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REFORMING THE STATUTORY INQUIRY WARNING LETTER PROCESS

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Public inquiries determine their own procedures to best meet the requirements of their terms of reference. A flexible approach to warning letters is essential to accommodate each inquiry's distinct needs.

Recommendations

1. Revoke the mandatory warning letter process in rules 13-15 of the Inquiry Rules 2006 and replace it with a discretionary process, aligning it with the procedural flexibility of comparative public inquiry models in other jurisdictions.
2. Issue guidance for inquiry chairs of both statutory and non-statutory inquiries on the use of warning letters and update it periodically, incorporating lessons from ongoing inquiries.
3. Compare and evaluate the cost, duration, effectiveness, and impact of statement-taking vs. statement-receiving approaches in public inquiries, and their use of warning letters, to inform and enhance future practices.

The conflicting arguments

Many leading inquiry chairs, practitioners, and other public inquiry experts have repeatedly called for the mandatory warning letter process for statutory public inquiries to be revoked, and replaced with a flexible approach, arguing that it causes unnecessary delays and adds millions of pounds to the cost of UK statutory inquiries. However, others maintain that compulsory warning letters are essential to ensure fairness and should be retained. In the absence of consensus, the status quo remains. This brief explains the reasons behind these opposing views and how revoking the current rules and replacing them with a discretionary process, supported by guidance, can address the concerns on both sides while delivering significant time and cost savings.

Mandatory or discretionary process?

Statutory inquiries are convened by a minister under the Inquiries Act 2005. The Inquiry Rules 2006 provide binding statutory guidance. Rule 13(3) mandates the chair of a statutory inquiry send a warning letter to a person before including any explicit or significant criticism of that person in an interim or final report. It also requires that they be given a reasonable opportunity to respond. Rule 15 contains detailed requirements for the letter's content. (See discussion in Mitchelle, Ireton et al 2021).

Both sides of the debate agree that a person must be given a fair opportunity to respond to criticism in an inquiry report before publication, as required by common law. They also agree that warning letters are effective in achieving this and improving the quality and robustness of inquiry reports. However, warning letters are not the *only* method by which to offer fair opportunities to respond to criticisms during the inquiry process nor the only means by which to clarify, check, or follow up on evidence.

The disagreement focuses on whether warning letters must be sent to *everyone* facing criticism in an inquiry report, even when they have already had a fair opportunity to respond to criticism, and on the level of detail prescribed under rule 15.

It is argued that the chair should have the discretion to decide when and how best to use warning letters, depending on an inquiry's specific circumstances.

The chair's general discretion over procedure and conduct

Section 17 of the Inquiries Act 2005 grants the chair of a statutory inquiry broad discretion to determine the procedure and conduct of an inquiry in a way that best meet its needs. The chair is required to act with fairness and with regard to the need to avoid any unnecessary cost. This deliberate flexibility allows each statutory inquiry to be set up and run in a manner that best suits its scale, subject matter, and terms of reference.

However, the Inquiry Rules 2006 include certain mandatory procedural requirements, including rules 13-15, which conflict with the chair's discretion and undermine the flexibility intended by section 17 of the Inquiries Act 2005.

Emergence of different procedural approaches

The 2024 House of Lords Select Committee on Statutory Inquiries highlighted a concerning lack of sharing of experience, procedural lessons, and best practice between inquiry teams (HL 2024 para 39). This insular approach, without shared insight and learning, has led to different procedural approaches evolving in parallel. Solicitors,

counsel, and civil servants who have worked on an inquiry often carry forward familiar procedures to subsequent inquiries. Over time, repeated use and familiarity with certain procedures can reinforce particular approaches and create resistance to change.

Statement-taking and statement-receiving inquiries

Our ongoing research has identified two distinct approaches to evidence-gathering that significantly impact views on the use of warning letters. Public inquiries are inherently inquisitorial, meaning they investigate evidence independently and pursue lines of inquiry wherever they lead (in contrast to adversarial processes, where a determination is made based on the arguments between opposing parties).

Many public inquiries adopt an inquisitorial approach from the outset, appointing a team to interview witnesses and take statements, for example the Mid Staffordshire NHS Trust Public Inquiry and Muckamore Abbey Hospital Inquiry. This enables the inquiry to ensure that witnesses focus on the terms of reference and address all matters of interest to the Inquiry, thereby minimising time and cost required to follow up on unaddressed matters (Kark 2021).

Others, such as the Chilcot Inquiry, Independent Inquiry into Child Sexual Abuse, and the Covid-19 Inquiry write to potential witnesses to ask them to produce and submit their own statements. This approach aims to reduce time and cost at the beginning of an inquiry. It does, however, introduce an adversarial element, since witnesses are more likely to provide evidence that supports their own viewpoint and position and exclude evidence that does not, including evidence specifically sought by the inquiry. This can narrow the scope of information received at that stage by the inquiry and necessitate significant follow-up work later on. A few inquiries, such as the Baha Mousa Inquiry, adopt a hybrid of the two approaches.

Empirical research is needed to assess whether statement-taking inquiries achieve overall time and cost savings, considering any additional consequential costs incurred later, including those associated with the warning letter process. Additionally, it is important to evaluate the impact of introducing an adversarial element early in the inquiry process, on participant experience, the effectiveness of evidence-gathering, and trust and confidence in the inquiry process. The potential benefits of adopting hybrid models should also be explored. The findings should be shared to inform and improve future inquiry practices.

Why statement-taking, statement-receiving and other inquiries have different warning letter requirements

When an inquiry takes its own statements, adverse evidence is put to the witness before and during witness interviews. If additional adverse material emerges later on, witnesses may be invited to provide supplemental evidence. Most individuals therefore have opportunities to respond to criticisms during interviews and oral evidence. After the report is drafted, the inquiry identifies persons who may not have had a fair opportunity to respond to criticism and sends them targeted warning letters.

For such inquiries, mandatory, detailed warning letters to *everyone* facing any explicit or significant criticism needlessly duplicate effort, delay publication, and add significant unnecessary cost.

Some inquiries have other, inquiry-specific, reasons for why warning letters are less useful. For example, during the Equitable Life Inquiry, warning letters were “generally of no use whatsoever" (Penrose, Blackthorn Chambers, 2016) as evidence and positions were already well known due to concurrent civil litigation proceedings.

Conversely, when an inquiry asks witnesses to produce their own statements, it is considerably restricted in its ability to put adverse evidence to witnesses during the evidence-gathering stage. In such cases, a detailed, comprehensive warning letter process becomes essential to ensure fairness and address any gaps or mistakes in the draft report. For such inquiries “some of the best information and submissions appear from criticised individuals at this stage of the process – i.e. when they actually know what is to be said about them” (Beer, HL Evidence 2024).

As a result, those with experience in statement-taking inquiries (or others where warning letters are less useful) often vehemently oppose the ‘wasteful’ *mandatory* and rigid requirements of the current warning letter process. In contrast, those familiar with statement-receiving inquiries strongly support its use for all individuals and organisations facing criticism in an inquiry report.

Both positions are valid in the context of their respective inquiry models, despite appearing contradictory. A discretionary process is therefore essential to provide inquiry chairs with the flexibility to tailor the use of warning letters to the needs of their specific inquiry.

Examples of criticism of the mandatory warning letter process

Sir Brian Leveson, Chair of the Leveson Inquiry stated the rule 13 process needs to be reformed as it "can be very lengthy and delay the publication of an inquiry's final report and recommendations" (HL Evidence, 2024).

Lord Penrose, Chair of the Equitable Life Inquiry: noted that responses to warning letters "merely repeated positions already well known" (Blackthorn Chambers, 2016).

Robert Francis, Chair of the Mid Staffordshire NHS Trust Public Inquiry: stated the inquiry "was extended by at least six months by having to undertake a rule 13 process" and the time and costs incurred was disproportionate to the benefit obtained from it. (HL evidence 2014 and Blackthorn Chambers, 2016).

Robert Jay, counsel to the Leveson Inquiry: stated "Rule 15 can in some circumstances… lead to unnecessary complication and an overly prescriptive approach. The difficulty again is that it is designed to cater for a whole range of circumstances" (HL Evidence, 2014).

Comparison with other jurisdictions

Ireland, Australia, New Zealand and Canada have comparative public inquiry models and have an equivalent common law requirement to ensure fairness for those who may be criticised. In all of these jurisdictions, those criticised in an inquiry report must be given a fair opportunity to respond prior to publication. However, none of these jurisdictions impose a mandatory warning letter process or prescribe the specific details that warning letters must include. Their courts have consistently emphasised the importance of maintaining procedural flexibility to allow inquiry chairs to adapt processes to the specific needs of each inquiry.

Example provisions from other jurisdictions

Section 14 Inquiries Act 2013 (New Zealand)

3) If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person—
   (a) is aware of the matters on which the proposed finding is based; and
   (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

See also Section 36 Inquiries Act 2014 (Victoria, Australia)

Chronology of UK recommendations for change

2014: The HL Select Committee on the Inquiries Act 2005 recommended revoking rules 13-15 and replacing them with a simpler, discretionary power (HL Select Committee, 2014).

2015: The Government initially rejected the above recommendation but then agreed to reconsider (Dinenage, 2015)

2016: The Treasure Committee commissioned a report on warning letters. The report produced provides a comprehensive review of the warning letter process and endorses the recommendation of the 2014 select committee to revoke rules 13-15 and replace them with a discretionary power and accompanying guidelines (Blackthorn Chambers, 2016).

2024: The HL Statutory Inquiries Committee accepted that improvements to the warning letter process are necessary but mistakenly concluded that they are possible within the existing form of the rules simply by introducing guidance (HL Select Committee, 2024).

Conclusion

Statutory inquiries are granted a broad discretion to determine their procedures, reflecting the diverse needs arising from the varying scale, subject matter, and terms of reference of UK public inquiries. The current mandatory warning letter process undermines the flexibility inquiry chairs require to tailor procedures to the specific needs of their inquiries.

Given that chairs are already bound by the common law duty of fairness and the statutory obligation to act with fairness under section 17 of the Inquiries Act 2005, a detailed mandatory process is both unnecessary and disproportionate.

Replacing it with a discretionary approach, supported by best practice guidance, will ensure that warning letters are issued only when necessary, resulting in significant time and cost savings for those inquiries where individuals have already had a fair opportunity to respond to criticism during the evidence-gathering stage.

Blackthorn Chambers, *A Review of Maxwellisation* (House of Commons Treasury Committee, HC 2016-17, 24 November 2016) para 100. Available at: https://publications.parliament.uk/pa/cm201617/cmselect/cmtreasy/maxwellisation/a-review-of-maxwellisation-24-11-16.pdf (Accessed 2 January 2025).

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DOI number: https://doi.org/10.17631/rd-2025-0001-drep