The Cost Effectiveness of Scottish Public Inquiries

Comments by the Right Hon Lord Carloway FRE

15 July 2025

General

I was once asked by the then Cabinet Secretary for Justice why judicially led public inquiries take so long and cost so much. My reply was that I did not know since they were not my inquiries, they were the Government's. That answer may seem a little impertinent, but it does explain in short compass that the Lord President, as head of the judiciary, does not have any control over these inquiries. They may be presided over by a sitting judge, whom the Lord President has recommended, but the Lord President has no jurisdiction over how they are conducted, including, importantly, how long they will take.

Given that context, it is difficult to comment on whether they are cost effective. That depends upon what they were, or are, intended to achieve and, more important, what they ultimately do achieve. In some cases, both north and south of the border, the answer to that may be "quite a lot" (eg Dunblane or Piper Alpha) or it may be "very little" (eg infected blood and trams). If the recommendations which are made by the inquiry are never acted upon, it is difficult to say that they were cost effective (eg Leveson inquiry in London) since they have not achieved anything positive.

As a generality, it is important to distinguish between court litigations, which are tightly controlled by a whole raft of procedural rules and well established practices, notably the use of written pleading which are intended to focus the issues in dispute, and a public inquiry, which is likely to have a wide ranging remit. At the outset, it is worth commenting that the Inquiry (Scotland) Rules 2007 are not really rules at all in the true sense. They may be prescriptive in certain narrow specific areas such as core participants and warning letters, but they do not set out a procedural framework for the conduct of the inquiry, notably timescales within which to achieve the objective. Rather, the received wisdom is to give the chair free rein to regulate future procedure. There are two immediately obvious problems with that. First, the chair will probably never have conducted a public inquiry before. The same may apply to the inquiry counsel and to the secretarial staff. Secondly, the chair may have very limited knowledge of the scope of the available evidence at an early stage in the proceedings.

It is all very well to allow the chair a wide discretion to determine the procedure in a given situation; each inquiry will have its own peculiarities. The reality is that each inquiry adopts its own bespoke procedure within which not only the core participants but also the inquiry counsel are keen to ensure that they have adequate time to explain their positions and to reply to any allegations made. There appears to be little incentive towards limiting the time taken other than on the occasional initiative of the chairs. Such moves may be resisted not only by the core participants on behalf of a person or institution but by counsel to the inquiry itself. It is difficult to curtail the extent of the evidence in the face of universal, and indeed internal, disapproval. Attempts to do so have generally failed and have led to fall outs between the chair and the inquiry counsel.

If economy of scale is to be achieved, two things have to be in place: first, a proper secretariat which has built up an institutional memory of how inquiries are successfully conducted; and, secondly, a proper framework of rules within which times for actions can reasonably be stipulated. These are at the core of legal procedures generally. They are not present within the public inquiry set-up.

At present, each inquiry takes time (a lot of time) to set up in terms of premises and digital services before the inquiry is able to start on its remit. The absence of set timetables is an apparent difficulty although, I confess, I know very little about why that is the case. In particular, in situations where, as is often the case, and intune with the spirit of the Rules, the scope of cross examination is severely curtailed, I do have any informed insight into why the appointed counsel to the inquiry takes so long to ingather and to present the relevant information in what is supposed to be primarily an inquisitorial exercise. That context is often undermined by one or more core participants introducing, often in the public forum, an adversarial aspect to proceedings which assumes an outcome favourable to the victims,

My experiences

I was responsible for recommending judges or retired judges to chair several Government inquiries. This became increasingly difficult over time as more and more judges came to realise that taking on a public inquiry would involve a considerable time commitment (ie years of their professional lives) with very little recognition (see eg the press criticisms of the infected blood, tram, Sheku Bayoh, Child Abuse and other inquiries).

The first inquiry which involved me was the Scottish Child Abuse Inquiry, which Lady Smith commenced in 2016 whilst still a sitting judge. At that time, there were no other sitting judges chairing inquiries; Lord Hardie (trams) and Lord Penrose (infected blood) being retired from the bench. Lady Smith was then in one of the Divisions (civil appeal courts). Given the pressures elsewhere in the court system, I asked the Government to increase the maximum number of judges permitted under section 1 of the Court of Session Act 1988 in order to cope with Lady Smith's absence. This was done by the Maximum Number of Judges (Scotland) Order 2016. This was (at the time) intended as a temporary measure until the conclusion of that inquiry. That has not yet happened, but in the meantime, Lady Smith has retired as a judge (and has thus been replaced) but continues as chair of the inquiry.

By the time of Lady Smith's appointment, Sheku Bayoh had died in police custody. Although it took some time before an inquiry was announced, this took place in late 2019. By that time, I had been asked to recommend a judge to lead this inquiry and had long since identified Lord Bracadale as willing to chair. By that time, Lord Bracadale had retired from the bench, so that his appointment did not cause the court service any operational difficulties.

Although the Child Abuse inquiry inevitably involved multiple victims and institutions, the same could not be said of the death of Sheku Bayoh. An inquiry into an unusual death and all those in custody are normally conducted at a Fatal Accident Inquiry in the sheriff court; the more significant incidents (eg the Clutha tragedy) being presided over by the local Sheriff Principal or maybe even an experienced sheriff (eg the M9 incident). For whatever reason, the Government decided that a judge led inquiry was required in Sheku Bayoh's case. The inquiry continues over five years on. I have no informed knowledge on why that should be.

The next request came with the Government's desire to establish a separate inquiry into the conduct of the COVID pandemic in Scotland. It was clear that this would involve a widespread inquiry into many facets of the institutional reactions to the pandemic. By this time (2022) it was becoming clear to both sitting and retired judges that taking on an inquiry of this nature may be a very onerous task indeed. Although I gained the impression that the Government thought otherwise, the Lord President has no power to require a judge to conduct a public inquiry. Putting matters loosely, and slightly inaccurately, that is not part of their job description. The Lord President can

deploy judges to the various courts but he cannot force a person who has been appointed as judge to undertake extraordinary work outwith the normal scope of Court of Session/High Court judging.

Although I was concerned that I may not be able to secure any suitable volunteer, I was fortunate in persuading Lady Poole, a sitting judge with considerable public law experience, to take on this task. Again, I asked the Government to increase the number of judges allowed under statute to accommodate her secondment. This was done in the Maximum Number of Judges (Scotland) Order 2022. Unfortunately, for reasons which I will not go into, Lady Poole decided to demit office as chair before the inquiry had started hearing oral evidence. This, not surprisingly, caused some consternation in Government circles even although I was able to find a suitable substitute in the form of Lord Brailsford; another sitting judge. That Inquiry, like its UK counterpart, is ongoing.

Then came the Government's desire to inquire into the construction of the Queen Elizabeth Hospital in Glasgow and the Sick Kids Hospital in Edinburgh. Although I confess to being rather troubled by having to find yet another judicial lead, in circumstances in which many judges were clearly troubled at the prospect of taking on a significant commitment in retirement, I was pleased that another retired judge, Lord Brodie, was able to undertake this. He has not had his troubles to seek with this complex construction investigation. It too is ongoing.

The next request was the El Jamel Inquiry. It is probably reasonable to say that I considered that there were no recently retired judges who could chair what ought to, but may not, be a relatively limited commitment. This time, one of our more experienced trial judges (Lord Weir) was persuaded to pick up the baton. Herein did lie an operational difficulty since he is a sitting judge and a direct replacement would need yet another increase in judicial numbers (cf below).

The final request to me came for an "Emma Caldwell" inquiry. This is, of course, the search for the reasons why the murder of Ms Caldwell in 2005 was not prosecuted at a much earlier stage; the murderer Iain Packer only being tried and convicted almost twenty years later upon evidence which appears to have been largely available not long after the murder had been committed. A problem arose here because of an expressed desire from the deceased's family's representative, without any basis in either good sense or logic, to have a judge from outwith Scotland chair proceedings. Fortunately, this was not acceded to. I had previously identified another recently retired judge to undertake this inquiry but the delays caused by the unusual request resulted in that judge deciding to do other things. A sitting judge (Lord Scott) was identified and has undertaken to conduct this inquiry. Rather like the Sheku Bayoh inquiry, this involves a single incident but with institutional involvement. It might be anticipated to last some time.

When I retired from office, I was conscious of the prospect of further requests for inquiries over the horizon. The most obvious one of these is what is referred to as the Rangers inquiry; examining the prosecution and settlement of persons involved in the liquidation of Rangers FC. I suspect that any such inquiry will require considerable time and effort to analyse the complexities of a company administration, solvency and liquidation.

Operational Matters

From an operational point of view, for a sitting judge to be seconded (effectively on a permanent basis) to an inquiry may be tolerable in the absence of an increase in the statutory limit on Supreme Courts judge numbers, provided that the Scottish Courts and Tribunal Service receive Government funding for the use of a temporary judge (ie a sitting or retired sheriff) or judges to replace the

permanent judge on the Court of Session/High Court bench. In the past, the Government has accepted this as a generality. The pressure on the Supreme Courts relates primarily to the conduct of High Court trials, and the loss of Lord Weir and Lord Scott, albeit on a temporary basis, should not therefore be underestimated. Both are particularly skilled, experienced and well respected judges.

This type of semi-permanent arrangement does have a knock on effect. A sheriff who is seconded to the High Court bench is likely to be one with particular skills and experience in criminal jury trials. His or her absence from the sheriffdom will create a skills gap. This does cause a problem since they have to be replaced from the pool of part-time (fee paid) sheriffs. As distinct from England, Scotland tries not to depend upon the use of fee paid members of the profession (ie advocates or solicitors who are not salaried judicial office holders) to fill in the gaps left by the system. This is because, in European Convention terms, the use of persons who are otherwise in private practice, and who will subsequently be appearing before the permanent judges and with their fellow colleagues at the bar, is not regarded as a good idea in terms of potential bias. There is thus a limited pool which is intended only to meet emergency situations, although that has changed somewhat since the advent of the pandemic.

The Sheriffs Principal indoubtedly have a problem with this because the available part-time (fee paid) sheriff pool is unlikely to have many persons with an equivalent skill set to those undertaking jury trials on a regular basis. The SPs are concerned about the secondment of their senior sheriffs generally for High Court work, even if this is, in any event, a modern norm as a consequence of the considerable increase in sex offences trials. An increase in the number of Court of Session judges is something which requires careful consideration. On the secondments of Lords Weir and Scott, I did not ask for an increase in the number of judges, but continued to rely on the "acting up" by fee paid sheriffs solution. This was partly in the optimistic hope that at least the El Jamel inquiry may be concluded with reasonable despatch.

I digress to observe that, although the number of full time judges is, and has for some time been, clearly inadequate to cope with the current workload in the form of sexual offences trials, I was reluctant to ask the Government to increase the maximum number of judges generally.

Conclusion

The question posed by the Convenor of the Finance and Public Administration Committee related to the impact on judicial resources. The answer is that, in relation to retired judges (eg Lady Smith, Lords Bracadale and Lord Brodie), the impact is nil. I had discontinued the use of retired judges, who had reached the stage of sitting in the appellate courts (civil Divisions), from sitting in appellate work as this was effectively "bed blocking" their younger, or at least junior, colleagues. Although retired trial judges continued to sit in trials, there were very few of them and the retired appellate judges, for the most part, did not want to undertake trial work for a variety of reasons. In relation to sitting judges (Lords Brailsford, Weir and Scott), they all require to be replaced whilst their inquiries are ongoing. Lord Brailsford has been replaced in the sense that another permanent judge has been appointed under the 2022 Order. As noted above, the services of Lords Weir and Scott will be missed, given their skills and experience. It is not correct to say that they cannot sit as judges whilst conducting their inquiries. They may do so but they are likely to be heavily focused on their inquiries. They are effectively replaced in the judicial system by the increased use of sitting or retired sheriffs as temporary judges. These sheriffs in turn are replaced in their sheriffdoms by temporary sheriffs.

In relation to the wider approach which may be taken to public inquiries, including any improvements, the first question which ought to be addressed is the identification of the

appropriate criteria upon which a public inquiry of the type under consideration is instructed. I will refrain from commenting on whether a particular public inquiry, as distinct from a Fatal Accident Inquiry, is needed in single fatality cases since whether to order an inquiry is a political decision and therefore a matter for Government and not the Lord President. Nevertheless, it is worth commenting that there are many sheriffs and sheriffs principal who are more than competent to deal with that type of case. Where there is an issue of general public importance, such as in cases of multiple deaths or injuries, the solution to the current problem remains as set out above. A set of real rules (and not those under the 2007 Order), and the development of an institutional memory by the creation of an inquiries secretariat are some of the more obvious solutions.