



The Right Honourable Lord Pentland  
Lord President

Parliament House  
Parliament Square  
Edinburgh, EH1 1RQ

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Kenneth Gibson MSP  
Convenor  
Finance and Public Administration Committee  
The Scottish Parliament  
Edinburgh

*Dear Mr Gibson,*

### **Cost-effectiveness of Scottish public inquiries**

Thank you for your letter of 7 July 2025 in which the Committee asks for my views in connection with its inquiry. I am most grateful for the Committee's invitation to explain my role in the process of appointment of judicial chairs to public inquiries. It affords a welcome opportunity to bring clarity and dispel any misconceptions as to what actually happens.

The Committee has already received written evidence from one of my predecessors, the Rt. Hon. Lord Gill. It also sought views from my immediate predecessor, the Rt. Hon. Lord Carloway, and I enclose a note on his experiences of the process which he has asked be sent on his behalf. I fully endorse the points they make. Although I took office as Lord President earlier this year, it is perhaps telling that I already have experience of the process in the context of the appointment of Lord Scott to chair the Emma Caldwell inquiry.

### **Context in which the judiciary operates**

Before I turn to the process, it is important I put judges as a cohort into context. Judges are appointed by His Majesty the King for the purpose of deciding court cases and presiding in jury trials. His Majesty appoints judges to ensure their absolute independence from any outside influence – which includes being independent from each other. They are recommended for appointment by the Judicial Appointments Board for Scotland, which is independent of the judiciary, government and Parliament, through a rigorous and lengthy selection process that assesses their ability to perform a judicial role. Their remuneration is set by the independent Review Body on Senior Salaries, more commonly referred to as the Senior Salaries Review Body, for

the purpose of attracting the best talent for the job. Those who apply for judicial roles, in turn, do so because they have a singular drive and ability to be a judge.

As head of the judiciary, the Lord President has a statutory duty to ensure the efficient disposal of business in the Scottish courts. However, although head of the judiciary, the Lord President is in no sense a judge's employer and therefore cannot order a judge to do anything except in the limited context of the organisation of court business or disciplinary proceedings.

The power to select and appoint the chair of a public inquiry rests solely in the hands of Ministers. It is not within the power or authority of the Lord President to compel a judge to become the chair of a public inquiry. The decision to accept appointment as chair of a public inquiry is for the judge alone. Where Ministers desire a judge to chair an inquiry, the most the Lord President can do is assist Ministers in identifying whom they might wish to approach for the role and put them in touch with each other.

### **The process**

Usually, government will make contact with the Lord President, in his capacity as head of the judiciary, indicating it is minded to establish a public inquiry, that it wishes to appoint a judge to chair it and of the desired judicial seniority. The Lord President may at this point express a view on whether appointing a judge is the best course of action and whether the desired seniority is necessary for the particular task.

If Ministers consider that it is the best course of action, the Lord President gives thought as to how best to invite expressions of interest. Chairing a public inquiry requires not only a certain skill set and level of experience but also a degree of knowledge and interest in the inquiry subject-matter. The pool of suitable judicial candidates is usually very small. The Lord President may approach individual judges and ask if they are interested. Alternatively, the Lord President may ask all judges of the desired seniority if they wish to express interest.

Should a judge express interest, the Lord President will let Ministers know who the interested judge is and leave it to them both to take forward discussions directly.

An interested judge may informally seek the views of the Lord President or colleagues who have chaired or are chairing other inquiries as part of considering if they wish to take on the role. Like my predecessors, I consider the chairing of a public inquiry to be a rewarding experience professionally notwithstanding the challenges involved.

After exploratory discussions have taken place between both parties, the Lord President is advised whether Ministers and the judge have agreed to the judge's appointment as chair of the public inquiry. I have no issue with the process as it currently stands. For my part I am happy to attempt to assist Ministers in their task of finding a suitable chair.

## **Practical considerations – the resourcing challenge**

Where the very real challenge arises for the Lord President and the court system is when an interested judge agrees to be appointed as chair. The knock-on impact is substantial, particularly at the present time.

If a judge is to be appointed to chair a public inquiry it is very unlikely they will be able to continue to sit in court cases during the appointment. Only a public inquiry of unusually limited scope and scale would allow a judge to be able to continue judicial duties while running and hearing an inquiry – and even then, they would only be able to progress a small percentage of the case load they would otherwise have handled.

If the judge is a senior judge – i.e. a judge of the Court of Session and High Court of Justiciary – then there are only 36 of those in the country, due to a statutory cap on numbers. In a typical year, such a judge would sit for 205 days. That translates to approximately 34 criminal trials. There are currently three serving senior judges chairing public inquiries. That amounts to nearly 10% of the sitting days available to deal with civil and criminal cases of the most serious kind; cases which the public has every right to expect will be dealt with reasonably promptly.

To put this in context, even without judges departing to sit on public inquiries, there is intense pressure on – not only, but especially – the senior judiciary. This is due to the far higher and sustained volume of serious criminal cases that was emerging just before the pandemic and which has since accelerated. It is driven by laudable policy changes and additional resource being provided to the police and Crown Office which has created an increase in the number of very serious cases coming to court.

For example, the number of pending High Court trials is on track to double this year compared to 2019/20 (despite increasing the number of High Courts operating from 16 to 22). Without more judges and increased funding for SCTS to support the running of courts, business gets stuck, waiting periods grow significantly and victims' and witnesses' confidence in the system may erode. SCTS projects that the number of new cases being registered is only going to increase; indeed, case volumes for the first quarter of 2025 have already exceeded original projections.

It is not well appreciated that that same cohort of senior judges also have sitting commitments on a number of appellate tribunals, including the Employment Appeal Tribunal, the Competition Appeal Tribunal and the Upper Tribunals which takes them away from sitting on court cases. The Lord President also has to comply with legislation that requires judges to participate in other public bodies or perform other non-judicial functions. Bearing in mind that at any given time some of the cohort will also be writing judgments or may be ill, somewhere around the equivalent of 3½ of the 36 senior judges are, in reality, not available to sit on court cases. Appointing a judge to a public inquiry, therefore, has a disproportionate impact on an already over-stretched resource as far as the core role of sitting on court cases and presiding in jury trials is concerned.

The usual way to address this challenge has been to seek from Scottish Ministers a change to the statutory limit on the number of senior judges to allow a replacement judge to be recruited. This is done by Order in Council. I am grateful that Ministers recognise there is an impact on the system when a judge chairs an inquiry.

It is, however, not a magic wand. Replacing an experienced judge with a newly appointed one inevitably brings an experience gap – and those appointed to inquiries tend to be our most experienced. The Judicial Appointments Board for Scotland has to undertake a recruitment exercise to fill the vacancy, which takes time. I work closely with the Board and it already has a recruitment programme so, even where it can undertake a recruitment exercise for a senior judge at short notice, it may mean that other programmed recruitments to fill other judicial roles have to be postponed, exacerbating shortages elsewhere in the system. Utilising less senior judges to sit as temporary judges in the High Court of Justiciary or Court of Session is also far from a sustainable solution as it simply removes the best talent from the lower courts, in turn displacing the resourcing challenge to the lower courts.

It is a matter for Ministers as to whether they wish a judge to chair a public inquiry but I would also echo the point made by my immediate predecessor: a judge is not always necessary or, in some cases, the right fit to chair a public inquiry but, if one is, there is considerable expertise not just among the senior judiciary but among sheriffs principal and sheriffs. They routinely chair Fatal Accident Inquiries within the structure of the governing legislation and do so efficiently and very effectively. The point I make above, about the impact on judicial resourcing of a senior judge being appointed to chair a public inquiry, obviously also applies as regards sheriffs and sheriffs principal.

I trust this is of assistance and I will follow the Committee's work with interest.