Law Society of Scotland

Inquiry Response

Finance and Public Administration Committee inquiry into the cost-effectiveness of Scottish public inquiries

May 2025

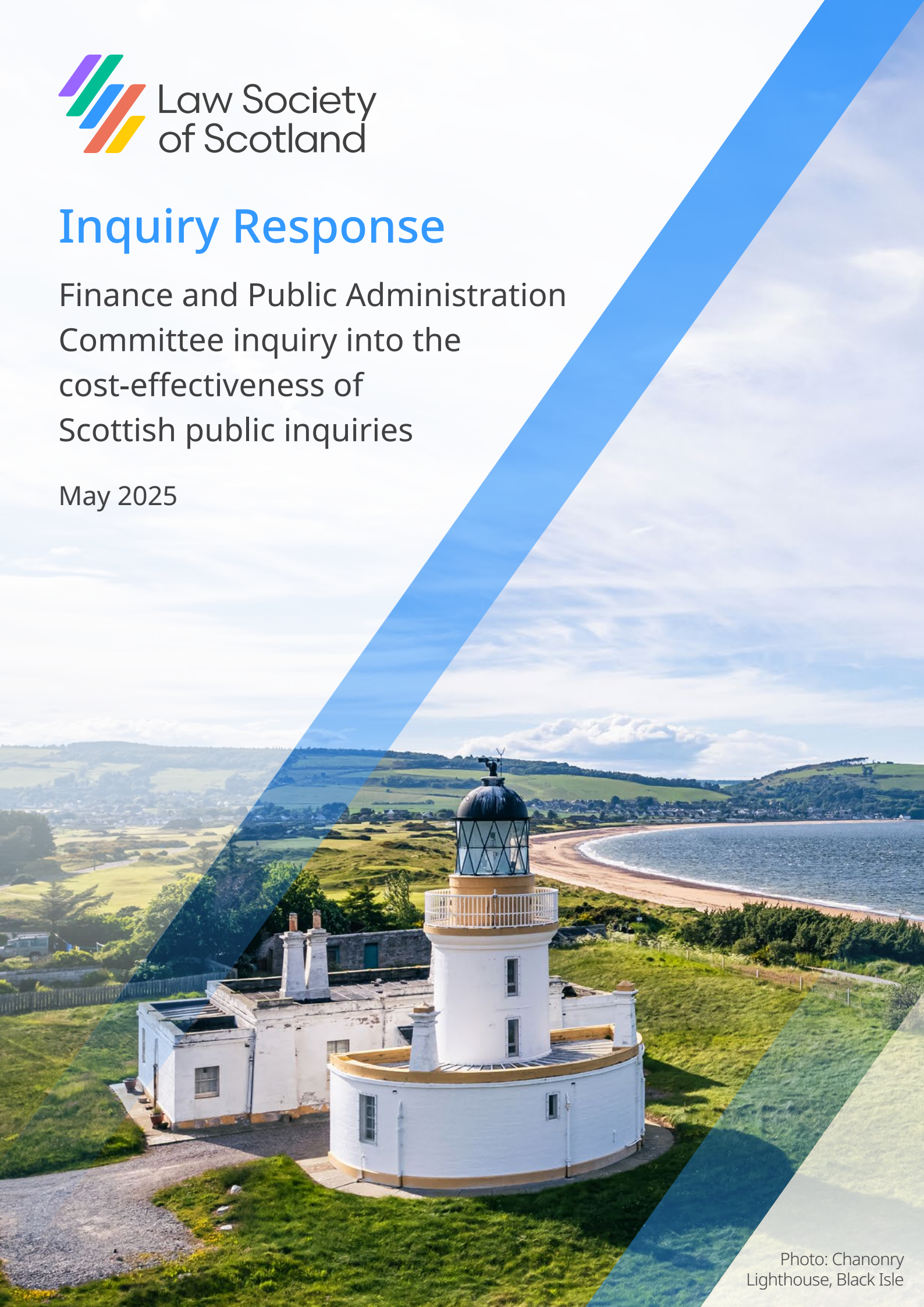

Photo: Chanonry Lighthouse, Black Isle

Law Society of Scotland

Finance and Public Administration Committee inquiry into the Cost-effectiveness of Scottish public inquiries

May 2025

Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society. Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Committee's inquiry into the Cost-effectiveness of Scottish public inquiries. We have the following comments to put forward for consideration.

General Comments

Introductory Comments

Whilst most Inquiries in Scotland are carried out under the *Inquiries Act 2005* some take place under ministerial or parliamentary authority. Statutory Inquiries are longer and can be more expensive. An Inquiry which was Ministerial in origin and approved by the Parliament was the Bonomy Report of the Infant Cremation Commission which was carried out by Lord Bonomy: Report of the Infant Cremation Commission - June 2014 .This Inquiry was achieved with a small team of administrators. Lord Bonomy met the affected families and produced 64 recommendations which were accepted by the Scottish Ministers and implemented by the Burial and Cremation (Scotland) Act 2016. It is worth bearing in mind that the Inquiry was commissioned in April 2013 and reported in June 2014.

The House of Lords Statutory Inquiries Committee was appointed by the House of Lords on 24 January 2024 "*to consider the efficacy of the law and practice relating to statutory inquiries under the Inquiries Act 2005*" and published its report Public inquiries: Enhancing public trust on 16 September 2024 (the 2024 Report).

The Committee identified that "*There are broadly two main types of public inquiry. Statutory inquiries are established with the authority of a specific Act. This is normally the Inquiries Act 2005 but could also be one of a small number of other statutory provisions, which vest ministers with the power to establish an inquiry in response to a specific set of circumstances…There is a second group of inquiries, often referred to as "non-statutory inquiries", which include independent departmental reviews, independent panels and ad hoc inquiries. They are not set up under the authority of an Act of Parliament, and their chief distinction from statutory inquiries is that they do not have the power to compel the production of evidence.*"

The Inquiries Act 2005 applies in England, Wales, Scotland and Northern Ireland and empowers UK, Scottish, Welsh and Northern Ireland Ministers to cause an inquiry to be held.

Since 2005 the following Inquiries have taken place in Scotland:

a. The Stockline/ICL Joint Public Inquiry (established 2004)
b. The Penrose Inquiry (infected blood products causing Hepatitis C and HIV) (established 2009)
c. The Vale of Leven Hospital Public Inquiry (C-difficile) (established 2009)
d. The Edinburgh Tram inquiry (established 2014)
e. Scottish Child Abuse Inquiry (established 2015)
f. Sheku Bayoh Inquiry (established 2019)
g. The Scottish Hospitals Inquiry (ongoing – Queen Elizabeth University Hospital, Glasgow and Royal Hospital for Children and Young People, Edinburgh)] (established 2020)
h. Scottish Covid 19 Inquiry (established 2022)
i. Inquiry into Professor Eljamel (established 2023)
j. The Emma Caldwell Inquiry (established 2024)

Cost-effectiveness of Scottish public inquiries – Call for Views Questions

1. How effective is the current model of public inquiries in Scotland, and to what extent does it deliver value for money?

Our Comment

It is difficult to assess the effectiveness of the current model unless parameters or goals are set in the ToR which provide for a means to make such an assessment. We agree with the 2024 Report which asserts at paragraph 13:

"The decisions taking during the establishment of an inquiry are key to its subsequent conduct and therefore its overall efficiency and effectiveness. There are examples of public inquiries that have had to be re-constituted because of the decisions taken during the early stages of establishing the inquiry. "

Section 1 of the 2005 Act provides that Scottish Ministers (and Ministers of the other administrations in the UK) have significant discretion in causing an Inquiry to be constituted:

"A Minister may cause an inquiry to be held under this Act in relation to a case where it appears to him that—:

(a) particular events have caused, or are capable of causing, public concern, or

(b) there is public concern that particular events may have occurred."

The most wide-ranging and complex public inquiry which has taken place in Scotland is the Scottish Covid 19 Inquiry.

Preparatory work for the establishment of the Inquiry was well planned, for example it is clear from the letter from the then Deputy First Minister John Swinney to the then chair of the Scottish Covid 19 Inquiry, Hon Lady Poole dated 14 December 2021 that the Scottish Government had undertaken consultation prior to announcing the Inquiry. The letter refers to "public engagement on a draft COVID-19 Inquiry Establishment Aims and Principles paper took place during August and September (2021)." The letter also refers to the Government engaging "regularly over recent months with family groups, including those who have been bereaved." and to the publication of an analysis report of the engagement: Scottish COVID-19 Inquiry: Analysis of the public and stakeholders views on the approach to establishing the public inquiry - gov.scot. Finally, the Deputy First Minister thanked Lady Poole: "for the discussions the First Minister and I have been able to have with you in preparation for the role.".

That letter also identifies certain issues which the Government consider important in the holding of the Inquiry, respect for human rights, pursuing the Inquiry in an inclusive and fair way and the need to report as quickly as is practicable. The Government also recognised the following essential aspects of the Establishment phase: "recruiting an inquiry team and putting in place premises and infrastructure…planning for the next stage of the inquiry, the investigatory stage including commissioning research and a period of reflection on the Terms of Reference (ToR) (which are set by Scottish Ministers).

In reply, Lady Poole said: "The inquiry will work independently to establish the facts in an open and transparent way in order to determine what lessons can be learned for the future. There is a great deal to be done in a short space of time. I will continue to give considerable thought as to how best to conduct the inquiry to ensure it fully achieves its aims, including a careful and thorough examination of the Terms of Reference.": Scottish COVID-19 Inquiry - gov.scot.

The ToR covered 12 areas of investigation, each being a strategic element of the handling of the pandemic, to identify lessons to be learned and recommendations as soon as practicable: Covid Public Inquiry - gov.scot. Furthermore, the Scottish

Government also committed to working with the UK Government to develop the approach to the UK-wide inquiry and expected the chair of the Scottish public inquiry to coordinate with the chair of the UK-wide one: UK Covid-19 Inquiry.

The terms of reference for the Scottish Covid-19 inquiry were set out on 14 December 2021 and revised on 9 June 2022. The Hon. Lord Brailsford replaced the Lady Poole as Chair of the Scottish COVID-19 Inquiry on 28 October 2022. Amended terms of reference also come into effect on 28 October 2022.

The UK Covid-19 Inquiry Chair, Rt Hon. Baroness Hallett DBE was appointed in December 2021. Following a public consultation, the Chair wrote to the Prime Minister to recommend changes to the draft Terms of Reference. The final Terms of Reference were received in June 2022.

The key to effectiveness of any public inquiry depends significantly upon the preservation and availability of relevant information.

The UK and Scottish Covid Inquiries have demonstrated the governmental use of WhatsApp, other social media and data. The deletion of this data as part of the public record means that such material will not be available to the Inquiries. This will reduce the efficacy of those Inquiries and unless the deletion of such data is prohibited by law of future Inquiries too.

2. Is there sufficient transparency around the purpose, remits (including any extensions), timescales, costs and effectiveness of public inquiries and what, if any, improvements are required?

Our Comment

The example of the Scottish Covid 19 Inquiry pre-establishment process gives some insight into the extent to which there is transparency around the purpose and remit of an inquiry.

It is more difficult to assess cost in advance – there may be a corelation between the length of the Inquiry and its cost. Inquiries dealing with complex issues may also be longer and consequently more expensive than those which do not. For example, on 1 September 2024:

a. the Scottish Child Abuse Inquiry (established 2015) had cost £85m,
b. the Sheku Bayoh Inquiry (established 2019) had cost £20.1m
c. the Scottish Hospitals Inquiry (established 2020) had cost £19.2.
d. the Scottish Covid 19 Inquiry (established 2022) had cost £26.1 Scotland's public inquiries have cost nearly £200m - BBC News

It is important to note that the final cost figures for Inquiries do not include the costs to government departments, core participants or other public bodies. They have to bear their own expenses, including instructing counsel, solicitors and officials.

As the House of Lords Select Committee on the Inquiries Act 2005 stated in its 2014 Report: *The Inquiries Act 2005: post-legislative scrutiny* : "A major cause of the unnecessary length and cost of inquiries has been that the secretariat of every new inquiry has had to start from scratch working out details of appointment of staff, procurement of office premises and a venue for public hearings, establishing a website, preparing budgets, procurement procedures, arrangements for electronic handling of documents, transcripts of evidence, and many other basic matters. As a result, some inquiries have bought new custom-made IT systems costing millions of pounds more than the systems used by other inquiries of comparable length." Microsoft Word - Inquiries Act 2005 report FINAL (page 7 and see paragraphs 181-193).

Ways to obviate such costs could be considered such as developing, in advance of any Inquiry being commissioned, a "bank" of appropriately skilled people to staff an inquiry, creating protocols for the development of websites and IT requirements, accounting practices and handling of evidence and documents. Having an effective website is as Lord Gill said to the post legislative scrutiny Inquiry "is also a huge benefit in a well-run inquiry. It is a medium of communication with the parties and it also enables everything to be on the record." (Q198).

These preparations could be available for statutory and non-statutory Inquiries alike and could be deployed swiftly and economically.

3. Are the current legislative framework and decision-making processes for establishing public inquiries adequate, and what, if any improvements are required?

Our Comment

The current legislative framework for statutory inquiries includes the Inquiries Act 2005. Inquiries must also comply with procedural rules, which are set out in The Inquiry Rules 2006. The rules apply to all inquiries established by UK Ministers. Consequently, they apply to inquiries set up by UK ministers, even where the inquiry is based in one of the devolved areas. The Inquiries (Scotland) Rules 2007 were also made by the Scottish Ministers under powers in section 41 of the 2005 Act. The basic legislative

framework is adequate but the Act having been the subject of reviews in both the UK and Scottish Parliaments is clearly in need of some amendment to improve the way in which Inquiries work.

The 2024 Report made a number of recommendations which touch on effectiveness therefore in setting up an inquiry, Ministers should consider:

a. statutory and non-statutory inquiry formats, and whether inquiries should be judge-led or non-judge/expert led, with either a single chair or a panel, on a case-by-case basis;
b. where appropriate, consulting with and involving inquiry victims or survivors on an inquiry's terms of reference, and provide guidance to those setting up inquiries on options for involving those groups;
c. including an indicative deadline for the final inquiry report in the terms of reference (with ministerial approval to extend the deadline); and
d. including a requirement that inquiries provide regular, public updates on their work and consider publication of interim reports (particularly where the inquiry is likely be lengthy).

There are issues in the legislation which the Joint Committee on Human Rights raised during the passage of the bill leading to the 2005 Act. These include compatibility with ECHR of the power of ministers to issue restriction notices (section 19(2)(a)), to withhold material from publication (section 25(4)) and to withdraw funding from the inquiry (section 39(4) and (5)). In the last 25 years there may have been changes in understanding about the ECHR and possible decisions of the ECtHR which would allow for a re-examination as to whether these provisions should remain in the 2005 Act.

Furthermore, the Act provides Ministers with wide discretion to commission an Inquiry but there is no provision to require Ministers to explain why they did not commission an Inquiry on a matter of public concern. This should be remedied if the Act is to be amended.

4. Are the processes for setting and monitoring costs for public inquiries adequate? What measures should be put in place at the establishment of a public inquiry to ensure value for money and prevent time and cost overruns?

Our Comment

As regards costs there are statutory provisions affecting costs in the 2005 Act. For example, under section 17(3): "In making any decision as to the procedure or conduct of an inquiry, the chairman must act with fairness and with regard also to the need to avoid any unnecessary cost (whether to public funds or to witnesses or others)."

Section 19(Restrictions on public access etc) also engages controls on delays and costs. Under this section restrictions may be imposed on attendance at an inquiry or disclosure or publication of any evidence given or provided to an inquiry. A restriction notice must specify such restrictions as the Minister or chairman considers to be conducive to the inquiry fulfilling its terms of reference or to be necessary in the public interest. The Minister or Chairman must have regard under section 19(4)(d) to "the extent to which not imposing any particular restriction would be likely— (i) to cause delay or to impair the efficiency or effectiveness of the inquiry, or (ii) otherwise to result in additional cost…"

An award in respect of legal representation is with in the province of the Chairman under section 40(2) and (40 where the payment of the award is subject to "such conditions or qualifications as may be determined by the Minister and notified by him to the chairman.".

These statutory provisions are only a framework for controlling costs. Cost control is a practice with which business are very familiar comprising identifying and reducing business expenses to increase profits. However, Inquiries are not-for-profit bodies. Their objectives are to publish recommendations for change, to prevent the reoccurrence of an event of public concern. Accordingly, they should not be judged on rules which apply to business enterprises.

5. What is the best way to ensure cost effectiveness of public inquiries while maintaining their independence?

Our Comment

The 2024 Report found that "Since 2019 the Cabinet Office has run an Inquiries Unit, whose remit is for the whole of the UK, including Scotland, to help share best practice.". One way to ensure cost effectiveness while maintaining their independence is to follow the guidance issued by the Inquiries Unit to ensure that inquiries do not "reinvent the wheel" by for example having difficulties acquiring a venue and sourcing IT systems. The creation of "Lessons learned" papers which can inform those involved in mounting Inquiries in the future is a way in which matters such as cost-effectiveness and independence are brought into to sharp focus when commissioning a new Inquiry.

6. What, if any, measures should be put in place to ensure recommendations made by public inquiries are implemented in a timely way?

Our Comment

Ministers could state a reporting date for the Inquiry in the Terms of Reference. That practice coupled with the adoption by the Inquiry of a project management tool such as a

Gantt chart with relevant milestones would be able to demonstrate scheduled and actual progress of the Inquiry. Periodic regular reports from the Inquiry could keep the issue of avoidance of delay in sharp focus.

7. What alternatives to the current model of public inquiries should be considered when particular events have, or could cause, public concern? Are there examples of good practice from other countries that Scotland could learn from?

Our comment

All public inquiries have the same core role: to establish facts, analyse those facts, and produce a report on a matter of public concern with recommendations to ensure that the same issues do not recur.

Alternatives to Scottish Inquiries under the 2005 Act could include:

a. inquiries under other legislation for example under section 14 of the Health and Safety at Work etc. Act 1974 or under section 69 of the Financial Services Act 2012.
b. Non-statutory inquiries such as Royal Commissions
c. Parliamentary Inquiries

Even within the scope of 2005 Act Inquiries in other jurisdictions of the UK there can be variations which differentiate one inquiry from another when both are dealing with connected matters of concern. For example, in relation to the impact of infected blood and infected blood products, and inquiries into child abuse.
Two separate statutory inquiries were commissioned by both the UK (the Langstaff or UK Infected Blood Inquiry) and Scottish Governments (the Penrose Inquiry) to investigate similar issues. It was noticeable that the Langstaff Inquiry covered the whole UK whereas the Penrose Inquiry focussed on Scotland. Both Inquiries considered infections arising from treatment by the NHS with infected blood and blood products. Another example are the Scottish Child Abuse Inquiry and the Child Sexual Abuse Inquiry. A close examination of the Terms of Reference provides the key to understanding the similarity between these Inquiries: Statutory Inquiries: differences in scope in different UK jurisdictions | MFMac The Scottish Inquiry ToR includes physical and psychological abuse rather than the sexual abuse which the UK inquiry has exclusively considered. This has expanded the nature of the evidence heard considerably in Scotland.

Considering the Inquiry framework outside the UK, Commonwealth jurisdictions have often a similar structure to the UK and some of the same issues:

a. **Canada** where the Inquiries Act 1985 provides that the Governor General may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof. Where an inquiry as described in section 2 is not regulated by any special law, the Governor in Council may, by a commission, appoint persons as commissioners by whom the inquiry shall be conducted: Inquiries Act

b. **Australia** Public inquiries have a long history in Australia. They are those discrete, temporary, ad hoc bodies, appointed by executive government with clear terms of reference, their membership drawn from outside of government and with public processes of review and reporting. Public inquiries are not parliamentary committees, departmental working parties, private consultancies, or reviews commissioned by permanent advisory bodies as these lack external independent membership and open processes: Public Inquiries: What are they and do they matter? - IPAA .The Inquiries Act 2014 in Victoria introduced a flexible system, offering three statutory options: a Royal Commission, a Board of Inquiry and a Formal Review. To reduce expenses, the Act also restricted inquiries form incurring costs unless authorised in their constitutive document and within the limits set in that document. The precise role varies significantly between inquiries, depending on their subject matter and terms of reference. While most UK and Australian inquiries incorporate elements of all three, to varying degrees, they can each be categorised as being primarily forensic, policy, or truth-telling. This distinction is currently recognised in Australia but not in the UK.2396730_Ireton.pdf

c. **New Zealand** Concerns had been growing in New Zealand in the early 21st century that formal inquiries had become excessively complex and adversarial, requiring greater use of legal representation and contributing to increased costs and delays. This in turn led to a rise in the use of non-statutory ministerial inquiries (established by individual ministers) as these were seen as a faster, more cost-effective alternative to statutory inquiries, and following a more investigative rather than adversarial approach. However, because they lacked statutory powers to compel witnesses their ability to address effectively complex issues was called into question. The Inquiries Act 2013 No 60 (as at 23 December 2023), Public Act Contents – New Zealand Legislation states the purposes of the legislation (a) providing for the establishment of both public and government inquiries to inquire into matters of public importance; and (b) recognising and providing for Royal commissions established under the Royal prerogative; and(c) enabling those inquiries to be carried out effectively, efficiently, and fairly: see Public inquiry reform in New Zealand | Institute for Government

d. **Ireland** In Ireland, there are several kinds of public inquiry. The Oireachtas has the power to establish tribunals of inquiry to investigate certain matters of public importance. If the Government considers that a particular issue of controversy or dispute is of such public importance that a public inquiry is necessary, it can propose a resolution to set up a tribunal of inquiry under the Tribunals of Inquiry (Evidence) Act, 1921.These tribunals are not permanent but are commissioned to investigate specific matters. They are usually chaired by judges or senior lawyers. On completion of the investigation, the tribunal submits a report to the Oireachtas, which may contain recommendations.

e. **Hong Kong** The Commissions of Inquiry Ordinance empowers the Chief Executive in Council to appoint at discretion one or more Commissioners referred to as a Commission to inquire into the conduct or management of any public body, the conduct of any public officer or into any matter whatsoever which is, in his opinion, of public importance: Cap. 86 Commissions of Inquiry Ordinance.

f. **Member States of the European Union** The EU carried out a comparative study on "Committees of Inquiry in National Parliaments" reporting in 2020. The study gathered information from 20 Member States' parliaments. The survey looked into the legal and administrative framework in which Parliamentary Committees of Inquiry (PCIs) operate in the EU Member States' parliaments. It focused on the investigative powers PCIs have at hand to assist national parliaments in exercising parliamentary control. The survey also examines the role of Member States' PCIs in guiding the action of the government, enhancing transparency and eradicating contraventions and maladministration. Most EU Member States' parliaments can set up PCIs, and the legal basis for their establishment is often enshrined in the Constitution. PCIs evaluate possible maladministration or corruption in the implementation of law by, in particular, requesting information and documentation from the government, administrative authorities, and, in some cases, private bodies, and by hearing witnesses or experts. The remit of PCIs at national level often covers everything in the "public interest" and therefore seems, at a first glance, broader than that of a PCI set up by the EU Parliament, the latter being competent to examine "alleged contraventions or maladministration in the implementation of Union law". In fact, instead of focusing on maladministration, many PCIs at national level often investigate large-scale scandals and catastrophes, such as financial crimes, corruption, paedophilia, smuggling and the reasons for mass tragedies. On the other hand, also in Parliament, PCIs have had a broad spectrum of investigations, focusing, for example, on racism and xenophobia, bovine spongiform encephalopathy (BSE) crisis, emission measurements in the automotive sector, money laundering and tax avoidance. However, many PCIs at national level cover also those fields of competence for which Parliament might

establish a temporary special committee: [Committees of Inquiry in National Parliaments - Comparative Survey] .

For further information, please contact:

Michael P Clancy OBE,WS,FRSE
Director Law Reform,
The Law Society of Scotland
michaelclancy@lawscot.org.uk