieldfield inquiry[11] demonstrates that there is a risk that, if a local authority can set up a new form of inquiry, the powers of compulsion could be abused, even though the inquiry itself is independent of the local authority.

7.13 Any poorly-conducted inquiry has the potential to fail the complainant, the family and friends of the complainant, future users of the service if faults are not corrected, and those criticised in the report. If there was wrongdoing and the inquiry fails to uncover it, the inquiry fails the complainant and the community; if there was no wrongdoing but the inquiry wrongly concludes that there was, the inquiry fails the community, and, specifically, those unfairly criticised. Privilege would attach,[12] so those criticised would have little recourse to any way of

[7] The Royal Commission on Tribunals of Inquiry, Report of the Commission under the Chairmanship of the Rt. Hon Lord Justice Salmon "The Salmon Report" (1966) Cmnd 3121, para 27.

[8] Para 17.

[9] *R (on the application of Howard) v Health Secretary* [2002] EWHC 396 (Admin); [2003] QB 830, paras 69–70.

[10] As the former Chief Executive of Torfaen Council put it, the question of whether to extend such powers to a local authority "go[es] to the question of a local authority's capacity to interfere with the freedoms and privileges of others (both individuals and agencies) in pursuit of their duty of community leadership and of realising the well being of the communities for which they are responsible."

[11] See para 5.27 above.

[12] See para 5.38.

salvaging their reputation, and possibly their careers.[13] The existence of the new form of inquiry would not guarantee that the inquiry would be well conducted.

7.14 One consultee suggested there is an underlying assumption that a public inquiry, conducted by a senior lawyer or member of the judiciary, will be faultless in its method and its findings. The point is put by David Carson:

> There is a hierarchy of inquiries. A judicial inquiry appears to be universally regarded as *la crème de la crème*. Public inquiries are preferred over private. A lawyer chair appears to be regarded as essential if the inquiry is to have any gravitas. The more inquiry members, then the more powerful or persuasive the conclusions and recommendations, appears to be the assumption. A dedicated secretariat demonstrates serious intentions.[14]

7.15 One submission suggested that we had treated Waterhouse, Jillings and Cartrefle all as inquiries and reports which were properly conducted and whose conclusions were sound. We certainly worked on the basis that the Waterhouse inquiry was properly conducted and its conclusions sound; we made no assumptions about the Jillings and Cartrefle reports. The consultee strongly disputed the view that the Waterhouse procedures and findings were fair or reliable.[15] He drew our attention to the forceful criticisms made of the Waterhouse inquiry itself by Anna Pauffley QC in her closing submissions to the inquiry.[16]

7.16 The SOLACE guidance and Salmon principles might be enough to ensure the quality of the inquiry, but such guidance will only be helpful to those willing to be

[13] See above para 5.90 on the relationship between the quality of the inquiry and qualified privilege.

[14] D Carson, "Structural problems, perspectives and solutions" in J Peay (ed), *Inquiries after Homicide* (1996), p 143.

[15] He wrote:

> There is no doubt in my mind that this danger attaches not only to local authority inquiries, but also to Tribunals of Inquiry inquiries where the possibility of appealing against findings of fact was ruled out following the recommendation of Lord Salmon. (Lord Salmon took the view that a Tribunal of Inquiry was an instrument of government and that as such it would be ineffectual if its findings were not seen as having finality.)
>
> It is highly unlikely that the hearings presided over, and the reports compiled by Lord Widgery for the first Bloody Sunday inquiry, and by Sir Ronald Waterhouse for the North Wales Tribunal, would ever have taken the form they did had the two chairmen believed that the conduct and conclusions of their Tribunals might eventually have been scrutinised by a higher court.

[16] Anna Pauffley QC submitted, amongst other things, that Treasury Counsel to the Waterhouse inquiry had adopted an adversarial approach. She also submitted, as was noted in the report itself,

> that we should not make any findings of fact implicating individuals in our report because the full evidence in relation to specific allegations that would be available at a criminal trial, including character evidence, has not been heard and because some allegations emerged very late in the proceedings so that the alleged abuser was at a disadvantage in dealing with them.

Waterhouse Report, para 6.03.

guided. The Shieldfield Review Team were aware of the notions of "natural justice" and of "Salmon letters" because they referred to them. That did not mean that they actually put them into effect.[17]

There is no need

Powers of compulsion will not necessarily be appropriate or useful

7.17 Even where an inquiry team has powers to compel attendance it might not be appropriate to use them, for the sake of the well-being of the witnesses themselves.[18]

7.18 In other recent inquiries conducted in public witnesses have not been compelled to attend, not out of consideration for the witnesses in question, but because it was quite evidently going to be pointless. In the case of Shipman this was because he had nothing to lose by refusing to attend. In the case of Kouao (who was responsible for the death of Victoria Climbié) it was because the witness would continue to deny responsibility. Thus, even if an inquiry has powers to compel attendance and the production of documents, this will not necessarily allow it to elicit the information it seeks.

Proliferation of powers

7.19 The legal landscape has changed much since SOLACE's report in 1978. Not only is there greater emphasis on continual external inspection and reporting, but there is a greater role for authorities working with other stakeholders. Local authorities are continually subject to assessments and reviews, which may well prompt an investigation into their own affairs. The new ethical framework encourages high standards of ethical governance and provides for an independent and open method for investigation of such complaints. In such

[17] In *Lillie and Reed v Newcastle City Council* [2002] EWHC 1600 (QB); [2002] All ER (D) 465 (Jul.), para 1126, Eady J held, "any claim to have accorded Christopher Lillie or Dawn Reed 'natural justice' in the course of this inquiry has no contact with reality". As regards "Salmon letters", which the Review Team claimed to have sent L and R, the letter actually sent to Lillie was very vague on what was alleged against him, and wrongly said that the Review would not be revisiting the criminal matters on which he had been acquitted (para 1160). Eady J in fact concluded that that assurance was a lie (para 1165).

[18] Eg, the inquiry on behalf of Edinburgh Council into abuse of children in care which followed criminal proceedings. In the report the team stated:

> The Inquiry had power to compel witnesses to attend, but we were quite clear that we would not put any pressure on the victims to attend, and that nothing would be gained by doing so. Nor did we ever need to resort to compulsory powers with regard to any other person. All those persons we were able to trace responded readily and constructively to our requests to speak to them.
>
> … Our ability to follow up "reports made" has been hampered by the failure of two of [the former residents in the children's homes] to speak to us. Nevertheless, we feel we were right not to insist on their attendance. The trial was a harrowing experience for the victims, and we do not believe it would have been right to have subjected them to any more unwanted questioning. Where possible, we have tried to obtain information about these reports in other ways, and that approach has been reasonably successful.

"Edinburgh's Children" (1999) paras 2.5 and 2.19. See paras 2.5 and 2.6 on why the inquiry felt an informal approach was best.

circumstances another form of inquiry may simply overload an already complex legal landscape, with little to offer in terms of added benefits.

7.20 In any event, a report may secure public confidence even though the inquiry took place in private. It may not always be easy to anticipate problems that an inquiry will encounter. The Family Law Bar Association thought there would be difficulty "identifying in advance which were the inquiries where such [additional] powers were likely to be needed, and those where they were not". They contrasted a complex inquiry which proceeded with full co-operation with an inquiry where the authority which had set it up then failed to co-operate with it.[19]

Costs implications

7.21 The costs of such an inquiry are significant, as various respondents noted. We agree with the assumption of the Family Law Bar Association that the likely cost of a formal inquiry will act as a deterrent to setting one up.

7.22 We note also that there are costs implications merely in creating the power because, if such a power is available but a local authority decides not to use it, it is likely that in some cases that decision will be challenged. If local authorities were granted such a power, then a failure to use the statutory inquiry in a situation where Article 2 rights are engaged will breach section 6 of the Human Rights Act. The local authority in this case will have the legal capability to conduct an investigation that fulfils the admittedly fluid and variable requirements of the duty to investigate. If it chooses instead to hold a non-statutory inquiry where it is known for example, that key witnesses will not co-operate, the decision to establish that inquiry will be open to challenge. This could take the form of a free-standing Human Rights Act claim for acting unlawfully contrary to section 6,[20] or be attached to a traditional judicial review action.[21]

7.23 Even if successful in resisting the challenge, the authority will incur costs in defending its decision. This suggests that a formal power of inquiry should be available, if at all, only in limited circumstances – then at least the preliminary stages of judicial review should eliminate completely unmeritorious applications.

7.24 Whether a new power is conferred on local authorities or not, the issue of cost remains a live one if the issue of adequate investigation is to be properly addressed. Philip Thomson, Head of Legal Services at Essex County Council, put it thus:

> … local authorities facing this issue will also have to weigh the need to be democratically accountable with the cost of financing an inquiry. … However, the expectations of a democratic society by its citizens are that authorities will conduct inquiries where the way they have conducted their functions is open to question. It is therefore a serious

[19] The Tyra Henry inquiry: "Whose child?" (1987) London Borough of Lambeth pp 5, 119.

[20] Human Rights Act 1998, s 7(1)(a).

[21] For instance, the decision to establish the inquiry as a non-statutory one could fall foul of general administrative law principles, such as failure to take into account a material consideration, *Wednesbury* unreasonableness and the like.

question for Government as to how local authorities will be enabled to undertake this task.

Potential for political abuse

7.25 It is conceivable that any inquiry procedure might be used for improper political purposes. For example, if political mileage could be made out of an inquiry into the presumed failings of a particular local authority department, it is feasible that an authority might instigate it. In some cases, the prime motivation of the authority establishing the inquiry might be political, rather than to learn from past errors. How much more destructive would a politically-driven inquiry be if it were public and with powers of compulsion, as opposed to being able to take evidence in private from witnesses who attend voluntarily. If the inquiry were chaired by an independent person, the powers of compulsion might be more acceptable.[22]

THE CASE FOR A NEW STATUTORY FORM OF INQUIRY

7.26 Notwithstanding the arguments against, we think there are also powerful arguments in favour of the idea. We first consider arguments put forward by respondents to the consultation paper. We then review the existing powers of inquiry open to a local authority. We examine the implications of the European Convention on Human Rights and Fundamental Freedoms. We review the powers of inquiry *other* bodies have and whether they would be adequate to the kind of case which might arise. We conclude that there are circumstances where this new form of inquiry could be needed.

The views of respondents

7.27 Several respondents thought there was no need for a new power. In particular, the Local Government Association reported no call from its member authorities for such powers. Their view was that in the majority of circumstances the existing powers are wholly adequate; only in very unusual circumstances do inadequacies appear. Most local authorities do not meet these circumstances.

7.28 Those respondents who had encountered these unusual circumstances were, by contrast, in favour of a new form of inquiry. Philip Thomson of Essex County Council[23] described the circumstances in which the case for an inquiry with powers of compulsion are strongest:

> Many of the inquiries covered by the consultation paper involve often highly distressing and emotional events which have befallen a family. Many will relate to the unlawful killing of a loved one. It is critically important in such circumstances that local authorities are subject to scrutiny and are democratically accountable. The prime, and perhaps

[22] Compare what happens with Monitoring Officers and ethical investigations. Members are required to make a complaint to the MO against another Member if they think the other is in breach of the Code of Conduct. The MO is not a Member, but it is questionable whether that degree of independence is enough to prevent such complaints becoming political weapons.

[23] The council which was jointly responsible with North Essex Health Authority and the Prison Service for establishing the inquiry into the death of Christopher Edwards at the hands of Richard Linford while in custody.

only satisfactory, way of achieving this, is by an inquiry followed by a public report.

7.29 He developed the argument on the grounds of greater democratic accountability:

> Currently, in seeking to be democratically accountable, local authorities will have to weigh the public interest in that accountability with their fiduciary duty to their council tax payers. Although the latter duty is important, it is our view that the balance should lie with democratic accountability, certainly in circumstances where the lives of citizens have been seriously affected by the action/inaction under review. The law should reflect that the importance of the public interest in accountability may, in such circumstances, outweigh the public interest in an authority's fiduciary duty to its council tax payers.

7.30 In line with the current drive towards greater openness and transparency in the public sector, creating a new statutory form of inquiry would enable local authorities to conduct a more thorough and effective inquiry than would otherwise be possible. It would safeguard the council from the accusation that the inquiry has been set up in order to absorb political pressure yet the inquiry itself is powerless. If an inquiry is unable to demand that all relevant evidence be placed before it, public confidence in the inquiry and in the agencies or persons under investigation will be dented. Victims and complainants may feel that their concerns are not being fully and openly addressed where there is a choice whether or not to help the inquiry. Hearing from those responsible for failures and wrongdoing the reasons for their actions may help bring about "closure" for the victims and their families. Such reasons are not always fully explored and tested in either criminal or civil actions.

7.31 The argument that the public interest may require additional powers of compulsion in cases where the usual kind of ad hoc inquiry is inadequate was advanced by five respondents, including Elizabeth Lawson QC, on behalf of the Family Law Bar Association.[24] As another respondent wrote: "Without these powers some inquiries have been unable to form substantive conclusions and recommendations and the whole purpose of the inquiry is undermined."

The Linford/Edwards inquiry

7.32 A recent example of an inquiry which was not able to garner all the evidence it needed is the Linford/Edwards inquiry.[25] Christopher Edwards was on remand when he was killed by another detainee, Richard Linford, who was later diagnosed as a paranoid schizophrenic. Linford pleaded guilty to manslaughter on grounds of diminished responsibility. The European Court noted that in these

[24] They thought that on the face of it, powers to compel the attendance of witnesses and the production of documents could be needed in the course of a Part 8 Review.

[25] The European Court held that the inquiry was independent, as it was chaired by a senior member of the independent bar. Additionally, there was no undue delay in the report, given the complexity and sensitive nature of the material under investigation. However, the lack of power to compel witnesses and the private nature of the inquiry failed to comply with the requirements of Article 2: *Edwards v United Kingdom* App no 46477/99, judgement 14 March 2002, (2002) 35 EHRR 487.

circumstances, "the trial was therefore brief".[26] The inquest into Christopher Edwards' death had been adjourned pending the trial but was closed on the conviction of Linford. Christopher Edwards' parents were advised that there was insufficient evidence to warrant prosecution for manslaughter on grounds of gross negligence of anyone in the statutory agencies involved in the case.

7.33 The statutory agencies with responsibility towards Edwards and Linford – the Prison Service, Essex County Council and North Essex Health Authority – established a private, non-statutory inquiry. The local authority, although not involved with the events on the day of the killing, had had prior involvement with Linford in their social services department. The inquiry was unable to make two prison officers give evidence, one of whom may have had evidence of potential significance to give to the inquiry.

The Interest Rate Swaps inquiry

7.34 A second example is the Interest Rate Swaps Inquiry.[27] That inquiry was also unable to compel the attendance of a significant witness. This left the inquiry without information which it needed. The inquiry wrote, "In our judgement, the Inquiry's unresolved difficulties with [this witness] point strongly to the need for statutory reform for this kind of *ad hoc* inquiry, as recommended by the Marre Committee … ."[28] The authors of the report developed their argument in a postscript to their report (a copy of which was sent to us as a response):

> It appears to us that a statutory basis should be found for *ad hoc* inquiries into local government finance, granting inspectors certain express powers and establishing a statutory procedure about which participants could acquire some prior knowledge and confidence.[29]

They then referred to the Marre Committee's report and concluded:

> In our view, there is an important statutory gap, identified by the Marre Committee in 1978, where a local authority requires an *ad hoc* inquiry into its financial affairs. Section 250 of the 1972 Act covers the situation where the Secretary of State has power to direct that an inquiry should be held, but *not* where the Audit Commission, an external auditor or a local authority seeks an independent inquiry in a difficult and controversial matter.[30]

7.35 While the circumstances of the Swaps inquiry were unusual, a similar situation could arise again where a local authority wishes to establish an independent inquiry into financial irregularities with a wider brief than an auditor could have and finds that it is hamstrung by the lack of powers to compel witnesses to attend.

[26] *Ibid*, para 22.

[27] V Veeder QC, John Barratt and Michael Reddington. In February 1990 an inquiry team was appointed by the London Borough of Hammersmith and Fulham to conduct an independent inquiry into the Borough's capital market activities. They reported in 1991.

[28] The Swaps report, ch 1, para 26.

[29] The Swaps report, Postscript to Chapter One, para 9.

[30] The Swaps report, Postscript to Chapter One, para 11.

Powers of inquiry available to a local authority

7.36 Although a local authority has a number of investigative tools at its disposal,[31] none permits it to set up an inquiry with the power to compel witnesses, take evidence on oath or compel production of documents of its own volition.

Tribunals of Inquiry Act inquiries

7.37 A local authority can seek to have a matter investigated by lobbying for an inquiry to be set up under the Tribunals of Inquiry (Evidence) Act 1921.[32] These inquiries provide for extensive powers of coercion when Parliament directs that a "definite matter ... of urgent public importance"[33] must be inquired into. The report which follows will attract absolute privilege, as a return of a report to Parliament. The costs of such an inquiry will be borne by central government.

7.38 The problems posed by this method are uncertainty and unsuitability. A Tribunal requires the support of both Houses of Parliament, along with a sponsoring member; this is normally a minister or the Prime Minister. This may be very hard to come by.

7.39 A matter of local concern may not meet the threshold of urgency and importance laid down in the Act. Indeed, a Tribunals of Inquiry Act inquiry may not be the most effective method of investigating a matter that can be performed in a less intrusive and informal way.

Petitioning for a ministe rial inquiry

7.40 If the authority considers that it will not obtain the co-operation from witnesses necessary to make the inquiry effective, or that the issues raised go beyond the geographical area of its borders, the local authority can also petition a minister to establish a statutory or non-statutory inquiry.[34] There will need to be a relevant enabling statute conferring a power to order such a ministerial inquiry.[35]

7.41 However, lobbying for a Tribunals of Inquiry Act inquiry or a ministerial inquiry will not guarantee one is set up. Central government, although now more aware of the positive duties imposed on it by Article 2 ECHR, is met with more requests for inquiries than it orders. Costs implications for central government are significant – for instance, the Bristol Royal Infirmary Inquiry cost £14 million.[36] It will be reluctant to investigate a matter which is primarily of local concern.

[31] See above paras 2.16 – 2.32.

[32] See para 2 in Appendix D.

[33] Section 1(1), Tribunals of Inquiry (Evidence) Act 1921.

[34] See paras 5 – 35 in Appendix D.

[35] See, for example, Local Authority Social Services Act 1970, s 7C; NHS Act 1977, s 84; Children Act 1989, s 81; Education Act 1996, s 507; Police Act 1996, s 49.

[36] http://www.bristol-inquiry.org.uk/about/q_and_a/brisqa1.htm#26

Comment

7.42 The local authority cannot establish, nor compel any other body to establish, an inquiry with powers to compel witnesses and production of documents. Does this matter? We say that it does, and we now explain why.

The need for proper investigation

7.43 Our view is that the public interest requires proper investigation, to prevent past mistakes being repeated, and for local authorities to be held accountable. The nature of that investigation will vary according to the gravity of the issue, but local authorities perform functions which crucially affect people's well-being. The public is best served by an investigation which is in fact able to explain to those immediately affected and the public in general what happened, why, and how any errors may be avoided, if they can.

7.44 We base our view on the public interest, but are fortified in it by obligations falling on the State by virtue of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). We now turn to consider the implications of the ECHR.

The positive obligations arising under the Convention

7.45 Positive obligations arise under the ECHR. One is the obligation on the State, in certain circumstances, to conduct an adequate investigation into a possible breach of a person's human rights. We examine here how such an obligation arises, first in general terms, then specifically in relation to Articles 2 and 3 of the Convention.

THE PRINCIPLE OF EFFECTIVENESS AS AN ORIGIN OF POSITIVE OBLIGATIONS

7.46 A number of positive obligations relating to Articles of the ECHR have their origin in the principle of effectiveness used by the European Court of Human Rights ("ECtHR"). The principle of effectiveness[37] is a fundamental principle of interpretation of the Convention by the ECtHR and domestic courts because

> the object and purpose of the Convention as an instrument for the protection of individual human beings requires that its provisions be interpreted and applied so as to make the safeguards practical and effective.[38]

7.47 This means that in considering whether there is an alleged violation, or likelihood of violation, of a Convention right, the court, and arguably decision-makers in legislatures and public bodies, must focus on the realities of the situation. The Convention is not intended to guarantee rights that are "theoretical or illusory but rights that are practical and effective",[39] because the Convention is "designed to safeguard the individual in a real and practical way as regards those areas with

[37] J Merrills, *The Development of International Law by the European Court of Human Rights* (2nd ed, 1995), 98–124.

[38] See *Loizidou v Turkey (Preliminary Objections)* (1995) 20 EHRR 99, para 72.

[39] See *Artico v Italy* (1980) 3 EHRR 1, para 33.

which it deals."[40] Accordingly, a remedy required by Article 13 must be "effective" in practice as well as in law.[41] The remedy required by Article 13 need not always be judicial in character.[42]

7.48 Thus, in order to protect or enforce human rights the law has to be effective, and the ECtHR has therefore imposed positive obligations on States in order that their domestic laws secure the rights under the Convention to all.

POSITIVE OBLIGATION ARISING UNDER ARTICLE 2

7.49 The material part of Article 2 of the Convention states:

> Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided for by law.[43]

7.50 Article 2 is of fundamental importance to the operation of the Convention[44] and must be strictly construed.[45] No derogation is permissible from its requirements, except in time of war.[46]

7.51 Two obligations are imposed upon the State. The negative obligation requires that the state *refrain from taking life*, by the actions of state agents. The positive obligation prescribes that the State must take appropriate measures to *safeguard life.*

7.52 Adjunct to these is a requirement for an effective investigation. Although this is not stated on the face of the Article, the procedural obligation to investigate has been read into it.[47] Where the State's responsibility has been engaged under either of the primary obligations, a local authority ad hoc inquiry may be relevant in discharging the investigative obligation. In some circumstances we think this will require the addition of powers of compulsion.

When is an effective investigation required by Article 2?

7.53 The circumstances in which the State is obliged under Article 2 to conduct an investigation into a death are not set in stone.[48] The commentators do not agree

[40] *Airey v Ireland* (1979) 2 EHRR 305, para 26.

[41] See, eg, *Ashkoy v Turkey* (1997) 23 EHRR 533 and *McGlinchey and others v UK* (2003) Application 50390/99, para 62.

[42] *Z v UK* (2001) 34 EHRR 97, para 106.

[43] Article 2(1).

[44] *McShane v UK* App No 43290/08, judgment 28 May 2002, para 91.

[45] *McCann v UK* [1996] 21 EHRR 97, para 147.

[46] Article 15(2) ECHR.

[47] *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390, para 32, [2003] UKHL 51. See eg, *McCann v UK* [1996] 21 EHRR 97, para 161; *Gulec v Turkey* (54/1997/838/1044), para 77; *Ergi v Turkey* (66/1997/850/1057).

[48] As Lord Woolf CJ on behalf of all the members of the Court of Appeal held, "by its nature it cannot be a duty defined by reference to fixed rules": *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390, [2003] QB 581, para 32. The issue is

the threshold at which the duty is engaged.[49] Many of the authorities are European Court of Human Rights judgments which are essentially pragmatic and very case-specific; only trends can be identified. The case law suggest that the following deaths may need investigation under Article 2:

(1) deaths caused by third parties when the victim is in the care and custody of the state, as in *Edwards*[50] and *Amin*;[51]

(2) deaths caused by alleged negligence by doctors where the victim was not in custody (but arguably under the doctors' control), as in *Powell*;[52]

(3) deaths caused by criminal acts of a nurse in a hospital, where the victim was in the hospital's "custody" and care, as in *Taylor*;[53]

(4) deaths caused by gross negligence by medical staff, as in *Khan*;[54]

(5) deaths even where there is no direct State responsibility for the death itself, as in *Menson v UK*.[55]

7.54 It is likely that the duty will be triggered where there is an arguable case that the positive or negative obligations in the Article have been violated. Hence killings by State agents and situations where deaths have occurred while the victim was in the care and or control of the State, or where the death was the result of a criminal act which the State is bound to investigate, are likely to require an investigation.

also being addressed by the Joint Committee on Human Rights: see *Deaths in Custody: Interim Report* (HL 12, HC 134) (2004, TSO).

[49] Lester and Pannick state that the duty to investigate arises where there has been a deprivation of the right to life through the use of lethal force: A Lester and D Pannick, *Human Rights Law and Practice*, para 4.2.32. Starmer submits that the duty arises in circumstances which might amount to a breach of Article 2: K Starmer, *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (1999), para 14.14.

[50] *Edwards v United Kingdom* App No 46477/99 judgement 14 March 2002; (2002) 35 EHRR 487.

[51] *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390; [2003] QB 581. Note that this case has been successfully appealed in *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51; [2003] 3 WLR 1169. The decision of the House of Lords *Middleton* was handed down in March 2004: see below para 7.64. Note also that the judgements at the Court of Appeal in *Amin* and *Middleton* were commented on in *R (Stanley) v Inner London Coroner* [2003] EWHC 1180 (Admin) and applied in *Sacker v West Yorkshire Coroner* [2003] EWCA Civ 217, [2003] 2 All ER 278 and *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129; [2003] 4 All ER 1239. See too *R (on the application of Green) v Police Complaints Authority* [2004] UKHL 6.

[52] *Powell v United Kingdom* App No 45305/99, admissibility decision of 4 May 2000.

[53] *Taylor v United Kingdom* [1994] 79–A DR 127.

[54] *R (on the application of Khan) v Secretary of State for Health* [2003] EWCA Civ 1129; [2003] 4 All ER 1239. See para 7.62 below.

[55] App no 47916/99 decision on admissibility of 6 May 2003. Held inadmissible on other grounds.

POSITIVE OBLIGATION ARISING UNDER ARTICLE 3

7.55 Article 3 reads: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". In a recent decision, the State's responsibility was engaged pursuant to Article 3, rather than Article 2.[56] The breach of Article 3 was not found proved by the European Court, but failure to provide an adequate domestic remedy may mean that the State is also in violation of Article 13 of the Convention:

> The Court has previously held that where a right with as fundamental an importance as the right to life or the prohibition against torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure… . Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should however be available to the victim or the victim's family a mechanism for establishing any liability of State officials or bodies for acts or omissions involving the breach of their rights under the Convention.[57]

7.56 The fact that breaches of Article 3 have not been proved does not necessarily mean that Article 13 is irrelevant, if the breaches were arguable:

> These complaints were not declared inadmissible as manifestly ill-founded and necessitated an examination on the merits. … An effective domestic procedure of enquiry would have offered more prospect of establishing the facts and throwing light on the conduct reasonably to be expected from the social services in a situation where the applicants demonstrated long-term and serious problems that arguably might have called for additional efforts of investigation to uncover the reality of the family dynamics.[58]

7.57 The engagement, or risk of engagement, of Articles 2 and 3 appear to give rise to the duty to investigate, as these Articles are unqualified and concern the most

[56] *DP and JC v UK* App No 38719/97; [2003] 1 FLR 50.

[57] *DP and JC v UK* App No 38719/97; [2003] 1 FLR 50, para 135. See also *Kaya v Turkey* App No 22729/93 judgement 19 February 1998, *Reports* 1998–I, (1998) 28 EHRR 1, para 107, *Ekinci v Turkey* App No 27602/95, hearing date 16 July 2002.

[58] *DP and JC v UK* App No 38719/97; [2003] 1 FLR 50, para 136. See also *Indelicato v Italy* (2002) 35 EHRR 40, paras 35–37 where although the ECtHR found that the allegations of a direct violation of Article 3 had not been proven, the delay and negligence in conducting an inquiry led to a violation of the positive obligation under Article 3. Consider also *McGlinchey and others v UK* (Application no 50390/99) (29 April 2003), [2003] 72 BMLR 168 where, in his partially dissenting judgement, Judge Sir Nicholas Bratza considered that the applicant's complaints did not fall outside the protection of Article 13. He was satisfied that the various complaints of the applicants raised an arguable claim and considered the applicant's rights were violated under Article 13 independently of Article 3.

extreme form of physical harm that can be visited on a person, namely death and torture.[59]

What constitutes an effective investigation?

7.58 The features of the investigation are fluid. The availability of civil proceedings may be given weight in determining compliance, but the mere fact that they are possible will not absolve the State from its investigative duty.[60]

7.59 In *Jordan* the European Court laid down several features that an investigation into a death (there, a death caused by acts of a State agent) should possess. It should be independent from those implicated in the events;[61] it must determine whether or not the use of force was justified, identify and punish those responsible;[62] it must be prompt and reasonably expeditious;[63] and there must be a sufficient element of public scrutiny, involving the next of kin "to the extent necessary to safeguard his or her interests".[64]

7.60 *Jordan* was applied at first instance by Hooper J in *Amin*, where the victim was killed by another inmate, not by a state agent. Hooper J held that the Secretary of State's refusal to hold a public inquiry, given the refusal of the CRE and the coroner to accede to the family's request, was incompatible with Article 2. Hooper J ruled "the obligation to hold an effective and thorough investigation can only be met by holding a public and independent investigation with the family legally represented, provided with the relevant material and able to cross-examine the principal witnesses."[65] The House of Lords held that Hooper J had

[59] Query whether a breach of the Article on slavery might not give rise to a similar duty. Article 4 does not merely impose a negative obligation upon a state to refrain from putting individuals into a condition of slavery, servitude or compulsory labour; the Commission has, however, read in to Art 4 a positive obligation to ensure that its laws prevent individuals from imposing such conditions upon others, see eg *X v Netherlands* (1983) 5 EHRR 598, para 2, (a decision of the European Commission of Human Rights), and R Clayton and H Tomlinson, *The Law of Human Rights* (2000), para 9.10. However, we have found no cases referring to effective investigations under Art 4. Nevertheless, given the positive obligation under Article 4 it is arguable that it would be presumed that there is an obligation on the state to mount an effective investigation into issues of slavery, servitude and forced labour.

[60] The Court described the relevance of civil proceedings to fulfilling the procedural obligation. It stated:

> ... civil proceedings would provide a judicial fact finding forum, with the attendant safeguards and the ability to reach findings of unlawfulness, with the possibility of damages. It is however a procedure undertaken on the initiative of the applicant, not the authorities, and it does not involve the identification or punishment of any alleged perpetrator. As such, it cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.

Hugh Jordan v United Kingdom App No 24746/94, judgement 4 May 2001, para 141.

[61] *Hugh Jordan v United Kingdom* App No 24746/94, judgement 4 May 2001, para 106.

[62] *Ibid*, para 107.

[63] *Ibid*, para 108.

[64] *Ibid*, para 109. See also *R (Wright) v Secretary of State for the Home Department* [2001] EWHC Admin 520; [2001] All ER(D) 204.

[65] *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390; [2003] QB 581, para 91.

approached the matter in the right way, and that *Jordan* and *Edwards* had established that, while there is "no single model of investigation" to fulfil the State's investigative duty under Article 2, there are "minimum standards which must be met, whatever form the investigation takes".[66]

7.61 Further, the House of Lords rejected any suggestion that there should be a more rigorous inquiry in the cases of acts by agents of the State which led to death than in cases where negligent omissions by State agents led to a death in custody.[67] Lord Steyn suggested that the former may be a greater affront to the public conscience than the latter, but, by contrast, the investigation of cases of negligence resulting in the death of prisoners may be often more complex and demanding, and that such systemic failures in the system may affect more individuals.

7.62 The issue arose again in *R (on the application of Khan) v Secretary of State for Health*.[68] The claimant's daughter died of a heart attack due to errors, described as "grossly negligent" by later expert evidence, when she was receiving dialysis. The cause of death was certified by the hospital as cardio-respiratory attack and lymphoma, but with no reference to the infusion of potassium which she had received in error. A police investigation took place during which the police asked the hospital not to communicate with the family. There was no prosecution. The NHS Trust embarked on its own internal investigations, but did not inform the family of the girl of the results or progress. There was an inquest, but no legal funding was made available for representation at the inquest. The Secretary of State stated he had no power to provide funding for legal representation, and he refused to order a non-statutory inquiry. The claimant applied for judicial review of that refusal. The refusal was initially upheld, but the Court of Appeal allowed the claimant's appeal, applying the Court of Appeal decision in *Amin*.

7.63 It held that:

(1) a police investigation where the family played no part and which resulted in a decision not to prosecute could not act as a substitute for an effective inquiry;

(2) the Trust investigations were not sufficiently independent to amount to an effective inquiry;

(3) a coroner's inquest would not discharge the State's obligation under Article 2 if the family could not play an effective part, which it could not in

[66] [2003] 3 WLR 1169, para 32 *per* Lord Bingham MR. See also paras 44–45, *per* Lord Slynn. The Court of Appeal, whose decision was reversed by the House of Lords, had held that the features of an effective investigation pronounced in *Jordan* were not to be regarded as "requirements set in stone": *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390; [2003] QB 581, para 60. The CA thought that the statement in *Wright*, therefore, that an investigation should have the general features identified in *Jordan* could not be accepted at face value.

[67] See the CA decision at [2002] EWCA Civ 390; [2003] QB 581, para 62, and Lord Steyn's comments at [2003] 3 WLR 1169, para 50. See too *R (on the application of Green) v Police Complaints Authority* [2004] UKHL 6.

[68] [2003] EWCA Civ 1129; [2003] 4 All ER 1239.

this case without legal representation due to the complex nature of the evidence;

(4) the admissions of liability did not discharge the obligation as the law did not require the family to initiate civil proceedings, the duty being on the State not the family; and

(5) in conclusion, the positive obligation under Article 2 had not been met since the case was a grave one where allegations, supported by expert evidence, of gross misconduct and an orchestrated cover up had been made.[69]

7.64 In *R(on the application of Middleton) v West Somerset Coroner*,[70] the House of Lords has recently reversed the decision of the Court of Appeal in part. The House confirmed the duty to investigate under Article 2 of the ECHR. The House held that to meet the procedural requirement, an inquest ought ordinarily to culminate in an expression of the jury's conclusion on the disputed factual issues in the case. A verdict that did not express the jury's major conclusions on an issue in the evidence at the inquest could not satisfy the expectations of the deceased's family or next of kin. They had legitimate interests in the conduct of the investigation, so had to be accorded an appropriate level of participation. The House of Lords concluded that there were some cases where the current coroner's regime did not meet the requirements imposed by the ECHR. To meet the requirements of the Convention, in some cases, will require coroners to exercise their discretion to elicit the jury's conclusion on the central issue or issues.[71]

7.65 What is important is that the State recognise in each individual case what is likely to be required for it to comply with the obligation.

7.66 An ad hoc inquiry by a local authority will not necessarily fall foul of the investigative obligation. The duty must be seen in the round, having regard to criminal prosecutions, civil actions, disciplinary proceedings, inquests and other forms of inquiry. The ad hoc inquiry must not be viewed in isolation. There will be occasions where it should be supplemented by powers of compulsion.

WHO IS THE STATE FOR THE PURPOSE OF DISCHARGING THE DUTY?

7.67 In one sense this question is solved very simply. The manner in which the procedural obligation is discharged is not necessarily by means of one investigation. There may be a series of inquiries and reviews triggered by the incident of which the local authority ad hoc inquiry is merely one component. In this sense, the local authority is doing its best to discharge a duty which is incumbent on the State as a whole. It cannot therefore, be legally responsible for

[69] *Ibid*, paras 68 – 75.

[70] [2004] UKHL 10

[71] The approach in *Middleton* was applied by the House of Lords in *R (on the application of Sacker) v West Yorkshire Coroner* [2004] UKHL 11. Here the House of Lords affirmed the approach of the Court of Appeal in this case.

failure of the State to provide a system which ensures compliance with the Article 2 duty.

7.68 This argument is fortified by the Court of Appeal's decision in *Amin.*[72] (The House of Lords did not address this point directly.) The Court of Appeal examined the Secretary of State's decision to refuse a public inquiry. In so doing it stated that the correct question to ask at the outset was whether the State had fulfilled its obligations under Article 2. It stated:

> To this question the Secretary of State is a proper respondent. He represents the State in a sense and to an extent not mirrored by the functions or responsibilities of the Coroner or the CRE. Of course those bodies, which owe public duties under statute, may be said to be emanations of the State. They are plainly public authorities for the purposes of the HRA. But we are clear, certainly in the present context, that central government is the proper body to stand in the shoes of the State when it is called on to answer an alleged violation of ECHR Article 2, including and in particular a violation of the implicit procedural duty to investigate.[73]

7.69 On examining the compatibility of the rules governing Coroner's inquests and Article 2, the court stated:

> The Article 2 duty is primarily that of the State; any shortcomings in the jurisdiction of a Coroner's inquest have to be made good by the State.[74]

7.70 The responsibility of discharging the procedural duty lies by default with central government, which will have the necessary powers to make amends for any shortcomings in the delegated methods of inquiry. It may choose to discharge the burden placed upon it by a system of inquiries and investigations. Any failure of these systems to satisfy the requirements will however constitute a violation by central government. The local authority that conducts an inquiry that does not meet the required standard will not be committing a breach of Article 2 or Article 3. Indeed, a deficient ad hoc inquiry arguably is not a breach *per se* – it is the

[72] *R v The Secretary of State for the Home Department ex p Amin* [2002] EWCA Civ 390; [2003] QB 581.

[73] *Ibid*., para 39.

[74] *R v HM Coroner for West Somersetshire ex p Middleton* [2002] EWCA Civ 390; [2003] QB 581, para 91. *Amin* and *Middleton* were heard together on appeal. The *Middleton* case concerned a suicide in custody in which the Coroner ruled that the issue of neglect should not be left to the jury. The Court of Appeal ruled that the inability to return such a verdict, without identifying individuals, meant that the investigation may not amount to a sufficient investigation for the purposes of Article 2. This ruling was following in *R (on the application of Lambourne) v Deputy Coroner for the District of Avon* [2002] EWHC (Admin) 1877; [2002] All ER (D) 443 (Jul.). Although this was only a Divisional Court decision, it was heard by Lord Woolf CJ and Curtis J. The House of Lords overturned the Court of Appeal's judgement in *Amin*: see *R (on the application of Amin) v Secretary of State for the Home Department* [2003] UKHL 51. It overruled the decision in *Middleton*, in part, in *R (on the application of Middleton) v West Somerset Coroner* [2004] UKHL 10; see above para 7.68. It should be noted that in *Re McKerr* [2004] UKHL 12 it was held that there was no common law right corresponding to the procedural right under Article 2 of the ECHR. The right was legislated for previously by Parliament and the Convention right became part of domestic law by virtue of the HRA 1998.

absence of other procedures to rectify the shortcomings in the inquiry that amounts to the breach.

THE DUTY ON THE LOCAL AUTHORITY TO ACT COMPATIBLY WITH THE CONVENTION

7.71 For the local authority, however, the matter does not rest there. Local authorities are public bodies for the purposes of the Human Rights Act 1998. Section 6(1) of the Act states that "it is unlawful for a public authority to act in a way which is incompatible with a Convention right." The local authority will thus be under a duty to act in a manner compatible with the Convention rights. Section 6(2) grants a statutory defence to public authorities who act in a manner incompatibly with Convention rights where the primary legislation means it could not act in any other manner[75] or that the subordinate legislation "cannot be read cannot be read or given effect in a way which is compatible with the Convention rights".[76]

7.72 This duty may have implications for the manner in which a local authority carries out an inquiry, even where it does not have powers to compel the attendance of witnesses. It is important to note that in *Edwards* significant emphasis was placed upon the involvement of the relatives in the non-statutory inquiry. Involving the relatives of the deceased does not need statutory power. Thus a local authority could find itself in breach of the obligation where it was within its competence to fulfil it.

7.73 If the local authority lacks the statutory power to compel witnesses to attend the inquiry then it may be unable to act in a manner that fulfils the Article 2 or Article 3 requirement. This may be a situation in which the statutory defence is applicable. In other words, the local authority, by central government's failure to ensure it can conduct effective inquiries, cannot help but fail to give effect to Article 2 or 3. It is therefore violating Article 2 or 3, but not acting unlawfully.

7.74 As a matter of good practice, it is expected in this situation that if the local authority considers its own inquiry and any other ongoing investigations will not satisfy the State's obligations under Article 2 or 3, it should petition the Secretary of State to order a statutory inquiry, whether ministerial or Tribunal of Inquiry. Indeed, the event which gives rise to a court examining the discharge of the obligation may well be the Secretary of State's letter of refusal to hold a full public inquiry.[77]

Comment

7.75 There are positive obligations on the State to ensure that an effective investigation into alleged breaches of Article 2 or Article 3 takes place. That duty is the State's. It may discharge it by making it possible for the investigation to be carried out by various bodies; the essential feature is that it must be effective. While it is incumbent on the State to provide an effective investigatory

[75] Human Rights Act 1998, s 6(2)(a).

[76] Human Rights Act 1998, s 6(2)(b).

[77] As in *Khan* (see para 7.62 above), and in *Amin* where judicial reviews were launched against the Coroner, the CRE and the Secretary of State for their failures to reopen investigations or investigate the matter in a more in-depth manner.

mechanism, it does not automatically follow that this kind of inquiry power must be made available to local authorities. However granting local authorities power to establish a new form of special inquiry may enable the duty to be more effectively delegated than at present.

Might another body have the appropriate powers?

7.76 In Appendix D we describe the powers of inquiry which are available to bodies other than the local authority. We summarise them as follows.

Inquiry established by Parliament or by a Minister

7.77 There may be a Tribunal of Inquiry established under the 1921 Act, or a Ministerial inquiry (statutory or non-statutory[78]). Such an inquiry[79] may be initiated in response to a request from a local authority, or without any request from the local authority.

External bodies with a duty or power of inspection

7.78 Various bodies have statutory duties of inspection and reporting on how local authorities discharge their responsibilities, such as the Social Services Inspectorate,[80] the Care Standards Boards, the District Auditor, the Commissioner for Local Administration (the Ombudsman), the Children's Commissioner for Wales, the Health and Safety Executive, the Environment Agency, as well as the Minister.[81] A Children's Commissioner for England has recently been announced.[82]

7.79 Some of the inquires held by the above will be conducted automatically; others will be triggered by an individual.

External bodies with a duty or power of investigation

7.80 From 1 April 2004, all deaths in prisons, probation hostels and immigration detention accommodation will be investigated by the Prisons and Probation

[78] The use of non-statutory ad hoc inquiries by central government is currently the subject of inquiry by the Public Administration Select Committee.

[79] An additional instance in a Bill currently before Parliament is a domestic homicide review directed by the Secretary of State (Domestic Violence, Crime and Victims Bill, 2004 cl 7. The bodies which can be directed to establish or participate in such a review are: a chief officer of police, local authorities, local probation boards, Health Authorities, and PCTs (cl 7 (4)). This is a review of the circumstances in which a person aged 16 or over has died as a result of violence, abuse or neglect at the hands of a family member or someone in the same household, "held with a view to identifying the lessons to be learnt from the death" (cl 7(1)).

[80] From April 2004 part of the Commission for Social Care Inspection, which will combine the work of the SSI, the SSI/Audit Commission joint review team and the National Care Standards Commission (NCSC).

[81] The Secretary of State may conduct a Best Value Inquiry where a local authority is failing to comply with the requirements of Best Value. It is ordered by the Secretary of State and benefits from the powers laid out in section 250(2) – (5) Local Government Act 1972. Rather than being used merely as a method of investigation, it is used as a sanction in order that the Secretary of State can take further punitive measures.

[82] Children Bill 2004, Part 1.

Ombudsman. Part of the terms of reference of each of these investigations will be to examine "whether any change in operational methods, policy, practice or management arrangements would help prevent a recurrence". Until the office of the Prisons and Probation Ombudsman is placed on a statutory footing, he has no power to compel co-operation with his investigations. Staff who are currently employed by the prison service would be expected to co-operate as part of the terms and conditions of their employment, and attendance at a coroner's inquest can be compelled.

7.81 The Independent Police Complaints Commission (IPCC), which replaces the Police Complaints Authority with effect from April 2004, will have the powers to require a police chief to produce any document and to inspect any police premises as necessary for the purposes of its investigations.[83]

7.82 The Inspectorate of Prisons inspects conditions in custodial institutions. The local board of visitors also inspect institutions: "Their role is to be the 'eyes and ears' of the Secretary of State locally, but they have both a grievance and an inspectoral role."[84]

An action in a court or tribunal

7.83 The local authority may find its procedures under the spotlight in court proceedings, and not just civil proceedings. There could be a prosecution by the Health and Safety Executive.[85] However, court proceedings are binary: X was or was not guilty of an offence; Y was or was not negligent.[86] Issues of management structure, training, responsibility and flaws in the legislation, which may not be explored in the courtroom, might fall within the scope of an inquiry's terms of reference.

THE CORONER'S COURT

7.84 One kind of court – the Coroner's Court – is perhaps an exception. An inquest is a fact-finding inquiry – one which will be reformed in the light of the Coroners Review which reported in 2003.[87] The Review made a large number of recommendations, some of which are designed to improve the coroner's ability to discover and comment on systemic failings which have contributed to a death, including fuller conclusions from inquests with a greater bias towards narrative

[83] Police Reform Act 2002, ss 15, 17 and 18.

[84] Description by Stephen Shaw, the Prisons and Probation Ombudsman, in 167 JP p 85, 8 Feb. 2003.

[85] Eg Leeds City Council fined £30,000 over deaths of two girls by drowning when on a river walk in October 2000.

[86] See further, Mavis Maclean, "How does an Inquiry Inquire? A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry" (2001) 28 Journal of Law and Society, 590, 596.

[87] *Death Certification and Investigation in England, Wales and Northern Ireland: The Report of a Fundamental Review* (2003) Cm 5831. The Home Secretary commissioned Tom Luce, the Chair of the *Fundamental Review*, to conduct some further work to link his Group's recommendations to those of the Shipman Inquiry's *Third Report (Death Certification and the Investigation of Deaths by Coroners)*. In March 2004, the Government published *Reforming the Coroner and Death Certification Service: a Position Paper* (Cm 6159) setting out a programme of reform.

and preventative findings rather than use of verdicts to impute liability inappropriately. In particular there are recommendations to:

(1) permit public inquests to be held into the deaths of, amongst others, those in custody or compulsorily detained under mental health powers, at the hands of law and order services;

(2) give the coroner explicit powers to determine the scale and scope of his investigation; and

(3) give bereaved families more information and rights.

Why these might not be adequate

7.85 In our view there are circumstances in which a matter of serious public concern ought to be thoroughly investigated, but it is possible that this will not happen unless set in motion by the local authority. This could arise either because no other body has or will have the power, or because another body has the power, but is unwilling to use it.

7.86 A practical example of the kind of situation in which a formal public inquiry might be justified could be one where it is thought, with good grounds, that a person in the care of the local authority, has suffered significant harm. Such a person might be a resident in accommodation run by (or under contract with) the local authority, or a person with mental illness, or mental disabilities, or an elderly person.

7.87 One respondent commented that children are covered by Part 8 Review procedures, but no comparable set of review procedures exists for vulnerable adults. This is true (although the matter is under review by the Department of Health).[88] But in any event Part 8 procedures do not give any powers of compulsion to the review team, and are designed to deal with a multi-agency approach in particular circumstances. It appears, from the very fact that the Climbié inquiry was established by the Secretary of State for Health and the Secretary of State for the Home Department, that, on occasion, a Part 8 review will be inadequate.[89]

7.88 A different kind of case is exemplified by the Swaps inquiry, which is described at paragraph 7.34 above. In such circumstances, a local authority itself might wish to investigate the wrongdoing. It lacks the power to compel witnesses to attend to give evidence. The authority may petition the Minister, but the Minister may decline to set up the necessary kind of inquiry.

[88] The Department of Health and the National Assembly for Wales have released consultation documents on guidelines to help protect vulnerable adults, and the procedures to be followed by the various agencies when investigating an incident: Department of Health, "No Secrets: The Protection of Vulnerable Adults Guidance on the development and implementation of multi-agency policies and procedures" (2000) for England, and National Assembly for Wales "In Safe Hands: Implementing Adult Protection Procedures in Wales" (2000).

[89] This accords with the experience of the Family Law Bar Association.

7.89 A statutory power would enable a local authority to order a full and frank investigation of a serious issue without having to seek ministerial or parliamentary support. The authority would be discharging its duties to the electorate and service recipients. There could be no accusations of a cover-up in the conduct of the inquiry. The appointment of an independent chair to the inquiry would symbolise openness and the need to be seen to be open. Public confidence in the agencies under investigation and the inquiry itself will be increased. The existence of such a power would also make it possible for a person to challenge the decision of a local authority *not* to establish such an inquiry.

7.90 A full inquiry, especially one conducted in public, might avoid the need for lengthy and costly court proceedings. Often victims are forced to use court action to try to discover what has happened. This may be ultimately unsatisfactory as court proceedings may not provide the answers sought. The present ad hoc inquiry system can provide some of these answers, but distrust of an inquiry's ability to access all relevant information can dent public confidence.

CONCLUSION

7.91 Following the recommendations of the Coroners Review, there will in future be improved provision for the public investigation of deaths which are not the result of natural causes.[90] But there are still other kinds of serious wrongs which justify proper and fair investigation, such as financial wrongdoing and harm short of death. We certainly cannot rule out the possibility that a matter of serious public concern ought to be investigated publicly, formally, and with powers of compulsion, but such an inquiry may not take place if local authorities do not set it in motion. Currently, they do not have the power to set up an inquiry with powers of compulsion.

7.92 At paragraphs 7.8 - 7.25 above we summarised the possible objections to a new form of inquiry. We considered the arguments against very carefully.

7.93 With regard to the objection at paragraph 7.17 (that no new power is needed) we demonstrate above that local authorities do not already have adequate powers,[91] that adequate investigative powers are needed,[92] and that no other body has the appropriate powers to conduct an effective investigation of serious wrongs which arise in the local authority context.[93]

7.94 With regard to the objection at paragraphs 7.21 - 7.24 (the costs), for the local authority it is likely to be a question of the marginal cost: the difference between appointing an inquiry with additional powers, or one with no statutory powers, rather than the difference between a potentially expensive inquiry and no inquiry at all.

[90] Annex 2 of the Government's Position Paper lists the categories of death where a coroner's investigation would be required.

[91] See paras 7.36 – 7.42 above.

[92] See paras 7.43 – 7.74 above.

[93] See above paras 7.76 – 7.90.

7.95 The essential feature of the arguments at paragraphs 7.9 – 7.16 (that an inquiry is a potentially heavy-handed tool of investigation which could be misused) is the risk of injustice. Against this must be weighed the risk of injustice where a matter is not properly investigated. We have established that there is a risk that, in some circumstances, a serious wrongdoing will not be adequately investigated. We believe that this should be remedied, so long as adequate safeguards can be built in to the inquiry process, and we believe that they can.

7.96 Due to the dangers entailed in powers of compulsion, we do not recommend that a local authority have the power to set up its own inquiry with powers to compel the attendance of witnesses and the power to compel the production of documents.

7.97 Instead, we recommend a new statutory power of inquiry for a principal local authority, whereby the inquiry does not itself have the power to compel witnesses to attend, but it has the power to apply to the court for a witness order. No witness can thus be compelled without consideration of the matter by a court. We develop this proposal in the next Part.

PART VIII
LOCAL AUTHORITY SPECIAL INQUIRIES

8.1 In the previous Part we explained why we recommend a new form of inquiry for local authorities, and the need for it to include procedural safeguards. In this Part we describe in detail the new form of local authority inquiry that we recommend.

INTRODUCTION: THE PURPOSE OF AN INQUIRY

8.2 An inquiry can serve a number of different functions:

- to establish facts,
- to answer the questions of the complainant and family,
- to look at associated cases,
- to establish systemic failings, to make recommendations, or
- to ascribe individual liability/responsibility (but not criminal culpability).

8.3 The Family Law Bar Association noted in their response that not all inquiries involve uncovering further facts; some entail assessing the implications of facts which are already known.[1]

8.4 There is scope for dispute as to how far it is appropriate to expect an inquiry to go beyond establishing facts or making recommendations. Some consider such purposes as providing a sense of catharsis for the affected community, or even answering the questions of the family of the victim, as axiomatic.

8.5 Others take a different view. For example, Sir Cecil Clothier, wrote[2]

> Although it may sound rather hard, it must be remembered that it is not the sole, or even the main, purpose of an inquiry into disaster to

[1] They wrote:

> We think it may be important to distinguish between two types of major inquiry in this field. In some, such as the North Wales Inquiry, there is a real fact finding exercise to be done. Allegations are made by one or more residents in a care home, whether for children, the elderly, the mentally or physically ill or disabled, that they have been abused by staff. One of the main tasks of such inquiries is to establish whether other residents have been abused and, if so, over what period of time.
>
> The other type of inquiry involves the death or serious mishandling of a case involving an individual family. Usually there will be a case file, in which the major events are set out. Inquiries of this type do not commonly uncover fresh facts about the main events, since often the only recollection which those involved have of the case, is what they wrote at the time. The focus of such inquiries is on why those individuals acted as they did or failed to act when they should have done.

[2] Sir Cecil Clothier KCB, QC was, inter alia, was the PCA (Ombudsman), the Chair of the Police Complaints Authority, and Chairman of the Council on Tribunals. He also chaired the Allitt Inquiry.

> offer solace to the victims. There are better ways of doing this. The report is not made to the victims but to those representatives of society who have the power to make things happen on behalf of us all. And the primary purpose of the inquiry, to my mind, is to enable society through its mechanisms to take whatever steps seem good to prevent a recurrence of some great disaster and its consequent suffering, not merely for the benefit of the victims (for whom it comes too late anyway) but for the future good of everyone. I believe that an inquiry is a learning tool and the allocation of blame is merely an incidental, if sometime inevitable, side effect. The expiation of wrong-doing is for those agencies, including where appropriate the judicial system, wherein resides the power of retribution.[3]

8.6 It must be recognised that "we have never succeeded in finding the perfect form of inquiry."[4] An inquiry is a multi-faceted process, discharging many functions of different importance to those involved in it. It is impossible and unrealistic for the inquiry process fully to satisfy everyone. What is most important is that the inquiry is as thorough and effective as possible, while respecting the rules of natural justice for all involved. Statutory powers are only one aspect of a successful inquiry.

8.7 Bearing these caveats in mind, we now describe the new form of inquiry which we recommend.

8.8 In brief, we recommend that a local authority should be able to establish an inquiry, with the inquiry having the power to apply to the High Court for an order compelling the attendance of a witness to answer questions and/or to produce documents, in those circumstances which fall outside the scope of other specific statutory inquiry powers. The new form of inquiry would thus enable a local authority to order a full investigation of a serious failure in the exercise of its functions in those circumstances where an ad hoc inquiry would not be adequate, without being dependent on obtaining either ministerial or parliamentary support.

8.9 There are three principal parts to effecting the change: the powers of the local authority to set up a special inquiry;[5] the powers need to run the inquiry;[6] and the powers of the inquiry to apply to the the High Court.[7] Enforcement of the High Court orders is discussed at paragraphs 8.115 – 8.125 below.

THE POWER FOR A LOCAL AUTHORITY TO ESTABLISH A SPECIAL INQUIRY

8.10 In the following paragraphs, we discuss the cirumstances in which local authorities may establish the special inquiry that we propose; how the special inquiry may be establised; some of the practical matters that must be considered.

[3] Sir Cecil Clothier, "Ruminations on Inquiries" in J Peay (ed.), *Inquiries after Homicide* (1996), p 52.

[4] Sir Edward Heath, *Hansard* HC (1982) Vol 27 col 494, July 8 1982.

[5] Paras 8.10 – 8.43 below.

[6] Paras 8.43 – 8.63 below.

[7] Paras 8.64 – 8.114 below.

The pre-conditions to establishing a special inquiry

8.11 There are three conditions that must be satisfied before a local authority will be able to establish a special inquiry:

(1) serious failure;

(2) no other statutory power of inquiry; and

(3) appropriateness.

A serious failure

8.12 The Bill provides that the commissioning authority must have reason to believe that there has been, or that there may have been, a serious[8] failure in the exercise of its functions. The authority can act whether or not a complaint has been made.

8.13 There are different ways in which a failure in the exercise of a local authority's functions might be regarded as serious:

because of the degree of harm caused to a person; or

because of the scale of the loss caused; or

because of the number of people potentially affected; or

because of the wider implications of the issue to be inquired into, either for the authority as a whole, or for other local authorities.

8.14 It will still be possible for a local authority to establish a special inquiry where it has delegated the carrying out of its functions to another body, but the satisfactory execution of those functions remains the responsibility of the local authority.[9]

8.15 Clearly the authority will not have to investigate and come to a conclusion as to precisely what occurred before making the decision about whether there should be an inquiry into it. But the authority will have to work on the information that it has, so in many cases some preliminary inquiry will have to be undertaken before the authority can make its decision.

Lack of any other specific power of inquiry

8.16 The Bill further provides that the power to establish the new form of inquiry should not arise where the circumstances already fall within the scope of a specific statutory power of inquiry. For example, once the provisions of the

[8] "Serious" harm or loss would mean the harm or loss was significant (more than trivial).

[9] For example where a local authority's functions are carried out by a private sector company. It has been held that "functions"

> embraces all the duties and powers of a local authority; the sum total of the activities Parliament has entrusted to it. Those activities are its functions.

Hazell v Hammersmith and Fulham LBC [1992] 2 AC 1, 29, *per* Lord Templeman.

Children Bill 2004 are enacted and in force, inquiries into serious failures in the provision of services to children will be undertaken under the provisions of that Act, not under the form of inquiry recommended here. The reason for this limitation is that it would not be appropriate or proportionate for there to be two potentially rival statutory forms of inquiry, which could arrive at opposite conclusions on the same issue.

Appropriateness

8.17 The Bill also provides that the local authority must consider that a special inquiry would be appropriate. As the special inquiry that we recommend will in essence be a statutory adjunct to the existing power of the local authority to establish an ad hoc inquiry,[10] this implies that the power should be used in situations where the authority fears that an ad hoc inquiry will not be effective.

8.18 The need to for the authority to regard it as appropriate to establish a special inquiry should prevent the authority setting up a special inquiry into a trivial matter, or one which is going to be or has been adequately investigated.[11] The special inquiry will also have costs implications.

8.19 As the power to ask the Court to compel witnesses to give evidence before it is potentially intrusive, it should not be used oppressively. A local authority will only wish to use the power proposed where an ad hoc inquiry will not suffice. Where the authority anticipated full co-operation from all those involved, then its ad hoc powers of inquiry should suffice.

8.20 Use of the new form of inquiry would be appropriate where it was likely that key people would not come forward voluntarily, for example, where potential witnesses were no longer employed by the authority, or had moved away from the area or abroad; or had indicated that they would not co-operate. Similarly, if key documents were likely to be withheld from the inquiry, such as the terms of a contract with a care supplier, or documents for which the authority claimed public interest immunity, this would justify use of the new power.

Authorities with power to set up a special inquiry

Principal local authority[12]

8.21 A principal local authority is to have the power, acting on its own, or jointly with any other principal local authority whose functions are to be investigated.

Joint working

8.22 Where two or more principal authorities wish to establish a special inquiry jointly, the conditions must be satisfied in respect of each of them. In other words, each joint commissioning authority must believe that there has been a serious failure

[10] Discussed above Part II.

[11] For example, an authority may well have a complaints procedure which is appropriate to deal with individual complaints. If the complaint concerns an allegation of improper conduct by a member, then the Standards Board may be the appropriate inquiring body.

[12] The definition can be found at para 2.3 – 2.5 above.

in the exercise of its functions, or that there are good grounds for thinking that may have been the case. This might be appropriate where, for example, there had been failures in the function of child protection, and the child in question was first in the care of one authority and then in the care of another. Here, a joint inquiry might be preferable, especially if one of the causes of failure was the handover from one to another. It does not, however, have to be the same kind of function which failed, or seems to have failed, in each authority.

8.23 It will not be possible under the draft Bill for any other body to join formally with the commissioning authority in establishing a special inquiry. That said, co-operation is possible in a number of ways and at a number of different levels. There would be no reason for a commissioning authority not to engage with other bodies in whatever way was appropriate. For example, it might enlist expert advice from another body, co-opt a member of another body onto a sub-committee responsible for overseeing the inquiry,[13] or accept a financial contribution from another body towards the cost of the inquiry.

Recommendation 7

8.24 **Principal local authorities, acting alone or together, shall have the power to establish a special inquiry where:**

(1) they believe or have reason to believe that there was or may have been a serious failure in the exercise of a function of theirs,

(2) the circumstances do not require an inquiry to be set up under any other specific statutory provision, and

(3) they consider it is appropriate in all the circumstances.

This power shall be additional to local authorities' existing powers of ad hoc inquiry and investigation.

8.25 As noted at the outset of this report, our remit was confined to the sphere of local authorities. Nonetheless, the essential features of the special form of inquiry, namely that

- it is independent of the commissioning body, and
- the power to compel witnesses to attend and answer questions is exercisable only with the approval and supervision of the court.

[13] A committee or sub-committee of an authority, other than committees regulating or controlling the finances of the authority, may co-opt members of the appointing authority or authorities under section 102(3) of the Local Government Act 1972. Advisory committees and sub-committees may also include co-opted members under section 102(4) of the LGA 1972. See the 1972 Act s 102, and the Local Government (Wales) Act 1994, ss 30(11), (13), 31(9), (11).

might make it an appropriate for adoption by other classes of public bodies, acting jointly with a principal local authority or alone. This is, however, a matter for Government, possibly as part of its current review of inquiries.[14]

Establishing the special inquiry

8.26 To establish a special inquiry, the local authority must:

(1) take the decision at the full council;

(2) take the decision in public;

(3) notify the Minister; and

(4) take reasonable steps to notify the complainant.

The decision is to be made by the full council

8.27 The decision to establish a special inquiry may not be delegated but must be taken by the whole authority (that is, by the members).[15] There are a number of instances where a council is prohibited by statute from delegating functions. Many of these concern circumstances where there may have been wrong-doing which must be reported to the council as a whole for it to consider.[16] We see the situation where a special inquiry may be required as similar. Further, the decision to be taken may lead to an expensive course of action for which all members should clearly be responsible.[17]

8.28 The power to establish a special inquiry is specifically exempted in the attached Bill from the possibility of delegation contained in section 101 of the 1972 Act.

LIMIT ON POWERS OF DELEGATION UNDER THE NEW EXECUTIVE ARRANGEMENTS

8.29 The Local Government Act 2000 introduced new models of working for local authorities. Instead of a system based upon decision-making by the council and committees, these three new models were: (1) a mayor and cabinet executive, (2) a leader and cabinet executive, and (3) a mayor and council manager executive.[18] Where a function falls to the executive, the LGA 2000 prescribes

[14] See *Effective Inquiries: A Consultation Paper from the DCA* CP 12/04, May 2004.

[15] In practice, it may well be that the proposal to hold an inquiry originates with one or other of the committees of the authority, such as the Overview and Scrutiny Committee, but it need not.

[16] Eg, the chief finance officer may be obliged to make a report to the authority and the authority may not delegate consideration of it: Local Government Finance Act 1988, s 114, 114(A) and 115. The same applies to a monitoring officer's report under Local Government and Housing Act 1989, s 5(5), and a public interest report by the external auditor under Audit Commission Act 1998, ss 8 and 11.

[17] There must be at least a quarter of the total number of members present for the meeting to be quorate: 1972 Act, Sched 12, para 6. A decision at a local authority meeting is made by voting on a resolution. For the resolution to be passed it must be approved by a majority, unless otherwise provided, with the person presiding having a second or casting vote: 1972 Act, Sched 12, para 39.

[18] Local Government Act 2000, ss 10, 11 and 12.

how it is to be discharged within each of the new possible structures. Our view is that the decision to establish a special inquiry is not to be one of the functions which is to fall to the executive part of the council, but must be exercised by the full council.

The decision is to be made in public

8.30 The decision to hold a statutory inquiry should be made in public. Where the subject matter which prompts the call for an inquiry relates to a matter which would normally be discussed in private, the item will need to be discussed in both the public and the closed Parts of the council meeting agenda. If the need to go into closed session arises unexpectedly, a resolution should be passed to that effect and the item considered in private, either immediately or when the meeting gets to the closed Part of the agenda. A local authority council meeting or committee meeting might find it necessary to go into private session to explore some aspect of the issue whether there should be an inquiry. It can rely on the existing provisions to do this. Nevertheless, the decision itself must be made during the part of a meeting which is open to the public.

8.31 A meeting at which such a decision is made may be an annual meeting,[19] or an extraordinary meeting.[20] The latter may be held as the council determines. Notice provisions apply.[21]

Recommendation 8

8.32 **The decision to establish a special inquiry shall be taken in public by the full council, or each of them if there is more than one.**

Requirement to notify the Minister

8.33 When establishing a special inquiry, the principal local authority commissioning the inquiry (or one of them, if there is more than one) must notify the Minister with responsibility for local government (currently the ODPM) of the decision in writing. If the commissioning authority, or one of them, is a Welsh local authority, then it must notify the National Assembly for Wales too. This may be done by the local authority sending a copy of the Minute of the meeting at which the resolution was passed to the Minister.

8.34 If a local authority has already petitioned a Minister to hold a Ministerial inquiry, which the Minister has declined, the requirement to notify the Minister of the local authority's decision is not affected.

[19] LGA 1972, Sched 12, para 1.

[20] LGA 1972, Sched 12, para 2.

[21] Five clear days' public notice are required for meetings of a principal council (including committees or sub-committees thereof) which are open to the public: LGA 1972, s 100A(6)(a). Detailed provisions about notice of such meetings to members, and who is to preside, are contained in Part I of Sched 12 to the 1972 Act. (Strangely, the notice to members remains at three days (as it used to be for notice to the public) not five days: para 4(2), although the Secretary of State has power to amend para 4(2).)

Recommendation 9

8.35 **The commissioning authority or authorities must notify the Secretary of State and, if the commissioning authority or one of them is a Welsh local authority, the National Assembly for Wales, in writing of the decision to establish a special inquiry.**

Requirement to notify the complainant or someone acting on behalf of the complainant

8.36 A complainant is the person affected by the way in which the local authority's function was carried out. Where there is a complainant, or a group of complainants, and the local authority resolves to establish a special inquiry, the local authority should take reasonable steps to notify them of that decision.

8.37 As with the requirement to notify the Minister, this may be fulfilled by sending a copy of the Minute of the meeting at which the decision was made. If this is not appropriate, the method of notification is for the authority to determine, taking into account any rules regarding such notifications that may have been made by the Secretary of State.[22]

8.38 Where a special inquiry is discontinued by the Secretary of State[23] then the same people should be notified as were notified when it was established.

Who is to be notified on the complainant's behalf?

8.39 It may be that the notification should be sent to someone on behalf of the complainant instead, for example where the complainant is under 18, has a mental disability, or has since died. The choice of who is to be notified on behalf of the complainant should be left to the judgement of the authority.

8.40 It would be hoped that by the time an authority is setting up an inquiry of this nature, it will already know about the family circumstances of the complainant and therefore know which people will want to be informed and by what method. Offence and distress can be caused by failure to communicate at all, or by communicating with some but not others.

8.41 As the decision to hold an inquiry must be taken in public,[24] this aspect of the policy aims to ensure that those most affected are informed about the decision. It is not intended to restrict notification or dissemination of the decision. For example, if there is doubt in a particular case as to whether the partner or the parents of a deceased complainant ought to be notified, then the authority should not consider itself inhibited from notifying all those who claim to be close. There is no need for the authority to try and decide for itself who has a "better" claim to be close to the complainant.

[22] See clause 4(5) of the Bill.

[23] See para 8.126 below.

[24] See para 8.30 above.

8.42 If, for whatever reason, notification is sent to one person but not to another, and that other asks for a copy of the minute, then he or she ought to be provided with access as required under existing statutory provisions.[25]

Recommendation 10

8.43 **The commissioning authority or authorities shall take reasonable steps to notify a complainant (or a person acting on behalf of the complainant) of the decision to establish a special inquiry and, if it occurs, that the inquiry is to be or has been discontinued on direction of the Secretary of State.**

RUNNING THE INQUIRY: PRACTICAL MATTERS

8.44 Many of the matters relating to the running of the inquiry are not prescribed in the Bill, but are nevertheless matters which must be taken into account when establishing a special inquiry.[26] Decisions on how to run the inquiry will be primarily for the inquiry. Nonetheless, there will be matters which in practice will require early negotiation between the inquiry and the authority, such as whether it is to be conducted in public or private, and the budget.[27]

Terms of reference

8.45 Appropriate terms of reference are *the* key to a successful inquiry outcome. The authority, as the commissioning body, will set the terms of reference. The terms of reference, and the interpretation of those terms of reference, must be consistent with the Bill which sets out the power to establish the inquiry.

Appointments

8.46 The local authority will appoint the person(s) to conduct the special inquiry. The authority must ensure that the person appointed will be regarded as independent of the authority and has the relevant skills and knowledge to conduct a successful inquiry.

The authority may not limit the inquiry's powers to seek a court order

8.47 The authority is not to be able to limit the power of the inquiry to apply to the High Court for an order to secure the attendance of persons or the production of evidence.[28]

[25] See para 5.19 above.

[26] Most of these points are common sense; see also the discussion in *Effective Inquiries: A Consultation Paper produced by the Department for Constitutional Affairs* (May 2004) paras 45–57.

[27] See section 3.5 of the SOLACE Report *Getting it right*.

[28] As the point of this kind of inquiry will be that it has the power to make such an application, it might be thought that a local authority would never wish to set it up with one hand, but restrict its powers with the other, but this is not inconceivable. An authority might, for example, wish to limit the powers to compel witnesses of a particular group, or see a way of keeping its costs down while announcing that it was undertaking the most thorough kind of inquiry open to it.

Effect if the inquiry is *ultra vires*

8.48 The significant difference between a special inquiry and an ad hoc inquiry is the power for the special inquiry to apply to the court for orders to compel the attendance of witnesses or the production of documents. If, for example when an application is made to the court for a witness order, it transpires that the authority was acting *ultra vires* when it established the special inquiry, the inquiry would have to cease.

8.49 We considered whether, it having been found to be *ultra vires*, the special inquiry could automatically be converted into an ad hoc inquiry. We have concluded that this should not happen automatically. A special inquiry either exists or it does not. If one is stopped by the authority, there should be a clean break between the special inquiry and whatever the authority does next. It could, of course, decide to establish an ad hoc inquiry, and even permit such inquiry to adopt material presented to the special inquiry. But we think the authority should be required to take a conscious decision on this matter.

8.50 Similarly, if a local authority sets up an ad hoc inquiry, it cannot simply convert that ad hoc inquiry into a special inquiry. If a local authority found that an ad hoc inquiry either was ineffective or was going to be ineffective because of a witness's refusal to co-operate, it would have to terminate the ad hoc inquiry, and then use the new statutory power we recommend to establish a special inquiry. The reason for this is that we wish to ensure that the requirements for the decision to establish a special inquiry to be taken in public by the full council[29] should not be circumvented.

Rules of procedure

8.51 The procedure to be adopted is for the inquiry to decide (subject to any rules made by the Secretary of State). The Bill gives the Secretary of State the power to lay down rules of procedure, after consultation with the Council on Tribunals. Procedural rules could cover matters such as the treatment of witnesses, recording of proceedings, communications with complainants or people on their behalf. Where the rules are to apply to special inquiries established by Welsh authorities, then the Secretary of State must make the rules jointly with the National Assembly for Wales. The Bill provides that commencement can be delayed until after such rules have been prepared.

Recommendation 11

8.52 **The Secretary of State shall have power, after consultation with the Council on Tribunals, to prescribe rules of procedure for the conduct of special inquiries, and if those rules are to apply to special inquiries established by Welsh local authorities, then the Secretary of State shall make them jointly with the National Assembly for Wales, but, subject to any such rules, a special inquiry shall be free to determine its own procedure.**

[29] On which, see paras 8.30 above.

Taking evidence on oath/affirmation

8.53 Normally, an inquiry undertakes various tasks, such as perusing documents, inviting witnesses to attend before it, putting questions to the witnesses and noting their answers. No form of local authority inquiry allows it to take evidence on oath/affirmation. We do not recommend that a special inquiry should have the power to take evidence on oath/affirmation.

8.54 A consequence of this is that a person cannot be prosecuted for perjury. However, if a person "knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, and the statement is made … in any oral declaration or oral answer which he is required to make by, under, or in pursuance of any public general Act of Parliament …" then he or she commits a criminal offence under section 5 of the Perjury Act 1911. So if a person gave untrue evidence and it could be proved that he or she had done so deliberately, and knowing it to be untrue, then in those circumstances he or she could face prosecution, even though no oath was taken.

Recommendation 12

8.55 **Special inquiries shall not have power to take evidence on oath or affirmation.**

Resources

8.56 The authority will have to consider the need:

(1) to provide (and/or pay for) the remuneration and expenses of those running the inquiry;

(2) to provide (and/or pay for) the cost of legal support to the inquiry;

(3) to provide (and/or pay for) accommodation for the inquiry;

(4) to provide (and/or pay for) secretarial/administrative support for the inquiry;

(5) to pay the other reasonable costs of the inquiry, including making applications to the court and any costs which follow from such applications (whether by agreement or by order of the court), and including indemnifying the inquiry panel; and

(6) to pay allowances and/or expenses of those attending the inquiry to give evidence or produce documents or other material;

(7) to pay for the reasonable costs of representation as determined by the inquiry.

Indemnifying the inquiry

8.57 As mentioned at paragraph 2.35 above, section 111 of the 1972 Act allows the local authority to "do any thing (whether or not involving the expenditure, borrowing or lending of money or the acquisition or disposal of any property or rights) which is calculated to facilitate, or is conducive or incidental to, the

discharge of any of their functions". While the case law, on whether section 111 permits the giving of an indemnity to persons who are not members or officers, such as the members of an inquiry panel,[30] is not crystal clear, we tend to the view that it does.

Recommendation 13

8.58 **The commissioning authority or authorities shall have power to pay for:**

(1) the inquiry's expenses, including indemnities for the inquiry;

(2) expenses incurred by witnesses in attending before the inquiry.

Power to direct payment of the costs of a witness's representation

8.59 One of the procedural questions that an inquiry will address is whether to permit representation of witnesses who give evidence to it. While we envisage that representation should often not be necessary and thus would not need to be paid for, it should be possible for such expenses to be met at the discretion of the inquiry. Any costs of representation should only be those that are reasonable in terms of amount.

Recommendation 14

8.60 **The inquiry may direct that the cost of representation incurred by a person attending before it shall be paid by the commissioning authority or authorities, but only insofar as it is reasonable in amount.**

Publication of the report and privilege

8.61 Qualified privilege as a defence in defamation would attach to evidence given to the inquiry, as to any other inquiry, as a matter of common law.[31]

[30] The ODPM has recently issued a consultation document in relation to indemnities for officers and members. ODPM propose to give local authorities the power to indemnify their members and officers where they act honestly and in good faith. As they build on existing law in relation to members and officers, and we are here concerned with indemnifying others, the proposals are not directly relevant here. "Providing Indemnities to Relevant Authority Officers and Members" July 2003. In the document ODPM write:

> …section 111(1) of the Local Government Act 1972 provides ancillary powers that may permit the offer of an indemnity by an authority, if to do so facilitates or is incidental or conducive to the discharge of a function of the authority.
>
> Doubts have arisen, however, about the extent to which authorities can provide indemnities, particularly where individuals incur personal liability for their actions on external bodies to which they have been appointed by their authority, and the scope to cover actions that are ultra vires or involve negligence.
>
> [*R v Westminster City Council ex p Union of Managerial and Professional Officers* [2000] LGR 611] …made it clear that a reasonably wide ranging indemnity was lawful within the provisions of section 111 in certain instances. However, some uncertainty remains as to the extent of existing powers.

Insofar as this helps at all, it points to the broad interpretation of section 111.

[31] *Adam v Ward* [1917] AC 309, 334. However, if an inquiry is judicial in nature, then absolute privilege applies: *Royal Aquarium and Summer and Winter Garden Society v Parkinson*

8.62 As regards publication of the report of the special inquiry by the commissioning authority, or of a part or a summary of it, qualified privilege should be available to the authority as a defence in the same circumstances as those we have recommended in Part VI. Whether it attaches in any given case will depend on whether the "fairness requirements" are, or seem to the authority to be, satisfied.

Recommendation 15

8.63 **Where a commissioning authority publishes the report (or part or a summary of the report) of a special inquiry to the public or a section of it and specified fairness requirements are met (see recommendation 5 above), then statutory qualified privilege shall attach, but where the fairness requirements are not satisfied, common law privilege and the statutory qualified privileges which apply where a document shall be open to public inspection shall not attach either.**

THE INQUIRY'S POWER TO APPLY FOR AN ORDER

8.64 It appears that the High Court does not have the power to issue a witness summons compelling attendance to inquiries except where specifically provided for by statute. The fact that contempt proceedings are provided for under the compulsion provisions in the Tribunals and Inquiries Act 1921, and, for example, under section 9 of the Parliamentary Commissioners Act 1967 (and other statutes relating to statutory powers of inquiry and investigation and obstruction of functions as if they were before the High Court[32] with statutory procedures for referral to the court) indicates that existing powers cannot be used to compel witnesses to attend a statutory inquiry.

8.65 It therefore appears that none of the existing powers or procedures by which the High Court can issue a summons to compel the attendance of a witness is appropriate for a procedure for the court to compel the attendance of a witness before a local authority statutory inquiry. Therefore, the Bill contains the framework of a new procedure giving the High Court the power to make the necessary orders and a procedure for the application.[33]

Power to apply to the High Court

8.66 The special inquiry is to have the power to request an order from the High Court for the attendance of a particular witness to answer questions and/or to produce a particular document or thing. The inquiry is to have the power to incur the costs

[1892] 1 QB 431, 442, *per* Lord Esher MR, which is said to state the law on this subject accurately: *O'Connor v Waldron* [1935] AC 76, 81 *per* Lord Atkin (PC).

[32] In addition to the Parliamentary Commissioner Act 1967, s 9, see also the Care Standards Act 2000, s 75, obstruction of the functions of the Children's Commissioner for Wales, section 436 of the Companies Act 1985, obstruction of inspectors and investigation, section 18 of the Financial Services and Markets Act 2000, inquiries under s 15. For comparison, see section 14 of the Scottish Public Services Ombudsman Act 2002. These are distinct from the limited powers of compulsion of a Coroner's Court under section 10 of the Coroners Act 1988.

[33] There are precedents where contempt is committed by obstruction of an inquiry (see n 63 below) but we do not think such a process would offer the requisite supervision by the Administrative Court and the range of remedies.

of making such an application without the approval of the commissioning authority, including the costs that it may be ordered to pay by the court.[34]

8.67 There would be nothing to prevent the inquiry team applying for an order against an officer of the commissioning authority itself. This might be necessary where the authority was not co-operating, or where the authority was withholding documents in order to respect a duty of confidentiality. In that latter case, the issue of whether the greater public interest lies in disclosure is best decided by the court.

Who

8.68 The application would be made by the inquiry team (not by the commissioning authority).

8.69 The local authority would not have any standing in the proceedings in its capacity as commissioning authority.

8.70 It would be open to the court to entertain representations and evidence from non-parties in the same way as in judicial review proceedings under rule 54.17 of the CPR.

When

8.71 The application could be made at any point during the inquiry, from the date it was appointed to the delivery of its report.

8.72 The inquiry would also have the power to conduct litigation which may follow from an application for an attendance order, such as enforcement or appeal proceedings.

Recommendation 16

8.73 **A special inquiry shall have the power, at any time during the life of the inquiry, to apply to the High Court for an order compelling a person to attend before it to answer questions or to produce a document or thing.**

The court's powers

The order

8.74 The Court is to have power to issue an order for the attendance of a particular witness ("the respondent") before the inquiry to answer questions and/or to produce a specified document or thing to the inquiry on application from such a statutory inquiry, and various ancillary powers.[35]

[34] See para 8.95 below.

[35] Arbitration powers in the Commercial Court provide some analogy in that the parties to the arbitration can go to court for a witness summons: Arbitration Act 1996, ss 43 and 44. The application for the summons is made in accordance with Part 34 of the Civil Procedure Rules (to the Admiralty and Commercial Registry or the appropriate District Registry).

8.75 The order will require the named respondent to attend before the inquiry on a specified date(s) and to answer questions put to him or her by or on behalf of the inquiry.[36] Alternatively or additionally it may require the respondent to produce a specified document(s) or thing(s) before the inquiry by a specified date.

Conditions for issuing the order

8.76 The court is only to issue the order where satisfied:

(1) that the respondent has material evidence to give to the inquiry, which evidence is unlikely to be able to be obtained from any other source;

(2) that the respondent has been given adequate notice of the matters on which the inquiry panel proposes to question him or her;

(3) that the respondent has refused or failed to attend, to answer questions or to produce the document or thing voluntarily;

(4) where the order sought is for the production of a document, that the document contains matters relevant to the inquiry, which evidence is unlikely to be able to be obtained from any other source; and

(5) that in all the circumstances it is just to issue the order.

This last factor would allow the court to review the conduct of the inquiry hitherto and the proposed future conduct. For example, the investigation by the court into the proposed conduct of the inquiry might prompt an undertaking from the inquiry.

HAVING MATERIAL EVIDENCE TO GIVE

8.77 Under the present witness summons system it appears to be accepted that a party who wishes to compel a witness must be left to judge in the first instance whether the witness can give material evidence. There appears to be a presumption that, until the contrary is shown upon a proper application, the witness can contribute to the proceedings.

8.78 These presumptions would not be appropriate for the proposed new procedure. It is a condition of the granting of the order that the witness is likely to be able to give material evidence: this would be a finding by the court prior to issuing the order.

CHALLENGES TO THE APPLICATION

8.79 As a matter of ordinary legal principle, the court's powers would only be exercisable where it was satisfied that the commissioning body had acted within its powers in establishing the inquiry in the first place. The court must be satisfied as to a certain state of facts before it can proceed to exercise powers dependent on that state of facts, in order to be sure that it has jurisdiction. For example, in *White and Collins v Minister of Health* an order of compulsory purchase made by

[36] The inquiry will not be empowered to take evidence on oath/affirmation; see above paras 8.53 – 8.55.

a local authority was quashed by the court because the order could only be made if "the land in question was not part of any park…". Luxmoore LJ said:[37]

> In such a case it seems almost self-evident that the court which has to consider whether there is jurisdiction to make or confirm the order must be entitled to review the vital findings on which the existence of the jurisdiction relied upon depends.

Thus the court might have to undertake a preliminary inquiry into the decision made by the authority.

8.80 A challenge on the grounds of *vires* would normally be by way of judicial review.[38] On such an application the usual principles would apply. The court would interfere with the decision only where it was outside the band of reasonable decisions, or had been improperly reached.[39]

8.81 Even where a person would not have had the necessary standing, or would have had but is outside the time within which the application for judicial review should have been made, if an application is made by an inquiry for an order against him or her, then the potential witness would be able to raise the question of *vires* and would be able to do so on the grounds that the court did not have the jurisdiction to exercise the power sought.

8.82 Thus a person against whom an attendance order was sought could contest the application on the basis that the decision to establish the inquiry was itself unlawful, and/or on the basis that any of the necessary conditions (see paragraphs 8.11 - 8.20) was not satisfied.

Recommendation 17

8.83 **The High Court shall have the power, on application by a special inquiry, to issue an order requiring a witness to attend before the special inquiry to answer questions or to produce a document or thing and the court may do so where satisfied that:**

(1) the witness is likely to be able to give material evidence to the inquiry, or that the document or thing is likely to be material evidence;

[37] *In re Ripon (Highfield) Housing Confirmation Order, 1938. White and Collins v Minister of Health* [1939] 2 KB 838, 855 – 6.

[38] An application for judicial review is subject to limitations as to standing of the applicant (Supreme Court Act 1981, s 31(3)), and compliance with time limits. Proceedings must be brought promptly and within any event within 3 months of the act complained of.

[39] See, e.g., *R v Lancashire CC Police Authority, ex p Hook* [1980] QB 603, 626 in which Waller LJ said:

> The question then remains whether or not it can be said that the conclusion to which the committee came is one at which no reasonable committee could properly arrive. I have come to the conclusion that the applicant has failed to show that no reasonable council committee could come to the conclusion at which this committee arrived and I would dismiss this appeal.

(2) the witness has been given adequate notice of the matters on which the inquiry panel proposes to question him or her;

(3) the respondent has refused or failed to attend, to answer questions, or to produce the document or thing voluntarily;

(4) the evidence is unlikely to be obtained from any other source; and

(5) that in all the circumstances it is just to issue the order.

Answering questions at the inquiry

8.84 It is important that special inquiries can meet the need for an effective investigation where there has been a serious failure in the performance by a local authority of one of its functions. An inquiry may not be effective where evidence cannot be secured. We therefore think it right that, when appearing before a special inquiry, a person shall have the privileges that would be available in civil proceedings. However, he or she may not refuse to answer a question, or produce a document or thing, solely because to do so would incriminate him or her, or a spouse.[40]

Recommendation 18

8.85 **Where a person attends before a special inquiry, he or she may not be compelled to answer a question or produce a document or thing that he or she could not be compelled to answer or produce in civil proceedings before the court, but that person shall not be excused from answering a question or producing a document or thing solely on the grounds that doing so would incriminate that person, or his or her spouse.**

8.86 There are safeguards in the scheme that we recommend against the abuse of compulsion. First, an order compelling a person to attend before a special inquiry can only be made by the High Court. Secondly, any evidence that is given may not be used against that person in subsequent criminal proceedings, as we now explain.

Restricting the use that may be made of evidence given

8.87 The Salmon Report recommended that a witness's evidence should benefit from automatic immunity to encourage witnesses to be as forthcoming as possible in the material they place before an inquiry.[41] We have followed this lead. We think it should not be possible to use evidence given to the special inquiry to incriminate a person in subsequent criminal proceedings, unless he or she had

[40] We anticipate that legislation will be forthcoming which may put civil partners on the same footing as husbands and wives in this respect. This would indeed have implications for clause 6 but it is not appropriate for our Bill to anticipate that change.

[41] The Royal Commission on Tribunals of Inquiry, Report of the Commission under the Chairmanship of the Rt Hon Lord Justice Salmon "The Salmon Report" (1966) Cmnd 3121 para 63.

introduced it into those proceedings.[42] It is our view that Article 6 of the ECHR requires such a safeguard to be in place.

8.88 The evidence given to the inquiry might prompt further investigation by state authorities, who may have another lawful way of obtaining the same information for use in subsequent criminal proceedings. It is quite likely that the same documentation will be produced. The restriction extends only to evidence given, not to documents or things produced, to the special inquiry. For oral evidence, a witness may be quite frank when questioned by the inquiry. Thus an evidence immunity will prevent the transcript of that evidence from being used in a subsequent criminal trial.[43] *Other* evidence obtained as a result of the evidence obtained under compulsion would be admissible in criminal proceedings, subject to the usual rules applicable in those proceedings.

8.89 The person who had given the evidence would, however, be able to use it in any subsequent proceedings.

8.90 Some witnesses will come forward in response to a request from a special inquiry, albeit reluctantly. It does not seem to us that they should be disadvantaged as compared with those who have the means and opportunity to obtain legal advice on whether they have to comply with a request to attend from a special inquiry. Therefore, this immunity should be applicable to oral evidence given by all witnesses to the inquiry, whether as a result of a court order or not.

8.91 Immunity of witnesses from prosecution is a different matter. It is an issue which may arise in relation to existing or contemplated criminal proceedings. It may sometimes be desirable for a witness to be guaranteed that he or she will not be prosecuted, but this is a matter for a decision in an individual case by the Director of Public Prosecutions, after consultation with the Law Officers as appropriate. We do not therefore think that any provision ought to be made to deal with immunity from prosecution.

Recommendation 19

8.92 **A statement made to a special inquiry shall not be admissible against the person who made it at the behest of the prosecution in criminal proceedings, or proceedings before service courts, in which that person is charged with an offence (other than an offence under section 5 of the Perjury Act 1911), unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person.**

Ancillary orders

8.93 The court would have the power to make ancillary orders in respect of:

[42] If, however, a person were to be prosecuted for knowingly and willingly making a false statement under s 5 of the Perjury Act 1911 on the basis of evidence given in compliance with an order from the High Court to answer questions from a special inquiry, then the evidence given to the inquiry would have to form part of the evidence against him or her.

[43] Nevertheless, an inquiry should not give undertakings as to confidentiality and immunity because it does not have the power to enforce it – disclosure is ultimately in the hands of the courts.

(1) any help that a respondent might need when attending before the inquiry, such as the need to be accompanied by a friend, professional helper or relative, being someone who would not answer for the respondent (i.e. not an advocate) but who could help the respondent to answer if required;

(2) any interpreting facilities to be provided to the respondent at the inquiry;

(3) the payment of the respondent's costs in attending the inquiry.[44] The court would have the power to direct that this should be attached as a condition to the order;

(4) the payment of the costs of the application to the court, including representation for the respondent in the application before the court, whether the application is granted in whole or in part, refused or adjourned. This would normally follow the result, but there may be cases where the court finds it just to order the inquiry panel to meet the individual's costs, even though the order the inquiry sought has been made (see further para 8.109 below); and

(5) any other order relating to the attendance of the respondent in the court's discretion. This might extend to an order that the inquiry should meet the respondent's costs of legal representation before the inquiry itself.

8.94 The court would also have the power to direct that the witness may give evidence to the inquiry by any means the court considers appropriate. For example, it may be more convenient to the witness, and adequate for the inquiry, for the witness to appear before it by TV link than in person. The court would be able to allow for that in the order.

Recommendation 20

8.95 **The court shall have the power to make ancillary orders in respect of:**

(1) any help that a witness might need when attending before the inquiry;

(2) payment of the witness's costs in attending the inquiry;

(3) payment of the costs of the application to the court, including representation for the respondent in the application before the court, whether the application is granted in whole or in part, refused or adjourned; and

(4) any other order relating to the attendance of the witness, in the court's discretion.

[44] The Civil Procedure Rules provide a model. They allow for payment of the witness's reasonable travel expenses by the inquiry, including providing that the sum for the travel expenses (also called conduct money) is to be paid or offered to the witness before he or she attends the court (in our case, attends the inquiry: CPR rule 34.7 and Practice Direction 34 "Depositions and Court Attendance by Witnesses", para 3.1.

Procedure

8.96 We propose a new procedure to allow special inquiries to apply for an attendance order. This will require an alteration of the Civil Procedure Rules by the Civil Procedure Rule Committee.[45] We outline our proposed procedure below to demonstrate how it would fit in with and utilise the existing Civil Procedure Rules. We believe that this proposed procedure is accessible, fair and efficient.

8.97 The proposed new procedure is by way of application to the High Court. The procedure envisioned is analogous to that for application for judicial review. As with judicial review, there would be no court proceedings already in existence. This is, we think, a significant difference from the situation where a party to existing proceedings makes use of the procedure provided by Part 34 of the CPR, and that difference is the reason we think the new procedure should be modelled on Part 8 rather than on Part 34 of the CPR.

8.98 Part 8 of the CPR, as modified by Part 54 of the CPR read with section 31 of the Supreme Court Act 1981, now contains all the procedural rules governing claims for judicial review.

Pre-action steps - need for a protocol?

8.99 In view of the fact that the kinds of steps which such a protocol might contain are those steps which an inquiry would have to take in any event (such as asking the witness to attend the inquiry),[46] we do not propose any pre-action protocol.

The claim form

8.100 Part 8 claims are used when there is no substantial dispute of fact.[47] A Part 8 claim form must state that Part 8 applies, and must set out the question the claimant wants the court to decide or the remedy sought. If a claim is brought pursuant to statute, the relevant statute and provision must be stated.[48] We propose that the remedy to be granted by the court in such applications is a witness summons. The order for attendance for sprecial inquiries can be modelled on form N20.

8.101 Any evidence the claimant (inquiry) relies on must be filed and served with the claim form.[49] The claim form should be filed with the Crown Office for allocation to the Administrative Court. As the claim involves the potential interference with the liberty of the person we propose that the claimant (inquiry) use a sworn statement regarding the written evidence that accompanies the claim form. The claim form should state:

[45] Amendment to the Civil Procedure Rules would be made by statutory instrument made under the Civil Procedure Act 1997, section 1 and Schedule 1 thereto. Rules are made by the Civil Procedure Rule Committee, under section 2 of the Civil Procedure Act 1997, after consulting in accordance with section 2(6)(a) of that Act.

[46] See para 8.83 where the conditions for issuing an order are set out.

[47] CPR r 8.1(2)(a).

[48] CPR r 8.2.

[49] CPR r 8.5(1), (2).

(1) who is making the application and its authority (the statutory authority under which the inquiry was established, by whom, when, and its terms of reference);

(2) what is applied for (the order sought);

(3) against whom (identifying the respondent);

(4) that the respondent has been requested to attend before the inquiry, and that he or she has refused or failed to attend;

(5) that the respondent has material evidence to give to the inquiry and that that evidence is unlikely to be obtained from any other source;

(6) where the inquiry wishes the respondent to produce a document, what document is required and why.

8.102 The sworn statement would provide the evidence in support of the application, namely evidence going to each of the matters which the court must find proved in order for it to issue the order. It will thus have to contain evidence going to:

(1) the establishment of the inquiry (the resolution of the local authority)

(2) the composition and terms of reference of the inquiry; an inquiry may consider it wise to include some evidence on how the inquiry has been conducted and how it proposes to handle the respondent, in order to satisfy the court that it will be fair for the summons to be issued;

(3) how and when notice has been given to the respondent, and indicate whether there has been any acknowledgement of being so notified, and if so what form that acknowledgement took;

(4) the respondent's refusal or failure to attend;

(5) what evidence it is anticipated the respondent can give (and/or document he or she can produce) and why it is relevant; and

(6) why the evidence is unlikely to be obtained in any other way.

Service of the claim form

8.103 The claim form and evidence filed in support should be served on the respondent. After service, the respondent has 14 days to acknowledge service.[50] Under the existing Part 8 procedure, a default in the acknowledgement of service leads to a judgement in default and an issuing of a witness summons against the respondent. We do not think that this default pathway to the issue of an attendance order is appropriate for our process because it would avoid any consideration of the merits of the application. It should be precluded.

[50] CPR r 8.3(1).

8.104 Acknowledgement of service will usually be on the official form, Form N210, but may be given informally by letter.[51] The respondent should be required to indicate whether the order sought will be contested. Respondents must file and serve their evidence when they acknowledge service. This evidence should be given in the form of a sworn statement or witness statement stating the facts in support of the refusal to attend the inquiry, for contesting the order sought, or other claims such as legal professional privilege. The claimant/applicant may file and serve evidence in reply within 14 days thereafter.[52]

The decision

8.105 The primary decision on whether to issue a witness summons in accordance with the application is normally, under Part 8, made by a judge in chambers on the papers filed with the court. Under our procedure, the decision must be made at a hearing at which the parties are present, and not on the papers unless the respondent has indicated when acknowledging service that he or she is content for there not to be a hearing and the court is content to decide the matter on the papers.

8.106 For example, the application might be made against a public body which believes it ought to claim public interest immunity for the document the inquiry wishes it to produce. In these circumstances the respondent public body might feel it cannot consent, but not believe that a hearing is necessary. The court might nevertheless wish to be addressed, and even take evidence, on the issue of whether the public interest lies in disclosure or non-disclosure.

Decision on the papers

8.107 If, exceptionally, there is a decision on the papers (see para 8.105 above) and the judge refuses the application, the claimant (inquiry) may apply to the full court for the issue of the attendance order. If on the other hand the judge issues the order the respondent may apply to the full court to vary the order or to set it aside.

Decision after a hearing

8.108 There could be a hearing to decide the application at which evidence could be given. Witnesses could be called at the request of either party or at the instigation of the court. If a party wished to summons a witness to this hearing, Civil Procedure Rules Part 34 would provide the appropriate process.

Costs of the application

8.109 If the judge issues the attendance order then the costs of the application should normally be awarded against the respondent. If the judge refuses the application the costs will normally be awarded against the claimant (inquiry). However, it is to be open to the court to require the claimant (inquiry) to meet the costs of the respondent even if successful. The liability of the parties for costs should be clearly stated on the claim form.

[51] PD 8, para 3.2.

[52] CPR r 8.5(5), (6).

8.110 The usual procedures concerning the issue and service of the attendance order should then be followed and supervised by the Administrative Court.

Funding of the respondent's legal representation before the court

8.111 Under the proposed scheme, the respondent may have to bear his or her own costs of the application, or even those of the inquiry making the application. Public funding should be available on a means and merits-tested basis, via the Community Legal Fund administered by the Legal Services Commission under the Access to Justice Act 1999 ("AJA 1999").

8.112 Section 6 of the AJA 1999 specifies the legal services which may be funded by the Community Legal Service ("CLS"). Subject to section 6(1) of the AJA 1999 and to section 6(6), the services which the Legal Services Commission may fund as part of the CLS are those that the Commission considers appropriate. (It is *possible* that the Commission in the exercise of this discretion may consider that it is not appropriate to fund the proceedings we specify. Also the Lord Chancellor may direct the Commission not to fund such proceedings by virtue of the power specified in section 6(1). We see no reason why either of these might be invoked.)

8.113 Section 6(6), together with Schedule 2, specifies cases which the CLS may not fund.[53] Schedule 2 to the Act lists a number of services which may not be funded, none of which covers the kind of proceedings we have in mind. Schedule 2 also excludes provision of advocacy in any proceedings except concerning proceedings in (amongst others) the High Court, Court of Appeal and House of Lords.

Appeals

8.114 Both parties are to have the right of appeal, in accordance with rule 52 of the CPR. Permission to appeal has to be sought from the High Court, and grounds must be made out. If permission is refused, the party may appeal against that refusal to the Court of Appeal. If permission is granted, the Court of Appeal hears the appeal. Appeal from a determination of the Court of Appeal on the appeal from the High Court is to the House of Lords.

Enforcement of the order of the court: civil contempt

8.115 Failure to comply with an order issued by the High Court is prima facie punishable as a contempt of court. Civil contempt is not a criminal offence[54] but the standard of proof in all forms of contempt is to the criminal standard, beyond a reasonable doubt.[55] The chief instance of civil contempt, or "contempt in

[53] This is subject to amendment by statutory instrument by AJA 1999, s 6(7) and by direction or authorisation of the provision of services excluded in Schedule 2 by the Lord Chancellor under AJA 1999, s 6(8). The Lord Chancellor issued a Direction on 2 April 2001, "Scope of the Community Legal Service Fund Exceptions to the Exclusions". Details are not provided here because advocacy before the High Court is not prohibited, and the kind of proceedings we envisage do not fall within the exclusions.

[54] *Cobra Golf Inc and another v Rata and another* [1998] Ch 109.

[55] *Dean v Dean* [1987] 1 FLR 517; *A-G v Newspaper Publishing plc* [1988] Ch 333.

procedure", is disobeying an order of the court by a party to the proceedings. Although, in practice, there is little to distinguish between civil and criminal contempt the distinction remains in force in relation to

(1) privilege from arrest;

(2) the principle that the prerogative of the Crown extends to remission of a sentence for criminal but not civil contempt; and

(3) the principle that a civil contempt can be waived, for if the party for whose benefit an order was made is content that it should not be performed the court has generally no interest in interfering with this decision.[56]

Mens rea *for civil contempt*

8.116 As the order we propose is in form and substance an order from the court, once it has been served, it must be obeyed, subject to a reason for non-compliance being made out. For the purposes of contempt, it is not necessary to demonstrate on the part of the person served any specific intention as to the consequences of their non-attendance for the administration of justice. Thus the *mens rea* for contempt of an order of the court can comprise:[57] wilful disregard,[58] recklessness or negligence.

8.117 A witness may be able to show that they had a reasonable excuse for their non-attendance. Thus a witness would not be in contempt if they were genuinely too ill to attend or otherwise prevented from attending by means beyond their control. The duty to attend court takes precedence over other public duties.

Powers of court once contempt is proved

8.118 A range of sanctions is available:

(1) imprisonment;

(2) a fine up to £1000; or

(3) an injunction which may be useful to restrain further non-attendance. Such a sanction may encourage attendance without having to initiate a new application for an attendance order.

8.119 The court's power to punish for contempt of court may be exercised by an order for committal to prison or by other means such as a fine. However, in punishing for contempt the court's powers are limited and the full range of sentencing options available to a criminal court are not available. For example the court has

[56] *Roberts v Albert Bridge Co.* (1873) LR 8 Ch App 753; *Woodward v Twinaine* (1839) 9 Sim 301.

[57] *Arlidge, Eady & Smith on Contempt* (2001), para 11 – 100.

[58] *Arlidge, Eady & Smith on Contempt* (2001), para 11 – 99.

no power to impose a community penalty. The term of imprisonment must be for a fixed term which cannot exceed 2 years.[59]

8.120 In the case of a coroner's court a coroner can impose a maximum fine of £1000 on a witness who fails to attend a hearing.[60] A similar level of fine can be imposed by inquiries established under the Tribunal and Inquiries Act or imprisonment up to a maximum of 6 months.

8.121 Where a local inquiry has been set up under section 250 of the 1972 Act, section 250(3) allows for fines of up to £1000, and/or a prison sentence for up to six months for refusal or deliberate failure to attend in accordance with the summons, or deliberate alteration, suppression, concealment, destruction or refusal to produce a book or document as required.

8.122 On the basis of parity with similar powers, the maximum period of imprisonment for contempt under our scheme should be 6 months and the maximum fine £1000.

8.123 It seems to us appropriate for the normal procedure for an application for an order of committal to apply. (We do not think that any process of certification of contempt by the inquiry would be appropriate, for example, because the contempt is disobedience of a court order, not contempt of the inquiry.)[61]

8.124 The court has the power to discharge a person found guilty of contempt prior to the completion of their sentence. There is a right of appeal in the case of civil contempt available to both the applicant and contemnor.[62] Permission to appeal is not required for an appeal against a committal order.[63] The rules are supplemented by a Practice Direction – Committal Applications which applies to any application for an order of committal of a person to prison for contempt.

Recommendation 21

8.125 **Failure to comply with an order made by the High Court to attend before a special inquiry shall be punishable as contempt of court, with maximum penalties of 6 months' imprisonment and/or a fine at level 3 on the standard scale.**

[59] Contempt of Court Act 1981, s 14.

[60] Coroners Act 1988, s 10. The coroner also retains the power to apply for a summons when there is a substantial interest in the witness attending. The coroner does not himself have the power to imprison a person for failure to attend. The coroner can apply to the High Court for a witness summons, and thereafter for committal to prison if the witness fails to attend the inquest in response to the summons. The coroner's position is akin to what we are recommending for an inquiry.

[61] Certification is the process used in an inquiry established under the Tribunals and Inquiries Act 1921. An example is the Bloody Sunday inquiry which encountered difficulties securing the attendance of the Rev Iain Paisley. He failed to attend the Tribunal as specified in a *subpoena*; the Tribunal ruled that unless the witness attended the inquiry the next morning he would be certified as in contempt of the Tribunal. He did then attend the next day. The Bloody Sunday Inquiry, Transcript of Main Hearing Day 204 07/05/02 p 130 lines 19 – 21, and 205 08/05/02 p 2 – 151.

[62] Administration of Justice Act 1960, s 13.

[63] CPR r 52.3(1)(a).

THE MINISTER'S POWER TO STOP A SPECIAL INQUIRY

8.126 There is one circumstance where a special inquiry ought to be stopped: where its work is being or will be duplicated by some other national inquiry. Therefore, if the subject of the special inquiry is or will be the subject of an inquiry established by the Minister under express or implied powers to establish a Ministerial inquiry or the prerogative,[64] or a 1921 Act inquiry,[65] a Health and Safety Commission inquiry,[66] or an inquiry established by the National Assembly for Wales, then the Minister may terminate the local authority statutory inquiry.

8.127 If the commissioning authority or one of them is a Welsh local authority, the Secretary of State must consult the National Assembly for Wales before directing a local authority to stop a special inquiry.

8.128 The Minister is only to have the power to halt the local authority inquiry where the matter is being investigated as described in paragraph 8.24 above.

8.129 There should be no statutory impediment to the inquiry established by the local authority beginning its work, nor delay built into the system. In practice, the local authority is likely to have been in communication with the relevant department from an earlier stage, and will therefore know whether the Minister or the Assembly is minded to take it over.

Recommendation 22

8.130 **If, in the view of the Secretary of State (after consultation with the National Assembly for Wales where appropriate), all or substantially all of the matters which are or will be the subject of a special inquiry are or will be the subject of one of the following forms of inquiry, then the Secretary of State may direct the commissioning authority or authorities to stop the inquiry at any time before the inquiry submits its final report, and the authority/ies shall do so without delay.**

8.131 **The forms of inquiry are:**

(1) a Tribunals of Inquiry (Evidence) Act 1921 inquiry;

(2) an inquiry established by a Minister of the Crown under an explicit power, an implied power, or the prerogative;

(3) an inquiry established by the Health and Safety Commission under section 14(2)(b) of the Health and Safety at Work etc. Act 1974; or

(4) an inquiry established by the National Assembly for Wales under any enactment.

[64] On Ministerial powers to establish an inquiry, see paras D. 5 – D. 35 in Appendix D below.

[65] I.e. one established under the Tribunals of Inquiry (Evidence) Act 1921.

[66] I.e. one established under the Health and Safety at Work etc. Act 1974, s 14(2)(b).

COMMENCEMENT

8.132 The provisions in the attached Bill would come into force on a date to be appointed. (The necessary procedural rules would need to be in place before the provisions came into force.)

8.133 There is not to be any restriction on the exercise of the new statutory power in terms of when an incident occurred or a complaint was made. Thus once the power is exercisable, a principal authority may establish a statutory inquiry into a matter that arose before the power became available.

CONVENTION-COMPATIBILITY OF OUR RECOMMENDATIONS IN THIS PART

8.134 As indicated at paragraphs 7.45 – 7.74 above, one of the principal considerations behind the recommendations in this Part is to promote compliance with the ECHR, in particular the investigative duties which arise under Article 2 and Article 3.

8.135 We have also taken account of the significance of Article 6, and therefore, although a witness may be compelled to give evidence to a special inquiry, that evidence may not subsequently be used against him or her in criminal proceedings unless he or she introduces it in those proceedings.

PART IX
SUMMARY OF RECOMMENDATIONS

QUALIFIED PRIVILEGE

Recommendation 1

9.1 Where:

(1) an Overview and Scrutiny Committee or a local authority, whether acting alone or with another local authority or other public body establishes an ad hoc inquiry because it has reason to believe there was or may have been a failure in the exercise of one of its functions, and

(2) a report, or part of a report, or a summary of a report of the inquiry is "published" to the public or a section of it by a principal local authority, being one which established the inquiry, and

(3) specified fairness requirements are met,

then statutory qualified privilege shall attach to the report, except to the extent that the report relates to matters that have no connection with the subject of the inquiry.

Recommendation 2

9.2 Statutory qualified privilege shall also attach to the report of a local authority special inquiry.

Recommendation 3

9.3 An inquiry (or other review or investigation) is not ad hoc if it is required to be held by or under any enactment.

Recommendation 4

9.4 Where the fairness requirements are not satisfied, neither common law privilege nor the statutory qualified privileges which apply where a document shall be open to public inspection shall attach either.

Recommendation 5

9.5 The fairness requirements are that:

(1) the inquiry has been fairly conducted, or the local authority has taken all reasonable steps to check that it has been fairly conducted, *and*

(2) the report meets the following conditions:

(a) it reaches conclusions based on findings of fact, and

(b) it only contains criticisms of people which, where practicable, have been put to them in advance of publication, with an opportunity for

them to respond, and, subject to the requirements of observing confidentiality, those responses are fairly represented in the report.

Recommendation 6

9.6 In any proceedings for defamation, any question as to whether or not the fairness requirements have been met shall be determined by the judge.

LOCAL AUTHORITY SPECIAL INQUIRIES

Recommendation 7

9.7 Principal local authorities, acting alone or together, shall have the power to establish a special inquiry where:

(1) they believe or have reason to believe that there was or may have been a serious failure in the exercise of a function of theirs,

(2) the circumstances do not require an inquiry to be set up under any other specific statutory provision, and

(3) they consider it is appropriate in all the circumstances.

This power shall be additional to local authorities' existing powers of ad hoc inquiry and investigation.

Recommendation 8

9.8 The decision to establish a special inquiry shall be taken in public by the full council, or each of them if there is more than one.

Recommendation 9

9.9 The commissioning authority or authorities must notify the Secretary of State and, if the commissioning authority or one of them is a Welsh local authority, the National Assembly for Wales, in writing of the decision to establish a special inquiry.

Recommendation 10

9.10 The commissioning authority or authorities shall take reasonable steps to notify a complainant (or a person on behalf of the complainant) of the decision to establish a special inquiry and, if it occurs, that the inquiry is to be or has been discontinued on direction of the Secretary of State.

Recommendation 11

9.11 The Secretary of State shall have power, after consultation with the Council on Tribunals, to prescribe rules of procedure for the conduct of special inquiries, and if those rules are to apply to special inquiries established by Welsh local authorities, then the Secretary of State shall make them jointly with the National Assembly for Wales, but, subject to any such rules, a special inquiry shall be free to determine its own procedure.

Recommendation 12

9.12 Special inquiries shall not have power to take evidence on oath or affirmation.

Recommendation 13

9.13 The commissioning authority or authorities shall have the power to pay for:

(1) the inquiry's expenses, including indemnities for the inquiry;

(2) expenses incurred by witnesses in attending before the inquiry.

Recommendation 14

9.14 The inquiry may direct that the cost of representation incurred by a person attending before it shall be paid by the commissioning authoriy or authorities, but only insofar as it is reasonable in amount.

Recommendation 15

9.15 Where a commissioning authority publishes the report (or part or a summary of the report) of a special inquiry to the public or a section of it and specified fairness requirements are met (see recommendation 5 above), then statutory qualified privilege shall attach, but where the fairness requirements are not satisfied, common law privilege and the statutory qualified privileges which apply where a document shall be open to public inspection shall not attach either.

Recommendation 16

9.16 A special inquiry shall have the power, at any time during the life of the inquiry, to apply to the High Court for an order compelling a person to attend before it to answer questions or to produce a document or thing.

Recommendation 17

9.17 The High Court shall have the power, on application by a special inquiry, to issue an order requiring a witness to attend before the special inquiry to answer questions or to produce a document or thing and the court may do so where satisfied that:

(1) the witness is likely to be able to give material evidence to the inquiry, or that the document or thing is likely to be material evidence;

(2) the witness has been given adequate notice of the matters on which the inquiry panel proposes to question him or her;

(3) the respondent has refused or failed to attend, to answer questions, or to produce the document or thing voluntarily;

(4) the evidence is unlikely to be obtained from any other source; and

(5) that in all the circumstances it is just to issue the order.

Recommendation 18

9.18 Where a person attends before a special inquiry, he or she may not be compelled to answer a question or produce a document or thing that he or she could not be compelled to answer or produce in civil proceedings before the court, but that person shall not be excused from answering a question or producing a document or thing solely on the grounds that doing so would incriminate that person, or his or her spouse.

Recommendation 19

9.19 A statement made to a special inquiry shall not be admissible against the person who made it at the behest of the prosecution in criminal proceedings, or proceedings before service courts, in which that person is charged with an offence (other than an offence under section 5 of the Perjury Act 1911), unless evidence relating to it is adduced, or a question relating to it is asked, by or on behalf of that person.

Recommendation 20

9.20 The court shall have the power to make ancilliary orders in respect of:

(1) any help that a witness might need when attending before the inquiry;

(2) payment of the witness's costs in attending the inquiry;

(3) payment of the costs of the application to the court, including representation for the respondent in the application before the court, whether the application is granted in whole or in part, refused or adjourned; and

(4) any other order relating to the attendance of the witness, in the court's discretion.

Recommendation 21

9.21 Failure to comply with an order made by the High Court to attend before a special inquiry shall be punishable as contempt of court, with maximum penalties of 6 months' imprisonment and/or a fine at level 3 on the standard scale.

Recommendation 22

9.22 If, in the view of the Secretary of State (after consultation with the National Assembly for Wales where appropriate), all or substantially all of the matters which are or will be the subject of a special inquiry are or will be the subject of one of the following forms of inquiry, then the Secretary of State may direct the commissioning authority or authorities to stop the inquiry at any time before the inquiry submits its final report, and the authority/ies shall do so without delay.

9.23 The forms of inquiry are:

(1) a Tribunals of Inquiry (Evidence) Act 1921 inquiry;

(2) an inquiry established by a Minister of the Crown under an explicit power, an implied power, or the prerogative;

(3) an inquiry established by the Health and Safety Commission under section 14(2)(b) of the Health and Safety at Work etc. Act 1974; or

(4) an inquiry established by the National Assembly for Wales under any enactment.

(*Signed*) ROGER TOULSON, *Chairman*
HUGH BEALE
STUART BRIDGE
MARTIN PARTINGTON
ALAN WILKIE

STEVE HUMPHREYS, *Chief Executive*
17 May 2004

APPENDIX A
DRAFT LOCAL AUTHORITIES INQUIRY BILL

The draft Local Authorities Inquiries Bill begins on the following page with a Contents section.

The draft Bill is then set out with the Clauses on left hand pages and Explanatory Notes on the corresponding right hand pages.

Local Authority Inquiries Bill

CONTENTS

PART 3

SUPPLEMENTAL

A

B I L L

TO

Enable local authorities to establish inquiries and to confer qualified privilege in respect of reports of certain inquiries involving local authorities.
Date Of Enactment

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART 1

SPECIAL INQUIRIES

Establishing an inquiry

1 Special inquiry

(1) A local authority may appoint a person to hold an inquiry (a "special inquiry") if—

(a) they have reason to believe that there was, or may have been, a serious failure in the exercise of a function of theirs, and

(b) they consider that a special inquiry into the failure would be appropriate.

(2) Two or more local authorities may jointly appoint a person to hold a special inquiry on their behalf if—

(a) the condition in subsection (1)(a) is satisfied as regards each of them, and

(b) they consider that a jointly-established special inquiry into the failure would be appropriate.

(3) The condition in subsection (1)(a) may be satisfied as regards a local authority whether or not they have received a complaint about the exercise of the function.

EXPLANATORY NOTES

These notes have been prepared to help explain the Bill. They do not form part of it. Where a clause or part of a clause does not seem to require any explanation or comment, none is given.

PART 1

SPECIAL INQUIRIES

Establishing an inquiry

Clause 1

This clause provides a local authority with the power to appoint a person to hold an inquiry which is to be known as a "special inquiry".

Subsection (1) establishes the conditions that enable a local authority to hold a special inquiry. Those conditions are that the local authority has reason to believe that there has been or may have been a serious failure in the exercise of any of its functions (subsection (1)(a)) and that a special inquiry would be appropriate (subsection (1)(b)). "Serious failure" is defined in clause 2.

A local authority is most likely to turn to a special inquiry where the authority anticipates that witness co-operation would not be forthcoming or there may be other problems in obtaining relevant evidence.

Subsection (2) provides that two or more local authorities may embark on a joint special inquiry into a serious failure of any of their functions. Each local authority must be satisfied as regards the test in subsection (1)(a) (the "serious failure test"). (It does not have to be the same serious failure for each of the local authorities establishing the inquiry.) They must also be satisfied that a jointly-established special inquiry is appropriate.

Subsection (3) enables a local authority to embark on a special inquiry on its own initiative, providing the conditions set out in subsection (1)(a) are satisfied, without having received a complaint from any person about the exercise of any of the local authority's functions.

(4) But the authority (or authorities) may not establish a special inquiry if the subject of the inquiry would (but for this subsection) include matters falling within subsection (5).

(5) A matter falls within this subsection if the authority (or any of the authorities) are expressly authorised or required by an enactment other than this section to establish an inquiry, review or other investigation into the matter (whether on its own or with other matters).

2 Serious failure

In determining for the purposes of section 1 whether there was, or may have been, a serious failure in the exercise of a function of theirs, a local authority may take into account, in particular—

(a) whether a person suffered, or is likely to suffer, significant injury, damage or loss as a result of the failure;

(b) the number of persons who have been, or are likely to be, affected by the failure;

(c) whether the failure has affected, or is likely to affect, the exercise of other functions of the local authority or the exercise of functions of other local authorities.

3 Decision of local authority

(1) The decision of a local authority to appoint a person to hold a special inquiry must be made—

(a) at a meeting of the local authority, and

(b) while the meeting is open to the public.

(2) Subsection (1)(b) does not prevent the exclusion of the public—

(a) under section 100A(2) of the 1972 Act (exclusion to avoid disclosure of information in breach of obligation of confidence), or

(b) by resolution under section 100A(4) of the 1972 Act (exclusion to avoid disclosure of exempt information),

during any other part of the proceedings relating to that decision.

(3) If two or more local authorities jointly appoint a person to hold a special inquiry, subsections (1) and (2) apply in relation to each authority's decision to make the appointment.

(4) Nothing in section 101 of the 1972 Act (delegation of functions) or in regulations under section 19(2) of the 2000 Act (delegation of functions to executive of another authority) applies to the making of a decision by a local authority to appoint a person to hold a special inquiry.

(5) Nothing in section 13 of the 2000 Act (functions which are responsibility of executive) or in regulations under that section has effect to make the decision of a local authority to appoint a person to hold a special inquiry the responsibility of an executive of the authority under executive arrangements.

4 Notice of inquiry

(1) A local authority must give the Secretary of State notice of their decision to appoint a person to hold a special inquiry.

Subsection (4) prevents a special inquiry from established if the failure of function was already the subject of another form of statutory inquiry, of a type set out in subsection (5). Subsection (5) provides that this limitation is to be imposed where the local authority is under specific statutory duty or has a specific statutory power to establish an inquiry, review or investigation into the matter.

Clause 2

This clause describes what might amount to a "serious failure" in the exercise of local authority functions (part of the test which must be met under clause 1). It gives a local authority discretion to take into account one or more of the factors outlined to determine whether or not there has been, or might have been, a serious failure in the exercise of any of its functions.

While the list of factors is not exhaustive, it includes:

whether significant injury (including both physical and mental injury) has been suffered by a person, or is likely to be suffered by a person in the future, as a result of a failure in a local authority's functions;

whether a person has suffered, or is likely to suffer, significant damage or loss (for example damage to property or loss of money or benefits) as a result of the failure by the local authority;

the number of persons who have been or are likely to be affected by the failure of the local authority (The greater the number of people who are thought have been affected, the greater the possibility that the failure was a serious one.); or

whether the failure by the local authority has affected or is likely to affect the exercise of other functions or provision of services by the local authority or by other local authorities. (This factor will encourage the local authority to take into account the further consequences of the alleged failure.)

These last two factors indicate that failures which might not at first sight appear to be serious may nonetheless be properly classified as serious because of their frequency or their impact on other functions of an authority or on the functions of other authorities.

Clause 3

This clause sets out how a local authority is to make the decision to establish a special inquiry.

Subsection (1) provides that a local authority must make the decision to hold a special inquiry at a meeting of the local authority that is open to the public.

Despite this general rule, subsection (2) provides that a local authority may exclude the public during any part of the process of making the decision when -

the local authority is required to exclude the public to avoid the disclosure of confidential information held by or disclosed to the local authority by virtue of the provisions of section 100A(2) of the Local Government Act 1972 (for example, to avoid disclosure of confidential medical records); or

the local authority is required to exclude the public to avoid disclosure of exempt information by virtue of section 100A(4) of the Local Government Act 1972. ("Exempt information" is specified in Schedule 12A to the Local Government Act 1972, and includes for example information relating to a particular employee of the local authority.)

Subsection (3) provides that, if there is more than one authority establishing a special inquiry, each of them must make its decision at a meeting that is open to the public.

The decision to establish a special inquiry is that of the whole council. Therefore, subsection (4) prevents the local authority from delegating the decision to hold a special inquiry to a committee or executive of the local authority under the Local Government Acts of 1972 and 2000, and subsection (5) prevents the local authority from making the decision to hold a special inquiry a responsibility of the executive of the local authority, formed under the Local Government Act 2000.

Clause 4

This clause concerns notification of the establishment of a special inquiry. It provides that the local authority must give notice of its decision to hold a special inquiry to the appropriate Minister, and to specified people. The local authority can additionally give notice to other people as it sees fit.

The local authority must give notice to the Secretary of State (subsection (1)), and to the National Assembly for Wales if the authority is a Welsh local authority (subsection (2)).

(2) If the local authority are a local authority in Wales, they must also give notice of their decision to the National Assembly for Wales.

(3) The local authority must take reasonable steps to give notice of their decision to any person who complained of the failure (or alleged failure) which is the subject of the inquiry (or to the person who appears to the authority to be acting on behalf of such a person).

(4) If two or more local authorities jointly appoint a person to hold a special inquiry, the requirements in subsections (1) to (3) apply to each authority; but nothing in this subsection prevents one of the authorities satisfying such a requirement on behalf of the other authority or authorities.

(5) Notices under this section must be given in the manner, and within the period, specified by the Secretary of State.

Conduct of inquiry

5 Conduct of inquiry

(1) The Secretary of State may make rules regulating the procedure to be followed in connection with special inquiries.

(2) But rules that regulate the procedure to be followed in connection with—

(a) a special inquiry established by a local authority in Wales, or

(b) a special inquiry established jointly by two or more local authorities, one or more of which are local authorities in Wales,

are to be made by the Secretary of State and the National Assembly for Wales, acting jointly.

(3) The power to make rules in subsection (1) or (2) is exercisable only after consultation with the Council on Tribunals.

(4) Subject to rules made under subsection (1) or (2), a special inquiry may regulate its own procedure.

(5) The local authority (or, in the case of a jointly-established inquiry, the local authorities) may—

(a) pay the person holding the inquiry such remuneration and expenses as the authority (or authorities) may determine;

(b) make provision for payment by the authority (or authorities) of allowances or expenses to a person in connection with attending before the inquiry to give evidence or to produce a document or other thing;

(c) make provision for payment by the authority (or authorities) of other costs of the inquiry.

(6) Subsection (7) applies if a person attending before a special inquiry to give evidence or to produce a document or other thing is represented before the inquiry by—

(a) a person who has a general qualification within the meaning of section 71 of the Courts and Legal Services Act 1990 (c. 41), or

(b) if the inquiry's procedure so allows, by any other person chosen by the person attending before the inquiry.

(7) If the person so attending incurs expenses in relation to such representation, the inquiry may determine (regardless of the provision, if any, made under

Subsection (3) requires a local authority to take reasonable steps to give notice of the decision to hold a special inquiry to the people who complained of the failure or possible failure in the local authority's functions, and also to a person who appears to be acting on behalf of the complainant. This might be, for example, a parent, a carer or a representative.

Where more than one authority is establishing the joint special inquiry, subsection (4) allows one of them to give the notices required under this clause on behalf of the other or others.

Subsection (5) provides that if the Secretary of State specifies the manner and the time period in which such notices must be given by the local authority, then the notices must be given as the Secretary of State specifies.

Conduct of inquiries

Clause 5

This clause addresses the making of the rules of procedure and the powers of a special inquiry.

Subsection (1) gives the Secretary of State power to make the rules of procedure governing the conduct of a special inquiry.

Subsection (2) provides that if such rules are made for inquiries established by authorities that include an authority in Wales, the Secretary of State and National Assembly for Wales shall make rules of procedure for special inquiries jointly.

Subsection (3) provides that the Secretary of State and the National Assembly for Wales must consult the Council on Tribunals before making procedural rules for special inquiries.

Subsection (4) provides that a special inquiry may regulate its own procedure, subject to any rules of procedure made by the Secretary of State under subsections (1) and (2).

Subsection (5) provides the local authority or authorities establishing the special inquiry with the following discretionary powers:

to pay the person or persons holding the inquiry such remuneration and expenses that the local authority determines appropriate;

to pay people attending before the inquiry such expenses as the local authority determines reasonable and appropriate in respect of attending the inquiry either to give evidence or to produce a document or other things relevant to the inquiry. These could include travel for the individual (and maybe someone to accompany him or her), and possibly a sum in recompense for loss of earnings or other expenses incurred such as substitute care for a dependant. This discretion may extend to payment of the costs of legal advice and representation, including costs that a person may incur in real anticipation of attendance before an inquiry even if they are not, in fact, ultimately required to attend; and

to make any provision for payment of any other reasonable costs of the inquiry (including indemnities).

Subsections (6), (7) and (8) together have the effect that, if a person attending before the inquiry is represented before the inquiry, the inquiry can oblige the local authority or authorities (or one of them) to pay the expenses reasonably incurred, or a part of them. Such a determination is at the discretion of the inquiry, but the local authority does not have to pay if the expenses or part of the expenses were unreasonably incurred. For the purposes of subsections (6), (7) and (8) representation may be by a person who is legally qualified, or by some other person so long as the inquiry's procedure allows such representation.

subsection (5)(b)) that the authority (or, in the case of a jointly-established inquiry, any one or more of the authorities) are to pay the person an amount in respect of his expenses or part of them; and the authority (or authorities) must pay the person accordingly.

(8) A local authority are not required as a result of subsection (7) to pay a person any amount in respect of expenses unreasonably incurred.

6 Orders to secure attendance

(1) The court may, on the application of the person holding a special inquiry, make such order as it considers necessary to secure the attendance of a person before the inquiry—

(a) to answer questions, or

(b) to produce a document or other thing.

(2) The court may make an order under subsection (1)(a) only if it is satisfied that—

(a) the person is likely to be able to give material evidence to the inquiry;

(b) the person has been given adequate notice of the subject-matter of the questions which the inquiry proposes to ask;

(c) the person has failed to attend before the inquiry or has failed to answer questions asked by the inquiry;

(d) the inquiry is unlikely to be able to obtain the evidence by other means; and

(e) in all the circumstances, it is just and reasonable to make the order.

(3) The court may make an order under subsection (1)(b) only if it is satisfied that—

(a) the person is likely to be able to produce a document or other thing that is likely to be material evidence in relation to the inquiry;

(b) the person has failed to produce the document or other thing (or, in the case of the document, a suitable copy of it);

(c) the inquiry is unlikely to be able to obtain the evidence by other means; and

(d) in all the circumstances, it is just and reasonable to make the order.

(4) An order under subsection (1)(a) or (b) may make provision as to—

(a) the means by which the person may give evidence to the inquiry;

(b) the payment of allowances or expenses to the person in connection with attending before the inquiry;

(c) the payment of the person's expenses in relation to representation before the inquiry;

(d) the provision of an interpreter when the person attends before the inquiry;

(e) such other matters relating to the attendance of the person before the inquiry as the court thinks fit.

(5) A person may not be compelled as a result of this section to answer a question or produce a document or other thing that he could not be compelled to answer or produce in civil proceedings before the court.

EXPLANATORY NOTES

Clause 6

This clause provides the court with power to make certain orders to secure the attendance of people and production of documents or other things to an inquiry. This clause also gives the inquiry the power to make an application to the court for such orders.

Subsection (1) provides the High Court with the power to make necessary orders to compel the attendance of a person before a special inquiry in order to answer questions or produce a document or other thing. “Other things” may include, for example, equipment. The application for such an order must be made by the person appointed to hold the special inquiry. The meaning of “document”, is further defined in clause 19(2).

Subsection (2) provides that the High Court may only make an order requiring a person to answer questions if it is satisfied that all the following conditions apply:

that the person has or is likely to have material evidence to the inquiry;

that the person has been given adequate warning of the subject-matter of the questions that the inquiry proposes to ask;

that the person has failed to attend or to answer questions at the inquiry (The implication is that the person must have been asked to attend and has declined; the inquiry cannot apply to the court as a first resort.);

that the inquiry is unlikely to be able to obtain the evidence by other means (For example, if the inquiry has already secured sufficient evidence from documents then there may be no need to compel the person to attend.);

that, taking into account all the circumstances of the inquiry it is just and reasonable to make the order. (Relevant circumstances may include the personal circumstances of the person, the issue on which the inquiry wishes to question him or her, the reasons the inquiry was established, and the way in which it is being and is likely to be conducted.)

Subsection (3) provides that the High Court may only make an order compelling a person to produce documents or things to a special inquiry if it is satisfied that all of the following conditions apply:

that the person is likely to be able to produce a document or thing and that that document or thing is likely to be material evidence in relation to the inquiry;

that the person has failed to supply the thing or document or an appropriate copy of the document to the inquiry (The implication is that the inquiry has asked the person to supply the document or thing and he has declined to do so; the inquiry cannot apply to the court as a first resort.);

that the inquiry cannot reasonably obtain the evidence it seeks by other means, for example from another person or organisation; and

that in all of the circumstances of the inquiry it is just and reasonable to order the person to attend to produce the document or thing. (Relevant circumstances may include the personal circumstances of the person, the likely significance of the document or thing which the inquiry wishes to see, the likely reliability of the document, the reasons the inquiry was established, and the way in which it is being and is likely to be conducted.)

Subsection (4) provides that when the High Court makes an order compelling a person to attend an inquiry or to produce a document or thing, the order may provide for one or more of the following:

how the person may give evidence to the inquiry, for example oral evidence via a video link, or some other form of communication with the inquiry or help in giving evidence;

that the inquiry shall secure the payment of the person’s expenses in attending the inquiry from the local authority, for example the payment of reasonable travel expenses;

that the inquiry shall secure the payment by the local authority of the person’s expenses in relation to representation before the inquiry;

the provision of and payment for an interpreter to enable the person to give evidence to the inquiry.

The High Court has a wide discretion to incorporate other matters into the order that it considers fit and necessary in a particular set of circumstances, for example that a person is accompanied when giving evidence before the inquiry, or that the questions shall not address specified issues, or requiring the production of original documents rather than copies.

Subsection (5) applies the evidential rules that protect a witness in civil proceedings.

(6) But a person shall not be excused from answering a question or producing a document or other thing on the ground that doing so might tend to incriminate the person or, if married, the person's spouse.

(7) Rules of court may make provision for and in connection with applications under this section.

(8) "Court" means the High Court.

7 Admissibility of statement

(1) A statement made by a person to a special inquiry is admissible in evidence in any proceedings, so long as it also complies with the requirements governing the admissibility of evidence in the circumstances in question.

(2) But in criminal proceedings in which that person is charged with an offence other than a relevant perjury offence—

(a) no evidence relating to the statement may be adduced, and

(b) no question relating to it may be asked,

by or on behalf of the prosecution, unless evidence relating to it is adduced, or a question relating to it is asked, in the proceedings by or on behalf of that person.

(3) "Criminal proceedings" includes—

(a) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955 (3 & 4 Eliz. 2 c. 18), the Air Force Act 1955 (3 & 4 Eliz. 2 c. 19) or the Naval Discipline Act 1957 (c. 53),

(b) proceedings before the Courts-Martial Appeal Court,

(c) proceedings before a summary appeal court established under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, and

(d) proceedings before a Standing Civilian Court.

(4) A relevant perjury offence is an offence under section 5 of the Perjury Act 1911 (c. 6) (false statements made otherwise than on oath).

8 Penalties for contempt

(1) This section applies where the court exercises its jurisdiction in relation to contempt of court arising out of a failure to comply with an order made under section 6(1)(a) or (b).

(2) Section 14(1) of the Contempt of Court Act 1981 (c. 49) (power to commit person to prison for fixed term not to exceed two years on any one occasion) has effect as if for the words "two years" there were substituted "six months".

(3) The amount of the fine which the court may impose on any one occasion is an amount not exceeding level 3 on the standard scale.

(4) "Court" means the High Court.

Subsection (6) excludes the protection of the privilege against self-incrimination.

The effect of subsections (5) and (6) together is that when a person provides evidence to an inquiry, he or she may not refuse to answer a question or produce a document or thing on the basis that to do so would incriminate him or her or his or her spouse. If the person claims some other privilege as a basis for refusing to answer, or to produce a document or thing, then that is left to the inquiry to resolve, in line with the existing rules for civil proceedings.

Subsection (7) allows for rules of court to be made to govern applications to the High Court made under this clause.

Clause 7

This clause provides for limits on the use in subsequent criminal proceedings of any oral statement or written statement given as evidence to a special inquiry.

Subsection (1) provides generally that a statement given to a special inquiry is admissible in any other proceedings as long as it complies with the rules on admissibility which apply to those proceedings. But subsection (2) places a limit on admissibility in relation to criminal proceedings.

Subsection (2) provides that any statement given by a person to a special inquiry may not be used against that person by the prosecution in any subsequent criminal proceedings (except where the person is charged with a relevant perjury offence), unless the person or the person's legal representative adduces evidence related to that statement, or asks a question related to that statement, in those criminal proceedings.

Subsection (3) provides that criminal proceedings for the purposes of this Bill includes proceedings in the service courts, namely courts-martial, the Courts-Martial Appeal Court, a summary appeal court, and a Standing Civilian Court.

Subsection (4) provides that the relevant perjury offence referred to in subsection (2) is that of making a false statement otherwise than on oath contrary to section 5, Perjury Act 1911. The effect is that the prosecution may use a statement given to a special inquiry in criminal proceedings where the person who made the statement is charged in those proceedings with making a false statement other than on oath.

Clause 8

Where a person fails to comply with an order of the court made under clause 6(1)(a) or (b) the court has the power to commence civil contempt proceedings against a witness to an inquiry. This clause sets out the penalties that the High Court can impose on a person if they are found guilty of contempt.

Subsection (2) provides that the custodial penalty for contempt of court arising out of a failure to comply with an order made under clause 6(1)(a) or (b) is a maximum of 6 months in prison. Subsection (3) limits the power of the court to impose a fine on a person to an amount that does not exceed level 3 of the standard scale used in the magistrates' court. That level is currently £1000.

Stopping an inquiry

9 Powers of Secretary of State

(1) This section applies if, in the view of the Secretary of State, all or substantially all of the matters which are (or will be) the subject of a special inquiry are (or will be) the subject of—

(a) an inquiry by a tribunal established under the Tribunals of Inquiry (Evidence) Act 1921 (c. 7);

(b) an inquiry established by a Minister of the Crown in accordance with a power conferred by an enactment or otherwise;

(c) an inquiry established by the Health and Safety Commission in accordance with section 14(2)(b) of the Health and Safety at Work etc. Act 1974 (c. 37);

(d) an inquiry established by the National Assembly for Wales in accordance with a power conferred by an enactment.

(2) The Secretary of State may direct the local authority (or, in the case of a jointly-established inquiry, the local authorities) that established the special inquiry to stop the inquiry; and the authority (or authorities) must cause the inquiry to stop without delay.

(3) If the inquiry is—

(a) a special inquiry established by a local authority in Wales, or

(b) a special inquiry established jointly by two or more local authorities, one or more of which are local authorities in Wales,

the Secretary of State must consult the National Assembly for Wales before giving a direction.

(4) A direction may be given at any time before the person holding the inquiry submits a final report to the local authority (or local authorities) that established the inquiry.

(5) If a local authority stop an inquiry because of a direction, they must take reasonable steps to give notice of the stopping of the inquiry to the persons (if any) who were entitled to receive notices under section 4(3).

(6) If two or more local authorities jointly appoint a person to hold a special inquiry, the requirement in subsection (5) applies to each authority; but nothing in this subsection prevents one of the authorities satisfying the requirement on behalf of the other authority or authorities.

(7) Notices under this section must be given in the manner, and within the period, specified by the Secretary of State.

Miscellaneous

10 Chairing an inquiry

A local authority (or, in the case of a jointly-established inquiry, the local authorities) may decide that a special inquiry is to be held by two or more persons; and in such a case the authority (or authorities) may designate one of them to chair the inquiry.

Stopping an inquiry

Clause 9

This clause gives a Minister of the Crown power to stop a special inquiry in specified circumstances. Subsection (1) provides that the power contained in subsection (2) is exercisable where the subject matter of the special inquiry is or will be the subject of one of four other forms of statutory inquiry. Those other forms are:

a tribunal of inquiry established under the Tribunals and Inquiry (Evidence) Act 1921;

an inquiry established by a Minister of the Crown exercising a power by virtue of an Act of Parliament or other source of power to hold an inquiry. Such an inquiry would be the result of the exercise of an express statutory power to hold an inquiry, or of the exercise of an implied statutory power, for example under section 2 of the National Health Service Act 1977, or of the exercise of a prerogative power;

an inquiry established by the Health and Safety Commission under section 14(2)(b) of the Health and Safety at Work etc. Act 1974; or

an inquiry established by the National Assembly for Wales under any statutory power.

Subsection (2) gives the Secretary of State the discretionary power to direct the local authority or authorities responsible for establishing the special inquiry to discontinue the inquiry. In response to such a direction the local authority or authorities must discontinue the special inquiry without delay.

Subsection (3) has the effect that if the commissioning authority, or one of them, is a Welsh authority, then the Secretary of State must consult the National Assembly for Wales before giving a direction to stop the special inquiry.

By subsection (4) a direction to stop a special inquiry may be given at any time before the person appointed to hold the special inquiry submits the final report to the commissioning local authority or authorities.

Subsection (5) imposes a duty on the local authority or authorities which established the special inquiry to take reasonable steps to notify those individuals with an interest in the inquiry, who are identified under clause 4, of the discontinuance of the special inquiry that has been ordered by the Secretary of State, but, by virtue of subsection (6) one authority may give the notices on behalf of the other or others.

Subsection (7) provides that if the Secretary of State specifies the manner and the time period in which such notices must be given by the local authority, then the notices must be given as the Secretary of State specifies.

Miscellaneous

Clause 10

This clause gives a local authority or authorities power to appoint more than one person to hold a special inquiry. If more than one person is appointed, then one person may be designated to chair the inquiry.

PART 2

QUALIFIED PRIVILEGE FOR REPORTS

11 Introductory

(1) Sections 12 and 13 apply if—

(a) a local authority or authorities establish a special inquiry or a one-off inquiry,

(b) a local authority and one or more other public bodies establish a joint inquiry, or

(c) an overview and scrutiny committee of a local authority conducts a review or scrutiny falling within section 16,

and the person holding the inquiry or the committee produces a report all or part of which (or a summary of all or part of which) is published to the public, or a section of the public, by the responsible authority.

(2) For the purposes of sections 12 and 13, a document is not to be treated as such a report to the extent that it relates to matters that have no connection with the subject of—

(a) the special, one-off or joint inquiry, or

(b) the review or scrutiny.

(3) The responsible authority is—

(a) in relation to a special or one-off inquiry, the local authority or any of the local authorities that established the inquiry;

(b) in relation to a joint inquiry, the local authority or any of the local authorities that established the inquiry jointly with one or more other public bodies;

(c) in relation to a review or scrutiny conducted by an overview and scrutiny committee, the local authority of which the committee is part.

(4) References to an overview and scrutiny committee include references to a sub-committee of such a committee.

12 Qualified privilege

(1) The publication by the responsible authority of defamatory matter contained in the report is privileged if—

(a) before publication the authority took all reasonable steps to satisfy themselves that the inquiry was conducted fairly, or

(b) even though they did not, the inquiry was conducted fairly.

(2) If part only of the report is published, the publication by the responsible authority of defamatory matter contained in that part is privileged if—

(a) before publication the authority took all reasonable steps to satisfy themselves that so much of the inquiry as is reported in that part was conducted fairly, or

(b) even though they did not, so much of the inquiry as is reported in that part was conducted fairly.

(3) If a summary of all (or part) of the report is published, the publication by the responsible authority of defamatory matter contained in the summary is privileged if—

EXPLANATORY NOTES

PART 2

QUALIFIED PRIVILEGE FOR REPORTS

This Part of the Bill provides for a new statutory form of the defence of qualified privilege to an action in defamation to be available to a local authority in certain circumstances.

The scheme of this Part is that if a local authority - described as "the responsible authority" - publishes, either to the public at large or to a section of it, a report of a special inquiry (set up under Part 1 of the Act), or of a one-off inquiry, or of a joint inquiry, or of a local authority overview and scrutiny committee (as defined in clauses 14, 15 and 16 respectively), then a new statutory form of qualified privilege to applies to it in specified circumstances. The new form of qualified privilege also attaches to publication of a part of a report of such an inquiry, or a summary of a report of such an inquiry. The specified circumstances include specified "fairness requirements" being met (clause 12). If the statutory qualified privilege does not apply because those fairness requirements are not met, then other specified defences of qualified privilege do not attach either (clause 13).

Clause 11

Subsection (1) provides that this clause applies where a local authority, described as the responsible authority, publishes (which means communicates) to the public or a section of it, the report, or part of the report, or a summary of the report, of defined classes of inquiry. If the communication is not made to the public or a section of it, clause 11 does not apply.

The classes of inquiry to which this applies are:

(a) a special inquiry (set up under Part 1 of the Act) established either by the local authority alone or with another local authority;

(b) a "one-off inquiry" (set up under the general powers of the authority, see clause 14) established either by the local authority alone or with another local authority;

(c) an inquiry established by a local authority jointly with one or more other public bodies (see clause 15); or

(d) a review or scrutiny carried out by an overview and scrutiny committee of a local authority (see clause 16).

Subsection (2) provides that a report will not attract the new qualified privilege to the extent to which it relates to matters that have no connection with the subject of the inquiry or review or scrutiny.

Subsection (3) describes the relstionship of the local authority that publishes a report (the responsible authority) to the inquiry or committee that produces the report.

Subsection (4) provides that a reference to an overview and scrutiny committee includes a reference to a sub-committee of such a committee.

Clause 12

Subsection (1) provides that qualified privilege will attach to defamatory material published by the responsible local authority if before publication either the local authority took all reasonable steps to satisfy itself that the inquiry was conducted fairly, or even if it did not, the inquiry was in fact conducted fairly.

Subsection (2) provides that qualified privilege will similarly attach where part only of such a report is published by the responsible local authority.

Subsection (3) provides that qualified privilege will similarly attach where a summary of a report or part of a report is published by the responsible local authority. In this case there is an additional condition, which is that the summary must have been prepared or approved by the person holding the relevant inquiry.

(a) the condition in subsection (1) (or (2)) is satisfied, and
(b) the summary was prepared or approved by the person holding the inquiry.

(4) An inquiry is not to be treated as conducted fairly unless—
(a) the person holding the inquiry bases his conclusions upon findings of fact;
(b) the person holding the inquiry has, so far as practicable, given every person criticised in the report the opportunity to respond to any criticism;
(c) any response of a person criticised in the report (or in the part or the summary that is published) is fairly represented in the report (or that part or summary).

(5) If in defamation proceedings a local authority seek to rely on a defence conferred by subsection (1), (2) or (3), the question whether the condition in subsection (1), (2) or (3)(a) is satisfied shall be determined by the judge alone.

(6) Where this section applies in relation to the report of an overview and scrutiny committee (or a sub-committee of such a committee)—
(a) references to an inquiry are to be read as references to the review or scrutiny conducted by the committee (or sub-committee), and
(b) the references in subsection (4) to the person holding the inquiry are to be read as references to the committee (or sub-committee).

(7) A publication is not privileged because of subsection (1), (2) or (3) if the publication is proved to be made with malice.

(8) This section does not—
(a) protect publication of matter the publication of which is prohibited by law, or
(b) limit or restrict a privilege that exists apart from this section.

13 Loss of other qualified privilege

(1) If the responsible authority publish the report of an inquiry in the first or second set of circumstances, they may not rely on the defences in subsection (4) as regards the publication.

(2) The first set of circumstances is that—
(a) the report (or part of it) is published to the public, or a section of the public, by the authority, but
(b) the condition in section 12(1) (or section 12(2)) is not satisfied in respect of that publication.

(3) The second set of circumstances is that—
(a) the summary of all or part of the report is published to the public, or a section of the public, by the authority, but
(b) the conditions in section 12(3) are not satisfied in respect of that publication.

(4) The defences are—
(a) the qualified privilege conferred by section 100H(5) of the 1972 Act;
(b) any qualified privilege conferred by regulations under section 22 of the 2000 Act;

Subsection (4) specifies certain conditions that must be met if an inquiry is to be treated as conducted fairly for the purposes of gaining qualified privilege. These are that:

the inquiry bases its conclusions upon findings of fact (The published material need not contain the facts on which the conclusions are based. The findings of fact might not be findings made by the inquiry itself.);

the inquiry has given every person criticised in the report the opportunity to respond to the criticism, as far as is practicable; and

any response to criticisms given by a person criticised is fairly represented in the published material.

Subsection (5) provides that in defamation proceedings any decision whether the conditions set out in subsections (1) (2) or (3)(a) have been met is for the judge alone to determine.

Subsection (6) adapts the fairness principles to reports of an overview and scrutiny committee.

Subsection (7) provides that a publication is not privileged by virtue of subsections (1), (2) or (3) if the publication is proved to have been made with malice; in other words the privilege is qualified, not absolute.

Subsection (8)(a) provides that this clause does not protect the publication of matter where its publication is prohibited by law, for example the law against breach of confidence or in contempt of criminal proceedings.

Subsection (8)(b) provides that this clause does not limit or restrict any other form of privilege that exists in addition to this clause.

Clause 13

Subsections (1) to (3) provide that, if privilege under clause 12 does not attach to the publication of a report, part of a report, or a summary of a report, because the inquiry was not conducted fairly or the fairness requirements are not met, or, in the case of the publication of a summary, the summary was not prepared or approved by the person conducting the inquiry, then certain statutory or common law qualified privilege which might otherwise be appropriate in the circumstances shall not attach.

Under subsection (4)(a) and (b), the statutory privilege which shall not attach is statutory privilege available under section 100H(5) of the Local Government Act 1972, or under any regulations made under section 22 of the Local Government Act 2000 (power to make equivalent provision for local authorities with executive arrangements).

(c) any defence, conferred otherwise than by or under an enactment, under which publication of the report to the public, or a section of the public, by the responsible authority is privileged unless the publication is shown to be made with malice.

(5) If the responsible authority may not rely on the defences in subsection (4) with respect to the publication of a report of a review or scrutiny conducted by their overview and scrutiny committee, those defences are not available to the committee with respect to publication of the report to the public, or a section of the public, by the committee.

(6) Where this section applies in relation to the report of an overview and scrutiny committee, references to an inquiry are to be read as references to the review or scrutiny conducted by the committee.

(7) In this section (except in subsections (2) and (3)) a reference to a report is a reference to the report or part, or a summary of all or part, of it.

(8) References to an overview and scrutiny committee include references to a sub-committee of such a committee.

14 One-off inquiry

(1) A one-off inquiry is an inquiry established by a local authority because they have reason to believe that there was, or may have been, a failure in the exercise of a function of theirs.

(2) An inquiry is also a one-off inquiry if—
(a) it is jointly established by two or more local authorities, and
(b) it satisfies the conditions in subsection (3).

(3) The conditions are—
(a) that the inquiry is established because each of the authorities have reason to believe that there was, or may have been, a failure in the exercise of a function of theirs, and
(b) that they consider that a jointly-established inquiry into the failures would be appropriate.

(4) For the purposes of this section, an inquiry, review or other investigation established by a local authority (or two or more local authorities) is not a one-off inquiry if the matters which are the subject of the inquiry, review or other investigation include matters falling within subsection (5).

(5) A matter falls within this subsection if an enactment other than section 1 expressly authorises or requires the local authority (or one or more of the local authorities) to establish an inquiry, review or other investigation into the matter (whether on its own or with other matters).

15 Joint inquiry

(1) A joint inquiry is an inquiry jointly established by a local authority and one or more other public bodies that satisfies three conditions.

(2) The first is that—
(a) the local authority have reason to believe that there was, or may have been, a failure in the exercise of a function of theirs, and

EXPLANATORY NOTES

Under subsection (4)(c), common law qualified privilege which would otherwise attach to a publication to which clause 12 applies, shall not attach.

Subsections (5) and (6) extend these principles to the report of an overview and scrutiny committee. Subsection (8) makes clear that this includes the sub-committee of an overview and scrutiny committee.

Clause 14

Subsection (1) defines “one-off” inquiry as an inquiry established by a local authority, where the authority believes there was or may have been a failure in the exercise of one of its functions.

Subsection (2) allows for a one-off inquiry to be established by one local authority jointly with another local authority. Subsection (3) provides that in this case, each of the local authorities must have reason to believe that there was or may have been a failure in the exercise of one of its functions, and that the establishment of a joint inquiry would be appropriate.

Subsections (4) and (5) contain the limitation that an inquiry cannot be a “one-off” inquiry if the local authority has a duty or power under any other enactment to establish an inquiry, review or investigation into the failure in question.

Clause 15

Subsection (1) defines a joint inquiry as an inquiry established by a local authority jointly with one or more public bodies. Three conditions must be satisfied.

Subsection (2) provides that the first condition is that the local authority and the public body must each have reason to believe that there was or may have been a failure in the exercise of one of its functions.

(b) the other public body (or each of the other public bodies) has reason to believe that there was, or may have been, a failure in the exercise of a function of the body.

(3) The second is that the local authority and the other public body or bodies consider that a jointly-established inquiry into the failures would be appropriate.

(4) The third is that one or more of the other public bodies is not a local authority.

(5) For the purposes of this section, an inquiry, review or other investigation established by a local authority and one or more other public bodies is not a joint inquiry if the matters which are the subject of the inquiry, review or other investigation include matters falling within subsection (6).

(6) A matter falls within this subsection if an enactment other than section 1 expressly authorises or requires the local authority or any of the other public bodies to establish an inquiry, review or other investigation into the matter (whether on its own or with other matters).

16 Overview and scrutiny committee

(1) A review or scrutiny conducted by an overview and scrutiny committee of a local authority falls within this section if—

(a) the review or scrutiny is undertaken because the committee has reason to believe that there was, or may have been, a failure in the exercise of a function of the authority,

(b) the committee reviews or scrutinises decisions made, or other action taken, as regards the failure, and

(c) the committee makes a report to the authority on the matter.

(2) References to an overview and scrutiny committee include references to a sub-committee of such a committee.

17 Consequential amendment

After section 100H(6) of the 1972 Act insert—

"(6A) Subsection (5) is subject to section 13 of the Local Authority Inquiries Act 2004.".

PART 3

SUPPLEMENTAL

18 "Local authority"

(1) In relation to England "local authority" means—

(a) a county council;

(b) a district council;

(c) a London borough council;

(d) the Common Council of the City of London in its capacity as a local authority;

(e) the Council of the Isles of Scilly.

(2) In relation to Wales "local authority" means—

Subsection (3) provides that the second condition is that the authority and public body consider that a joint inquiry would be appropriate.

The third condition in subsection (4) ensures the difference between joint inquiries and joint one-off inquiries.

Subsections (5) and (6) provide that a joint inquiry cannot be established under this provision where the failure in question is subject to a specific statutory duty or power to establish an inquiry, review or investigation into it.

Clause 16

This clause describes the sorts of review or scrutiny by an Overview and Scrutiny Committee (or a sub-committee) to which the new qualified privilege may attach.

PART 3

SUPPLEMENTAL

Clause 18

This clause defines “local authority” for the purposes of the Bill.

(a) a county council;
(b) a county borough council.

19 Other defined terms

(1) In this Act—

"the 1972 Act" means the Local Government Act 1972 (c. 70);
"the 2000 Act" means the Local Government Act 2000 (c. 22);
"enactment" includes subordinate legislation;
"joint inquiry" has the meaning given by section 15;
"Minister of the Crown" has the same meaning as in the Ministers of the Crown Act 1975 (c. 26);
"one-off inquiry" has the meaning given by section 14;
"responsible authority" has the meaning given by section 11;
"special inquiry" has the meaning given by section 1.

(2) In this Act "documents" includes information recorded in any form; and, in relation to information recorded otherwise than in legible form, references to its production include references to production of a copy of the information in legible form.

20 Inquiry held by two or more persons

Where two or more persons are appointed to hold an inquiry, references in this Act to a person appointed to hold such an inquiry are to be read as references to all of the persons so appointed.

21 Rules

Any power under this Act to make rules is exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

22 Commencement

(1) This Act comes into force on such date as the Secretary of State may by order appoint.

(2) Different dates may be appointed for different provisions and for different purposes.

(3) The power to make an order under subsection (1) is exercisable by statutory instrument subject to annulment by a resolution of either House of Parliament.

23 Short title and extent

(1) This Act may be cited as the Local Authority Inquiries Act 2004.

(2) This Act extends only to England and Wales.

EXPLANATORY NOTES

Clause 19

This clause provides for the definition of other terms used in this Bill. The effect of subsection (2) is that “documents”, which appears in clause 6, includes digital, audio, and video recordings and that where the information is not recorded in legible form, any references to its production includes a legible form, which would include a transcript.

Clause 20

If two or more persons are appointed to hold an inquiry within the scope of this Bill, then any reference to a “person” appointed to hold an inquiry refers to all persons appointed.

Clause 21

Clause 5 provides for the power to make rules. Clause 21 states that such power is exercisable by the making of secondary legislation in the form of a statutory instrument. Such a statutory instrument is subject to annullment by a resolution by either House of Parliament.

Clause 22

This clause provides for the circumstances in which the Bill or part of the Bill comes into force as an Act of Parliament.

Subsection (1) provides that the Act of Parliament derived from this Bill comes into force on a date appointed by the Secretary of State.

Subsection (2) provides that different provisions may come into force on different dates.

Subsection (3) provides that the power of the Secretary of State to make an order under subsection (1) is exercisable by secondary legislation in the form of a statutory instrument which is subject to annulment by a resolution of either the House of Commons or House of Lords.

Clause 23

An Act derived from this Bill may be referred to as the Local Authority Inquiries Act 2004. Subsection (2) provides that this Act will only operate in England and Wales. It does not extend to Scotland or Northern Ireland.

APPENDIX B
EXTRACTS FROM 'GETTING IT RIGHT', SOLACE GUIDANCE ON THE CONDUCT OF EFFECTIVE AND FAIR AD HOC INQUIRIES

THE REVIEW GROUP

During 2001, a number of Chief Executives who had been involved in the commissioning of ad hoc local inquiries for their authorities thought it would be opportune to look again at the practice and procedures of such inquiries and to re-visit the report published by the Society of Local Authority Chief Executives and Senior Managers (SOLACE) and the Royal Institute of Public Administration (RIPA) in 1978. That report had been followed by the then Local Authority Associations who published a paper on the same topic in 1980.

A representative review group was established of local government officers from various disciplines, which was joined by observers from some Government departments, the Law Commission and the Council on Tribunals.

The terms of reference for the group were:

- To consider the current experience of local authorities in the conduct of ad hoc local inquiries and internal investigations, taking account of the SOLACE/RIPA paper published in 1978 and the Local Authority Association paper published in 1980, and the developments in the law since then.

- To identify good practice and to prepare guidance for local authorities and their Chief Executives on the practical issues to be faced when proposing to convene an ad hoc inquiry or internal investigation.

FACING THE ISSUES

Before launching an inquiry, it is important to think carefully about the following issues:

- What exactly is the purpose of the inquiry?

- Have terms of reference been clearly established?

- Who will chair the inquiry? Should he/she be external to the authority?

- Who else should be on the inquiry team?

- Will the inquiry be held in public or private?

- What support will be needed – finance; administration; legal?

- Have procedures for conducting the inquiry been agreed which:

    - are fair to all and consistent with natural justice?

- avoid trespassing on disciplinary or criminal matters?

- What people or bodies will need to be appraised of the inquiry and its progress?

- How will the report be delivered?

- Will the report be published? How?

- What assurances, if any, is it appropriate to give to witnesses about confidentiality or potential disciplinary consequences?

- Is there a clear sense of how long the inquiry will take and its likely cost? Is this proportionate to the matters to be considered?

This Guidance seeks to help those authorities considering setting up an inquiry to answer these questions.

THE GUIDANCE

REFERENCES

In the report we refer to a number of key texts and decided cases. For ease of reference we list below the full titles and the abbreviated form used hereafter:

Report of Inquiry into Exports of Defence Equipment to Iraq - Sir Richard Scott (1996)	*The Scott Report*
The Advice of the Council on Tribunals to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers (1996)	*The advice of the Council on Tribunals*
Lost in Care: Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974 (2000)	*The Waterhouse Report*
The Law Commission: Consultation Paper No 163 Publication of Local Authority Reports (2002)	*The Law Commission*
Lillie and Another v Newcastle City Council [2002] EWHC 1600 (QB)	*Lillie v Newcastle CC*
R (on the application of Persey) v Secretary of State for Environment Food and Rural Affairs and others [2002] EWHC 371(Admin) [2002] 3WLR 704	*Persey v SoS EFRA*
R (on the application of Howard) v Secretary of State for Health [2002] EWHC 396 [2002] 3WLR 738	*Howard v SoS Health*
Edwards v UK [2002] ECHR App 464 77/99 – Judgement 14 March 2002	*Edwards v UK*

A CODE OF PRACTICE OR GUIDANCE

The term “code of practice” carries with it an implication of rules and prescriptions. What is most marked in the evidence we have received from respondents is the great variety of circumstances in which inquiries are set up by local authorities and the range of purposes served and outcomes anticipated. Many urged us therefore not to be prescriptive.

This view is more widely shared and aptly summarised in the advice of the Council on Tribunals:

> It is clear that the infinite variety of circumstances that may give rise to the need for a major public inquiry make it wholly impracticable to devise a single set of model rules or guidelines that will provide for the constitution, procedure and powers of every such inquiry. All that can be done is to set out a number of objects that should be borne in mind when an inquiry is being established, and to offer guidance in support of those objectives according to the circumstances of the particular inquiry.

We therefore respectfully disagree with our predecessors in 1978 who proposed a code of practice and rules of procedure. We have tried instead to frame our guidance, not as a code, but in a way which might assist those advising on the commissioning or conduct of an ad hoc inquiry.

While there inevitably will be some tricky legal points to consider, we have not written a legal treatise. We hope that there are nevertheless sufficient technical references to enable a local authority to ask the appropriate questions and for advisers to research their answers.

It is important to recognise that the onus is on each local authority to make its own decision for its own case. We hope that when an authority does so, it will be alert to the issues which experience suggests will arise and be armed with the arguments and sources to help in resolving them.

What is clear is that there is a wide gradation of inquiry circumstance; each involves an investigation but not every investigation proceeds formally or in public.

Our view is that there is not much to be gained from attempting an exhaustive nomenclature with subtle distinctions. What is important is that those commissioning the activity of investigation or inquiry and giving it a name, are clear themselves as to its nature and proposed procedure and that they make that clear to those taking part, to those to whom its report will be addressed and to the wider public who may be concerned with the issues it examines.

In this review we simply use the term “inquiry” to encompass all the situations.

THE GUIDANCE - SOME PRINCIPLES

Although the circumstances of inquiries are many and various, and we do not propose to offer prescriptive advice about their handling, nevertheless there are some basic principles which we think underlie the holding of these inquiries.

The First Principle

It is not only within the legal competence of local authorities to establish ad hoc inquiries; it is also in their interest to do so in appropriate circumstances.

Eady J. encapsulated the point of local authority accountability when he said, in *Lillie v Newcastle CC*, "I believe there is a powerful argument for concluding that a local authority does have an obligation to tell the public (and, in particular, its own chargepayers and the consumers of its public services) what has gone wrong, to account for it and to explain how matters are going to be ordered in the future to avoid similar problems."

We also believe that local authorities are now operating in a climate which encourages them not only to be accountable in the sense described, but also to take a very wide representative view of their communities, not constrained by the statutory powers governing the provision of particular services or limited to the extent of those services. Section 2 of the Local Government Act 2000 recognises this in conferring very wide powers to do anything which a council considers likely to promote or improve the economic, social or environmental well being of its area.

We expect that local authorities will wish to hold inquiries from time to time concerning a whole range of issues affecting their area, and not merely to explain things which have gone wrong. The versatility, flexibility and adaptability of the ad hoc inquiry are its strengths and are of great value to local authorities.

The Second Principle

When commissioning an inquiry, the local authority and the person(s) conducting it are masters of their own procedure. The procedures they adopt must respect the rights of individuals and must be fair and consistent with natural justice.

Lord Denning MR described the investigating role robustly in *R v Race Relations Board ex p Selvarajan* [1975] 1WLR 1686, "the investigating body is… master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body must come to its own decisions and make its own report".

Although an ad hoc inquiry cannot and should not replace the procedural arrangements already in place to deal with, for example, disciplinary matters, individuals may nevertheless be affected by the potential or actual findings of an inquiry. If they are employees of the local authority, they are entitled also to expect that the employer will not unnecessarily damage the relationship of confidence and trust between employer and employee. And whether or not they are employees, if they are likely to be adversely affected by the findings of an inquiry, procedural safeguards must be adopted at the outset or during the proceedings to ensure fairness to them when the inquiry is reported.

The advice of the Council on Tribunals put it this way:

> The need here is for the procedures of the inquiry to be fair to witnesses and to others whose interests may be affected by the work of the inquiry and by its conclusions.

Fairness will include, for example, being impartial or unbiased, receiving and taking account of evidence on both sides of a case, putting a witness who has been criticised or maybe blamed on notice of any allegations and protecting such a witness from self-incrimination.

The procedures put in place should nevertheless in our view be proportionate to the nature and seriousness of the matter in hand.

The Third Principle

Local authorities should have as key objectives those described by the Council on Tribunals in 1996: not only fairness, but also effectiveness, speed and economy.

The Council said:

> Effectiveness
>
> > The need here is for the constitution, procedure and powers of the inquiry to be such as to enable it to fulfil the purpose for which it is being set up. In other words, the inquiry must be properly equipped to investigate the issues thoroughly, ascertain all the relevant facts and reach a conclusion.
>
> Speed
>
> > The need here is for the proceedings of the inquiry to be completed with as much expedition as is practicable.
>
> Economy
>
> > The need here is for the proceedings of the inquiry to be completed without losing sight of the time and money that the proceedings will involve, whether for the taxpayer or for individuals involved in the inquiry.
> >
> > The extent to which these objectives [including fairness] are met for a particular inquiry will be determined by decisions taken early on as to the setting-up, procedure and powers of the inquiry. Suffice it to say that the objectives of effectiveness and fairness should not, as a matter of principle, be sacrificed to the interests of speed and economy.

SOME PRELIMINARY MATTERS

The topics we now discuss are set out broadly chronologically following the likely course of an inquiry. But the issues are not necessarily to be decided sequentially: some matters may have to be considered together because they have an inevitable interaction.

What are the purposes of the inquiry? Or, why are we doing this?

The pressure to establish and announce the holding of an inquiry may obscure the purpose for doing so. Considering carefully the purpose may, however, assist in defining the terms of reference and may affect the procedures for conducting the inquiry. And at the same time, it may be sensible to assess objectively the relative seriousness of the matter. The nature of the inquiry should, in principle, as we have said, be proportionate to the matter in hand; that includes an early assessment of its likely duration and cost.

An inquiry may have a cathartic purpose, seeking to remove or allay public anger or fear, aiming to restore public confidence and, at the same time, making proposals to improve future performance. All inquiries will normally be concerned at least with establishing some facts. They may have some straightforward questions in mind, "what happened and why"; or an inquiry may be expected to, or find itself obliged to, attribute personal responsibility to something which has happened as the facts are uncovered.

Those setting up an inquiry should, in our view, consider at the outset if the nature of the matter is likely to include expressly or by implication blame. If so, then particular attention should be paid to the form and structure of proceedings, to avoid things going wrong later. Having, therefore, at the outset a good sense of the general purpose, the weight and seriousness of the matter and potential outcomes will assist the authority in shaping the inquiry.

Are there powers to do it?

Our evidence is that the power of a local authority to set up an ad hoc inquiry has not caused difficulty in practice.

Andrew Arden QC told us, "I do not believe that it is necessary to affirm the power of the local authority to conduct such investigations. I do not think it can seriously be in doubt". This view was confirmed by the Court of Appeal in *R v Broadland DC (ex p Lashley)* [2001] 3LGLR 25.

In *Lillie v Newcastle CC*, Eady J. said "There is a wide discretion under s.111 of the Local Government Act 1972 to do anything calculated to facilitate the discharge of a local authority's statutory functions. If the circumstances warrant it, a local authority may thus commission and fund a public inquiry".

Section 2 of the Local Government Act 2000 also enables a local authority to do anything which they consider likely to promote or improve the economic, social and environmental well being of their areas. An ad hoc inquiry may assist an authority in realising these objectives and the power is wide enough to set one up.

In addition, there are specific powers in Social Services legislation which require the investigation of complaints (section 7B of the Local Authority Social Services Act 1970, and section 26(3) of the Children Act 1989). It was under these powers that Newcastle City Council set up the review team which resulted in the case we have referred to.

Drafting terms of reference

The terms of reference will reflect the purpose of the inquiry. They are very important as they not only set the direction of the inquiry, but they also set the limits of the inquiry. The terms of reference are the responsibility of the commissioning local authority.

Our evidence is that terms of reference may sometimes be controversial, particularly if the subject-matter is controversial. They may have to be the subject of negotiation with interest groups concerned with the matter; and sometimes they might benefit from being drafted following consultation.

The terms of reference should be in writing and, in our view, make clear in particular what is the aim of the inquiry; if the inquiry is expected to attribute responsibility and appropriate circumstances; if it is expected to make recommendations and, if so, what kind.

While practice clearly varies, in our view, an authority should endeavour to discuss the draft terms of reference with the person appointed to chair the inquiry, as it may avoid later difficulties of interpretation.

Terms of reference should not however be a straitjacket. They should be sufficiently wide to enable the inquiry to explore thoroughly matters which emerge. But if they are too widely drawn, there may be consequences in time and cost to the authority, and the inquiry may stray into areas which, for whatever reason, are not appropriate for it. The local authority should make clear any issues which it does not wish the inquiry to address and be prepared to justify in public any restrictions it imposes of that kind. The inquiry itself may have to interpret its terms of reference and it may be a measure of its independence that it is able to do so; but, if possible, there should be an agreed procedure to allow the terms of reference to be amended if it is found necessary to do so.

Local authorities and those conducting inquiries should be wary of interpretations which may take the inquiry outside its ostensible remit. The discussion and criticism of the terms of reference of the review team in *Lillie v Newcastle CC* are a warning of the possible consequences.

There may be pressure to decide at the outset of the inquiry whether, and if so in what form, to publish the report of the inquiry. We discuss later the factors to be taken into account by the authority at the time of any actual publication; it may not be possible however to assess the issues in advance of knowing the evidence and the findings. It will therefore be a matter of judgement at the outset of the inquiry what is said about ultimate publication, if anything. However there is likely in most cases to be a desire to publish and we found the formula adopted in one of our practical examples in Annex 3 to be a sensible way of putting it, leaving an assessment of how much to be judged when the report is delivered. “The findings of the inquiry and any recommendations will be made public”.

At the same time as considering the formal terms of reference, the authority may wish to add its assessment of a timetable for the inquiry, when it wishes the inquiry to report and, after discussion with the person appointed to conduct it, the

authority may wish to set out some other targets for the work of the inquiry. The authority will wish to prepare an estimate of its likely cost.

Is the inquiry to be independent and what does the local authority think that means?

The nature of the independence of the inquiry will follow from an assessment of the purpose of the inquiry. While independence is not by itself a cardinal procedural principle, some form of independence distinguishes an inquiry from an internal departmental or managerial investigation. Nevertheless, our evidence is that independence can be expressed in varying degrees of detachment from the local authority. The degree to which the authority will wish to establish independence may relate to the need to demonstrate the strength, integrity and, especially, public plausibility of the process and hence the outcome. The importance of those factors will reflect the circumstances being investigated. Therefore those establishing the inquiry will want to consider this issue and their justification for the nature of the independence of the inquiry.

It may be considered sufficiently independent for an inquiry to be conducted by a chief officer of the authority where that officer is detached from the circumstances. We had evidence of external persons conducting inquiries but supported by a panel of local authority officers or councillors. A perception of independence may therefore be satisfactorily achieved, given local circumstances, even though the inquiry is conducted wholly or in part by persons connected with the authority. Nevertheless, their integrity must be protected by ensuring that once appointed they are free from influence or pressure from the authority.

In other cases, however, the local authority will consider that the true independence of those conducting the inquiry is the only way in which they and their public can be satisfied of a detached and wholly impartial investigation.

It may also follow, when the purpose of the inquiry is being considered, that concerns to establish beyond any reasonable doubt the independence of the inquiry process are so important, that they will have other practical repercussions beyond the appointment of wholly independent persons to the inquiry. For example, it might be considered prudent to ensure that no-one concerned in the conduct of the inquiry has any conflict of, or shared interest with, the individuals or organisations involved with the subject matter, perhaps by requiring them to sign an appropriate declaration of interest. Although lawyers by whomsoever employed have a duty to give impartial advice, it may be found practical to arrange for any legal advice to the inquiry to be given by lawyers not employed by the local authority and it might be appropriate for the inquiry offices to be in, and/or any interviews or hearings to take place in, premises not associated with the local authority.

Is the inquiry to take place wholly or partly in private or in public?

Our evidence indicates that the experience from responding officers and chairs is that most local authority ad hoc inquiries have been held in private.

Inquiries ordered by Ministers however are likely to concern significant matters of great public concern and are often held in public. But Ministers also order inquiries which are held in private and their decisions to do so have sometimes been controversial and challenged in the courts, successfully in the Shipman inquiry (*R v SoS for Health ex p Wagstaff*).

In the absence of any statutory requirement, there is no clear-cut criterion for the decision whether or not to hold an inquiry in public. And the court in *Persey v SoS EFRA* did not agree that there is any legal presumption that a Ministerial inquiry into a matter of public concern should be held in public.

The arguments advanced in favour of holding inquiries in public may be summarised as follows:

- An inquiry into a matter of great public concern should in principle be conducted in public.
- Public hearings will reassure the public that the subject matter of the inquiry has been fully, fairly and fearlessly investigated and that there has been no cover-up.
- Evidence given in public is less likely to be embellished.
- More information may become available where witnesses find out what evidence others have given.
- Only when the public is present will there be complete confidence that everything possible has been done for the purpose of arriving at the truth and that lessons will be learned for the future.
- A public inquiry provides a stage for a form of communal catharsis which may be offered allowing for the public venting of anger, distress and frustration.

The arguments advanced in favour of holding inquiries in private may be summarised as follows:

- Witnesses may be prepared to offer more information if they know that their answers will not be subject to instant reporting in the media.
- Inquiries conducted in private are usually quicker and cheaper.
- It is perceived that inquiries held in public may concentrate on the culpability of individuals and therefore require procedural protection of those individuals thus lengthening the inquiry.
- When an inquiry is conducted in private, no witness knows when interviewed how much the inquiry already knows. This facilitates the investigatory process.

The representative from the Department of Health on the review group advised us as follows:

> Whilst DH would always make decisions on the basis of the facts of the individual case, our experience has shown that public inquiries

> have proved to be significantly more costly and time consuming than those held in private. We would normally therefore only recommend full public inquiries in cases where national lessons can be learnt and where there is a very serious issue and significant loss of public confidence. Recent examples have been the Bristol Royal Infirmary Inquiry, the Shipman Inquiry and the Climbié Inquiry. Each of these Inquiries has, or will, cost several million pounds and has taken two to three years to report.
>
> There have been a number of private independent inquiries which have been reported in recent years. These include the Inquiry into the Ashworth Special Hospital, the Alder Hey Inquiry and the Brompton Inquiry. Each has been set up with an independent chair and panel, has taken evidence in private sessions and published full reports. Our experience of these inquiries is that they are less costly and report more swiftly.
>
> We have recently established at national level an inquiry into health service failures which adopts a modified form of private inquiry, whereby the witnesses, or their representatives, can attend all the evidence-taking sessions to satisfy the victims that all the relevant issues have been addressed. We are in the process of setting up a second inquiry in this form. In both these cases, the central issue is the failure of local health services to take account of a number of complaints, over a significant time period, about serious misconduct by doctors. In the circumstances, it was clearly important to recognise the concerns of the victims' groups that the full range of issues should be fully aired.
>
> We also hold a number of statutory inquiries into health service issues which are normally set up by the Regional Director of Public Health (with the agreement of Ministers). Practice to date has been that these inquiries are independent and are conducted in private.

The case-law and arguments are discussed in *Persey v SoS EFRA*. In that case, a challenge to the Secretary of State's decision to hold the "Lessons Learned" inquiry into the 2001 foot and mouth outbreak in private was not upheld. Contemporaneously, in *Howard v SoS Health*, a challenge to a decision by the Secretary of State not to hold public inquiries into the activities of two medical practitioners was also not upheld.

Arguments under the Human Rights Act 1998 have also been advanced in support of the argument that inquiries should be held in public. In the cases cited above both courts held that Article 10 (freedom of information) did not apply so as to require the inquiries in question to be held in public. The article prohibits interference with freedom of expression; it does not require its facilitation.

A successful challenge however to the procedure of an inquiry established by a county council with the prisons service and a health authority was made at the European Court of Human Rights under Article 2 (right to life). In *Edwards v UK*, a completely independent inquiry concerning a death in custody and assisted by independent solicitors heard the evidence in private. The inquiry had no powers to compel witnesses or the production of documents. The European Court found that the lack of power to compel witnesses and the private character of the proceedings in which the applicants were excluded, save, when they were giving

evidence, failed to comply in the circumstances with Article 2. It held that while publicity of proceedings or the results of an inquiry may satisfy the article, in the present case, the public interest attaching to the issues was such as to call for the widest exposure possible.

We have noted from some of our evidence that it may be possible in some circumstances for parts of inquiries to be held in public with relatively informal arrangements. In general however, we consider that it is likely only to be in exceptional cases that the public interest will persuade local authorities to hold ad hoc inquiries in public. A local authority should nevertheless ask itself the question at the outset and be prepared with its own arguments in support of the decision it reaches. And it should consider whether it has created a legitimate expectation on the part of the public that the inquiry will be held in public.

Is the Human Rights Act engaged in the subject matter of the inquiry?

In Paper 6 in Part 2 of the Guidance, there is a discussion with reference to the developing case law of the situations where the European Convention on Human Rights (ECHR) may be engaged in the conduct of inquiries. We refer above to the arguments which have been advanced in reliance on the Act to challenge decisions concerning the holding of inquiries in private.

Wherever there has been a serious injury or death as a result of the actions of (or failure to act by) a local authority or other public authority, it is important to bear in mind that Articles 2 (right to life) and 3 (right to freedom from inhumane or degrading treatment or punishment) may also be engaged. That is not to say that there is necessarily a breach of these articles by the public authority concerned, but that an arguable case that either of these articles has been breached can be made. If these articles of the ECHR are engaged, then there is an obligation to conduct a thorough investigation of the circumstances. Section 6 of the Human Rights Act 1998 obliges local authorities to comply with these sections of the ECHR. It is hoped that such situations will be rare and to date this has been the experience of local authorities conducting ad hoc inquiries. However, because the law is developing in this area, an authority should ensure it obtains legal advice if, exceptionally, it has to consider holding an inquiry where Articles 2 and 3 may be engaged.

Although case law continues to develop, basically an effective, independent and timely investigation must be carried out. The nature of investigation (or investigations when taken together) would depend on the circumstances of each case and what counts as independence for one situation would not in another. These matters are complex and contingent on other inquiries such as inquests or criminal prosecutions which may be ongoing. But case law does show that good design of an inquiry, perhaps giving greater participation to the victim's family, choosing the right chair, making appropriate early admissions of failure or ensuring that the important witnesses do agree to be interviewed can help to avoid the need for further costly, and sometimes unnecessary, private or even public inquiries.

Is the inquiry to be conducted by one person or with others?

A decision must be taken as to whether the inquiry should be conducted or chaired by a single individual or whether he or she should be part of a panel or committee or have the assistance of assessors.

Many inquiries are conducted by a single individual. But a committee or panel can serve a number of purposes. They may, for example, bring a representative role and offer balance if the subject is both contentious and there are potentially conflicting interests concerned with the outcome. They may be appointed to offer technical advice in a complex matter. They may give a breadth of view and, in any case, assist the chair and share the work.

Assessors are generally appointed to offer technical advice but they may also be full members of the inquiry thus, in effect, signing the report contributing to and accepting its conclusions, or they may act simply as advisors.

Our evidence is that practice varies but a decision as to the appointment of the panel and its role needs to be made at the outset. If the chair is already appointed, he or she may have a view. But we consider it axiomatic that the chair should take overall responsibility for the conduct of the inquiry.

Should the chair be a practising lawyer or legally trained?

Our evidence is not only that practice varies but that there are divisions of opinion. Our understanding is that Government departments, unless they are obliged by statute to engage a member of the judiciary or senior lawyer, often use non-lawyers as chairs with success. However, it is clear that the subject matter or complex nature of some ad hoc inquiries requires a sound grasp of basic procedure, the handling of witnesses under challenge and the ability as the inquiry unfolds to recognise possible legal difficulties. In *Lillie v Newcastle CC* where an action in defamation against an independent and highly qualified review team appointed by the City Council was successful, no-one with legal training was a member of the team. The judge said, “I wish to make clear that the terms on which the review team was appointed and the methodology adopted were wholly unsuited to the task… the result was that they proceeded to make their findings without any of the elementary safeguards being accorded to two citizens in jeopardy”.

If non-lawyers are engaged as chairs and there is a panel with no legal representation, the local authority should ensure that the chair has free access to appropriate legal advice. Although lawyers have a duty to give impartial advice, if perceived independence from the local authority is considered essential, then legal advice can be made available to the chair from an external source.

Counsel to the inquiry

In major Ministerial inquiries, it is often the case that Counsel to the inquiry is appointed to assist in laying the relevant evidence before the inquiry. Counsel can take much of the burden of detailed questioning from the inquiry and pursue matters more vigorously than would be appropriate for the inquiry itself, in order to avoid giving the impression that the inquiry has formed a certain view.

It is also the case in such major inquiries where parties are represented by lawyers, in order to avoid extensive cross-examination, Counsel to the inquiry can ensure that any necessary points can be put to witnesses on behalf of the parties.

In the inquiry which lead to the case of *Edwards v UK* independent solicitors acted as advocates to the inquiry.

Although our evidence from respondents suggests that local authority ad hoc inquiries may only wish to make use of this arrangement in exceptional cases, it is a question which in a major matter an authority will wish to consider and discuss with the appointed chair.

Finding the people to do it – assessing the costs

Our evidence is that some difficulty has been experienced in finding people to chair or take part in inquiries as panel members or assessors.

This is an area where we believe that the professional societies in local government can be of help and in Part 2, Annex 10 we list the bodies who will currently offer possible candidates. We would like to see more deliberate efforts made to select and recruit possible candidates by the professional societies.

In *Lillie v Newcastle CC*, the judge described the selection arrangements for the appointment to the review team concerned in the case. There was an advertisement for candidates and interview and selection from a short list of ten by a panel consisting of a chief officer of the City Council, a senior medical officer nominated by parents, and a project manager from the providers of the Independent Persons Scheme under the Children Act.

It is also important not to overlook an assessment of the likely costs. Experience suggests that some inquiries can be very expensive. The fees to be paid to those concerned with the conduct of any inquiry should be agreed in advance, and other incidental costs should be estimated.

Offering an indemnity

Our evidence is that local authorities must be prepared to offer inquiry teams an indemnity in appropriate terms. We are grateful to the Department of Health for allowing us to include a copy of a standard letter of indemnity by way of example as Annex 1 [not reproduced here].

Providing administrative support

Our evidence is that sound administrative arrangements are necessary for the efficient running of an inquiry. In simple cases administration may be carried out by the person conducting the inquiry with modest help from the authority. In more complex matters and inquiries of a long duration, a dedicated secretariat may be necessary to order the documentary material, identify and correspond with witnesses, liaise with other parts of the commissioning local authority, for example lawyers, and the media office. The secretariat will maintain a log of events during the inquiry, a timetable and programme of activities, and keep track of the costs.

There should be methods for recording and transcribing oral evidence and for collating key documentary evidence.

Attention should be given to the place or places where the inquiry will work and to the security of the material assembled for it.

The requirement of independence in exceptional cases may suggest that the whole of the administration should be provided outside the local authority. It will be recalled that in the inquiry which lead eventually to the case of *Edwards v UK* the panel were assisted by an independent firm of solicitors appointed by the commissioning authorities to provide secretarial and administrative support and to arrange for the attendance of witnesses as well as acting as advocates to the inquiry.

Employee trade unions[1]

...

When establishing the inquiry, the authority will need to consider the extent to which employees may be asked to give evidence and the likelihood of criticism of employee conduct emerging.

The authority may wish to consult trade unions at an early stage on the nature of the inquiry and to be prepared to accept representations from the unions on behalf of their members.

This is the responsibility, in our view, of the authority not of the inquiry.

Insurers

While considering setting up an ad hoc inquiry, a local authority may need to consider whether any of the issues being considered might be the subject of insurance indemnity...

In Part 2 of this report [not reproduced here], we reproduce the joint guidance of the Local Government Association and Association of British Insurers on this matter and the authority will wish to consider the analysis of the issues and that guidance. The inquiry too should bear it in mind when framing its report in appropriate cases.

Complainants and families

Some inquiries are set up to investigate circumstances which are of particular concern and sensitivity to individuals and sometimes their families who may have been affected by things which have gone wrong. When establishing such an inquiry, and during its progress, the authority may want to ensure that those individuals know what is happening and to do so in a sympathetic way. Their concerns may be so serious that the procedures adopted by the inquiry should enable them to participate appropriately.

[1] The issues which the authority will need to consider in relation to the giving of evidence by their employees are considered in a more detailed paper in Part 2, not reproduced here.

General

An ad hoc inquiry is of an "inquisitorial" character. The inquiry is responsible for gathering evidence, questioning witnesses and determining the progress and direction of its proceedings. There are no "litigants" and "witnesses" have no case to put forward.

Ad hoc inquiries, as we have defined them, have no powers to compel witnesses to attend or to give any evidence and they have no power to compel the disclosure and production of documentary evidence.

As we have discussed above and return to later, ad hoc inquiries have a responsibility to be fair. The Scott Report described the inquiry process as follows:

> Those responsible for the conduct of any Inquiry must, at an early stage, take decisions as to the procedure to be adopted for the taking of evidence. The objects to be served by the procedures will be threefold: first, the need to be fair and to be seen to be fair to witnesses and others whose interests may be affected by the work of the Inquiry: second, the need for the Inquiry's work to be conducted with efficiency and as much expedition as is practicable: third, the need for the cost of the proceedings to be kept within reasonable bounds. While the second and third of these objects must never be allowed to submerge the need to be fair, there is an inevitable tension between, on the one hand the requirements of fairness and, on the other, the need for an efficient process.
>
> In deciding on the procedures to be adopted, the nature of the Inquiry is all important. Most inquiries are of an inquisitorial character. The contrast is with proceedings of an adversarial character such as civil and, in this country, criminal litigation. Procedures customary in or apt for adversarial litigation will not necessarily be appropriate in inquisitorial proceedings. In an inquisitorial Inquiry there are no litigants. Witnesses have no "case" to promote: their role is to assist the inquiry to establish the facts. They may have an interest in protecting their reputations, in protecting themselves from possible criticism and in answering as cogently and comprehensively as possible allegations made against them. But they have no "case" in the adversarial sense. Similarly, until the stage has been reached at which an inquisitorial Inquiry reaches provisional conclusions which are critical of an individual, the Inquiry does not have a "case" against any individual.

Opening the proceedings

It may be helpful for the local authority to publicise the setting up of the inquiry and to indicate the manner in which its work will proceed. The inquiry itself may choose to open its proceedings in public, even if thereafter its work will be wholly or mostly in private.

A commencement of this kind may be a useful way of appealing for evidence if the issues require it.

Obtaining the evidence

The inquiry may have the benefit at the outset of a large number of reports or written accounts of the matter and issues. These are likely to suggest immediate lines of inquiry, the identity of those who may assist and the local authority files which may need to be examined. And nowadays, it will be prudent to arrange for e-mail correspondence to be tracked and copied.

However, the inquiry may have painstakingly to identify material and initial witnesses and may only build up a picture piecemeal. Advertising generally, or to a particular constituency, for written submissions and people to meet the inquiry is often used.

While we discuss below the procedural safeguards for witnesses which it may be necessary to introduce, it is also the case that, in the circumstances of many inquiries, they can be successfully completed after relatively informal interviews and without calling into question all the procedural arrangements we suggest may need sometimes to be addressed.

During the early period of an inquiry, a number of hypotheses will emerge to be tested later. One of our respondents reminded us that this process may take time, not simply because the witnesses can not be easily timetabled, but because of the iterative route an inquiry has to take and because of the "sheer grind of establishing every relevant detail so that it can not be controverted".

Effective management of the inquiry, helped with appropriate administrative support, should ensure that key documents are assembled, filed and referenced along with the records of witness statements. In due course, the inquiry will have to satisfy itself that narrative account and conclusions can be substantiated point by point with the evidence it has received. The risk of failing to do so properly is chronicled in *Lillie v Newcastle CC*.

Witnesses – generally

We refer to "witnesses" in this report as the term is well understood even though it carries undertones of the court and the adversarial process. We simply mean anyone who helps the inquiry in writing or orally by agreeing to answer questions or offer comment.

In the early stages of evidence gathering, nothing or little may be known and witnesses may simply be asked if they have any relevant information to give. They may do so in writing, or be invited for interview. The interview may be very informal and it need not be in an inquiry setting and might be at the home or workplace of the witness or even by telephone. At that stage, all that the witness may need to be told is the nature of the inquiry, the arrangements for the interview including, for example, (if appropriate) that the witness may be accompanied, and that expenses will be paid and any understandings concerning confidentiality.

In ad hoc inquiries witnesses can not be compelled to give evidence or to attend. Our evidence however is that it is customary to offer travel and subsistence payments to those who are not employees of the commissioning local authority, although this may not always be necessary.

Depending on the nature of the matter, witnesses may be encouraged to bring a friend or adviser in support, though not to act as an advocate. We discuss later the additional arrangements to assist witnesses which are necessary if the inquiry adopts procedures to protect those who may be the subject of criticism.

Our evidence suggests that time and care should be taken with witnesses at all stages of any inquiry. We received from one of our respondents a sample letter he sent to invite witnesses to an inquiry established by a health authority [not reproduced here]...

Another respondent told us that, when chairing an inquiry, he thinks it best to work out a carefully prepared written and sympathetic introduction to be read out when any witness is interviewed. The statement might include references to the procedure being adopted, to the voluntary nature of the attendance of the witness and what might happen next.

If the witness asks, the inquiry may agree that their evidence will be treated as confidential, that is to say not reproduced or identified in any report without their consent. If the circumstances of the matter require it however, confidentiality may have to be subject to some exceptions. For example, evidence given in confidence disclosing the possibility of an alleged serious offence. And it may be prudent to obtain legal advice before giving guarantees of confidentiality to any witness.

Employees as witnesses

Although the inquiry will identify employees of the local authority whom it wishes to interview, it is the responsibility of the local authority, in our view, to establish the terms on which employees will attend. In appropriate cases, the authority will have had discussions with trade unions to which we have already referred...

Here we set out some of the critical issues for consideration by the authority:

1. Although the inquiry will not have powers to compel attendance, the local authority may consider that a request to attend is a reasonable instruction within the terms expressed or implied of the employee's contract of employment.

2. Employees should be assured that no action will be taken against them for providing information in good faith to an inquiry. That is not to say, however, that subsequent action might not be taken if it is found that, as a result of the inquiry, a disciplinary offence may have been committed.

3. The local authority should agree with the inquiry what arrangements should be in place to offer confidentiality for employee evidence in the context of that offered to other witnesses.

4. We do not think that local authorities will wish normally to give general guarantees or undertakings to employees, for example that no disciplinary action will be taken against them, as a condition for such evidence being given.

5. Employees giving evidence should be allowed to bring a representative to advise them, but not to answer questions or act as an advocate.

6. There is a relationship of confidence and trust between an employer and employee. The local authority as employer owes a duty at common law to act in such a way that it does not breach that duty, whether an employee may be subject to disciplinary proceedings or otherwise. This may have an impact on the way in which evidence is given by or about an employee; how that evidence is referred to in the report of an inquiry and as to whether officers are identified by name in any report which is published.

Other procedural safeguards for witnesses

It is important to recognise not only the wide variety of subject matter of ad hoc inquiries and therefore of relative seriousness, but also that the inquiry process itself may move from a straightforward assembling of the facts to a more detailed and critical examination of what has been exposed. The risk that the actions of an employee may become the subject of more extensive scrutiny and criticism may not be apparent until the inquiry has been underway for some time.

Some inquiries may therefore have in effect two main stages. The first stage is the collection and consideration of the initial evidence and the framing of some hypotheses; the second stage being the testing of those hypotheses, including the establishing of responsibilities.

Because of the iterative process of establishing the facts it may prove necessary to invite some witnesses to return again. The safeguards which are offered to witnesses are central, in our view, to the fairness of an ad hoc inquiry. It is for each inquiry to determine from the nature of the subject matter and the evidence already available the safeguards which should be applied at the outset, or at a point when the evidence subsequently revealed requires it.

Reference is often made to the six cardinal principles of procedure recommended in the Report of the Royal Commission on Tribunals of Inquiry in 1966 – the Salmon Report.

We note that those principles, while very influential, were proposed to protect citizens called to give evidence before formal tribunals of inquiry established under the 1921 Act, of which there have been relatively few. Moreover, the Government has not sought to enact them and they remain recommendations, not rules of law.

The Scott Report and Sir Louis Blom-Cooper commented critically on the principles suggesting that they carried strong overtones of ordinary adversarial litigation.

As a consequence of that report, the Council on Tribunals prepared its advice for the Lord Chancellor and the Government subsequently accepted it. We have found it very helpful in our consideration of the issues confronting local authorities.

Putting the witness on notice

If the inquiry is already aware of the matters which might make a witness vulnerable to criticism, the witness should be put on notice and the matter should be set out to enable the witness to reply. The same applies to a witness who, having previously given evidence, has become subsequently the subject of adverse criticism or allegations. The witness may need to be advised that answers need not be given to questions and especially not to questions which might lead to self-incrimination.

If other proceedings might be in contemplation or seem a reasonably likely outcome, then witnesses concerned should be protected when giving evidence if indeed they are prepared to do so. If no guarantees about immunity from action can or should be given by the local authority, the inquiry can nevertheless excuse the witness from answering particular questions or disclosing particular documents on the grounds of confidentiality or privilege, or the witness may be allowed to give evidence in private on a non-attributable basis. In reaching their findings, even if critical, the inquiry should be very careful not to reach any judgement which should properly be made in other proceedings.

Access to transcripts and final report

While it is generally sensible in many inquiries to check with every witness a transcript of what they have said, when a witness is responding to criticism or an allegation they should be shown a transcript of their evidence as a matter of course. They should be allowed to correct or comment on it. If they are to be the subject of criticism in a published report, they should be able to see and comment on the relevant draft extracts if they have not already had an opportunity to respond to a proposed conclusion.

We think it unlikely that local authorities will wish to publish the transcripts of evidence in full otherwise than insofar as it is referred to or quoted in the final report.

Legal representation

We have suggested above that at any stage a witness should be allowed to bring a “friend” to advise but not to act as an advocate or respond to questions.

It may however be clear at the outset, or it may emerge, that there are serious allegations or criticisms of individuals. If they are invited or recalled to give evidence implicitly to reply, consideration should be given by the inquiry as to whether legal representation should be encouraged and, if so, on what basis and by the local authority as to whether it will meet the cost. We do not think it appropriate to suggest that legal representation should always be made available in local authority ad hoc inquiries, nor that it should always be allowed.

If legal representation is allowed in any case, the inquiry will have to decide the extent to which lawyers will participate. As the Council on Tribunals points out, the inquiry must retain a discretion over the way in which evidence is given, the extent of all submissions and any cross-examination. We note that the Scott Report did not consider that adversarial practice should be incorporated into the procedures at an inquisitorial inquiry.

Some practical examples

Our attention was helpfully drawn to some practical examples of how chairs of inquiries had addressed some of these issues. We set out in Annex 3 [not reproduced here] procedures adopted in three inquiries. One was conducted by a former local authority Chief Executive for a health authority, one was conducted for a local authority (The London Borough of Hammersmith and Fulham "Interest Rate Swaps Inquiry" chaired by V V Veeder QC); and the third is from the major public inquiry into the Bristol Royal Infirmary chaired by Professor Kennedy.

RELATIONSHIPS WITH OTHERS

Before, during and after an ad hoc inquiry there may be other investigations by other agencies. The inquiry may have to consider how to handle these relationships.

In the case of local authorities, those most likely to be or become involved are the police, the council's external auditors and the Ombudsman. Other agencies may also be considering action, for example the Health and Safety Executive and the Environment Agency. There is also the possibility that the local authority itself will have already conducted, or is proposing to conduct, disciplinary proceedings.

In each case, discussions with the agency concerned may be necessary, particularly to avoid prejudicing the conduct of other proceedings.

An extreme case where the local authority had previously conducted disciplinary proceedings, resulting in a dismissal of two employees who were subsequently acquitted in criminal proceedings, arose in *Lillie v Newcastle CC*. The effect on the subsequent review commissioned by the City Council was significant. The failure properly to recognise the implications of the previous proceedings was a contributory factor in the successful action for defamation brought by the dismissed employees against the review team.

If proceedings of whatever kind have already taken place against an individual concerned in the subject matter of an ad hoc inquiry, that inquiry should not directly or indirectly attempt a "re-trial". The individual, if a witness and willing to give evidence, should be protected appropriately when doing so and the inquiry must take particular care when recording the evidence on which it relies and reaching its conclusions.

If the inquiry uncovers evidence which discloses possible criminal offences, then the person conducting the inquiry should consider whether, and at what stage, to disclose the material to the police. In a serious case, the inquiry might have to be adjourned pending police inquiries so as not to prejudice them.

THE REPORT

The text

Arrangements for drafting the final report may vary according to the nature of the complexity of the matter and the volume of material. Our evidence suggests that the chair very often undertakes most or all of the drafting. Whatever arrangement is adopted, in our view, the ultimate responsibility for the text of the report remains with the person appointed to conduct the inquiry, even if others have

contributed to its preparations. If the inquiry is conducted by a panel or committee, depending on the role established for their participation, they and the chair will be collectively responsible for the whole report when submitted to the local authority.

Some elementary points

When the draft is being prepared and finalised there are some points to be kept in mind:

- The report should address the terms of reference and should describe the methods adopted by the inquiry.

- While being prepared, findings and conclusions to be included in the report should be carefully cross-checked against the evidence, statements of fact should be directly referable to the statements or documents considered by the inquiry and, if the inquiry has to decide on the balance of probabilities where the truth lies, it should make clear the reasoning.

- Care should be taken not to pre-empt decisions about responsibility which may properly be the subject of other proceedings. It follows that subjective judgements should generally be avoided. The facts will speak for themselves.

- Where discussions have taken place with the local authority's insurers, the inquiry should take account of this.

- The inquiry should take care to respect any undertakings reached regarding confidentiality and the references to individuals made in the text.

- The inquiry should consider whether people and places should be anonymised for their benefit, especially children and vulnerable adults.

- The inquiry will wish to consider the arrangements which may have been made with or by the local authority regarding the delivery and ultimate publication of the report (to which we also refer below).

It is instructive to read the detailed analysis and criticism of the report of the review team made by the judge in *Lillie v Newcastle CC*. We are grateful to the Department of Health for allowing us to reproduce at Annex 4 [in this report set out in Appendix C] advice prepared following legal advice to those conducting investigations and inquiries in the Health Service.

Recommendations in the report

The terms of reference should have defined the matters where the local authority would like recommendations to be made by the inquiry. Our evidence is that drafting recommendations is not necessarily found to be very easy. One respondent pointed out to us that, although an inquiry may produce an executive summary, many will only read the recommendations. As a consequence of this, in his view, the recommendations should be drafted very carefully.

There is a risk that recommendations may be too prescriptive, too detailed thus losing the main messages; that they do not keep within the framework of the

inquiry; that they are unrealistic or, for example, they propose detailed changes of procedure or practice which the local authority is much better placed to develop and consider for itself.

One respondent suggested to us, “the best kind of recommendations are those which give a starting point to a review based on the report”.

Sharing the draft

Some witnesses may or should be shown some draft extracts referring to them; but practice apparently varies as to whether the whole draft report should be shared more widely outside the inquiry before it is delivered.

On the one hand, the perception of independence required by the circumstances or the degree of possible culpability of the local authority as such might make sharing the reported draft impossible without prejudicing its integrity. On the other hand, securing the intelligibility of the report in its local context and the realism of the recommendations proposed may suggest, in less controversial circumstances, that a limited showing of a draft to, say, the Chief Executive of the local authority (assuming he or she is not the subject of the inquiry) may be useful.

Delivery and publication

It is for the local authority to determine to whom the report of the inquiry is to be addressed and delivered; it is also for the local authority to decide what arrangements will be made for disclosing the report and in what form, to members of the council and other parties concerned, including those who may have given evidence.

While on the face of it things may be straightforward, a number of serious problems may be encountered which the local authority will have to address. Summarised they are:

- The manner in which the report will be presented within the formal processes of the council.

- The implications of the statutory provisions for the convening of meetings, giving notice of business and providing documents including access to background papers (or excluding them on the grounds of confidentiality) – Part V a of the Local Government Act 1972.

- The implications of the Data Protection Act 1998 and the Freedom of Information Act 2000 (when both are fully implemented) may also require consideration. This will particularly be the case when an inquiry is held in private, when the detailed evidence, for example, witness statements or interviews, is not published and when, for example, the report is published only in part or in summary. An individual might seek access to a witness transcript if it contained evidence about them. A member of the public may wish to have access to general information by the local authority which in the case of an inquiry could include records of evidence heard privately.

There is a detailed analysis of the implications of the provisions of Part V a of the Local Government Act 1972 in *Lillie v Newcastle CC*.

- The implications of the law of defamation and the nature of any defences available to the inquiry and local authority (who are likely to also have indemnified the inquiry members).

Our conclusion is that a commissioning local authority is now clearly on notice that it will have to assess its position in relation to publication of an inquiry report with some care. It should do so, in our view, early in the process and not under the pressure of events and should be clear what steps it is going to take when the report is delivered. We believe however that these are not issues which should inhibit authorities from exercising their public responsibilities; rather they impose a valuable discipline on authorities and on inquiries to ensure the procedures are fair and that inquiry reports have proper and defensible integrity.

Publicity

The local authority may wish to publicise the report of an inquiry and may wish, for example, to hold a press conference. If it does so, it should take account of the possible risks arising from publication which we have referred to above. It will wish to discuss with the chair and members of any inquiry team whether and, if so, to what extent they take part in any such publicity.

APPENDIX C
DEPARTMENT OF HEALTH ADVICE

ADVICE ISSUED BY THE DEPARTMENT OF HEALTH IN 2002 TO THOSE CONDUCTING INVESTIGATIONS AND INQUIRIES IN THE HEALTH SERVICE ADDRESSING THE PRECAUTIONS WHICH SHOULD BE TAKEN TO AVOID LOSING THE PROTECTION OF QUALIFIED PRIVILEGE

The following broad guidelines may assist those undertaking inquiries of this kind both in maximising the chance that publication of an ensuing report to the public at large will be held to attract the protection of qualified privilege as a matter of law and in minimising the chance of such prima facie protection being lost because of a finding of malice:

(1) It is no defence to an action in defamation that the defendant has merely repeated allegations made by others.

(2) Any limitations in the investigative process should be fully explained.

(3) The status of information and of its sources requires most careful attention. Great caution is required in relation to allegations based on hearsay or derived from an unidentified or anonymous source; and even more caution is required in the case of gossip or rumour. Any deficiencies in the information collected should be fully and fairly explained.

(4) Information should be tested and verified wherever possible. An explanation and warning should be provided where this is not possible.

(5) Those criticised should be given the fullest opportunity possible to respond to the specific detail of each allegation made against them; and their responses should be adequately and fairly reported.

(6) A report should always present both sides of each matter under investigation. Conversely, selectivity should always be avoided if there is any danger of a distorted picture being conveyed.

(7) The language of criticism should be temperate and balanced.

(8) Findings should be made or conclusions expressed only where the subject matter has been fully investigated and the evidence fully warrants the finding or conclusion concerned.

(9) Conversely, the evidence should never be manipulated to fit an existing assumption or pre-conceived idea.

(10) The more serious the nature of the allegations being investigated, the more vital its compliance with the above guidelines.

APPENDIX D
EXISTING NON-LOCAL AUTHORITY POWERS OF INQUIRY AND INSPECTION

D.1 This appendix describes the powers that already exist for bodies other than a local authority to establish an inquiry.

TRIBUNALS OF INQUIRY ACT INQUIRIES

D.2 Section 1(1) of the Tribunals of Inquiry (Evidence) Act 1921 states:

> Where it has been resolved … by both Houses of Parliament that it is expedient that a tribunal be established for inquiring into a definite matter described in the Resolution as of urgent public importance, and in pursuance of the Resolution a tribunal is appointed for the purpose either by His Majesty or a Secretary of State, the instrument by which the tribunal is appointed or any instrument supplemental thereto may provide that this Act shall apply, and in such case the tribunal shall have all such powers, rights, and privileges as are vested in the High Court, or in Scotland the Court of Session, or a judge of either such court, on the occasion of an action in respect of the following matters:–
>
> (a) The enforcing the attendance of witnesses and examining them on oath, affirmation, or otherwise;
>
> (b) The compelling the production of documents;
>
> (c) Subject to rules of court, the issuing of a commission or request to examine witnesses abroad;
>
> and a summons signed by one or more of the members of the tribunal may be substituted for and shall be equivalent to any formal process capable of being issued in any action for enforcing the attendance of witnesses and compelling the production of documents.

D.3 Thus a Tribunals of Inquiry Act inquiry will possess the power to summon witnesses in a similar manner to a ministerial inquiry. The difference between the two types is the instigator. Whereas the ministerial inquiry merely needs government approval, a Tribunals of Inquiry Act inquiry needs Parliamentary support.

D.4 Recent inquiries established under this power include the Bloody Sunday inquiry into the Events of 30 January 1972 chaired by Lord Saville of Newdigate[1] and the Inquiry into the Dunblane Shootings chaired by Lord Cullen.[2] The Waterhouse

[1] An Inquiry into the events on Sunday 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day, taking account of any new information relevant to events on that day, established 29 January 1998.

[2] The Public Inquiry into the Shooting at Dunblane Primary School on 13 March 1996 (1996–97) Cm 3386.

Report itself was similarly a Tribunals of Inquiry Act inquiry.[3] Prior to this spate of inquiries, the 1921 Act had not been engaged since the Crown Agents inquiry in 1977.[4]

INQUIRIES ORDERED BY A MINISTER

D.5 These may be pursuant to an express statutory provision, possible under a power which may be implied into a more general provision, or ad hoc.

Express statutory inquiries

D.6 Statutes often contain an enabling provision allowing for the relevant minister to hold an inquiry into the subject-matter of the legislation.[5] This power arises most frequently in areas where although the minister may exercise some central control, day to day work is carried out by other bodies.

D.7 The inquiries examined here are those which have been ordered by a minister where an express statutory procedure regulates their conduct. Where an inquiry has been ordered by a minister under his or her implied statutory powers there will be neither statutory powers nor regulation of the procedure.[6]

D.8 With the exception of the Health and Safety at Work etc Act 1974 (examined in the section below), the enabling statutes replicate either all or most of the powers of the ministerial inquiry laid out in section 250 Local Government Act 1972.[7] The most common Acts of Parliament used to establish inquiries are:

(1) Section 49 of the Police Act 1996; this was used to establish the Stephen Lawrence Inquiry.[8]

(2) Section 84 of the National Health Service Act 1977; this was used to establish the Bristol Royal Infirmary Inquiry.[9]

(3) Section 81 of the Children Act 1989.

[3] The Waterhouse Report, para 1.01.

[4] Report of the Fay Committee of Inquiry on the Crown Agents on 1 December 1977 (1977–78) Cmnd 49.

[5] See, for example, The Police Act 1996, the NHS Act 1977, the Children Act 1989; s 17 Gas Act 1965, ss 248–249 Road Traffic Act 1960; s 20 Ministry of Transport Act 1919; s 90 Transport Act 1962; s 10 Care Standards Act 2000; s 16 Coast Protection Act 1949; s 62 Electricity Act 1989; s 15 Local Government Act 1999, Fire Service Act 1947, s 33, Mental Health Act 1983, s 125.

[6] See para A.24 below.

[7] The Southall, Ladbroke Grove, and joint inquiry into Train Safety Issues were all set up under Health and Safety at Work etc Act 1974, s 14(2)(b).

[8] The Stephen Lawrence Inquiry (1999) Cmnd 4262–I.

[9] Learning from Bristol: Report of the Public Inquiry into Children's Heart Surgery at the Bristol Royal Infirmary (2001) Cmnd 5207. The Secretary of State has indicated that he will only use the power to establish a public inquiry where the matter raises serious public concern, important ethical questions or fundamental issues of health policy: Department of Health, "Building a Safer NHS for patients: implementing an organisation with memory - Report of an expert group on learning from adverse events in the NHS chaired by the Chief Medical Officer" para 42.

The Victoria Climbié inquiry was established under all three of these provisions.[10]

D.9 Under the Police Act 1996, only subsections 250(2) and (3) of the Local Government Act 1972 are applicable.[11] For inquiries established under the NHS 1977 Act, subsections (2) – (5) are reproduced. For Children Act inquiries, subsections (2) – (5) are applicable.[12]

Section 250 Local Government Act 1972 inquiries

D.10 A general power to instigate a local authority inquiry is found in section 250(1) of the Local Government Act 1972. This can be used by any minister who is authorised to "determine any difference, to make or confirm any order, to frame any scheme, or to give any consent, confirmation, sanction or approval to any matter, or otherwise to act under the Act, or under any other Act affecting local authority functions."[13] This power is mainly used in the context of planning, licensing, and educational inquiries, but can be used where the minister considers that an authority is failing to comply with its duties under the Best Value scheme.[14]

D.11 The powers available under section 250 Local Government Act 1972, will now be examined.

D.12 Section 250(1) enables the powers described below to be engaged where the Secretary of State is authorised to hold an inquiry, either under the Act itself or under any other enactment relating to the functions of a local authority.

D.13 Section 250(2) grants the minister the power to

(1) issue witness summons

(2) require witnesses to give evidence

(3) require witnesses to produce documents

(4) administer and take evidence on oath

where the witness is refunded for the expenditure incurred. The power cannot be used to require production of title of land not belonging to the local authority.

D.14 Section 250(3) allows for fines of up to £1000, and / or a prison sentence for up to six months for:

(1) refusal to attend in accordance with the summons

[10] It is believed to be the first public inquiry set up under three express statutory provisions; see para 8 of the opening speech to the Inquiry by Lord Laming 31 May 2001.

[11] Section 49(3), Police Act 1996.

[12] Section 81(4), Children Act 1989.

[13] See generally A Arden, *Local Government Constitutional and Administrative Law* (1999) paras 8.4.1 – 8.4.16.

[14] Local Government Act 1999, s 5(4).

(2) deliberate failure to attend in accordance with the summons

(3) deliberate alteration, suppression, concealment, destruction or refusal to produce book or document required or is liable to be required to be produced.

D.15 Subsections (4) and (5) provide for the determination of costs as between the local authority (or other body subject to the inquiry) and the minister. Although these two subsections are not explicitly made available to Police Act inquiries, the Police Act does provide for costs of the inquiry to be met.[15] It also grants the relevant minister the power to make public a summary of the findings and conclusions where the whole report is not published, so far as it appears to him consistent with the public interest. [16]

D.16 These types of inquiry normally arise where a minister, acting under powers conferred upon the minister by statute, orders the local authority to conduct an inquiry. An example of this is the current inquiry into the death of Victoria Climbié, which was set up by the Secretary of State for Health,[17] and the Secretary of State for the Home Department[18] under the chairmanship of Lord Laming. Inquiries established by statute normally have power to order witness attendance and compel disclosure to the inquiry.[19]

Health and Safety at Work etc Act 1974

D.17 Express statutory inquiries may also be established under the Health and Safety at Work etc Act 1974. The power to conduct an inquiry under the Act arises where the Health and Safety Commission thinks it "necessary or expedient" to investigate any accident, occurrence, situation or other matter whatsoever.[20] It is irrelevant whether or not the Health and Safety Executive is responsible for the enforcement of any statutory provisions regulating the matter.[21] However, the matter to be investigated must be for any of the general purposes to which the Part of the Act relates.[22]

[15] Section 49(5), Police Act 1996.

[16] Section 49(4), Police Act 1996.

[17] In exercise of his powers under the Children Act 1989, s 81 and under the National Health Service Act 1977, s 84.

[18] In exercise of his powers under the Police Act 1996, s 49.

[19] See eg, Children Act 1989, s 81(4), National Health Service Act 1977, s 84(2)(a) and Police Act 1996, s 49(3) for the Victoria Climbié inquiry.

[20] Section 14(1), Health and Safety at Work etc Act 1974. The Health and Safety Commission is composed of nine members, nominated by organisations representing employers, employees, local authorities and others. It has general oversight of the work of the Health and Safety Executive: see note 21 below.

[21] Section 14(1), Health and Safety at Work etc Act 1974. The Health and Safety Executive is composed of three board members. The Executive is entrusted with ensuring that risks to people's health and safety from work activities are properly controlled.

[22] Section 14(1), Health and Safety at Work etc Act 1974.

D.18 The general purposes are:

(1) securing the health, safety and welfare of persons at work;[23]

(2) protecting persons other than persons at work against risks to health or safety arising out of or in connection with the activities of persons at work;[24]

(3) controlling the keeping and use of explosive or highly flammable or otherwise dangerous substances, and generally preventing the unlawful acquisition, possession and use of such substances.[25]

D.19 Section 14(2) provides for two forms of inquiry. Section 14(2)(a) provides that an "investigation" can be held on the direction of the Commission by the Executive. Section 14(2)(b) stipulates that an "inquiry" may be held into any such matter, where the Secretary of State has given his consent.

D.20 Inquiries under section 14(2)(b) are directed to be held in accordance with regulations laid down by the Secretary of State, and are to be held in public, except to the extent that the regulations provide otherwise.[26] The regulations may in particular include powers of entry and inspection,[27] power to summon witnesses and take evidence on and administer oaths,[28] and provision relating to the inquiry being held in public.[29]

D.21 The procedure of these inquiries is governed by the Health and Safety Inquiries (Procedure) Regulations 1975.[30] In addition to providing details for notification [31] and representation[32] at the inquiry, the person appointed to hold the inquiry is granted the power to:

(1) serve notice to require the attendance of witnesses or the production of documents (either at his own volition or on the application of anyone entitled or likely to appear);[33]

(2) determine the procedure to be adopted at the inquiry;[34]

[23] Section 1(1)(a), Health and Safety at Work etc Act 1974.

[24] Section 1(1)(b), Health and Safety at Work etc Act 1974.

[25] Section 1(1)(c), Health and Safety at Work etc Act 1974.

[26] Section 14(3), Health and Safety at Work etc Act 1974. This provision is not applicable to investigations under s 14(2)(a).

[27] Section 14(4)(a), Health and Safety at Work etc Act 1974.

[28] Section 14(4)(b), Health and Safety at Work etc Act 1974.

[29] Section 14(4)(c), Health and Safety at Work etc Act 1974.

[30] SI 1975 No 335.

[31] See Reg 4 and 5 SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

[32] See Reg 6 SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

[33] Regulation 7(1) SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

[34] Regulation 8(1) SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

(3) administer and take evidence on oath.[35]

D.22 Unless the minister considers that matters of national security are in issue, or the appointed person thinks that the evidence to be received will disclose trade secrets, the inquiry is held in public.[36] If witnesses fail to give evidence or produce documents, or intentionally to obstruct any person in the exercise of his powers under that section they are liable on summary conviction to a fine not exceeding £400.[37]

D.23 There is thus a distinction in terms of powers between Health and Safety investigations under section 14(2)(a) and inquiries ordered by the Commission under section 14(2)(b). Inquiries dependent on the consent of the Secretary of State can compel witnesses to attend and produce documentation.

Implied statutory inquiries

D.24 In addition to inquiries set up in pursuance of an express statutory provision, ministers may also establish inquiries under general provisions often contained in an Act of Parliament.

D.25 Hence, the Inquiry into the Royal Liverpool Children's Hospital[38] was not set up under an express ministerial inquiry power. It was established as an "Independent Confidential Inquiry"[39] under the general supervisory power in section 2 National Health Service Act 1977. The section states:

> Without prejudice to the Secretary of State's powers apart from this section, he has power–
>
> (a) to provide such services as he considers appropriate for the purpose of discharging any duty imposed on him by this Act; and
>
> (b) to do any other thing whatsoever which is calculated to facilitate, or is conducive or incidental to, the discharge of such a duty.

D.26 Another recent example is the Bichard Inquiry.[40] The Home Secretary has ordered an independent inquiry apparently under his general duties contained in section 36 of the Police Act 1996. This section states:

(1) The Secretary of State shall exercise his powers under the provisions of this Act referred to in subsection (2) in such a manner and to such an extent as appears to him to be best calculated to promote the efficiency and effectiveness of the police.

[35] Regulation 8(6) SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

[36] Regulation 8(3) SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975.

[37] Regulation 7(3) SI 1975 No 335 Health and Safety Inquiries (Procedure) Regulations 1975; s 33 Health and Safety at Work etc Act 1974.

[38] The Royal Liverpool Children's Inquiry Report (2001).

[39] The Royal Liverpool Children's Inquiry Report (2001) ch 1 para 2.1.

[40] See www.bichardinquiry.org.uk

D.27 The Home Secretary has stated that he expects full cooperation from all the parties and that if the Chairman of the inquiry reports to him that this is not forthcoming, that he will not hesitate to exercise his powers under section 49 of the Police Act 1996 to allow the inquiry to summon and question witnesses.[41] This statement demonstrates the importance of the attendance and cooperation of witnesses in order to guarantee an effective inquiry.

Ad hoc inquiries

D.28 Ad hoc inquiries can be established by central government even in the absence of express or implied statutory authority. In this regard, central government is fundamentally different from local authorities, which are subject to the rule of *ultra vires*.

D.29 Ad hoc inquiries are established under the prerogative.[42] The legal basis is thus the same as for Royal Commissions, upon which Campbell comments:

> …the common law does not allow to royal commissioners any greater powers of inquiry than it allows to an ordinary citizen. It denies them coercive powers of any kind. [43]

D.30 Hence an ad hoc inquiry established by central government will lack any power to force co-operation with the inquiry. It will rely "entirely upon its powers of persuasion".[44]

D.31 There is a difference in terminology between "ad hoc" inquiries for central government and local authorities. Local authority ad hoc inquiries, as we explain in Part II,[45] are those established under implied statutory authority. Ad hoc inquiries set up by central government are those established under the common law prerogative of the executive.

D.32 Ad hoc inquiries have been used for situations where central government itself is under investigation. This may be because there is less need to have the full range of statutory powers where witness attendance and the delivery of documents can be easily secured. Present civil servants can be directed, as a condition of their employment, to co-operate with the inquiry, and documents can be easily gathered from relatively few sources.

D.33 An ad hoc inquiry may also be ordered where other forms of inquiry are unavailable. For instance, a Tribunals of Inquiry Act Inquiry will not be available in Parliamentary recess, unless the Houses have been recalled. Similarly, statutory inquiries, whether express or implied, are dependent on the action of a specifically named minister. Where a matter to be investigated is particularly

[41] Home Office Press Release, 18 December 2003, (see www.homeoffice.gov.uk/docs2/bichard_statement.html).

[42] Ian Leigh, "Matrix Churchill, Supergun and the Scott Inquiry" [1993] PL 630, 642.

[43] Enid Campbell, "Contempt of Royal Commissions" (1984), p 4.

[44] Brian McHenry, "The Public Inquiry Solicitor" (1999) 169 NLJ No 6914, 1772, 1773.

[45] See paras 2.61 – 2.69 above.

wide-ranging and potentially *ultra vires* a statutory provision and Parliament is in recess, the only option is for an ad hoc inquiry without statutory powers.

D.34 Recent examples of ad hoc inquiries established by central government include the Scott inquiry,[46] the Phillips inquiry into BSE,[47] Clarke LJ's Thames Inquiry,[48] and the three inquiries into the handling of the 2001 Foot and Mouth crisis.

D.35 Evidently a ministerial inquiry or a Tribunals of Inquiry Act inquiry may be initiated in response to a request from a local authority, or without any request from the local authority.

AUDIT PROCEEDINGS

D.36 The role of the District Auditor is to audit the accounts of the local authority. His role and functions are governed by the Audit Commission Act 1998 and the Audit Commission Code of Audit Practice.

D.37 The functions of the auditor are set out in section 5 of the Audit Commission Act 1998.[49] The focus of a normal audit is to ensure financial regularity in the accounts of the authority. Questions of law arise in so far as the legality of the expenditure is examined. The auditors should not, as stated in the Code of Audit Practice, "admit questions on general matters, such as the audited body's policies, finances or procedures, which are not about the actual accounts for the relevant year."[50]

[46] Report of the Inquiry into Exports of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions (1995-1996) HC 115.

[47] Report of the Inquiry into BSE and variant CJD in the United Kingdom (2000).

[48] Thames Safety Inquiry: Final Report by Lord Justice Clarke (2000) Cmnd 4558.

[49] Section 5 states:

> (1) In auditing accounts required to be audited in accordance with this Act, an auditor shall by examination of the accounts and otherwise satisfy himself–
>
> (a) if they are accounts of a health service body, that they are prepared in accordance with directions under subsection (2), [or (2B)] of section 98 of the National Health Service Act 1977;
>
> (b) in any other case, that they are prepared in accordance with regulations under section 27;
>
> (c) that they comply with the requirements of all other statutory provisions applicable to the accounts;
>
> (d) that proper practices have been observed in the compilation of the accounts;
>
> (e) that the body whose accounts are being audited has made proper arrangements for securing economy, efficiency and effectiveness in its use of resources; and
>
> (f) that that body if required to publish information in pursuance of a direction under section 44 (performance information), has made such arrangements for collecting and recording the information and for publishing it as are required for the performance of its duties under that section.
>
> (2) The auditor shall comply with the code of audit practice applicable to the accounts being audited as that code is for the time being in force.

[50] The Audit Commission, "Code of Audit Practice" (March 2002), para S1.7.

D.38 In addition to performing an annual account, the audit process also allows for a report to be produced by the auditor, where it is considered by the auditor that it is in the public interest for the matter to be considered by the body concerned or brought to the attention of the public.[51] This report can be made either at the conclusion of the audit process or produced immediately.[52]

D.39 The purpose of such reports is to raise matters to be investigated by the body concerned.[53] So an auditor's report can be a method by which a local authority can be alerted to a matter of concern which should be probed further. The further investigation by the local authority may complement the auditor's report. For instance, a draft public interest report on Lancashire CC recommended that certain matters, including improper behaviour by the Leader of the Council, be investigated further.[54] This was taken forward by the Standards Committee commissioning an ethical governance audit,[55] carried out by an independent investigator.

D.40 Any recommendations made by the auditor in the course of a normal audit, or a public interest report, must be debated by the council in public.[56] Hence statutory qualified privilege will attach to such reports and recommendations.[57]

D.41 In addition to the above powers, the Commission may conduct an extraordinary audit. This may be prompted by a public interest report[58] (see paragraph A.36 above) or by an application from an elector,[59] or directed by the Secretary of State.[60]

OTHERS

D.42 In addition to audit investigations, other external bodies with statutory functions may investigate how the local authority discharges its responsibilities, such as the Social Services Inspectorate (from April 2004 to be part of the Commission for Social Care Inspection, which will combine the work of the SSI, the SSI/Audit Commission joint review team and the National Care Standards Commission (NCSC)), the Care Standards Boards, the Commissioner for Local Administration (the Ombudsman),[61] the Children's Commissioner for Wales,[62] the Health and Safety Executive, the Environment Agency, as well as the Minister.[63]

[51] Section 8(a), Audit Commission Act 1998.

[52] Section 8(b), Audit Commission Act 1998.

[53] Encyclopaedia of Local Government Law para 3–999.1115.

[54] KPMG, "Lincolnshire County Council Report in the Public Interest Audit 1998/1999 and 1999/2000" (2 May 2002).

[55] Lincolnshire County Council, "Ethical Governance Audit: Report of Rodney Brooke CBE DL" (14 June 2002).

[56] Sections 10, 11, Audit Commission Act 1998.

[57] Section 100H(5)(b), Local Government Act 1974.

[58] Audit Commission Act 1998, s 25(1).

[59] *Ibid*.

[60] Audit Commission Act 1998, s 25(2).

[61] Described in more detail at paras A.44 – A.50 below.

D.43 Some of the inquires held by the above will be conducted automatically; others will be triggered by an individual.[64] The reports they furnish to the local authority on their performance and compliance with standards may well alert the council to a matter it wishes to investigate of its own accord.

D.44 The Independent Police Commission (which replaces the Police Complaints Authority with effect from a date yet to be appointed) will have the powers to require a police chief to produce any document and to inspect any police premises as necessary for the purposes of its investigations.[65]

The Commissioner for Local Administration (the Ombudsman)

D.45 The Commissioner for Local Administration (also known as the local government Ombudsman) deals with complaints with how specified authorities have treated members of the public. The Ombudsman is permitted to investigate written complaints made by or on behalf of a member of the public who claims to have suffered injustice in consequence of maladministration, in connection with action taken or default first arising after 1974.[66]

D.46 Any complaint must be made by an individual or a member of the council on his or her behalf. It is possible that a non-executive member may well wish to press the cause of the aggrieved member of the public by supporting or referring the complaint in order to hold the executive to account.

D.47 The jurisdiction of the Ombudsman is limited. In addition to certain procedural requirements,[67] complaints cannot normally be heard if there is recourse to an appeal or tribunal; [68] the matter affects all or most of the inhabitants of the area; [69] it concerns the action taken by any police authority in connection with the investigation or prevention of crime;[70] it concerns the conduct of civil or criminal

[62] Care Standards Act 2000, s 74 and Children Commissioner for Wales Regulations 2001, regs 4–9, 13, 14.

[63] The Secretary of State may conduct a Best Value Inquiry where a local authority is failing to comply with the requirements of Best Value. It is ordered by the Secretary of State and benefits from the powers laid out in subsections 250(2) – (5) Local Government Act 2000. Rather than being used merely as a method of investigation, it is used as a sanction in order that the Secretary of State can take further punitive measures.

[64] For example, The GSCC is responsible for investigating complaints about registered social workers that might affect their suitability as social workers. Such complaints or referrals are investigated and the GSCC's Conduct Committee has the authority to suspend or remove a registered worker from the Social Care Register, if it finds that there has been misconduct.

[65] Police Reform Act 2002, ss 15, 17 and 18.

[66] Section 26(1), Local Government Act 1974.

[67] Section 26(2), (4), (5), Local Government Act: complaints not to be entertained if not in writing, the aggrieved person has not consented, more than 12 months have elapsed, the complaints procedure of the local authority has not been used,

[68] Section 26(6)(a), Local Government Act 1974.

[69] Section 27(c), Local Government Act 1974.

[70] Section 28, Local Government Act 1974, Schedule 5 para 2.

proceedings before any court of law;[71] it concerns contractual or commercial transactions;[72]or it is a personnel matter.[73]

D.48 The Ombudsman nevertheless has the discretion in many of the situations outlined above[74] to entertain the complaint.

D.49 Recourse to the Ombudsman is not likely to be a mechanism favoured by the local authority. This is because the jurisdiction of the Ombudsman is limited to complaints made by, or on behalf of, a member of the public. The only way the authority can be involved directly in a matter referred to the Ombudsman is if a member of the authority acts on behalf of an aggrieved person. The member of the authority is not likely to be part of the executive or ruling party but may be a back-bencher or a member of an overview and scrutiny committee. In other words, although the member will be part of the council, he or she is not likely to be part of the governing limb of the authority.

D.50 Where a matter comes to the attention of the governing part of the authority they are not likely to engage the Ombudsman procedure and open themselves up to a finding of maladministration with the subsequent bad press this might involve. The procedure is similarly only suitable where the matter is limited to one specific event, rather than a matter that affects the authority's area as a whole. The jurisdiction is limited to the manner in which the authority came to the decision, rather than the policy choices governing the decision reached, or the substance of the decision itself. This is again not likely to satisfy the desire to conduct an investigation into the concerning incident.

D.51 However, the Ombudsman procedure has been described because the authority may wish to engage one of the other mechanisms to inquire into the matter to avoid an aggrieved person having recourse to the Ombudsman.

Standards Boards Investigations

D.52 The Local Government Act 2000 created a new ethical framework for local authorities. Local authorities have to draw up Codes of Conduct,[75] to which members must sign up.[76] Local authority Codes must incorporate certain mandatory sections of Model Codes.[77] The Model Codes are laid down by the

[71] Section 28, Local Government Act 1974, Schedule 5 para 1.

[72] Section 28, Local Government Act 1974, Schedule 5 para 3(1), save certain transactions listed in para 3(3).

[73] Section 28, Local Government Act 1974, Schedule 5 para 4.

[74] See for exclusion 2, s 26(3); exclusion 3, s 26(4); exclusions 5 – 7 s 26(6). Exclusions 1, 4, 8 – 12 confer no discretion to entertain the complaint. However s 26(10) Local Government Act 1974 provides that at all times the Ombudsman should act at discretion, but subject to the preceding provisions of the section. One Ombudsman has admitted that many of the complaints received and entertained by the Ombudsmen could indeed be dealt with by way of judicial review - Edward Smothersby CB, "The Local Government Ombudsman as an alternative to judicial review" (undated from website), p 2.

[75] Local Government Act 2000, s 51.

[76] *Ibid*, s 52(1)(a).

[77] *Ibid*, s 51(4)(a).

Secretary of State for English local authorities[78] and the National Assembly of Wales has drawn up a similar Model Code for Welsh local authorities.[79] Local authorities must also establish standards committees,[80] to promote and maintain high standards of conduct within the authority and to assist members of that authority to observe the authority's code of conduct.[81]

D.53 In England, a new body, the Standards Board for England,[82] will appoint ethical monitoring officers to investigate written allegations of a failure to comply with the relevant code.[83] The ethical monitoring officer investigates the complaint,[84] and if the officer concludes that there has been a breach of a code of conduct, he or she must refer the case to the Adjudication Panel for England for a hearing and judgment.[85] In Wales, the written allegation is investigated by the Local Commissioner for Wales,[86] and if the Commissioner concludes that there has been a breach of a code of conduct, the Commissioner may refer the case to the Adjudication Panel for Wales.[87] Matters can also be referred to the Adjudication Panel on an interim basis where the ethical monitoring officer or the Local Commissioner for Wales conclude that a breach of the code is likely to have occurred, and that it would be in the public interest to suspend the member.[88] Three members of the relevant Adjudication Panel are appointed to form the case tribunal.[89] The case tribunal may impose penalties ranging from public censure to disqualification as a councillor for up to five years,[90] subject to a right of appeal to the High Court.[91]

D.54 Ethical standards officers and the Local Commissioner for Wales have access to all information held by the local authority which they think necessary for the purpose of conducting the investigation.[92] The procedure, including disclosure of documents, compellability of witnesses and costs, of the case tribunals of the

[78] Local Government Act 2000, s 50(1); The Local Authorities (Model Code of Conduct) (England) Order 2001 SI 2001 No 3575.

[79] *Ibid*, s 50(2); The Conduct of Members (Model Code of Conduct) (Wales) Order 2001 SI 2001 No 2289 (W 177).

[80] *Ibid*, s 53(1).

[81] *Ibid*, s 54(1).

[82] *Ibid*, s 57(1).

[83] *Ibid*, s 58(2).

[84] *Ibid*, s 59(1)(a).

[85] *Ibid*, s 59(4)(d); s 64(3).

[86] *Ibid*, s 69(1)(a).

[87] *Ibid*, s 69(4)(d); s 71(3).

[88] *Ibid*, s 65(3),(4); s 72(3),(4).

[89] *Ibid*, s 76(1),(2).

[90] *Ibid*, s 78(1); s 79(4),(6).

[91] *Ibid*, s 78(10); s 79(15).

[92] *Ibid*, s 62(1), s 70(1); SI 2001 No 2286 (W 174) The Local Commissioner in Wales (Standards Investigations) Order 2001, art 2, Sched 1.

Adjudication Panels is to be governed by regulations laid down by the Secretary of State in England and the National Assembly in Wales.[93]

D.55 The Standards Board for England was established on 22 March 2001.[94] There is as yet little guidance as to how it, the Local Commissioner for Wales, and the Adjudication Panels will interact with other forms of inquiry.[95]

The Children's Commissioner for Wales

D.56 The Children's Commissioner for Wales is an independent office with the task of ensuring the protection of rights of children and young people. It was established following a recommendation in the Waterhouse Report.

D.57 The office of the Children's Commissioner for Wales was established under section 72 of the Care Standards Act 2000.[96] The Commissioner's functions include reviewing and monitoring complaints made by service providers, whistleblowing, advocacy, the provision of advice and information, providing other assistance and making reports.[97]

D.58 The Commissioner has the power to examine cases of particular children by means of a public inquiry if it involves an issue that has a more general application to the lives of children in Wales.[98] The procedure for such examinations is provided for by Part III of the regulations and the publication of reports by Part VI of the regulations.[99] For the purposes of such an examination the Commissioner has the same power as the High Court in respect of the attendance and examination of witnesses which includes administration of oaths and the examination of witnesses abroad, the provision of information, and the payment of expenses.[100]

D.59 In the Annual Report and Accounts of the Commissioner for 2002–2003 the Commissioner states that the inquiry work is expanding and proposes a restructuring of the organisation for 2003–2004.[101] The Commissioner reports on the inquiry in the Clywch Examination concerning allegations of abuse by the former pupils of John Owen. They identify that this inquiry is to provide for new guidance, and practices and procedures for working with children in teaching.

[93] Local Government Act 2000, s 77(2)–(6); SI 2001 No 2288 (W 176) Adjudications by Case Tribunals and Interim Case Tribunals (Wales) Regulations 2001. As yet, no regulations have been made for England.

[94] See http://www.local-regions.dtlr.gov.uk/ethical/board/index.htm

[95] There are provisions enabling the bodies involved in the new ethical framework to refer matters on between themselves; see, eg, Local Government Act 2000, s 67.

[96] See also The Children's Commissioner for Wales Regulations 2001, SI 2001 No 2787 (W237).

[97] Care Standards Act 2000, ss 73 and 76.

[98] Care Standards Act 2000, s 74.

[99] The Children's Commissioner for Wales Regulations 2001, SI 2001 No 2787 (W.237).

[100] Care Standards Act 2000, s 74 (4), (5) and (6).

[101] Children's Commissioner for Wales Annual Report and Accounts 2002–2003, p 8.

This inquiry was to be completed in November 2003 with a report published in 2004.

D.60 In 2001 the Children's Commissioner for Wales Act extended the Commissioner's role to all children. It also gave the Commissioner the power to review proposed legislation and the policy of the National Assembly for Wales to consider the potential effect that either legislation or policy might have on children in Wales. This review power includes the power to make representations to the National Assembly for Wales about any matter that affects children.[102] This means that the Commissioner can deal with issues outside the responsibility of the National Assembly for Wales, such as youth justice, the family courts and social security benefits.

D.61 The office of Children's Commissioner also exists in Scotland and Northern Ireland. In England the Government has proposed the establishment of the post of Children's Commissioner in the Green Paper *Every Child Matters*.[103] In this paper the Government proposes that the Children's Commissioner for England should have the power to advise the Government and others regarding the impact of decisions and policies on children.[104] The Government is concerned that the Children's Commissioner should not become too dominated by responding to individual complaints and considers that the Commissioner should focus on strategic matters, with issues of individual complaints being left to other bodies to deal with. However the Government does envisage that the Children's Commissioner for England will have the powers to establish investigations into cases that have a wider relevance on the direction by the Secretary of State.[105] At present there is no Bill before Parliament concerning the establishment of a Children's Commissioner for England.

AN ACTION IN A COURT OR TRIBUNAL

D.62 An authority may be liable where it acts contrary to the common law, for example in breach of contract, or in tort, where it may be liable for the negligent exercise of statutory powers[106] or statutory duties,[107] vicariously liable for negligence of

[102] Care Standards Act 2000, s 72A, B and 75A.

[103] Cm 5860, published Sept 2003.

[104] *Ibid*, para 5.50.

[105] *Ibid*, para 5.51.

[106] *Stovin v Wise* [1996] AC 923.

[107] *X v Bedfordshire CC* [1995] 2 AC 633*; Barrett v Enfield LBC* [2001] 2 AC 550; *W v Essex CC* [2001] 2 AC 592; *Phelps v Hillingdon BC* [2001] 2 AC 619.

employees[108] or for intentional wrongdoing of its employees,[109] or for misfeasance in public office.[110]

D.63 In addition to liability in private law, a local authority's actions and decisions can also be challenged by judicial review. This can arise where it acts beyond the scope of its statutorily defined powers (illegality); or where it exercises its discretion unreasonably (irrationality); or breaches the requirements of natural justice (procedural impropriety).[111] However, it must be noted that it does not necessarily follow that where a local authority has acted unlawfully in the "public law" sense, it is liable in private law, as the relevant private law cause of action must be made out.[112]

D.64 The Human Rights Act 1998 makes it unlawful for public bodies to act inconsistently with the ECHR, and empowers the court to give appropriate remedies, including damages, for contravention of Convention rights. Convention rights may be relied on in actions against a local authority (as well as in a judicial review of a local authority decision).[113] Therefore the acts of a local authority may be scrutinised in the light of private law principles, administrative law principles, and Convention rights.

D.65 The local authority may thus find its procedures under the spotlight in court proceedings. However, court proceedings are binary: X was or was not guilty of an offence; Y was or was not negligent.[114] Issues of management structure, training, responsibility and flaws in the legislation may not be explored in the courtroom whereas they might fall within the scope of an inquiry's terms of reference. Generally speaking, a courtroom or tribunal is not the appropriate forum for investigation with a view to bringing about change in future practice.

The Coroner's courts

D.66 One kind of court is perhaps the exception to this general statement, or could be. The system of inquests has been under review.[115] The Coroners Review was

[108] *Phelps v Hillingdon BC* [2001] 2 AC 619.

[109] As *per* Lord Steyn: "the law of vicarious liability sometimes may embrace intentional wrongdoing by an employee" in *Lister v Hesley Hall Ltd* [2001] UKHL 22 para [16]; [2001] 2 WLR 1311, 1317, where the torts of the employee "were so closely connected with his employment that it w[as] fair and just to hold the employers vicariously liable": [2001] UKHL 22 para [28]; [2001] 2 WLR 1311, 1323. See further paras 3.10 – 3.16 below.

[110] *Racz v Home Office* [1994] 2 AC 45; *Three Rivers DC v Bank of England (No 3)* [2000] 2 WLR 1220.

[111] This classification is taken from Lord Diplock's speech in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.

[112] *X v Bedfordshire CC* [1995] 2 AC 633.

[113] See, eg, K Markus and M Westgate, "Recent Developments in Public Law" Legal Action [2001] Nov 25, 26–27.

[114] See further, Mavis Maclean, "How does an Inquiry Inquire? A Brief Note on the Working Methods of the Bristol Royal Infirmary Inquiry" (2001) 28 Journal of Law and Society, 590, 596.

[115] There have been numerous calls over recent years for reform of the inquest process. Eg, in the report of the inquiry into the death of Paul Wright while in the custody of HM Prison Service, the author recommended "It should be part of the conditions of service of prison

completed in 2003. If recommendations of the Coroners Review are implemented, the inquest is highly unlikely to retain its current form, and the obligations on the state imposed by Article 2 might be met by the new form of inquiry into death.

service staff that they co-operate with inquiries into deaths in custody, in particular with the new 'independent' element which I recommend": Dr J Davies, "Report on the death of Paul Wright" (2002), para 6.1. He wished to see "the operation of small panels of independently-led 'inquisitors', operating outside the formal law court system, but perhaps in parallel with the Coroner's Courts" (para 6.3).

APPENDIX E
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The SOLACE Review Group shared with us responses it received to questionnaires it distributed. We are grateful to all those who responded to the SOLACE questionnaires.

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