

Ruling by Chair on position statements

Introduction

[1] At a preliminary hearing on 18 November 2021 counsel for the family of Sheku Bayoh moved me to request core participants to produce position statements as part of the inquiry process. I ordered counsel for the family to lodge written submissions and gave an opportunity to other core participants to do likewise. All of the core participants did so. I am grateful to counsel for all of the core participants for the care with which they have approached the task. All sought to be constructive in their submissions. The motion by counsel for the family has usefully focused the issue as to how position statements might best assist the inquiry.

[2] It was also helpful to note that there was recognition by the core participants that they were under a duty of candour to the inquiry. I very much wish that the inquiry should be conducted in a spirit of cooperation and candour and hope that the approach reflected in the written submissions will be maintained throughout the inquiry.

[3] I have also had the benefit of a Note from counsel to the inquiry analysing the submissions of the core participants and making recommendations.

[4] The term “position statement” is not one with which we are familiar in Scottish procedure. I understand that it is a form of written pleading used, for example, in family proceedings in England. That said, the concept is straightforward and there was general agreement on the part of the core participants that the flexibility of section 17 of the Inquiries Act 2005 (the 2005 Act) meant that it was competent for

me to request position statements. I would understand the obtaining of position statements as being a process which could be used independently of opening and closing statements, both of which are provided for in the legislation.

Submissions of counsel for the Sheku Bayoh family

[5] Counsel for the family submitted that a position statement comprised a request by the inquiry for a full statement of the position of a particular core participant in relation to the terms of reference. The broad issues that would be covered by position statements would be:

- the immediate circumstances leading to the death of Mr Bayoh;
- how the police dealt with the aftermath;
- the subsequent investigation into the death; and
- whether race was a factor.

Within these broad categories specific issues might arise on which the inquiry could request the position of core participants. Knowledge of the position of core participants in relation to such issues would be of assistance to the inquiry because it would identify where there was agreement among core participants; it would allow the inquiry to identify the contentious issues that require to be explored; and position statements had been used in other public inquiries.

Submissions of other core participants

[6] A number of core participants raised concerns about the terms of the proposal advanced on behalf of the family. They pointed to a need to identify the purpose of a position statement and to specify the issues to be addressed. Having regard to the different roles and responsibilities of core participants, any focused request for a position statement should be addressed to particular core participant organisations. What is requested must be within the knowledge of the core participant to whom the request is directed. Position statements should not be sought from core participants who are individuals. Any request for a position statement should not be made until full disclosure had been completed.

[7] In addition, some core participants submitted that there was a danger that preparation of position statements could introduce an adversarial aspect into what should be an inquisitorial process.

Use of position statements in other inquiries

[8] It is instructive to begin by considering the way in which position statements have been used in other inquiries.

The Manchester Arena Inquiry

[9] In this inquiry family members of victims invited the chair, Sir John Saunders, to request position statements covering four areas:

1. An explanation of the core participants' responsibilities, processes, policies and resources;
2. A narrative of the core participants' performance with the respect to the terms of reference of the Inquiry;
3. Learning since the events of the bombing on 22nd May 2017; and
4. The performance of others in so far as it affected the core participant and was within their knowledge.

[10] Sir John dealt with the various elements of the application in a variety of ways. In relation to item 1 (*an explanation of the core participants' responsibilities, processes, policies and resources*), he considered that that was being adequately provided through ingathering of evidence, which should continue.

[11] In relation to item 2 (*a narrative of the core participants' performance with respect to the terms of reference of the inquiry*), he ordered that that should be dealt with in opening statements. Written opening statements should be lodged a number of weeks before the start of the oral hearings. In her submission to me, Ms McCall QC, senior counsel for three individual police officers who are core participants, explained that this order was supplemented by a Note prepared by the inquiry's legal team which provided specification of those core participants falling within the chair's ruling and set out in a detailed annex those parts of the terms of reference which each of those core participants were to address.

[12] In relation to item 3 (*learning since the events of the bombing on 22 May 2017*), as I understand his ruling, Sir John did order a position statement in the form of a “brief statement” setting out the changes that had been made as a result of the inquiries by core participants into their performance on the day. He suggested that that should be relatively simple to produce and set a date for lodging it.

[13] In relation to item 4 (*the performance of others in so far as it affected the core participant and was within their knowledge*), he ordered that this should be dealt with in closing statements which should be served in writing in advance.

[14] This nuanced approach makes use of a range of processes available to an inquiry to meet the particular issues being addressed. It reflects the flexible approach of an inquisitorial inquiry.

The Grenfell Tower Inquiry

[15] The chair of the inquiry, Sir Martin More Bick, made use of position statements in two situations.

[16] The first, before any evidence was led, was to ask commercial and governmental bodies to describe in general terms the part they played in the maintenance and refurbishment of Grenfell Tower in the five years immediately preceding the fire.

[17] The second request, which was made in the course of the evidence, was to request a number of organisations to provide a position paper:

“...describing in reasonable detail the actions they have already taken to address questions of public safety raised by the fire, the rationale behind them, and any further steps which they currently plan to take. The position paper should be supported by documentary evidence and should identify the person or persons within the organisation principally responsible for the steps described.”

[18] The first of these was simply a factual matter similar to that which in the Manchester Arena inquiry was dealt with by ingathering evidence. No doubt in

Grenfell it was a convenient way of ascertaining the factual position in a complex web of responsibilities. The fact that the obtaining of this information was carried out differently by each inquiry simply reflects the individual nature of a particular inquiry. Of more interest is the use in both inquiries of a position statement to obtain from organisations a statement of lessons learned and actions already taken by them. This might be particularly relevant in relation to later hearings of the Sheku Bayoh Inquiry.

Undercover Policing Inquiry

[19] Ms McCall QC noted that in the Undercover Policing Inquiry, ‘position statements’ were submitted but exclusively for the purpose of addressing legal issues (e.g. the Chair requesting undertakings from the Attorney General). She points out that that is not what is envisaged by the family’s request to me.

Scottish Hospitals Inquiry

[20] For present purposes I simply note the approach adopted by Lord Brodie in relation to closing statements after the first tranche of evidence. I do not consider that it has a bearing on the immediate issue of whether I should seek position statements before the evidence is led.

The general approach of the Sheku Bayoh inquiry

[21] As noted above, section 17 of the 2005 Act allows a considerable degree of flexibility in the way in which the inquiry is conducted. Section 17(1) provides:

“subject to any provision of this Act or of rules under section 41, the procedure and conduct of an inquiry are to be such as the chairman of the inquiry may direct.”

That is subject to Section 17(3) which provides:

“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).”

[22] The inquiry has been proceeding by ingathering material, analysing it, redacting where necessary and disclosing relevant material to core participants. A chronology, a chapter on law and practice and a list of issues for the first hearing have now been provided to the core participants, as well as a substantial amount of material. Core

participants now have an opportunity to comment on these documents. They have the opportunity to identify significant gaps or omissions in these documents and draw that to the attention of counsel to the inquiry. This approach is designed to allow core participants an opportunity to engage with the work of the inquiry and to ensure that all relevant issues have been included.

[23] The inquiry's solicitors are now taking statements from witnesses and in due course a number of witnesses will give oral evidence. There will be an opportunity for the legal representatives of core participants to suggest lines of questioning to counsel to the inquiry. It will be open to legal representatives to make applications to examine witnesses in terms of rule 9 of the Inquiries (Scotland) Rules 2007 (the 2007 Rules).

[24] Rule 10(1) of the 2007 Rules provides:

“(1) The recognised legal representative of a core participant may, unless the chairman directs otherwise— (a) make an opening statement to the inquiry panel at the commencement of the first of any oral hearings, and (b) make a closing statement to the inquiry panel.”

I have already indicated that I shall give the opportunity to core participants to make opening and closing statements. I note the submission of counsel for the Lord Advocate that opening statements should be lodged in writing at a suitable point before the oral hearing. There would then be an opportunity to speak to the submissions at the hearings. That approach may have much to commend it.

Position statements

[25] I consider that the approach of the Sheku Bayoh Inquiry, outlined in the preceding paragraphs, is comprehensive and robust. The question arises as to whether, in addition, it would be appropriate to seek position statements from certain core participants. Under reference to the list of issues recently provided to the core participants in respect of the first hearing, counsel to the inquiry submitted that there were specific legal issues which were within the knowledge of particular core participants and which could usefully be the subject of a request to these core participants to assist the inquiry. She submitted that a targeted approach would be of most use to the inquiry team.

[26] It would certainly be premature to seek position statements at this stage for later hearings. That much was, I think, recognised by counsel for the family. In respect of hearing 2 (cause of death), hearing 3 (post incident management and the subsequent investigations), and subsequent hearings, the work of the inquiry team has not yet concluded and there has been no disclosure of documents.

[27] I also consider that it would be premature to seek position statements from all core participants regarding the issue of race, which will be a thread running through all hearings and culminate in a specific hearing on race. At this stage, no documentation has yet been provided to core participants in respect of that hearing.

[28] I am satisfied that at this stage any requests for position statements should be restricted to the matters to be covered in hearing 1. I agree with the submissions that any issues to be addressed in a position statement should be specific and clearly focused. They should serve a particular purpose. What is sought should be within the knowledge of the particular core participant. Having regard to the different roles and responsibilities of core participants, any focused request for a position statement should be addressed to particular core participant organisations. I do not think that seeking position statements from core participants who are individuals would be a productive exercise. There is no statutory definition of position statement and the approach in other inquiries has not been uniform. For the purpose of the Sheku Bayoh Inquiry, a position statement should be understood as a statement issued by a core participant, at the request of the chair, in answer to a specific question relevant to an issue being considered by the inquiry.

[29] A further consideration is whether there is any advantage in requesting a position statement rather than indicating specific issues that should be addressed by particular core participants in opening statements. The use of position statements would precede opening statements. That would mean that the specific matters within the knowledge of the particular core participants would be available to other core participants before the preparation of their opening statements. That would allow them to consider their position in response to contents of the position statement. In

addition, it would allow counsel to the inquiry to focus the issues before the hearing and develop lines of questions. It might also assist me in considering applications by core participants to ask questions on particular issues.

[30] I recognise that, as counsel for the Chief Constable submitted, the position of a core participant might change in the light of the evidence. I am also conscious, as was pointed out by counsel for the Lord Advocate, that the evidence to be led in hearings 1 and 2 has never been canvassed in any forum previously. I do, however, consider that it is realistic, prior to evidence being led, to request certain core participants to state a position in relation to matters which are within their knowledge. Overall, I think that this approach has the potential to improve efficiency and I do not consider that it would detract from the inquisitorial nature of the inquiry. For these reasons, I propose to request a number of specific position statements from certain core participants.

[31] I consider that there has been sufficient disclosure, along with the inquiry documents, to allow certain core participants to provide their position in respect of particular issues.

[32] In recommending the approach which I am adopting, counsel to the inquiry has proposed a number of specific issues, relating to the subject matter of hearing 1, for consideration by specific core participants. These are set out in the table in the Annex.

[33] I do not consider that it would assist the inquiry, before hearing any evidence in relation to the subject matter of hearings 1 and 2, to seek in a position statement about reviews carried out and lessons learned since 2015. I may, however, as I noted above when considering the Grenfell and Manchester Arena inquiries, revisit that in relation to subsequent hearings. Similarly, I may at a later date request position statements in relation to changes made to training and guidance.

[3] It may be that in the course of the inquiry one core participant may wish to criticise the actions of another core participant. I consider that the point at which

such criticism should be advanced will be in closing statements after the evidence has been heard. I shall in due course set out a timetable for the lodging of written closing statements.

[35] While the approach which I am taking does not precisely reflect the proposal advanced on behalf of the Sheku Bayoh family, I consider that it is a development of that proposal, arrived at in the light of the submissions of other core participants and the input of counsel to the inquiry.

Ruling

[36] I request each of the core participants identified in the second column of the table in the Annex to provide a position statement in respect of the subject matter specified in the corresponding cells of the first column. The position statement should briefly and succinctly provide the requested information.

[37] Position statements should be lodged with the inquiry by 1 April 2022. I stress that preparation of the position statements should not interfere with compliance by core participants with current requirements of the inquiry, whether for evidence, information, or other forms of assistance. I would expect core participants, in accordance with their commitment to cooperate with the inquiry, to commit sufficient resources timeously to comply with the reasonable requirements of the inquiry.

The Right Hon Lord Bracadale

3 February 2022

Annex

	Subject of position statement	Core participants to provide
1	Whether, as a general proposition, Police Scotland have a duty to carry out a risk assessment before deploying officers to an incident where calls are received alleging a man is carrying a knife in public. If so, who is responsible for carrying out that assessment and when should it be done?	Chief Constable
2	The circumstances in which specialist resources (Armed Response Vehicle; dog unit) should be deployed.	Chief Constable
3	The circumstances in which (a) force and (b) incapacitant spray (such as CS and PAVA) may be used to detain or arrest a suspect; and the criteria that determine whether the use of force or incapacitant spray was lawful.	Chief Constable
4	Whether the Scottish Police Federation and their staff have a right or duty to provide advice to officers following a death in custody regarding completion of paperwork, including provision of statements; and if so, what that advice should be.	Scottish Police Federation Chief Constable
5	Who has the authority to determine the status of police officers as witnesses/suspects following a death in custody; and how that decision should be intimated to officers.	Lord Advocate and PIRC

6	(a) Whether the officers involved in the incident were under an obligation to complete their notebooks, use of force forms and use of spray forms on or around 3 May 2015; and (b) whether there was any lawful basis on which they could refuse to comply with such obligations.	Lord Advocate Chief Constable Scottish Police Federation
7	(a) Whether the officers involved were under an obligation to prepare/provide operational statements, and/or to give statements to the Police Investigations and Review Commissioner; (b) if so, when; and (c) whether the privilege against self-incrimination takes precedence over any such obligations.	Lord Advocate Chief Constable Scottish Police Federation
8	Whether Police Scotland require serving officers to meet particular standards of health and fitness throughout their service.	Chief Constable Scottish Police Federation
9	Steps taken by Police Scotland to ensure ACR operatives and officers responding to the incident on 3 May 2015 complied with any obligations under the Equality Act 2010.	Chief Constable