Justice Committee

Inquiries into Deaths (Scotland) Bill

Letter from the Scottish Government to the Convener

The Justice Committee has asked for the comments of the Scottish Government on Patricia Ferguson MSP’s Inquiries into Deaths (Scotland) Bill which was introduced on 1 June. I have met with Ms Ferguson, who was accompanied by Patrick McGuire of Thompsons Solicitors, to discuss her draft Bill on two occasions (in December and March) after her final proposals were lodged.

The following comments relate only to the broad policy elements of Ms Ferguson’s Bill as introduced. In the timescale available to the Scottish Government, due to a delay in the publication of the Member’s Bill, it has not been possible for full consideration to have been given to potential legal or operational issues.

Mandatory FAIs

Section 4 of the Bill makes provision for inquiries at the discretion of the Lord Advocate. Ms Ferguson’s Bill differs from the Scottish Government’s Bill in relation to categories of mandatory inquiries.

*Industrial diseases and deaths resulting from exposure at work to certain substances*

Section 2(1)(b) of Ms Ferguson’s Bill extends the current mandatory category in the Inquiries into Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 for deaths as a result of accidents in the course of employment to include a requirement for a fatal accident inquiry (FAI) to be held for a death as a result of industrial disease or exposure to any substance hazardous to health at work.

It is not clear, however, how the public interest would be served by an FAl when the exposure causing the fatality may have been decades ago, at a work place that no longer exists, and where in any event the risks and dangers of that exposure are now fully known and understood. I note that during evidence on 19 May the Society of Solicitor Advocates said “It is unrealistic to have a mandatory inquiry in every case of industrial disease.”

According to Ms Ferguson’s Policy Memorandum, the Bill “recognises that some deaths caused by industrial disease and such exposures will be in circumstances where the exposure was many years earlier and where the circumstances of such disease and exposure are well known.” Section 9(5) provides that a mandatory FAl need not be held in such a case if the Lord Advocate is satisfied that the method and circumstances of exposure to the disease or substance hazardous to health is well known within the industry within which the exposure took place and that no further lessons can be drawn from the death. The Scottish Government considers that the additional references to lessons learned in sections 1(2)(b) and 9(5) and elsewhere within Ms Ferguson’s Bill are unnecessary given that the Lord Advocate’s consideration of whether the circumstances of a death had been fully aired, in the context of the Scottish Government’s Bill, would include such factors.
The apparent aim of these provisions together is to have an opt-out decision-making process for the Lord Advocate instead of the current discretionary process, with a presumption that there will be an FAI in these circumstances unless the Lord Advocate is satisfied of the criteria set out in section 9(5). Ms Ferguson’s Financial Memorandum notes that “It is not known how many deaths within this category are anticipated to take place in a year but, in view of the exception made in section 9(5), it is thought that there will not be more than one or two additional FAIs held every five years as a consequence of this amendment.”

The Scottish Government’s Bill retains the Lord Advocate’s discretion to hold an FAI when there is public interest in a death as a result of industrial disease or exposure to hazardous substance. The Solicitor General, in her evidence, provided reassurance to the Justice Committee when she said that a death as a result of new technologies and industries, such as fracking, is exactly the type of circumstance that would warrant a discretionary FAI in the public interest as the circumstances would be unknown and lessons would need to be learned. The Lord President and HSE support retention of the Lord Advocate’s discretionary power in these circumstances.

The Scottish Government, and 83% of respondents to the Government’s consultation, believe that the current provisions for work-related deaths are sufficient.

**Deaths of persons receiving compulsory mental health treatment**

Section 3 of Ms Ferguson’s Bill provides for a range of categories of death where it will be mandatory to hold an FAI. These include deaths of people in legal custody, children in secure accommodation (both of which are also included in the Government’s Bill) and those subject to compulsory detention by a public authority within the meaning of section 6 of the Human Rights Act 1998. Ms Ferguson’s Bill does go further than Lord Cullen’s recommendation for this category to include patients in hospital for mental health treatment both on a compulsory and on a voluntary basis. Lord Cullen’s review did not include voluntary patients as they “have chosen to avail themselves of care and treatment”.

The Financial Memorandum accompanying the Inquiries into Deaths (Scotland) Bill provides no estimates on the numbers of FAIs that could result from this provision as “it is not known how many deaths in this category are likely to result in any year” (paragraph 41).

In 2012-13, the Mental Welfare Commission for Scotland (MWCS) reported on 78 deaths of patients subject to compulsion, 58 of which were natural cause deaths. MWCS and the Royal College of Psychiatrists (RPpsych) do not support mandatory FAIs for patients who are subject to compulsory detention or treatment orders and have commented that deaths of this category of patient give rise to no more concern than deaths of other mental health patients. Ms Ferguson’s proposal would affect every natural cause and expected death and it is difficult to see how the public interest is served by holding an FAI in such circumstances.
Such deaths are already the subject of investigation by the procurator fiscal or MWCS and the Lord Advocate has discretionary power to hold an FAI into such deaths when it is considered to be in the public interest.

The inclusion of voluntary mental health patients would increase the number of FAIs even further.

The Scottish Government's Bill does not provide for mandatory FAIs into deaths of those detained by a public authority, including mental health patients, because the current provisions are sufficient. RCPsych noted that the MWCS is already automatically informed of any deaths of detained patients and has the discretionary option of holding an inquiry itself, and suicides, sudden, unexplained deaths or where there is a concern about healthcare contributing to the death should be reported to COPFS.

I note that, 74% of respondents to the Scottish Government’s consultation favoured the retention of the investigation by the procurator fiscal and the exercise of discretion by the Lord Advocate on completion of the investigation to instruct an FAI. The Lord President during evidence said “I think that we are in danger of imposing unnecessary rigidity on the system. The system by which the Crown makes investigations and forms judgments is, I think, the best model”. Although there was some support for the alternative proposal of a case review investigation by a public authority as the Mental Welfare Commission Scotland combined with the continuation of the Lord Advocate’s duty to investigate the death and a discretionary power to initiate an FAI, it was opposed by 59% of respondents.

There may be a case for these various inquiries and investigations to be formalised and rationalised with the process made clearer, though not necessarily in legislation. The Scottish Government does not believe that FAI legislation is the vehicle for this.

In all of the above categories, a mandatory FAI may cause the family unnecessary distress.

Certain deaths and accidents to be treated as occurring in Scotland

Section 5 of Ms Ferguson’s Bill broadly replicates the provisions of sections 5, 6 and 7 of the Scottish Government’s Bill

Citation of witnesses for precognition

Section 6 broadly replicates the terms of section 9 of the Government’s Bill.

Notification to relevant persons

Section 7 of the Member’s Bill broadly replicates the list of persons who may participate at an inquiry as set out in section 10 of the Scottish Government’s Bill (with the addition of a definition of relatives that was not considered necessary in the context of the Scottish Government’s Bill).
The provision also places a duty on the Lord Advocate to notify the persons set out in subsection (4), within six months of becoming aware of the death, that the Lord Advocate intends to investigate the death and to apply for the holding of an FAI. Alternatively the Lord Advocate may notify those persons that it is not possible to decide on an FAI because of the need for other proceedings to take precedence.

The Scottish Government does not believe that the provisions in section 7(1)(a) and (b) of Ms Ferguson’s Bill are necessary because of the commitment which COPFS has given to the Committee to introduce a “Milestone Charter” under which the procurator fiscal will inform families after three months of the death being reported as to the progress of the death investigation and the likelihood of an FAI being held. The provisions of section 7(1)(c) in relation to deaths caused by industrial disease, etc. are unnecessary for reasons set out above.

**Application to hold an inquiry**

Section 8 of the Member’s Bill imposes a duty on the Lord Advocate to apply to the sheriff for the holding of an inquiry under section 12 in the mandatory and discretionary circumstances set out in sections 2-4. The Scottish Government’s Bill simply requires the procurator fiscal to notify the sheriff that an FAI is to be held.

Section 9 sets out the exceptions in which an inquiry need not be held and this is where the circumstances in which the death occurred are established in other proceedings and where no further lessons may be drawn which may be the subject of a sheriff’s recommendations.

The Scottish Government would suggest that it is for the sheriff to decide whether he or she might make recommendations rather than the Lord Advocate and that the decision should be based on the public interest in its widest sense. The exceptions are otherwise the same as in section 3 of the Government’s Bill other than those set out in subsection (5) referred to above. Therefore to amplify my earlier point about the unnecessary nature of the new references to lessons learned throughout Ms Ferguson’s Bill, these provisions risk undermining the principle that it is only the sheriff at the conclusion of proceedings who is in a position to fully reflect on lessons that can be drawn from the death.

Section 10 sets out the circumstances in which Ms Ferguson believes the Lord Advocate must notify interested parties what further action is intended following the other proceedings mentioned in section 9. This broadly replicates section 8 of the Scottish Government’s Bill which obliges the Lord Advocate to inform parties where an inquiry is not to be held – this mirrors current practice by COPFS and the Scottish Government intends to remove the words “if requested to do so” by Stage 2 amendment. In cases where the Lord Advocate intends to proceed to an FAI there seems no need to inform parties as under section 10(1)(b) and (c) of Ms Ferguson’s Bill as they will be informed in the usual way when an FAI is to be held.

**Time limits**

Section 11 of Ms Ferguson’s Bill where an FAI is to be held on either a discretionary or mandatory basis, the Lord Advocate must apply for such an inquiry; within three
months of notifying the relevant persons of the intention to hold an inquiry: alternatively if is not possible for the Lord Advocate to apply for such an inquiry in that timeframe, then as soon as practicable thereafter.

This proposal does not seem to acknowledge that in December 2013 the Lord Advocate instructed the Scottish Fatalities Investigation Unit that a request for an FAI to take place should be made to the relevant court within two months of the procurator fiscal receiving Crown Counsel’s instructions to hold an FAI. This may be after a decision has been taken not to prosecute or after criminal or other proceedings have been concluded.

Sections 7 and 11 require the Lord Advocate to notify ‘relevant persons’ of the decision on whether to hold an inquiry within prescribed timescales. The circumstances set out are narrowly drawn and do not take account of other reasons why a time limit might not be met. For example, many discretionary FAIs are medical cases. Officials in COPFS have advised that information is not always available in such cases in order to decide whether to hold an FAI until after 6 months. Medical FAIs do not usually involve criminal proceedings and any decision is dependent on expert reports, which form part of the death investigation and which may take some time to obtain.

It is of course my expectation that the Crown Office’s forthcoming Milestone Charter will cover all of these points.

Section 12 broadly replicates the provisions of sections 13 and 14 of the Scottish Government’s Bill in relation to the initiation of the inquiry except that Ms Ferguson’s Bill would not appear to permit the flexibility of section 11 of the Scottish Government’s Bill.

Specialist sheriff courts

Section 13 of the Member’s Bill is a new provision, which was not recommended by Lord Cullen, to permit FAIs into work-related deaths under section 2 of her Bill to be held in the Sheriff Personal Injury Court proposed to be established by the recent All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015, or before a specialist personal injury sheriff. The criteria set out in subsection 4 is that this should be possible where it appears to the Lord Advocate that the significance and importance of the inquiry in the public interest merit the inquiry being held in that court, or where a relative requests that the inquiry be held in that court and there is no special cause for the inquiry not to be held in that court.

This proposal seems to go against the purpose of an FAI, which is a fact-finding forum held in the public interest and which does not attempt to apportion blame or guilt in the civil or criminal sense. Personal injury actions are adversarial civil actions whereas FAIs are inquisitorial judicial inquiries held in the public interest. These are two completely different legal specialisms and it would be inappropriate for these to be conjoined. The Sheriff Personal Injury Court is proposed to be established for the purposes mentioned in the 2015 Order referred to and not for any other purpose.
Placing FAIs in the Sheriff Personal Injury Court would effectively turn FAIs into the preliminary proceedings of personal injury actions and would run contrary to the Scottish Government’s policy to reverse the recent trend for FAIs to become more adversarial. The Scottish Government has, however, proposed that it will be possible for both sheriffs and summary sheriffs to specialise in FAIs, which may better meet Ms Ferguson’s policy aims. Sheriffs Principal will also continue to be able to preside over FAIs.

**Holding of an inquiry**

**Preliminary hearing**

The matters which section 15(6) suggest may be determined at the preliminary hearing seem matters which would be better addressed in rules rather than through primary legislation.

**Powers of the sheriff**

The provisions of section 16 of Ms Ferguson’s Bill broadly replicate those of section 18 of the Scottish Government’s Bill.

**Evidence and witnesses**

Section 17 broadly mirror the provisions of the Scottish Government’s Bill although unnecessary detail is added which appears to override the inherent powers of a sheriff to deal with obliging witnesses to attend, the production of evidence and obstructing the court process.

**Inquiry to be conducted in public**

Section 18 of Ms Ferguson’s Bill conflates the provisions of sections 20 and 21 of the Scottish Government’s Bill (Inquiry to be conducted in public and publishing restrictions in relation to children) but does not deal in such detail with the protections available in relation to children which are contained in the Scottish Government’s Bill.

**Criminal proceedings and the adjournment of the inquiry**

There remains an overwhelming need to ensure that criminal behaviour is dealt with in criminal proceedings and therefore normally this must take precedence over the FAI. Thompsons, Solicitors, have commented:

“It is more important than ever that breaches of health and safety law are prosecuted in the criminal courts because the UK Coalition Government removed the right of accident victims to rely on health and safety legislation in claims for damages under the Enterprise and Regulatory Reform Act 2013.”

Ms Ferguson’s Bill provides that it should be possible for the FAI to commence before criminal proceedings – which is possible under the current system. It is assumed that the desire is to emulate the English system where coroners’ inquest
proceedings begin ‘early’ and in advance of any criminal proceedings. Section 20 provides for adjourning proceedings where they would be prejudicial to criminal proceedings and this is the main reason why FAIs are usually not held in advance of criminal proceedings. The Scottish Government maintains that the better practice is the time-served practice of FAIs not being convened until the Lord Advocate has (informed by the other relevant authorities) decided whether or not to bring criminal proceedings.

The criminal proceedings may of course obviate the need for the circumstances of death to be established by an FAI if they are established in the criminal proceedings. For all of these reasons, the Scottish Government believes that this provision is inappropriate and unnecessary.

**Sheriffs’ recommendations to be legally enforceable and subject to appeal**

Section 21 of Ms Ferguson’s Bill broadly replicates section 6(1) of the 1976 Act and thus does not take into account Lord Cullen’s recommendation that section 6(1)(c) should be clarified. It does not mirror the provisions in section 25(2) and (4) of the Scottish Government’s Bill which distinguishes between precautions which may have prevented the death which is the subject of the FAI and precautions which might be taken to prevent deaths in similar circumstances in the future. Nor does it address the question of how realistically the recommendation may prevent deaths in the future. All of these issues are addressed in the Scottish Government’s Bill.

Like the Scottish Government’s Bill, section 21(2) and (3) of Ms Ferguson’s Bill does provide that the evidence on which the sheriff may make his recommendations does not have to be corroborated and the determination of the sheriff is not admissible in other proceedings.

Section 22 of Ms Ferguson’s Bill provides for sheriffs to make recommendations and broadly replicates section 25(5) of the Scottish Government’s Bill, permitting the sheriff to address a recommendation to a participant at the inquiry or any other person who the sheriff considers has an interest in the recommendation.

Section 22 also, however, provides that before making a recommendation the sheriff must send any person to whom the sheriff proposed to direct a recommendation (1) the proposed determination and (2) the recommendation which it is proposed to make to that person. The person is then given an opportunity of being heard or represented or of making a written statement and the sheriff must consider any such representation before making the recommendation.

Section 23 of Ms Ferguson’s Bill goes broadly replicates the provisions of rules 13 and 15 of the Inquiry Rules 2006 and rule 12 of the Inquiries (Scotland) Rules 2007 (all made under the Inquiries Act 2005 which regulates public inquiries in the UK) which require the sending of a warning letter to any person who may be criticised at the FAI or in the sheriff’s determination or recommendations.

The effect of both sections 22 and 23 of Ms Ferguson’s Bill would be to lengthen FAIs and to introduce a more adversarial element, which the Scottish Government believe would be particularly unhelpful. FAIs would inevitably take longer to conclude
while the sheriff permits parties to consider whether they wish to make representations about potential recommendations. The warning letter process would also add significant length and cost to the FAI process.

Sheriffs’ recommendations do not bestow legal rights and obligations on participants at an FAI and a sheriff will only make recommendations by which the death might have been avoided. The purpose of an FAI is not, however, to apportion blame or guilt in a civil or criminal way. By contrast, persons and bodies who are involved in a major incident which is the subject of a full public inquiry should be entitled to receive prior warning of possible criticism in the inquiry’s final report.

Section 24 broadly replicates section 26 of the Scottish Government’s Bill in relation to the dissemination of sheriffs’ determinations and recommendations. It does not, however, permit part of the determination to be withheld.

Section 25 of Ms Ferguson’s Bill relates to enforcement of recommendations and envisages that the person to whom a recommendation is addressed must comply with the recommendation or must notify the sheriff, the Lord Advocate and any other participant at the inquiry that (1) the recommendation has been fully implemented or (2) the reasons why it has not been fully implemented, what steps have been taken to implement or the timescale during which it is expected that the recommendation will be implemented. I comment on the possible interplay with the new appeal provisions below.

This provision broadly imitates the Scottish Government’s proposal that parties to whom sheriffs’ recommendations are addressed should be obliged to respond to SCTS (not the sheriff, the Lord Advocate and other participants), as the most appropriate body to receive and publish responses to sheriffs’ recommendations, particularly as the sheriff’s determination is published on the SCTS website. This was agreed by as being logical by the Chief Executive of SCTS. In this way the Scottish Government’s Bill will foster accountability on the part of those to whom sheriffs’ recommendations are addressed and responses to them will become more transparent by providing a public record.

The Scottish Government’s consultation sought views on responses going to the sheriff, however the Lord President, SCTS, the Sheriffs Principal and the Sheriffs’ Association raised serious concerns as the sheriff’s role in the FAI is ended (functus officio) once the determination has been issued.

Section 25(3) envisages a role for the Lord Advocate in reporting a failure to comply with the requirement to notify action taken, or not taken, in pursuance of the recommendation. It would then permit the sheriff to call back any party to whom recommendations have been made to ascertain if those recommendations have been implemented. If the recommendation has not been implemented then under section 25(4) the sheriff will be permitted to make an order requiring the person to implement the recommendation. This would mean a continuing involvement in the enforcement of recommendations by the sheriff.
Under section 25(6) and (7) a person who is subject to an order from a sheriff to implement a recommendation would commit an offence if they do not do so without reasonable excuse.

This is likely to have major implications for shrieval and court resources if such a proposal were to be adopted, since FAI proceedings would effectively continue while interested parties debated with the sheriff – with justification or not – whether recommendations had or had not been, or should be, implemented.

More importantly, Lord Cullen, in his evidence to the Committee, said it would unconstitutional for sheriffs to make law by means of a recommendation at the conclusion of an FAI.

There would be other difficulties in making a sheriff’s recommendations legally binding. Recommendations are made as to how deaths in similar circumstances may be avoided in the future. They do not bestow legal rights or obligations on anyone. A sheriff cannot be considered to be an expert in all fields and it is surely better that a sheriff’s recommendations are considered by the regulatory and safety bodies in the relevant field (as would be the case under section 26 of the Government’s Bill) to assess whether, for example, they have wider implications or whether they are only relevant to particular circumstances. Persons are also free to take civil action against those they perceive as liable or partially at fault in the death. The establishment of civil liability will incentivise corrective action in other cases by the party at fault. In addition if wider societal action is needed, it is for the UK or Scottish Government to legislate, as appropriate, with due regard to Parliament’s, constituents’ and stakeholder views on the appropriateness of the wider applicability of the recommendations.

The Faculty of Advocates suggest that if recommendations were to become legally binding that FAIs would become longer, more expensive and more adversarial.

We believe that the proposal in the Scottish Government’s Bill strikes the right balance between the status quo and making recommendations legally binding. Obliging a response to the sheriff’s recommendation will foster accountability and publication of the response or lack of response will provide a public record of any action taken.

The Committee should note that, I assume for legislative competence reasons, recommendations are not binding under Ms Ferguson’s Bill if they affect reserved matters such as health and safety at work. This would be likely to affect a large number of potential recommendations arising out of FAIs.

Further, given the serious constitutional concerns that members of the judiciary have expressed to the Committee about giving them a function tantamount to a legislative function, it is possible that sheriffs may feel inhibited from making recommendations and thus, despite the best intentions, actually regress from current practice where sheriffs are not inhibited in this way. This was a point we rehearsed when I gave oral evidence to the Committee.
Appeals

Sections 26 to 31 of Ms Ferguson’s Bill replicate sections 110 to 113 and sections 115 and 116 of the Courts Reform (Scotland) Act 2014 which apply to civil proceedings. FAs are not, however, civil proceedings. They are inquisitorial judicial inquiries held in the public interest.

Appeals possibly involving both the Sheriff Appeal Court and the Court of Session would be hugely time-consuming and expensive. It could, for example, mean that instead of recommendations being complied with, as would be incentivised under the Scottish Government’s Bill, the routine practice of those receiving recommendations would be to immediately appeal leading to delay, cost and uncertainty.

General

Sections 32, 33 and 34 of Ms Ferguson’s Bill broadly replicate the provisions of the Scottish Government’s Bill on re-opening inquiries, offences by corporate bodies and power to regulate procedure at FAs by rules. In the case of re-opening inquiries, Ms Ferguson’s provisions are not nearly so comprehensive.

I believe that the aims of the Scottish Government to modernise the FAI system will be best achieved by the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill which will implement the majority of Lord Cullen’s recommendations.

I hope these comments are helpful to the Committee.

Paul Wheelhouse
Minister for Community Safety and Legal Affairs
4 June 2015