

COUNCIL ON TRIBUNALS

**Advice to the Lord Chancellor on the
procedural issues arising in the conduct
of public inquiries set up by Ministers**

July 1996

This advice arises out of a consultation exercise initiated by the Lord Chancellor in the light of the report by Sir Richard Scott of his Inquiry into Exports of Defence Equipment to Iraq. The report was published on 15 February 1996.

The consultation exercise invited views on the recommendations contained in Sir Richard Scott's report about the conduct of public inquiries set up by Ministers to investigate particular matters of public concern. Following the consultation, the Lord Chancellor asked the Council on Tribunals to consider and advise on the procedural issues that arise in the conduct of such inquiries, having regard to the recommendations in Sir Richard Scott's report and to the views expressed upon consultation.

In their advice, the Council conclude that it is wholly impracticable to attempt to devise a single set of model rules or guidance that will provide for the constitution, procedure and powers of every inquiry. Instead, the Council advise that such issues should be addressed by taking into account, for each inquiry, the objectives of effectiveness, fairness, speed and economy.

The advice examines a number of issues to be addressed by those responsible for setting up an inquiry including issues relating to the constitution, powers and procedures of the inquiry.

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**ADVICE TO THE LORD CHANCELLOR ON THE PROCEDURAL ISSUES
ARISING IN THE CONDUCT OF PUBLIC INQUIRIES
SET UP BY MINISTERS**

PART 1: INTRODUCTION

Background

- 1.1 In this report we are offering our advice to the Lord Chancellor on the topic of procedural issues arising in the conduct of public inquiries set up by Ministers to investigate particular matters of public concern.
- 1.2 Our advice arises in the context of Sir Richard Scott's Report of his Inquiry into Exports of Defence Equipment to Iraq which was published on 15 February 1996. This report included not only discussion of the procedures adopted by Sir Richard Scott in conducting his inquiry, but also observations about the factors to be taken into account when major public inquiries are set up in the future.
- 1.3 In the light of Sir Richard Scott's observations on the conduct of public inquiries, the Lord Chancellor's Department issued a Press Notice on 26 February 1996 stating that -
- "The Government has agreed to consider carefully the recommendations made in Sir Richard Scott's Report in relation to the conduct of public inquiries set up by Ministers to investigate particular matters of public concern. The Lord Chancellor, Lord Mackay of Clashfern, would welcome views on the recommendations set out in Chapter K.1 of the Report on Inquiry Procedures.
- ... Views are sought as soon as possible, and no later than 1 May 1996. The Lord Chancellor has it in mind that at the end of this consultation period, the Council on Tribunals should be asked to consider the issues raised and to offer their advice".
- 1.4 Although the request for our advice came from the Lord Chancellor alone, we have not confined ourselves to inquiries in England and Wales. The Scottish members of the Council played a full part in our deliberations, and our advice sets out general principles that are intended to apply in Scotland as well as in England and Wales.
- 1.5 The Scott Report recommendations referred to in the Lord Chancellor's Department Press Notice are set out in the **Appendix** to this advice.
- 1.6 During the consultation period our Secretariat held discussions with the Lord Chancellor's Department to ascertain the likely areas upon which our advice would be sought. We needed to satisfy ourselves that our commitment to this advice would not block progress on our normal work in relation to tribunals and inquiries. For we knew that the resources needed to produce our advice would have to be found from within our existing budget. We also knew that the Department hoped to receive our advice no later than July 1996. Some care was therefore needed in setting out our terms of reference.

Our terms of reference

- 1.7 Our terms of reference were agreed as follows -
- "To consider and advise on the procedural issues that arise in the conduct of public inquiries set up by Ministers to investigate particular matters of public concern, having regard to the recommendations made in Sir Richard Scott's report, and to the views on those recommendations that have since been expressed".**

- 1.8 The need to define our terms of reference carefully results from the very broad meaning of the term "public inquiry". A public inquiry covers a wide spectrum of fact-finding procedures ranging from the most formal inquiry such as Tribunals of Inquiry under the Tribunals of Inquiry (Evidence) Act 1921 and Royal Commissions, through to everyday inquiries such as those held under the planning legislation to determine planning appeals. Many public inquiries are statutory, with their constitution and procedure set out in statute or in subordinate legislation. Other public inquiries may be described as "ad hoc" - that is to say, they are set up by Ministers to investigate a particular situation that has arisen.
- 1.9 Our terms of reference confine our advice to public inquiries that are "set up by Ministers to investigate particular matters of public concern". Such inquiries are frequently of the "ad hoc" variety rather than statutory and are established for the purpose of investigating specific matters of public concern. The Scott inquiry itself arose from one such matter and the recommendations about the holding of inquiries set out in the Scott Report are concerned with major ad hoc public inquiries of that kind.
- 1.10 Accordingly, our advice will focus on public inquiries that are essentially non-statutory in nature, albeit that they may be clothed with powers conferred by the Tribunals of Inquiry (Evidence) Act 1921. Strictly speaking this has the result that our advice falls outside the remit given to us by the Tribunals and Inquiries Act 1992. That remit, as it relates to inquiries, is contained in section 1(1)(c) of the Tribunals and Inquiries Act 1992 which authorises us -
- "to consider and report on such matters as may be referred to the Council under this Act, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure".
- 1.11 The term "statutory inquiry" is defined in section 16 of the 1992 Act as meaning an inquiry or hearing which is held pursuant to a *duty* imposed by any statutory provision, or an inquiry or hearing held in pursuance of a *power* conferred by any statutory provision where the inquiry or hearing has been designated by order of the Lord Chancellor and the Lord Advocate as a statutory inquiry. Accordingly non-statutory inquiries of the sort with which our advice is primarily concerned fall outside our remit, as indeed do Tribunals of Inquiry set up under the 1921 Act.
- 1.12 Nevertheless, many of the procedural issues that arise in the conduct of public inquiries arise irrespective of whether the inquiries are set up by statute. Many, if not most, procedural issues arising in the conduct of public inquiries do so in the context of ensuring that persons who appear before the inquiry - or who have an interest in the outcome of the inquiry - are treated fairly by the inquiry in the giving of their evidence and in the manner in which their evidence is taken into account when the inquiry reaches its findings. Accordingly, in preparing our advice, we have drawn upon our experience of the running of statutory inquiries. These include planning inquiries, highway inquiries and consumer credit appeals. We have also drawn on our experience of the working of tribunals since a number of them -for example, the traffic commissioners - have procedures that are in some respects analogous to inquiry procedures.
- 1.13 Our terms of reference require us to have regard to the recommendations made in the Scott Report and to the views on those recommendations that have since been expressed. So far as the latter are concerned, the Lord Chancellor's Department have received, and shown to us, the comments made by some 30 individuals and organisations. Although our advice does not in general attribute comments made by any particular individual or organisation, they have nevertheless provided us with a useful insight into the conduct of major public inquiries. Many of these contributions came from persons who have themselves previously conducted major public inquiries, including a contribution from Lord Howe of Aberavon, who was publicly critical of the way the Scott inquiry was conducted.

PART 2: THE NATURE OF OUR ADVICE

2.1 We should like to make clear at the outset that our advice does not seek to direct in any way the procedure that should be followed at public inquiries generally or at any particular type of public inquiry. Rather our advice should be viewed as offering guidance which draws attention to the range of issues that will need to be considered when a major inquiry is being set up. The advice falls under three main headings: the setting-up of the inquiry, the powers of the inquiry and the procedure of the inquiry. Some of the advice will be directed primarily at those persons responsible for setting up the inquiry. In other cases, the advice is addressed more at those responsible for the conduct of the inquiry once it has been established. In some instances, it may be appropriate for the advice to be considered jointly by those setting up the inquiry and those responsible for holding it.

2.2 We should like to preface our advice with some observations which, being relevant to major public inquiries generally, are reflected in the detail of our advice.

Key objectives

2.3 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 objectives 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.

2.4 Those concerned to set up and conduct inquiries are likely to agree in general terms the importance of effectiveness, fairness, speed and economy. We take the key objectives to be as follows.

Effectiveness

2.5 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.

Fairness

2.6 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.

Speed

2.7 The need here is for the proceedings of the inquiry to be completed with as much expedition as is practicable.

Economy

2.8 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.

2.9 The extent to which these four objectives 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.

PART 3: THE SALMON PRINCIPLES

- 3.1 It is appropriate at this stage to refer to the "six cardinal principles" set out in the report of the Royal Commission on Tribunals of Inquiry under the chairmanship of Lord Justice Salmon (as he then was). This report ("the Salmon Report") was published in 1966 and its six cardinal principles are commonly referred to as the "Salmon principles". The Royal Commission was established to review the working of the Tribunals of Inquiry (Evidence) Act 1921 and to consider whether it should be retained, replaced or amended. The Commission was established against a background of criticism about the procedural working of the inquiry held by Lord Denning into the Profumo affair, although Lord Denning's inquiry was not itself an inquiry set up under the 1921 Act.
- 3.2 Much of the Salmon Report was concerned with the need for safeguarding the position of citizens called to give evidence before Tribunals of Inquiry established under the 1921 Act. The need for such protection arises from the powers of such Tribunals to require persons to attend, produce documents and give evidence on oath. Anyone who fails to attend or take the oath or answer any question put to him is liable to be punished for contempt of court. The Salmon Report considered that the difficulty and injustice with which persons involved in such an inquiry might be faced could be largely removed if six cardinal principles were strictly observed.
- 3.3 These six cardinal principles are as follows -
1. Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate.
 2. Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them.
 - 3.(a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.
 - (b) His legal expenses should normally be met out of public funds.
 4. He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the inquiry.
 5. Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard.
 6. He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him.
- 3.4 It is important to note that these six principles are recommendations and are not rules of law. Moreover, they are recommendations about the procedure to be adopted for Tribunals of Inquiry under the 1921 Act rather than before inquiries generally. These points are worth emphasising because a number of commentators over the years have referred to the six principles as though they were rules of procedure to be strictly applied to public inquiries generally. However, the Salmon Report was concerned solely with the workings of Tribunals of Inquiry under the 1921 Act and with safeguarding the position of persons appearing before those Tribunals.

PART 4: THE SCOTT REPORT RECOMMENDATIONS

- 4.1 Our terms of reference require us, in formulating our advice, to have regard to the recommendations in the Scott Report about inquiry procedures. These recommendations are set out in paragraphs K1.1 to K1.8 of Part 4 of the Scott Report (see **Appendix** to this advice). We have also considered the passages in paragraphs B2.1 to B2.46 in Part 1 of the report in which Sir Richard Scott comments on the procedures adopted by him in conducting his inquiry.
- 4.2 These recommendations in the Scott Report are concerned with "the factors to be taken into account in deciding what procedures should be adopted for an inquisitorial Inquiry such as this" (para. K1.1).
- 4.3 The Report points out that in a number of inquiries since 1966 consideration has had to be given to the extent to which the Salmon principles should be adopted. The Report notes that consideration had to be given to this issue for the purposes of the Scott inquiry itself.
- 4.4 The Report states that the procedures to be adopted at an inquiry will need to serve three objects: first that of fairness to witnesses and others whose interests may be affected by the work of the inquiry; secondly the need for the inquiry's work to be conducted with efficiency and as much expedition as is practicable; and thirdly the need for the cost of the proceedings to be kept within reasonable bounds.
- 4.5 In deciding on the procedures to be adopted, the Report observes that the nature of the inquiry is all-important. Most ad hoc inquiries are of an inquisitorial character, that is to say, it is the inquiry itself that is responsible for gathering evidence, questioning witnesses, and determining the progress and direction of the proceedings. By contrast, civil and criminal litigation is of an adversarial character, where each side presents to an impartial arbiter a case which is then tested by the other side. The Report points out that procedures appropriate for adversarial litigation would not necessarily be appropriate in inquisitorial proceedings. Moreover, at an inquisitorial inquiry there are no litigants and witnesses have no "case" to put forward.
- 4.6 The Report comments that the Salmon principles "carry strong overtones of ordinary adversarial litigation. So, while the principles should always be borne in mind when procedures for an investigative Inquiry are being formulated, consideration must be given in respect of each of the principles to the effect which the implementation of that principle would be likely to have on the conduct of the particular inquiry" (para. K1.4).
- 4.7 The Report discusses each of the principles in turn and considers the extent to which it is appropriate to inquiry proceedings.
- 4.8 In relation to the **first** principle (before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate) the Report comments that this should not be applied so as to prevent the inquiry from questioning persons for the purpose of ascertaining whether they have any relevant information to give.
- 4.9 In relation to the **second** principle (before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them) the Report comments that at the outset of inquisitorial proceedings there will often be no "allegations" against any individual, but as the inquiry proceeds evidence may be given which involves others and the part played by them in the matters under investigation. If the evidence is potentially damaging to those affected by it, they must be given notice of it and invited to give their own evidence in response.
- 4.10 In relation to the **third** principle (a person should be given an adequate opportunity of preparing his case and of being assisted by legal advisers, and his legal expenses should normally be met out of public funds) the Report questions the use of the word "case", and suggests substituting the

word "evidence". The need for legal assistance will arise at two stages: when preparing to give evidence and when responding to proposed criticism.

- 4.11 In relation to the **fourth** principle (a person should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the hearing) the Report comments that this principle would need some adjustment to be suitable for application to most inquisitorial inquiries. If the inquiry itself is undertaking the questioning of witnesses, the requirement that a witness be questioned by his own lawyer will often lead to an unnecessary waste of time and money.
- 4.12 In relation to the **fifth** principle (any material witnesses a person wishes called at the inquiry should, if reasonably practicable, be heard) the Report adds the gloss that written evidence may suffice.
- 4.13 In relation to the **sixth** principle (a witness should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him) the Report says that fairness may require this in some instances but there should be no automatic right to cross-examine a witness in every case. Such a right would often be incompatible with the efficient conduct of the inquiry.
- 4.14 Having considered each of the Salmon principles in turn, the report sets out its own recommendations on the procedures to be adopted for an inquiry of this sort. These are as follows -
1. Adequate advance notice should be given to witnesses on the matters in respect of which they will be asked questions;
 2. Adverse and damaging allegations made by other witnesses should (if they are relevant) be drawn to the attention of the object of the allegations so that he or she can, if desired, respond to them; care should be taken to prevent any irrelevant damaging allegations being made in the course of oral testimony; if such allegations are made in written evidence, they should not be published;
 3. Proposed criticisms should be drawn to the attention of the objects of the criticisms so that they can, if desired, make representations or offer additional evidence in response before the criticisms become final;
 4. Legal assistance should be available to those involved, both at the stage of giving evidence and at the stage of responding to criticisms;
 5. Adversarial procedures, such as the right to cross-examine other witnesses, the right to have an examination-in-chief or re-examination conducted by a party's own lawyer or the right for interested parties to participate, over and above the extent mentioned, in oral hearings, should not be incorporated into the procedures at an inquisitorial Inquiry, except to the extent that fairness requires it or the particular circumstances warrant it.
- 4.15 As we have already indicated, it is impossible to devise a single set of procedural rules which will be appropriate to all inquiries. The Salmon principles were recommendations designed to provide safeguards for hearings under the 1921 Act. The recommendations in the Scott Report are not limited to such inquiries. Both sets of recommendations address issues of fairness which those responsible for establishing and conducting public inquiries will wish to consider whilst at the same time having regard to the needs of effectiveness, speed and economy. We believe that the differences between the two sets of recommendations are largely ones of terminology and emphasis.
- 4.16 The Scott Report made two further recommendations about inquiry procedures which are not directly related to the Salmon principles. The first is that in cases where the matters for investigation by an inquiry involve the manner in which public duties were discharged by public

officials, oral hearings should usually be open to the public. The second recommendation is an amendment to the existing law to enable evidence at ad hoc inquiries to be taken on oath. We refer briefly to both matters later.

PART 5: THE SETTING-UP OF THE INQUIRY

Preliminary considerations

- 5.1 In setting up an ad hoc inquiry, a Minister is in effect taking responsibility for inserting a new piece of machinery into what is likely to be a complex and sensitive situation. Accordingly, he needs at the outset to be aware of the implications of what he is doing, and to have a clear perception of the public interest to be served in establishing the inquiry. He needs to appreciate that virtually any form of inquiry will give rise to questions to which there is no clear cut and universal, and perhaps in many circumstances no entirely satisfactory, answer.
- 5.2 The Minister will need to consider the purpose of the inquiry that he is contemplating. Many inquiries go well beyond the investigation of fact that is the hallmark of an inquiry and assume the nature of a **review** of the policy in a particular area. Where the procedure contemplated will involve a substantial element of policy examination and advice, the Minister will wish to consider the possibility of entrusting that element to a suitably constituted group or committee, with official support as necessary. In cases where it is essential that an independent inquiry should also review and advise on issues of policy, it may be appropriate either for the inquiry membership to be sufficiently-widely drawn to provide the policy expertise required or for an assessor to be appointed to assist the inquiry.
- 5.3 The Minister's perception of the public interest to be served in establishing the inquiry, and his assessment of its purpose, will influence his decision both as to the form of the inquiry and as to the scope of its terms of reference. In this connection, the Minister will also need to address his mind to the timescale within which he would hope to receive a report. He will have to think about any report's likely content, and about what matters should be made public.
- 5.4 The Minister has to be conscious of the impact of an inquiry on other legal processes, such as civil litigation, criminal prosecutions, coroners' inquests or accident investigations. He has to be aware not only of the need, so far as possible, to avoid duplication of processes, but also of the extent to which his decision to set up an inquiry may preclude, or render more difficult, other forms of due process.
- 5.5 These are among the issues that must be considered by the Minister before he exercises his responsibility of deciding whether or not to set up an inquiry. In any particular case, there may be other difficult and sensitive issues requiring consideration. At the same time, the Minister may be under pressure from Parliament, the media and the public to take quick action by announcing a "full public inquiry". Although the Minister will wish to avoid undue delay in making an announcement, he does need time to consider his decision. He will not wish to be rushed into an ill-considered commitment, and he should be prepared to defend the need for due reflection.
- 5.6 Once a Minister has decided to set up an inquiry, it is right that he should discuss with the person invited to head the inquiry the issues outlined above and any other issues arising in the particular case. It is desirable that a public announcement be made as soon as practicable not only about the setting up of the inquiry and the person chosen to head it, but also about its scope and the form it will take, its precise terms of reference and the timescale to which it aims to adhere. This should not be seen as reducing the discretion of the person chosen to head the inquiry. However, the exercise of that discretion will be assisted if the person concerned knows what is in the Minister's mind from the outset. The following paragraphs of this advice are intended to facilitate early consideration of some of the relevant issues.

The form of the inquiry

- 5.7 When considering the form of an inquiry, the Minister needs to consider the range of available options. There may be a ready-made statutory framework in place. For example, in relation to accidents, the relevant legislation often provides not only for routine accident investigations but also for more formal investigations in the nature of a public inquiry. Legislation often provides for a Minister to cause an inquiry to be held in connection with the exercise of his statutory functions in a particular area, for example local government, the police, or the national health service. The possible advantage in using a statutory procedure is that it will normally carry with it statutory powers, such as the power to call for evidence, to summon witnesses, and to hear evidence on oath.
- 5.8 Other options include a Royal Commission, a Parliamentary inquiry, a Departmental inquiry or a tribunal of inquiry under the Tribunals of Inquiry (Evidence) Act 1921. A Royal Commission would be more suitable for the consideration of broad areas of policy. Parliamentary inquiries have historically tended to have a bad reputation for producing divisions on party-political lines, as the Salmon Report pointed out; an investigation into a scandal may in itself give rise to serious public unease. A Departmental inquiry may be suitable for the investigation of matters of lesser public importance, or possibly matters where some degree of secrecy needs to be preserved. There is also the possibility of an inquiry by the Security Commission into matters falling within their remit.
- 5.9 Tribunals of inquiry under the Tribunals of Inquiry (Evidence) Act 1921 involve a resolution 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". The Salmon Commission considered that the 1921 Act should be invoked only in cases involving something in the nature of a "nation-wide crisis of confidence". The Act invests the tribunal with the powers of the High Court (in Scotland, the Court of Session) with respect to enforcing the attendance of witnesses, examining them on oath, and compelling the production of documents. It requires the tribunal to sit in public, unless in the opinion of the tribunal it is expedient in the public interest to exclude the public for reasons connected with the subject matter of the inquiry or the nature of the evidence to be given. Inquiries under the 1921 Act are infrequent. They have always been confined to cases of the kind described in the Salmon Report. Ministers sometimes decide to set up a judicial inquiry without invoking the 1921 Act, notwithstanding that the subject matter of the inquiry would fall within the Salmon criterion. The Scott inquiry is an example. Such inquiries do not seem to differ from 1921 Act inquiries save in respect of their powers. Had the Scott inquiry found that it needed the powers given by the 1921 Act, the necessary steps would have been taken to invoke the Act. However, as we note below, it is more satisfactory if this matter is decided at the outset.

Other concurrent proceedings

- 5.10 As indicated in paragraph 5.4 above, the Minister needs to be aware of any other proceedings which may have a bearing on the scope and handling of the inquiry. These could include criminal proceedings, coroners' inquests (or in Scotland, fatal accident inquiries), and routine accident investigations. There may well also be the possibility of civil litigation, or employers' disciplinary proceedings. Where there is clear evidence of criminal activity, criminal proceedings would normally precede a public inquiry. The fact that criminal proceedings are pending should lessen the pressure for establishing an immediate public inquiry for the purposes of attributing blame, but there may nonetheless be a perceived need for a public inquiry for the purpose of trying to ensure that the type of incident in question will not be repeated.
- 5.11 In those cases where criminal proceedings have not preceded the public inquiry, in order to ensure that persons giving evidence before an inquiry will speak frankly, consideration may have to be given to conferring immunity from prosecution. This is a difficult and important matter which should be discussed at an early stage with the Attorney General, the Lord Advocate, or other appropriate prosecuting authority. Whether it would be in the public interest to confer immunity, and, if so, how far the immunity should go, are questions which must be considered in

the particular circumstances of each case. In the Scott inquiry, witnesses were given immunity in respect of certain offences, in terms that neither the witness's own evidence nor the documents he was required to produce would subsequently be used against him. This left open the possibility of prosecution based on evidence available from elsewhere. A witness should always be informed of the scope of any immunity granted to him, as happened in the Scott inquiry.

- 5.12 Also in the Scott inquiry civil servant witnesses were given certain assurances that their evidence would not be used in any disciplinary proceedings against them. Whether such assurances can and should be given, and if so to whom, should be determined in the light of the particular circumstances of the case, recognising both the public interest and the rights of both public and private employers.
- 5.13 The conferring of immunity does not, of course, protect a witness against civil action, although some degree of protection may be afforded in respect of certain types of inquiry by the Witnesses (Public Inquiries) Protection Act 1892 (which makes it an offence to take certain actions having the effect of obstructing or intimidating inquiry witnesses).
- 5.14 A witness may be protected in other ways during the course of an inquiry. The inquiry may excuse him from answering particular questions or disclosing particular documents on grounds of confidentiality or privilege, or he may be allowed to give his evidence, or some of it, in private. We refer to these matters again below, when discussing the procedure at the inquiry.

Who will comprise the inquiry?

- 5.15 In inquisitorial inquiries of the kind here being considered, it is usual to ask a senior judicial figure, or other eminent senior lawyer, to head the inquiry. In addition to their legal expertise, judges by their experience are well equipped to assess evidence, and their independence and impartiality will command public confidence. The Lord Chancellor or Lord President of the Court of Session, as appropriate, should be consulted. Their consent would be required if a serving judge were to be chosen to head the inquiry. In some inquiries, consideration could be given to the appointment of an eminent non-lawyer of manifest independence and integrity.
- 5.16 Consideration should be given to appointing wing members to the inquiry. Wing members can provide a breadth of experience which can be brought to bear on the subject matter of the inquiry. They can also enhance public confidence in the fairness of the process and in the inquiry's conclusions. They can afford the inquiry chairman helpful support and some protection against errors of judgment, in matters of both substance and procedure. Although wing members will take their lead from the inquiry chairman, they will be expected to play a full and equal part in the inquiry's work. The desirability of having wing members will depend to a great extent on the breadth of the inquiry's terms of reference. As discussed in paragraph 5.2 above, if the inquiry involves consideration of broad policy issues, a spread of expertise will almost always be desirable.
- 5.17 Consideration should also be given to the appointment of assessors to advise and assist the inquiry on specific aspects of its work. Assessors are particularly helpful where the subject matter of the inquiry involves consideration of technical issues in a specialist field. Assessors are not full inquiry members, but it is usual to make known in the inquiry report the contribution they have made.
- 5.18 Although the final decision will rest with the Minister, he will wish to discuss with the inquiry chairman at the outset whether wing members or assessors should be appointed. In the case of assessors, it should be made clear in respect of what matters they will advise and assist the inquiry.

Terms of reference

- 5.19 As indicated in paragraph 5.3 above, the inquiry's terms of reference will require careful consideration from the outset. Notwithstanding that there may be some pressure, healthy in a

democratic society, for a "full public inquiry", care should be taken to ensure that the terms of reference go no wider than is necessary to fulfil the specific need which the Minister has in mind when setting up the inquiry. If the terms of reference are too wide, this may result in unnecessary cost and delay, and may introduce questions which merely confuse the essential issues.

- 5.20 Consideration could be given to incorporating within the terms of reference any specific requirement that the Minister wishes to see fulfilled, for example, the making of recommendations, the provision of a summary of conclusions, or a target date for completion. Even if these matters are not incorporated into the terms of reference, they should be addressed at the outset in discussion with the inquiry chairman, and should be the subject matter of an announcement.

Counsel to the inquiry

- 5.21 In certain types of inquiry, for example major accident inquiries where several parties may be represented, it is usual to have Counsel to the inquiry, to assist in eliciting and laying before the inquiry the relevant evidence, and ensuring that the representatives of interested parties do not set the agenda. Even in a purely inquisitorial inquiry, Counsel to the inquiry can fulfil a useful role in relieving the inquiry of the burden of asking questions, and in avoiding the danger of the inquiry being seen to descend into the arena. Where there is a need for forceful questioning of witnesses, it is often better if this is undertaken by Counsel to the inquiry, rather than by the tribunal itself. Otherwise, the tribunal may be seen as having already formed a certain view. And if objection is taken to specific questions, it is less embarrassing for the inquiry to adjudicate if the questions came from Counsel. Counsel to the inquiry may also be helpful in eliciting technical evidence.

- 5.22 The question of having Counsel to the inquiry should be discussed between the Minister and the inquiry chairman when they discuss the question of wing members and assessors. The presence of wing members on the inquiry may sometimes obviate the need for Counsel to the inquiry, since some of the burden of questioning which would otherwise fall to the inquiry chairman may be assumed by the wing members. Exactly when it might, or might not, be appropriate to have Counsel to the inquiry is a matter for decision according to the circumstances of the individual case: we do not judge it right to offer prescriptive advice on this point.

- 5.23 If Counsel to the inquiry is appointed, he or she will of course work closely with the inquiry chairman and other members in working out the general direction of the inquiry. However, it is important, not least from the presentational viewpoint, that Counsel should not be seen to be part of the inquiry panel. At the hearing, the roles of the tribunal and Counsel should be seen to be distinct. For example, as noted above, it may be necessary from time to time for the tribunal to intervene to stop a particular line of questioning by Counsel. The perception of the separate roles of the tribunal and Counsel is greatly enhanced if they are physically separated from each other in the inquiry room.

- 5.24 In the past, it was common for a Law Officer to appear as Counsel to the inquiry, but this is not now generally thought desirable, particularly where the Law Officers' Ministerial colleagues (or, indeed, the Law Officers themselves) have been involved in the subject matter of the inquiry. There can be difficulties and embarrassment for the Law Officers in keeping distinct their functions as advisers to Ministers and guardians of the public interest. To some extent, the Treasury Solicitor may also be in a difficult and embarrassing position vis-a-vis the inquiry, if he has advised Ministers on matters which the inquiry is investigating. However, the Treasury Solicitor's traditional role in providing the inquiry with the necessary legal and administrative support is, as indicated below, an essential one.

Secretariat and accommodation

- 5.25 From the outset, the inquiry will require a dedicated team of support staff to undertake the preliminary administrative arrangements and service the inquiry throughout its course. In England and Wales, this task will usually fall to the Treasury Solicitor's Department. The size of the team, and the seniority of its members, will vary according to the nature of the inquiry. Ministers will

receive appropriate guidance from the Treasury Solicitor. In some instances, the Department of the Minister establishing the inquiry will provide the necessary support staff.

- 5.26 The role of the inquiry's Secretariat should not be an obtrusive one. They are there to assist the inquiry and those appearing before it. However, it is important that they should do nothing that might identify them too closely with the inquiry panel itself. This could have the effect of compromising the perception of the inquiry's independence. The inquiry's Secretary should be discouraged from assuming too high a profile.
- 5.27 Care should be taken in choosing an appropriate venue for a public inquiry. Again, the requirements will vary from inquiry to inquiry. However, the basic requirements for accessibility, seating capacity, and adequate facilities must be met. Regard should be had to the Checklist and Code of Practice for Disabled People Using Tribunals, prepared by the Council on Tribunals. In some cases, it may be appropriate for the inquiry to sit in a number of different locations.

PART 6: THE POWERS OF THE INQUIRY

- 6.1 Attention should be given to whether the inquiry has all the powers necessary to enable it to perform the function for which it was set up. As indicated in paragraphs 5.7 and 5.9 above, an inquiry held under statute will normally be invested with powers to compel the attendance of witnesses and the production of documents, and to administer the oath. A non-statutory inquiry enjoys no such powers. Thought therefore needs to be given at the outset to the question whether such powers will be needed. Although it is possible to convert a non-statutory inquiry into a statutory one during the course of the inquiry, this is not very satisfactory and should be avoided if possible.
- 6.2 In paragraph 5.9 above, we explain that the Tribunals of Inquiry (Evidence) Act 1921 may be invoked to clothe an ad hoc inquiry with the powers of the High Court to summon witnesses, send for documents, administer oaths and so forth. These powers are reinforced by penal sanctions. However, in order to bring the Act into play, both Houses of Parliament must resolve that a tribunal shall investigate some matter described as being "of urgent public importance".
- 6.3 The 1921 Act has, as already indicated, been invoked rarely, and then only in the circumstances described in the Salmon Report, where something in the nature of a "nation-wide crisis of confidence" was involved. Prior to the Scott inquiry, the 1921 Act had not been invoked since 1977, when the Crown Agents inquiry was set up. It was not invoked for the Scott inquiry, although that inquiry might seem to have fallen squarely within its terms, subject to the necessary Parliamentary resolutions.
- 6.4 It may be that the experience of previous inquiries under the 1921 Act, particularly that of the Crown Agents inquiry itself, had led to the perception that such inquiries would inevitably take much longer and involve greater expense, particularly if the Salmon principles were strictly adhered to. However, that does not seem to be necessarily so, as was shown by the Aberfan inquiry. Much would depend on the scope of the inquiry. It is noteworthy that since the Scott inquiry the 1921 Act has been invoked twice, in the case of the Cullen inquiry into the Dunblane shootings and the Waterhouse inquiry into child abuse in North Wales.
- 6.5 In the case of the Scott inquiry, it was thought at the outset that the inquiry would need no special powers in order to accomplish its task satisfactorily. However, Sir Richard Scott would have liked to be in a position to take evidence on oath. He found that he was apparently precluded from doing so by section 13 of the Statutory Declarations Act 1835. In his report, he suggested that the Act be amended to provide a mechanism for surmounting this difficulty in the case of non-statutory ad hoc inquiries. It has subsequently been suggested that the terms of section 16 of the Evidence Act 1851 might be broad enough to permit a non-statutory inquiry set up by Ministers to take evidence on oath, but this is by no means certain.

- 6.6 It may be that the statutory provisions should be looked at afresh, with a view to clarifying and updating them, and, if thought desirable, incorporating some such mechanism as suggested by Sir Richard Scott. However, in our view, such a change would require full consideration following wide consultation. The question of administering the oath cannot really be considered in isolation from consideration of other powers such as the power to compel witnesses and the production of documents. Conferring a power to administer the oath in non-statutory inquiries would raise questions as to the purpose of the special provisions in the Tribunals of Inquiry (Evidence) Act 1921 itself. In any event, in many inquiries the taking of an oath would arguably have little effect on the accuracy and truthfulness of the evidence given. Ultimately, Sir Richard Scott did not consider that his inquiry had been hampered by the fact that evidence was not taken on oath.
- 6.7 It has also been suggested that non-statutory public inquiries should qualify for subpoena powers, and that this might be effected for England and Wales by amendment to Order 38 rule 19 of the Rules of the Supreme Court. This was recommended by the inquiry panel in the Jason Mitchell Inquiry Report in 1996. That inquiry was conducted on behalf of Suffolk Health Authority, rather than a Minister, but the recommendation would be capable of application to inquiries set up by Ministers. Again, it seems to us that such a change would raise questions as to the purpose of the special provisions in the Tribunals of Inquiry (Evidence) Act 1921. We do not believe that such a change should be contemplated without full consultation.

PART 7: THE PROCEDURE OF THE INQUIRY

- 7.1 As indicated earlier, there can be no standard rules of procedure appropriate for all ad hoc inquiries. The conduct of the inquiry must be for the inquiry chairman in consultation with any other members of the inquiry to determine in the light of the particular circumstances, and procedures must be flexible. Ministers do, of course, have a legitimate interest in the way an inquiry is conducted, for example, to ensure due expedition. Accordingly, it is desirable that the inquiry chairman should discuss with the Minister at an early stage the procedures he envisages adopting. The broad ground rules for the inquiry should be established from the beginning, but the inquiry should retain complete flexibility to adapt to new circumstances as they arise.

Preliminary public hearing

- 7.2 It is very desirable that there should be a preliminary public hearing at which the inquiry's intended procedural ground rules can be announced, explained, discussed with the major interested parties or their representatives and determined, and the need for flexibility emphasised. Consideration should be given to inviting to such a preliminary hearing all those who are expected to be called as principal witnesses, or their representatives. The opportunity could be taken at the hearing to determine the basis on which public funding of legal advice and representation is to be allowed, as discussed in paragraphs 7.12-7.15 below.

Inquisitorial or adversarial procedures

- 7.3 Inquiries of the kind under consideration are essentially inquisitorial in character. It is the inquiry itself that is responsible for gathering evidence, questioning witnesses, and determining the progress and direction of the proceedings. This differs from the adversarial nature of ordinary litigation in the civil and criminal courts, where each side presents a case which is then tested by the other side. However it is not possible to draw an absolutely hard and fast distinction between the inquisitorial and adversarial modes. For example, accident inquiries can assume something of an adversarial character, with different groups of individuals having different sets of interests. The presence of Counsel to the inquiry may also introduce an adversarial element into the proceedings. Features characteristic of adversarial litigation may properly be introduced into the inquisitorial process, if that assists in the fair and efficient conduct of the inquiry. How far this may be appropriate will vary greatly according to circumstances.

Public or private hearings

- 7.4 In principle, it seems right that an inquiry into a matter of public concern should itself be conducted in public, unless there is a strong public interest in the inquiry, or part of it, being held in private for reasons such as national security. As indicated in paragraph 5.9 above, the Tribunals of Inquiry (Evidence) Act 1921 makes provision along these lines. The Scott inquiry proceeded on the same basis. There are well-recognised areas where confidentiality may be necessary, and may indeed be required by statute, for example under the banking legislation. But these cases are exceptional. Aside from any other consideration, public hearings go a long way towards reassuring the public that the subject matter of the inquiry has been fully investigated and that there has been no "cover-up". This may be a particularly important consideration where the inquiry is concerned with the manner in which public duties have been discharged by public officials.
- 7.5 Nonetheless, there may on occasions be advantages in conducting an inquiry in private, provided that the inquiry's report is made public. Sometimes it may be easier to elicit the truth when questioning is not conducted in the full glare of publicity. Witnesses may be prepared to volunteer more information if they know that their answers will not be subject to instant reporting in the media. Some inquiries conducted in public, for example certain inquiries into the abuse of children, have tended to be characterised by the media as witchhunts. It should also be noted that inquiries conducted in private are usually quicker and cheaper.
- 7.6 Where an inquiry is held in public, consideration should be given to allowing the press access to relevant documentary or written evidence, in order to give a fuller picture. This might prove impracticable in a case involving a mass of documentary evidence. Attention would need to be paid to questions of confidentiality and privilege.
- 7.7 There is no doubt that some witnesses at inquiries held in public find the presence of the media somewhat daunting. These feelings tend to be exacerbated if the witness considers the media coverage tendentious or unfair. There is the danger that a witness will not give of his best under these circumstances. The presence of television cameras could have a similarly unsettling effect. Anything that the inquiry can do to mitigate the problem without inhibiting the freedom of the press is to be encouraged. Steps should be taken when making arrangements for the accommodation of the inquiry to ensure, so far as possible, that the media presence is not obtrusive. Moreover, the inquiry, and Counsel to the inquiry, should conduct themselves in a manner conducive to fair reporting.

Putting witnesses on notice

- 7.8 An inquiry would not wish to call a witness unless satisfied that there are circumstances affecting him which the inquiry proposes to investigate. However, as part of its preliminary work, the inquiry will need to find out whether particular persons have relevant information to give. This may involve approaching them directly and asking them questions.
- 7.9 The Salmon Report stated that before any person is called as a witness he should be informed of any allegations against him and the substance of the evidence in support of them. This has given rise to the practice of sending so-called "Salmon letters". It is obvious that at the outset of an investigation there will be no fully formed "allegations", and there is a danger that "Salmon letters" will be treated as something more than what they actually are. They are in no sense equivalent to indictments in criminal proceedings. However, it is important that a witness, before he gives his evidence, is made aware of the inquiry's areas of concern and the respects in which, in the light of the information so far available, he may be vulnerable to criticism. He should be given as much information about these matters as possible. This is not only fair to the witness, but it should also help the inquiry when the witness comes to give evidence.
- 7.10 There is a particular problem when damaging allegations or evidence emerge during the course of an inquiry, after the witness affected has already given evidence. In these circumstances, the

witness affected should be given an opportunity to respond. This may involve recalling both that witness and the witness making the allegations or giving the damaging evidence. A witness should normally be told the source of damaging allegations or evidence against him, unless there are very good reasons to the contrary.

- 7.11 In the Scott inquiry, in addition to being given a transcript of their oral evidence to check, and if necessary correct, witnesses were given the opportunity of commenting on draft extracts of the final report that affected them, so that they could make further representations or offer additional evidence before final conclusions were reached. This process proved difficult and time-consuming. It was not contemplated in the Salmon Report, and should certainly not be regarded as necessary in every case. In many cases, witnesses will already have had the opportunity of dealing with the relevant points, whether evidential or judgmental, before the inquiry reaches the stage of coming to conclusions. However, the inquiry should, as in other procedural aspects, be flexible, and if a witness has not already had an opportunity to respond to a proposed conclusion which is critical of him then there may well be a case for adopting the course taken by the Scott inquiry for that witness.

Legal assistance and representation

- 7.12 The Salmon Report said that a witness should be given an adequate opportunity of preparing his case and of being assisted by legal advisers, and that his legal expenses should normally be met out of public funds. Sir Richard Scott thought that legal assistance should be available to those involved, both at the stage of giving evidence and at the stage of responding to criticisms. These recommendations are not controversial, although we think it should be made as clear as reasonably possible at the preliminary public hearing the extent to which the costs of witnesses' lawyers will be met out of public funds.
- 7.13 There is more controversy about legal representation, in the sense of witnesses at the inquiry having lawyers to protect their interests, to speak for them through opening and closing statements, to take them through their evidence, to re-examine them after they have been questioned by the inquiry or Counsel to the inquiry, and to cross-examine other witnesses. There appeared, however, to be a consensus among those commenting on the Scott inquiry procedures that legal representation in this sense should not be regarded as an absolute entitlement. The inquiry must retain a discretion over the way in which evidence is given, the extent to which cross-examination is permitted, and the extent of oral submissions, as well as the extent to which legal costs incurred during any of these procedures should be met out of the public purse.
- 7.14 Written evidence to the inquiry will often be a fully adequate substitute for examination-in-chief, and for opening and closing statements made orally. Indeed, the High Court itself makes increasing use of written evidence and argument. However, it should not be assumed that hearing legal representatives will necessarily add significantly, or at all, to the length of the inquiry, provided the inquiry itself retains overall control. Opening statements and the like from lawyers can help to distil issues and eliminate misunderstandings, and may also enhance fairness. Oral testimony can give the press and the general public a better understanding of the matters under the inquiry's consideration, and may assist in allaying public concerns. Being taken through evidence in chief can put a witness at ease, enabling him to give of his best when being questioned by the inquiry. Cross-examination of other witnesses may sometimes be the most effective way of resolving conflicts of evidence. Re-examination can be a much quicker way of clarifying outstanding points than the submission of additional written statements. In short, although legal representation should not be regarded as an automatic right, and the inquiry should prevent any abuse of the opportunity to be heard, it may be counterproductive to start from the position that legal representatives will only be heard exceptionally. The inquiry should be ready to exercise its discretion in favour of hearing legal representatives and oral testimony and allowing cross-examination whenever it seems appropriate.
- 7.15 In some inquiries, strict adherence to the Salmon principles regarding legal representation has created difficulties, and has led to the inquiry being excessively prolonged. It is clearly undesirable that there should be mass legal representation throughout the course of an inquiry.

The inquiry chairman should have power to authorise persons to be represented, either at public expense or privately, for part only of the inquiry, having regard to the extent to which their interests are involved in what the inquiry is currently investigating. Joint representation of witnesses with a similar interest is to be strongly encouraged. In the event that evidence affecting a person is given unexpectedly, the inquiry may need to notify that person, and if necessary in the interests of fairness make appropriate arrangements to allow legal representation and cross-examination.

- 7.16 A witness may wish the inquiry to call another person as a witness. Provided that other person has material evidence to give, the inquiry should, if reasonably practicable, invite him to give evidence. Written evidence may suffice.

The report of the inquiry

- 7.17 Inquiries of the kind under consideration will invariably involve the inquiry, or the inquiry team, in preparing a written report for submission to the Minister. The preparation of the report falls outside our terms of reference. However we agree with a number of commentators who urge that inquiry reports of any length should provide for an executive summary of the findings and recommendations.

- 7.18 It will almost always be appropriate for the inquiry report to be published, even if the inquiry has been conducted in private. It is to be expected that Ministers will be involved in the arrangements for publication, and will explain any editing that might have been necessary.

APPENDIX

(paragraphs 1.5 and 4.1)

**Scott Report recommendations
about inquiry procedures
(Part 4, Section K, Chapter 1)**

PART 4 SECTION K RECOMMENDATIONS

CHAPTER 1

Inquiry Procedures

- K1.1 In a number of Inquiries since 1966 consideration has had to be given to whether all, or which, of the six "cardinal principles" of procedure recommended by the Salmon Royal Commission should be adopted¹. That consideration was necessary in the case of this Inquiry and led to the adoption of the procedures detailed in Section B. It seems to be sensible that, with the benefit now of hindsight, I should review the factors to be taken into account in deciding what procedures should be adopted for an inquisitorial Inquiry such as this.
- K1.2 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.
- K1.3 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.
- K1.4 The six Salmon "cardinal principles" carry strong overtones of ordinary adversarial litigation. So, while the principles should always be borne in mind when procedures for an investigative Inquiry are being formulated, consideration must be given in respect of each of the principles to the effect which the implementation of that principle would be likely to have on the conduct of the particular Inquiry. For example

(i) Principle (1)

"Before any person becomes involved in an inquiry, the Tribunal must be satisfied that there are circumstances which affect him and which the Tribunal proposes to investigate".

¹ see paragraph B2.29 *supra*

This principle should not be applied so as to prevent the Inquiry from questioning persons for the purpose of ascertaining whether they have any relevant information to give.

(ii) Principle (2)

"Before any person who is involved in an inquiry is called as a witness he should be informed of any allegations which are made against him and the substance of the evidence in support of them".

If an individual against whom damaging evidence has been given is himself intended to give evidence, he should, unless there is some special reason to the contrary, be referred to the damaging evidence and to relevant background documents. Thereafter, Principle (2) is in my opinion inappropriate to inquisitorial proceedings.²

(iii) Principle (3):

"(a) He should be given an adequate opportunity of preparing his case and of being assisted by legal advisers.

(b) His legal expenses should normally be met out of public funds".

The need for legal assistance may come at two stages: first, when a witness is preparing the evidence he wishes to give to the Inquiry whether of his own motion or in response to the Inquiry's questions, and, secondly, when deciding whether to respond and how to respond to notice from the Inquiry of criticisms of his conduct that the Inquiry is minded to make.

The "adequate opportunity" referred to in the principle will require, first, that a proposed witness be given notice of the matters on which he will be asked questions and, secondly, that the object of proposed criticism be given notice of what is proposed to be said about him.

(iv) Principle (4):

"He should have the opportunity of being examined by his own solicitor or counsel and of stating his case in public at the hearing".

The principle would need some adjustment to be suitable for application to most inquisitorial inquiries. Questions to witnesses are part of the investigative process being undertaken by the Inquiry. Provided the witness has received adequate notice of the matters in respect of which questions will be asked, has had the opportunity of legal assistance in preparing his answer, and has an opportunity of supplementing his answers to the inquiry's question by putting his own statement or statements in evidence, no more would ordinarily be needed. In particular, a requirement that an opening statement or supplemental evidence should be elicited in question and answer mode by the witness' solicitor or counsel is, in my opinion, likely in most cases to lead to an unnecessary waste of time and money.

² In a note to the Report of the Crown Agents Tribunal, Mr Justice Croom-Johnson, the chairman of the Tribunal said "Our experience has been that the use of the word "allegation" fosters an adversary approach and tends to introduce rigidity into a process which ought to be flexible.

(v) Principle (5):

"Any material witnesses he wishes called at the inquiry should, if reasonably practicable, be heard".

Subject to the qualification that written evidence may suffice and render oral evidence unnecessary, this principle would, I think, be accepted and applied by every Inquiry.

(vi) Principle (6)

"He should have the opportunity of testing by cross-examination conducted by his own solicitor or counsel any evidence which may affect him".

There will certainly be circumstances in which fairness requires that an opportunity to cross-examine witnesses to an Inquiry should be allowed to other persons. But I would unhesitatingly reject the proposition that the right to cross-examine a witness should automatically be allowed to every person affected by that witness's evidence. The proposition would be likely in many Inquiries to be inimical to, perhaps destructive of, the efficient conduct of the Inquiry. The question whether and to what extent facilities for the cross-examination of witnesses should be afforded to others should, in my opinion, be decided on a pragmatic, case by case basis. In 1976 in giving procedural directions for the purpose of the Red Lion Square Inquiry that he was about to conduct, Lord Scarman pointed out the distinction between his Inquiry and adversarial litigation. "It is not the sort of adversary-style confrontation between parties with which we English lawyers are familiar in the criminal and civil trials of our country" he said. He then said this about cross-examination:

"There is, in an Inquiry of this sort, no legal right to cross-examination, but I propose, within limits, to allow cross-examination to the extent that I think it helpful to the forwarding of the Inquiry, but no further."

Cross-examination should, in my opinion, be allowed if there is no other effective way of achieving fairness, but, given the adverse implications of cost and time likely to follow upon a decision to allow the general cross-examination facilities contemplated by principle (6), satisfactory alternatives that would achieve fairness should, in my opinion, be sought. These alternatives might, for example, take the form of copying transcripts of adverse evidence to those affected by it and inviting written or oral responses together with the possibility of recalling the witnesses in question for further examination. It must be borne in mind, also, that criticism proposed to be based upon any adverse evidence must be put to the object of the criticisms before they become final. The person criticised will thus, in any event, have an opportunity to answer the proposed criticism and to give evidence in refutation.

K1.5 In summary, in my opinion, care should be taken lest by an indiscriminate adoption and application of the six "cardinal principles" the Inquiry's inquisitorial procedures become hampered by an unnecessary involvement of adversarial techniques and of lawyers acting for witnesses and others whose interests may lie in delay and obfuscation. Sir Louis Blom-Cooper has commented that:

"The prime characteristic of the 1921 Act tribunals, underlined by the Salmon recommendations, was in effect to elbow out the inquisitorial aspects of public inquiries in favour of procedural safeguards borrowed from the legal system".

and that:

"... the Salmon Commission ... positively encouraged administrators and participants to turn the inquiry into an accusatorial procedure (a) by the framing of specific issues couched in the terms of reference and (b) by conducting an adjudication of those issues by the methods familiar to English lawyers engaged in the court system".

In *re Pergamon Press Ltd*³ Lord Denning, Master of the Rolls, said that "inspectors [in a DTI inquiry] can obtain information in any way they think best, but before they criticise or condemn a man, they must give him a fair opportunity for correcting or contradicting what is said against him"⁴ and Lord Justice Sachs, in the same case, added "In the application of the concept of fair play there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand."⁵

K.16 Accordingly, in my opinion

- (i) adequate advance notice should be given to witnesses on the matters in respect of which they will be asked questions;
- (ii) adverse and damaging allegations made by other witnesses should (if they are relevant) be drawn to the attention of the object of the allegations so that he or she can, if desired, respond to them: care should be taken to prevent any irrelevant damaging allegations being made in the course of oral testimony; if such allegations are made in written evidence, they should not be published;
- (iii) proposed criticisms should be drawn to the attention of the objects of the criticisms so that they can, if desired, make representations or offer additional evidence in response before the criticisms become final;
- (iv) legal assistance should be available to those involved, both at the stage of giving evidence and at the stage of responding to criticisms;
- (v) adversarial procedures, such as the right to cross-examine other witnesses, the right to have an examination-in-chief or re-examination conducted by a party's own lawyer or the right for interested parties to participate, over and above the extent mentioned, in oral hearings, should not be incorporated into the procedures at an inquisitorial Inquiry, except to the extent that fairness requires it or the particular circumstances warrant it.

K1.7 In cases where the matters for investigation by an Inquiry involve the manner in which public duties were discharged by public officials, oral hearings should, in my opinion, as a general rule be open to attendance by the public.

³ [1971 1 Ch 388

⁴ *Ibid* at p 399 and 400

⁵ *Ibid* at p 403

K1.8 One of the effects of section 13 of the Statutory Declarations Act 1835 is that it would be unlawful for evidence to an ad hoc Inquiry to be taken on oath⁶. The prohibition contained in section 13 is subject to the exceptions set out in section 7 of the Act but is, in my opinion, nonetheless unnecessarily inflexible. It should, in my opinion, be made possible for evidence to ad hoc inquiries to be given on oath. On the assumption that the prohibition imposed by section 13 still serves some useful purpose - a matter that I have not investigated and on which I have no view - an appropriate amendment ought, when a suitable legislative opportunity presents itself, to be enacted. I recommend an amendment under which the Lord Chancellor (or perhaps, the Attorney General) is given a discretionary power, on application made to him, to authorise the administering of the oath for the purpose of evidence to be given to an inquiry or in proceedings specified in the application. The amendment could, I suggest, take the form of an addition to the "judicial proceedings" exception contained in section 7 of the Act. If the amendment I have recommended had been in place when the present inquiry was instituted, I would have made an application to enable me to take evidence on oath.

⁶ See paragraphs B2.38 to B2.41 *supra*