Public inquiries: striking the balance

BY EMILY CARTER
senior associate, Kingsley Napley LLP

IN THIS ARTICLE, WE DISCUSS TWO RECENT decisions made in the course of the Leveson inquiry into the culture, practice and ethics of the press in order to highlight the particular issues facing those involved in public inquiries – and the difficult balancing exercises faced by the chairman in protecting the interests of individuals and organisations while effectively fulfilling the objectives of the inquiry.

The Leveson public inquiry into the culture, practice and ethics of the press is the latest in a series of inquiries held in recent years examining issues of significant public interest. Although public inquiries will often focus on the actions of government or other public bodies, companies and corporate officers can find themselves involved – whether as participants or witnesses – as exemplified by the Leveson inquiry. Over the years, inquiries have considered diverse topics – from the Lord Saville's inquiry into the events of 'Bloody Sunday', Dame Janet Smith's inquiry concerning the deaths caused by Harold Shipman, Lord Hutton's inquiry into the circumstances of David Kelly's death and Robert Francis QC's ongoing inquiry into the failings of the Mid Staffordshire NHS Trust. However, there are certain features these inquiries all have in common. They will involve a detailed examination of a vast quantity of evidence obtained from a variety of individual witnesses and organisations. Having considered this evidence, the chairman hearing the inquiry will prepare a report consisting of both findings with respect to the events in question and recommendations for the future. And by definition, public inquiries will be conducted under the public gaze and to a greater or lesser extent, the media spotlight.

After outlining the defining features of a public inquiry under the Inquiries Act 2005 (the 2005 Act), this article considers two areas of potential concern to those drawn into public inquiries. Firstly, the risk of evidence given in an inquiry giving rise to civil or criminal liability is considered, specifically with reference to the decision of Leveson LJ concerning the parallel criminal investigation into phone hacking. Secondly, Leveson LJ's decision concerning the receipt of anonymous evidence provides an insight into the circumstances in which an inquiry will impose restrictions on this otherwise transparent process.

PUBLIC INQUIRIES: POWERS, PROCEDURE AND PUBLICITY

It is open to the chairman to establish the procedure for the inquiry, bound only by the terms of reference, the broad framework established by the 2005 Act and the common law duties of fairness. As a starting point, it is expected that the full proceedings of an inquiry will be held in public and there is specific obligation under s18 on the chairman to ensure that the public, including the press, can attend the inquiry, see simultaneous transmission of proceedings and view a record of evidence and documents given.

The chairman has specific powers to compel witnesses to provide documentary material to the inquiry and to attend to give oral evidence. At the commencement of an inquiry, the chairman's first steps will be to write to all those individuals and organisations that may be able to provide evidence relevant to the terms of reference seeking both disclosure of categories of potentially relevant documents and a witness statement.

The grounds upon which it is possible to withhold information from the inquiry are limited. The chairman's powers under s21 of the 2005 Act to compel the provision or production of information are limited by s22, which provides that no person can be compelled to provide information that they would not be required to provide in civil proceedings. The most important classes of documents to which this restriction extends include material subject to legal professional privilege and held subject to conditions of confidentiality.

All material held by a public inquiry is exempt from requests under the Freedom of Information Act 2000. However, there is the potential for any information provided to an inquiry to be released in the public domain. Documentary material will be disclosed to the other 'core participants', often via an electronic database, and a proportion of this material will be formally exhibited to witness statements and disclosed to the public, usually on the inquiry website.

Mechanisms exist to ensure fairness, such as the provision of 'warning letters' to witnesses concerning prospective areas of criticism in the final report. However, for those witnesses

who are asked to provide written or documentary evidence to a public inquiry, and who may be called upon to give oral evidence during public hearings, there are significant consequences that may follow on from their involvement, whether it be disclosure of information into the public domain, critical comment within a public report or the making of recommendations that will impact upon the future operation of an organisation. For some, there is a real concern with respect to civil or criminal liability arising from the evidence given in the course of an inquiry.

THE QUESTION OF LIABILITY AND PARALLEL PROCEEDINGS

Section 2 of the 2005 Act prohibits the chairman making any finding of civil or criminal liability with respect to any witness. However, this is qualified:

> 'The inquiry panel is not to be inhibited in the discharge of its functions by any likelihood of liability being inferred from facts that it determines or recommendations that it makes.'

This defines the general approach to questions of liability in the course of inquiry proceedings; while some protections are available, their effectiveness will be tempered by the imperative of holding an effective inquiry.

A witness is able to rely upon the privilege against self incrimination in both answering questions and providing documents. However, in many cases there is a fine line between incriminatory information and more general information that may set in process an investigation leading to the discovery of incriminating evidence. Undertakings have been provided by the attorney general confirming that evidence given by a witness will not later be used against them in any criminal proceedings (and similar undertakings may be sought from employers with respect to disciplinary proceedings). However, such undertakings are designed to encourage reluctant witnesses to provide full and frank evidence and may not provide complete protection, for example, only applying to the individual's own evidence and not evidence given by other witnesses about that individual.

The issue of liability becomes even more complicated in circumstances where there are overlapping investigations or proceedings. In the usual course of events, it would be expected that any such proceedings would precede a public inquiry to ensure that the administration of justice is not undermined by the process of the inquiry. However, the phone hacking scandal has led to two parallel investigations being undertaken. Alongside the ongoing police investigation, the overwhelming public interest justified an immediate public inquiry. The terms of reference were specifically crafted in two parts to enable Leveson LJ to commence the general part of the inquiry immediately and to consider the specific concerns with respect to phone hacking within the media in due course. Nevertheless, serious concerns arose as to whether splitting the inquiry in this way would be sufficient to protect the integrity of the criminal proceedings while enabling the first part of the inquiry to proceed in any meaningful sense.

'In many cases there is a fine line between incriminatory information and more general information which may set in process an investigation leading to the discovery of incriminating evidence.'

Having heard submissions on this issue, Leveson LJ provided a ruling on 7 November 2011 (available on the inquiry website, www.levesoninquiry.org.uk). The resolution suggested by the Crown Prosecution Service and the Metropolitan Police Service was to not to rehearse any evidence during part 1 that was likely to prove central to any criminal proceedings. Leveson LJ was not prepared to go that far, but he decided upon a series of practical steps that were designed to prevent prejudice arising in practice. In effect, he determined that he would be able to sufficiently exercise control over the flow of information through his counsel to prevent prejudice arising. He then said:

> 'It should not be thought that this decision is without consequences, a number of which some might find unpalatable. The first concerns the material that I will deploy in this part of the inquiry. If I am concerned that it will shed more heat than light on some aspect of the inquiry (particularly if the point or issue can be covered in other ways), I shall not deploy it. Neither will I deploy it if, because of its nature or contents, I am concerned that it might, indeed, create a risk of causing serious prejudice to the investigation or any prosecution. The benefit of using any material must outweigh the potential disadvantage [...]
>
> The same is so in relation to the witnesses who are to be called to give evidence. The purpose of calling for evidence (and subsequently bringing witnesses to the inquiry to speak in person) is to understand, in a general sense, what has been happening and whether (and, if so, how) arrangements might be made to improve the regulation of the press media in the various areas described in the terms of reference. It is not to provide a public platform unfairly to pillory anyone for doing no more than exercising the rights which all of us are afforded. There may thus be what some might consider to be surprising omissions in relation to Module 1 of Part 1 (the press and the public) on the basis that certain individuals who are suspects in the police investigation should not and – given the remit of this aspect of the inquiry – need not give evidence orally.'

It was clear from Leveson LJ's ruling that alongside the interests of those identified as suspects in the investigation, the fair conduct of any trials in future is clearly a significant public interest. However, given the chairman's broad discretion to regulate the inquiry evidence, the public interest in enabling the inquiry to progress was given particular weight in the balancing exercise undertaken.

RESTRICTIONS ON THE PUBLIC NATURE OF INQUIRIES

In accordance with s19 of the 2005 Act, the chairman may impose restrictions on both attendance at the inquiry or disclosure or publication of any documents given it is where conducive to the inquiry fulfilling its terms of reference or necessary in the public interest and having regard to a number of matters, including the risk of harm or damage (including death, injury, harm to national security or economic interests). A high threshold for such applications was fixed in the House of Lords decision in *Re Officer L* [2007] in which it was held that an officer who feared for his personal safety in giving evidence to an inquiry concerning sectarian violence in Northern Ireland would need to provide objective evidence to substantiate an application to provide evidence anonymously.

'Alongside the interests of those identified as suspects in the investigation, the fair conduct of any trials in future is clearly a significant public interest.'

This issue was considered from a different angle in January this year by the Administrative Court in the context of the Leveson inquiry (*R (on the application of Associated Newspapers Ltd) v Leveson* [2012]). Associated Newspapers sought the judicial review of Leveson LJ's decision in November 2011 to receive evidence from journalists who wished to provide a candid, and no doubt critical, account of the inner workings of news organisations anonymously for fear of losing their employment and damaging their professional reputation. Although recognising that such evidence would have limited weight given that it would not be possible to properly test it, he was prepared to receive such evidence subject to the names of those being criticised also being withheld from the public domain. He felt this appropriate within the context of part 1 of the inquiry, in which he did not intend to make any findings with respect to the behaviour of newspapers or its editors.

Leveson LJ's decision was challenged on the basis it would breach principles of natural justice and open justice, without sufficient consideration being given to balancing the relevant public interests. Specifically, given that the chairman had not yet considered any particular applications for anonymity, the claimant argued that a subjective fear of 'career blight' would be insufficient grounds to justify anonymity, especially when compared to the decision in *Re Officer L*.

In the Administrative Court, Toulson LJ acknowledged that the essential distinction between the case considered by the House of Lords and that considered by Leveson LJ was that the Robert Hamill inquiry was aware of the identity of the witnesses seeking anonymity, and they were therefore compellable. In this case, the journalists offering evidence were unknown to the inquiry and would remain so unless anonymity was granted. The court appears to accept that Leveson LJ had limited options available to him but to accede to the request for anonymity if he considered the evidence relevant and important to the i inquiry.

Toulson LJ identified three questions to be considered. Firstly, was there a credible basis for accepting that these witnesses would not give evidence because of a real fear of 'career blight'; secondly, was it better for the course of the inquiry to admit such evidence than not to; and thirdly, would its admission be likely to cause such prejudice to newspaper organisations that it would be unfair to admit it notwithstanding the detrimental impact on the inquiry. The Administrative Court demonstrated its usual reluctance to be drawn into such assessments and noted these were questions for the Chairman of the inquiry unless his decisions were plainly wrong. And the court clearly did not believe this to be the case:

> 'If the court ruled that the chairman could not lawfully admit evidence of the kind under consideration, and his report reflected the fact, the result would be that the inquiry would not have examined the raft of available material. There would be cause for concern that in those circumstances the inquiry would have failed in a significant regard to achieve its terms of reference, and the credibility of its findings and recommendations would be lessened. It would be open to the criticism of not having heard the full story.'

Despite recognising the legitimate concerns of those newspaper organisations that may be made the subject of 'anonymous' criticism, Toulson LJ noted that an inquiry is not the same as a criminal trial or disciplinary proceeding and commented:

> 'The public interest in the chairman being able to pursue his terms of reference as widely and deeply as he considers necessary is of the utmost importance.'

Both decisions made in the course of the Leveson inquiry demonstrate the various competing interests in balance within the public inquiry process and the very pragmatic approach taken to maintaining this balance. Importantly, they demonstrate the overwhelming weight of the public interest in the chairman being able to effectively fulfil the terms of reference, that will very often trump the concerns of individuals and organisations with respect to their own reputation, personal and business interests and liability.

By Emily Carter, senior associate, Kingsley Napley LLP.
E-mail: ecarter@kingsleynapley.co.uk.

Re Officer L [2007] UKHL 36.

R (on the application of Associated Newspapers Ltd) v Leveson [2012] WL 14723