Note by Lord Hardie

Apart from statutory Inquiries established under the Inquiries Act 2005 ("the Act") and subject to the Inquiries (Scotland) Rules 2007 ("the Rules) there are many different types of Inquiry that may be considered to be within the category of public inquiries. These include mandatory and discretionary Fatal Accident Inquiries, non-statutory Inquiries and ad hoc Inquiries into specific incidents. An example of an ad hoc Inquiry is cited by John Sturrock KC in his answer to Question 7. He acknowledges that it was unnecessary to undertake the forensic review that might be expected in some statutory public inquiries. It is not difficult to understand why that should be so. The matter under investigation by Mr Sturrock appears to have been a discrete issue of allegations of bullying and harassment in NHS Highland. I acknowledge that a statutory Inquiry would have been inappropriate in that case and would certainly not have provided value for money, if one takes into account the cost of establishing the Inquiry, appointing Counsel and Solicitor to the Inquiry as well as the Secretariat. Equally it would be inappropriate to appoint an individual to undertake a forensic inquiry without the support of an Inquiry Solicitor, Inquiry Counsel and a Secretariat to assist the individual in establishing the facts that led to the matter of public concern.

At the stage of addressing an issue of public concern Scottish Ministers should consider all of the available options as well as statutory inquiries and should select the model that will address the issue most appropriately and most effectively.

Statutory and non-statutory public inquiries

I have assumed that the Committee is concerned principally with statutory and non-statutory public inquiries, although I would expect public bodies commissioning investigations such as that mentioned above relating to NHS Highland to expect the ad hoc inquiry to be delivered on time and within budget. That task will be much simpler in cases confined to a restricted issue dealing with current complaints.
In her submitted response Dr Ireton observes that in Scotland non-statutory inquiries remain an option but Scottish public inquiries are predominantly statutory. The principal difference between them is that in a non-statutory inquiry, the chair does not have the statutory powers of compelling witnesses to give statements and to attend as witnesses at public hearings or of compelling the production of documents necessary to fulfil the terms of reference of the inquiry.
I experienced the inadequacies of a non-statutory inquiry In the Edinburgh Tram Inquiry (ETI). The then First Minister announced that the ETI would be a non-statutory inquiry, that I would chair it, that the terms of reference had been agreed and that he looked forward to a "swift and thorough inquiry". The statement of the then First Minister merely raised expectations of the public about the early conclusion of the inquiry without the public realising that the statement had been

made without any knowledge of what would be involved in undertaking an independent, transparent and thorough inquiry into the scandal of the Edinburgh Tram Project which was a matter of significant public interest. I was not asked to comment on the possibility of concluding a swift and thorough investigation that would satisfy the agreed terms of reference.

Although I had been consulted about the terms of reference, I was not asked for my views about the creation of a non-statutory inquiry. As it transpired the creation of a non-statutory inquiry prevented me from accessing material held by the City of Edinburgh Council and resulted in the refusal of key witnesses to co-operate with the inquiry (See my letter dated 30 October 2014 in Volume 4, Appendix 2 of the ETI Report). That letter also highlighted that section 37 of the Act provided immunity from suit to the chair, solicitor to the inquiry, counsel to the inquiry and anyone engaged to provide assistance to the inquiry. It also afforded witnesses the same protection against actions for defamation as exists in court proceedings. Those safeguards were not available in a non-statutory inquiry.

In contrast the then government accepted the recommendation of the 2024 Report of the House of Lords Committee ("2024 Committee") entitled "Public Inquiries: Enhancing public trust" that non-statutory inquiries could be an "effective and more flexible model" and "may achieve [their] terms of reference more swiftly and at lower cost".

On balance the committee may wish to recommend the retention of both options, recognising the perceived strengths of each of them and to leave it for Scottish Ministers to decide in each case which is the more appropriate form of public inquiry.

Budget and Timescale

Prior to my appointment there was no discussion about timescale or any agreed budget. In fairness, it would have been difficult to agree a timescale or budget without being aware of the approximate number of prospective witnesses who had been involved in the project from whom statements might be required or the volume of documents to be considered. That does not mean that there was no oversight of the ETI. From the outset of the Inquiry the Secretary liaised with the sponsor department, agreed an annual budget, provided monthly returns and reported on progress.

That may be the only realistic solution when one is dealing with an event that lasted several years, involving the Inquiry in assessing an unknown volume of material and identifying and interviewing an unknown number of witnesses. The alternative is to fix a budget and timescale in the likely event that either or both will need to be

revised upwards as the investigation progresses. This approach might undermine public confidence in the Inquiry.

Costs of a Public Inquiry

Before leaving the question of budgets there is one matter that I raised in my Report of the ETI. Following my appointment as chair of ETI, I had to identify suitable premises with the assistance of the Solicitor to the Inquiry, whom I had appointed immediately following my appointment, and other civil servants unconnected with the ETI. This issue is addressed in chapter 2 of my Report. I was offered and accepted the use of premises that were surplus to requirements of Creative Scotland. The rent was paid by the Scottish Government and the office premises had the appearance of a modern office with adequate IT connections. The appearance was deceptive and for almost 6 months staff at ETI struggled with inadequate IT connections which frequently failed. The effect on staff morale was significant and there was a considerable waste of time and money during that time. In the Report I refer to the fiasco of Vodafone failing to install a cable on different occasions for different reasons and failing to link the portals to a newly installed cabinet.

Apart from accommodation it was necessary to appoint a Secretary whose early tasks included staffing the Inquiry office with document coders, an IT manager and others. Many of the staff were agency workers while others were civil servants electing to transfer to ETI. Because of civil service procedures the delay in civil servants, including the Secretary, moving to ETI resulted in delay to the initial progress of the Inquiry. The process of setting up the Inquiry with accommodation, staff and other resources gave the impression of our reinventing the wheel. There was little or no guidance to assist with this stage of the Inquiry. My first recommendation of 24 in my Report was that “Scottish Ministers should undertake a review of public inquiries to determine the most cost-effective method of avoiding delay in the establishment of an inquiry, including consideration of establishing a dedicated unit within the Scottish Courts and Tribunals Service [SCTS] and publishing regularly updated guidance for people involved in the establishment and progress of public inquiries”

That recommendation was similar to a recommendation in the 2014 Report of a House of Lords Committee on the post legislative scrutiny of the Inquiries Act 2005 (“2014 Committee”). The then government rejected that proposal, arguing that such a unit was “not appropriate or necessary….given the relative infrequency of the establishment of new inquiries and their duration”. Instead it highlighted that the Cabinet Office and Ministry of Justice provided support to departments in establishing new inquiries. Rather than creating a new unit to share best practices, it proposed strengthening existing Cabinet Office processes and forming a

practitioners' forum to facilitate regular sharing of best practices. A dedicated inquiries unit was subsequently established within the Cabinet Office in 2019. The committee may wish to consider the proposal to include such a unit within SCTS. The infrequency of the creation of public inquiries should not preclude the creation of the unit. Members of the unit could perform other duties within SCTS when they were not involved in establishing an inquiry. The existence of such a unit within SCTS would also remove any perception of a conflict of interest when the sponsor department was involved in the project that is the subject of scrutiny, as occurred in ETI. The sponsor department was the Department of Transport whose officials had been involved in the tram project.

The 2024 Committee Report also recommended the formation of a Joint Parliamentary Committee to monitor government responses to inquiry recommendations and hold the government to account for implementing accepted recommendations.

The committee may wish to consider a similar approach to allay perceptions that Reports of public inquiries sit on ministers' shelves gathering dust and result in concerns that the expenditure incurred on the relevant public inquiry was wasted public money.

Net costs of an Inquiry

Wherever possible and in the interests of economy regarding public expenditure I used resources that had already been funded by the public purse. These included the cost of accommodation which was vacant and where the Scottish Government was the tenant and had sub-let it to a government department or agency. It also included the salaries of permanent civil servants who had transferred to the ETI and whose posts in their former department were not filled. Although these costs were added to the costs of the ETI as an accounting exercise, the public purse did not incur any additional expense. I am aware that not all public inquiries have adopted a similar approach. For example some may use accommodation that is not already available within the Scottish Government's portfolio of leased but vacant property; some may also use more staff recruited from outside the civil service. In these examples the costs will be included in the costs of the inquiry and will be additional expenditure incurred by the public purse.

As I explained in my video release of the ETI Report, if the expenditure on resources already funded by the public purse was deducted from the cost of ETI, the cost at that time would have reduced from £13.1 million to £8.7 million.

That was the reason for Recommendation 4 of the ETI Report noted below:

“In reporting the cost of a public inquiry Scottish Ministers should report its net cost to the public purse, after discounting expenditure already incurred on accommodation, staff and other resources, as well as the total cost appearing in the accounts of the sponsor department.”

This recommendation would result in the public disclosure of both the total cost of £13.1 million and the discounted cost of £8.7 million. Such an approach would enable comparisons to be made with other inquiries who had chosen not to use available assets already funded by the public purse and would assist any assessment of value for money.

Inquisitorial nature of a public inquiry

Unlike judicial proceedings that are adversarial in our system, the conduct of a public inquiry is inquisitorial. In some of the responses there is a concern expressed that proceedings at public inquiries are often adversarial and the involvement of lawyers in the redaction of material results in an increase in the costs of the inquiry.
The concerns about proceedings becoming adversarial should be allayed if the chair of the inquiry applies the spirit, as well as the letter, of Rule 9 of the Rules, the relevant sections of which are reproduced below:

9.—(1) Subject to paragraphs (2) to (5), where a witness is giving oral evidence at an inquiry hearing, only–

(a) the inquiry panel;

(b) counsel to the inquiry;

(c) if counsel has not been appointed, the solicitor to the inquiry; or

(d) persons entitled to do so under paragraphs (2) to (4),may examine that witness.

(2) Where a witness, including a core participant, is being examined at an inquiry hearing, the chairman may direct that the recognised legal representative of that witness may examine the witness.

(3) Where–

(a) a witness has been examined at an inquiry hearing by counsel to the inquiry, or by the inquiry panel; and

(b) that witness' evidence relates directly to the evidence of another witness,

the witness to whom the evidence relates or the recognised legal representative of that witness may apply to the chairman for permission to examine the witness who has given oral evidence.

(4) A core participant or the recognised legal representative of a core participant may apply to the chairman for permission to examine any witness giving oral evidence.

(5) When making an application under paragraph (3) or (4), the core participant or recognised legal representative must state–

(a) the matters or issues in respect of which a witness is to be examined;
(b) whether the examination will raise new matters or issues; or
(c) where no new matters or issues are likely to be raised, reasons why the examination should be permitted……

It will be seen that the chair is able to limit, and even exclude, the cross-examination of witnesses that would be allowed as an entitlement in adversarial proceedings. To reinforce this Rule I issued Inquiry Direction No 10 in advance of the public hearings. This required core participants to give prior notice to me of questions that they wished to raise with any witness and to explain the significance of the proposed questioning to the remit of the Inquiry. I determined whether such questions were of assistance to my remit and, if they were, asked Counsel to the Inquiry to include these questions in his examination of the witness. Only if it was considered to be more efficient was the legal representative of a core participant permitted to ask questions of a witness in relation to the points approved by me.

Rule 10 of the Rules permits legal representatives of core participants, or core participants themselves who do not have a legal representative, to make opening and closing statements “unless the chairman directs otherwise”. I issued Procedure Direction No 7 advising participants that there would be no opening statements. That decision avoided a considerable amount of the time taken at public hearings as well as the time and effort by legal representatives, and consequent saving of expenditure, and was in keeping with the practice in Scotland of starting proceedings, except civil jury trials, with the evidence of the first witness.

The committee may wish to consider recommending the amendment of Rule 10 to exclude the opportunity of anyone making an opening statement. Such an amendment would result in a uniform practice that resulted in significant savings and would not leave the question for consideration by the chair of each inquiry.

Warning letters

Before leaving the Rules some respondents have criticised the requirement to issue warning letters to persons or organisations who may be criticised in the Report (referred to as the “Maxwellisation Process” in Mr Mullin’s response). The relevant Rule is Rule 12 reproduced below for the convenience of the committee:

12.—(1) The chairman may send a warning letter to any person where the chairman considers that–
(a) the person might be, or has been, criticised during the proceedings at the inquiry;
(b) criticism of the person may be inferred from evidence given during the proceedings at the inquiry; or
(c) the person may be criticised in the report (and any interim report).

(2) The warning letter must–

(a) state what the criticism or proposed criticism is;

(b) contain a statement of any facts that the chairman considers may substantiate the criticism or proposed criticism;

(c) refer to any evidence or documents which may support those facts;

(d) invite the person to make a written statement if the person wishes; and

(e) note that the information is subject to confidentiality restrictions.

(3) The chairman may send copies of any evidence or documents referred to with the warning letter, if the chairman considers it appropriate to do so.

(4) Where the warning letter is sent to a person by virtue of paragraph (1)(b)–

(a) paragraph (2) does not apply; but

(b) the letter must refer to the evidence or documents from which the chairman considers criticism could be inferred.

(5) Paragraphs (2) to (4) are subject to any restrictions on the disclosure of evidence, documents or information–

(a) imposed under section 19 (restrictions on public access etc.) of the Act;

(b) applying by virtue of section 23 of the Act (risk of damage to the economy); or

(c) resulting from a determination of public interest immunity.

(6) The recipient of a warning letter may disclose it to the recipient's recognised legal representative.

(7) The inquiry panel must not include any significant or explicit criticism of a person in the report (and in any interim report) unless–

(a) the chairman has sent that person a warning letter; and

(b) the person has been given a reasonable opportunity to respond to the warning letter.

It will be seen that Rule 12(7) prohibits the inclusion of any criticism of a person unless the chair has sent that person a warning letter and the person has been given a reasonable opportunity to respond to the warning letter.

Where numerous people are the subject of criticism, as occurred in ETI and will be apparent from the final Report, this process takes a considerable amount of time. Each letter must be framed by reference to the final draft Report and must specify the proposed criticism and include a reference to evidence or documents on which the chair relies for the proposed criticism. As I mentioned in my video release of the Report there were numerous warning letters and responses, many of which were substantial with one extending to several hundred pages. Each of these responses

had to be considered carefully and adjustments made to the Report to reflect any modification that I felt was justified in light of any response.

This is undoubtedly a requirement that extends the time of the Inquiry and increases the cost. If the committee considered that the requirements of Rule 12 should be removed, it would need to consider what alternative provision should replace it to ensure that persons or organisations subject to criticism are afforded an opportunity to refute or to mitigate that criticism.

Professor Cameron's submission

In relation to the experience of Professor Sandy Cameron concerning expensive lawyers becoming involved in redaction of documents, that is again a matter that the chair can prevent. An aggrieved person may wish redactions to be made to documents in the possession of the Inquiry or may even produce redacted documents. Both situations arose in the ETI. Where redacted documents are submitted to the Inquiry the chair should refuse to accept them and should require the person, using the powers under section 21 of the Act if necessary, to produce an unredacted copy and to seek a ruling that redactions should be made to it. Only the chair may redact documents if satisfied that there is an issue of privilege or confidentiality. There were several requests by core participants to redact documents. In each case I determined the application on the basis of written representations and balanced the interests of individuals against the public interest in having the material available to assist me in fulfilling my terms of reference. There was no additional cost to the Inquiry because I considered the written submissions in the course of a day when I was working at the Inquiry offices. With one exception, my decisions were accepted by the person seeking redaction. The exception was Bilfinger Berger, the contractor responsible for constructing the tramline. They petitioned the Court of Session to review my decision to refuse their application for redaction of material that they claimed was commercially sensitive. The Court refused the Petition. However, Bilfinger then appealed that decision to the Inner House (the appeal court) of the Court of Session. The appeal was unsuccessful. They advised the Solicitor to the Inquiry that they wished time to consider an appeal to the Supreme Court of the United Kingdom and an undertaking was given that we would not release the unredacted document until any appeal was determined or they intimated that they would not appeal. In the event they decided not to appeal and the unredacted document was released.

Although the litigation delayed the progress of the Inquiry it did not otherwise increase the cost of it because the Court of Session awarded expenses to ETI against Bilfinger for the original hearing and the appeal hearing.