Justice Committee

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill

Written submission from the Society of Solicitor Advocates

I would like to thank the committee for the opportunity to give evidence on behalf of the Society on 19 May. A number of matters arose on which I would like to elaborate.

1. Different aspects of public interest I mentioned that there were differences between the public interest in the enforcement of the criminal law by prosecution and the public interest in lessons being learned for the future by the holding of an FAI. The Lord Advocate presently has the responsibility for both of these issues and the tendency increasingly is to pursue the prosecution avenue at the expense of an inquiry. Indeed the whole thrust of the Crown’s response to the committee’s call for evidence is based on prosecution being given primacy.

The committee has been given a number of instances in other submissions, for example the FBU response, which show first that giving primacy to prosecution may delay for very lengthy periods the holding of an FAI and second that once a prosecution has been mounted and a plea of guilty tendered the Crown apparently considers there are no lessons to be learned.

The FBU submission, with its detailed account of the aftermath of the death of firefighter Ewan Williamson, gives a graphic example of the dampening effect the potential for a prosecution has on the ability even to begin to start the process of learning practical lessons for the future. It also shows that the agreed statement of facts given to the judge on the tendering of a guilty plea does not begin to address the type of systemic problems which an FAI would be able to consider. Other high profile cases, such as the Flying Phantom and the 2009 North Sea helicopter crash, demonstrate that putting decisions on prosecution ahead of an inquiry can lead to very lengthy delays. The committee will also be well aware of the thematic report of the Inspectorate of Prosecutions into the Health and Safety Division of COPFS (http://www.gov.scot/Resource/0041/00418557.pdf). The public interest in learning lessons should, it is submitted be given greater priority.

2. The position of the Lord Advocate It is important to remember that the present role of the Lord Advocate in the holding of FAIs is not a part of the Lord Advocate’s prerogative as the head of the prosecution service, stemming from the Treaty of Union or the Scotland Act. The legislative history of FAIs and the role of COPFS and the Lord Advocate are set out in Lord Cullen’s report (paragraphs 2.1-2.22). There is therefore no constitutional reason for the current bill not to provide that the bringing forward of an inquiry for its purposes should proceed independently of any decision to prosecute or not. In practice the facts which will inform both the question of a prosecution or the holding of an inquiry will be the same but, as indicated, the uses to which those facts are put are quite different.

3. Would an FAI inevitably prejudice a prosecution? In our view the answer is no. It is rarely the case that an FAI is held where the death was the result of a crime
involving mens rea or criminal intent. There are exceptions – the Lockerbie case being one, where an FAI was held and, of course, many years before the prosecution. Most cases particularly of workplace accidents involve statutory breaches of health and safety law where an error or omission has had fatal consequences. It is difficult to see how an exploration of the factual background of such an incident in open court from witnesses under oath for the purpose of establishing the cause of death and preventing future accidents, so far as possible, would make the subsequent prosecution of an alleged wrongdoer impossible. So long as the determination of the sheriff could not be founded upon in criminal (or civil) proceedings, as at present, any subsequent court having to consider a breach of the criminal law would have a different task but would have the benefit that many of the facts would already have been explored and potentially agreed. Putting an FAI first would enable the lessons to be learned quickly and acted upon.

4. Making recommendations effective There respectfully appears to be a desire in the committee to arrive at a solution to the very real problem that a recommendation from an FAI currently has no teeth. Having given the matter further reflection there are a number of potential avenues. It is necessary to consider the nature of the recommendation. Does it involve purely practical matters; would it extend beyond the parties involved in and the circumstances of the inquiry in question; is there any need for any rule or law to be amended; how would the recommendation be enforced?

Taking the most simple situation, where a recommendation involved a practical step specific to a party to the inquiry, whether the approach was that under section 27 of the present Bill or the one in section 20 of Patricia Ferguson MSP’s proposed Inquiries into Deaths (Scotland) Bill, if the person to whom the recommendation was addressed accepted and acted on the recommendation, the matter would be closed. Even then, in either situation, if there was a subsequent failure in compliance and an accident occurred, what would be the status of the earlier recommendation and its acceptance? The earlier inquiry would be complete and any further action, as with the original fatality, would have to take the form of a further FAI, a prosecution, and claims for damages.

The situation would be more complex in the event that the recommendation (a) was of a more general nature affecting parties beyond the incident in question or industry more widely, (b) required action by professional or regulatory bodies, or (c) would need changes in Statute or Regulations (the Committee has been referred to the example of the absence of requirement for MOTs of mobile cranes). Ultimately, however, even if the recommendation was accepted and acted upon, any further accident would also be handled in exactly the same way as the most straightforward situation referred to in the last paragraph.

It is therefore compliance and ensuring so far as possible the likelihood of compliance that will be effective in reducing the prospect of further fatality.

At the meeting of the Committee on 19 May I suggested that one step to strengthen the proposed regime under the current Bill would be for the response to any recommendation to be made to the sheriff rather than to SCTS. This would mean that the inquiry procedure would not formally close until after the responses had
been received. This would also leave open the prospect that the sheriff could order a further hearing, if so advised, into any matter raised in a response. There are further steps which could be taken without altering the existing character of an FAI. Firstly, the Justice Committee itself could monitor recommendations and responses as part of Parliament’s policy of assessing the effectiveness of legislation. It could then make its own recommendations for amendments to Regulations or Statutes as appropriate.

Secondly, the Scottish Ministers could be given power to bring forward subordinate legislation under the Bill for the purpose of promoting compliance with recommendations made, including, if thought appropriate, the creation of offences to bolster such legislation.

Finally, there would be dissemination of recommendations to those who are relevant, together with professional or regulatory bodies, as envisaged by sections 25(5)(b) and 26(1)(b) of the current bill (subject to the amendment suggested above).

All of these measures collectively would give the greatest chance that recommendations would be heeded and acted upon without either altering the nature of the inquiry process or of judicial legislation.

5. Deaths abroad The question was posed concerning the necessity of repatriating the body as currently contained in section 6. An alternative would be to give the Scottish court power to deal with any case in which the deceased died domiciled in Scotland. Domicile in this instance would have the same meaning as in family law i.e. place of permanent residence even if the person was currently resident abroad at date of death. Removing the need to repatriate the body would avoid ruling out cases where repatriation was impossible.

6. I hope these additional suggestions are helpful. If the Society can be of any further assistance please let us know.

Tom Marshall
President
22 May 2015