

Direction 1 – Standard of Proof



In terms of section 17 of the Inquiries Act 2005 (“the Act”), Lord Brodie (“the Chair”) of the Scottish Hospitals Inquiry (“the Inquiry”) directs that in general the standard of proof that he will adopt when considering evidence with a view to making a factual determination, will be the civil standard of balance of probabilities. However, this is without prejudice to the Chairman expressing a conclusion specifically by reference to a different standard of certainty.

Lord Brodie, Chair of the Scottish Hospitals Inquiry
16 June 2021

Note

Section 17(1) of the Act (headed “Evidence and procedure”) provides that, subject to any provision of the Act or the Inquiries (Scotland) Rules 2007 (“the Rules”), procedure and conduct of the Inquiry are to be such as the chairman may direct. Section 17(3) of the Act requires that 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 to others).

The Remit and Terms of Reference of the Inquiry require the Chairman to determine specified matters to be determined. In terms of section 24 of the Act, the chairman is required to deliver a report setting out the facts determined by the Inquiry. Neither the Act nor the Rules specify what standard of proof is to be applied in making such findings. Section 2 of the Act provides that an inquiry is not to rule on and has no power to determine any person’s civil or criminal liability. Accordingly, neither the civil standard of proof (on the balance of probabilities) nor the criminal standard (beyond reasonable doubt) is necessarily mandated by statute. The Inquiry is an investigative or inquisitorial process and, strictly, the question of onus of proof therefore does not arise. Nevertheless, in the interests of fairness, and with a view to achieving both consistency and certainty, the Chairman considers that he should make clear to core participants and other interested parties what his approach to fact-finding will be. By doing so, it is his intention to provide assistance to parties when they come to make submissions on the effect of evidence, and to provide additional clarity to those who come to read his report.

The Chair is of the opinion that proof on a balance of probabilities is the appropriate standard for him to adopt. That it is more likely that something has occurred than not, is a rational basis for fact-finding. It is that adopted in civil litigation. As a standard, it is generally understood without the need for further exposition.

The Chair recognises that there may be matters in respect of which, having regard to the evidence, he may wish to express a conclusion with a greater or lesser degree of certainty than that indicated by balance of probabilities. Where appropriate, he will do so but in so doing he will make clear that he is departing from what is otherwise the adopted standard.