Justice Committee

Stage 1 Report on the Inquiries into Deaths (Scotland) Bill
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Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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Introduction

1. Patricia Ferguson MSP introduced the Inquiries into Deaths (Scotland) Bill on 1 June 2015 and the Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill at Stage 1 on 2 June 2015. It is a Member’s bill, and was introduced whilst this Committee’s Stage 1 scrutiny of the Scottish Government’s Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill (“the Government’s Bill”) was ongoing.

2. Both the Government’s Bill and Ms Ferguson’s Bill would repeal and replace the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (“the 1976 Act”) and give effect to many recommendations of Lord Cullen’s Review of fatal accident inquiry (FAI) legislation. Ms Ferguson’s Bill does not use the term “fatal accident inquiry”; it refers instead to “inquiries”. This report uses both “fatal accident inquiry” and “death inquiry” as it discusses both this Bill and the Government’s Bill.

3. The Committee supports the general principle behind both Bills (this Bill and the Government’s Bill) currently before Parliament to reform the law relating to fatal accident inquiries. Lord Cullen’s inquiry and our Stage 1 scrutiny of the Government Bill have made very clear that modernisation of the law is necessary.

4. We have already recommended that the Parliament agree the general principles of the Government’s Bill in our Stage 1 report on that Bill, and set out our reasons for doing so. Where there is no significant divergence between proposals for reform in this Bill and in the Government’s Bill, we do not repeat the arguments. The main focus of this report is on proposals in the Bill which diverge from the Government Bill.

5. We consider the Government’s Bill to be the appropriate vehicle to modernise fatal accident inquiry legislation. Where, as discussed further below, we consider that provisions in this Bill which are not replicated in the Government’s Bill have merit we would encourage the Scottish Government to engage in dialogue with the Member in charge in order to strengthen the Government’s Bill should it pass Stage 1 and enter its amending stages.

Current process for fatal accident inquiries

6. Fatal accident inquiries are held to establish the circumstances surrounding certain deaths. They are presided over by sheriffs. The sheriff may make recommendations to prevent future deaths in similar circumstances. Under the
current law, mandatory FAIs must be held where someone dies in legal custody or in an accident related to their work.

7. The Lord Advocate is the ministerial head of the Crown Office and Procurator Fiscal Service (COPFS) and is responsible for the prosecution of crime and the investigation of deaths in Scotland. Procurators fiscal investigate all sudden deaths where the circumstances surrounding the death appear suspicious, accidental or unexplained.

8. In those circumstances or where a death gives rise to serious public concern, the Lord Advocate has discretion to hold an FAI in circumstances where the Lord Advocate decides it is expedient and in the public interest to do so.

9. The Lord Advocate also has discretion not to hold an FAI (even a “mandatory” FAI) if the circumstances of the death have been adequately established in related criminal proceedings (or some other forms of inquiry).

10. Around 50 to 60 FAIs are held each year. The COPFS carries out investigations into the circumstances of deaths in significantly more cases – approximately 5,500 each year. These death investigations are carried out by the Scottish Fatalities Investigation Unit, which was set up following Lord Cullen’s review.

11. An FAI is generally considered to be an inquisitorial process where the sheriff takes an active role in establishing the facts surrounding the death, and whether lessons can be learned, as opposed to criminal and civil proceedings which are considered to be adversarial and are more concerned with apportioning blame or ascertaining whether a crime has been committed.\(^4\)

12. Under the 1976 Act, it is not possible to appeal the sheriff’s findings or the Lord Advocate’s decision whether to hold an FAI. However, such decisions can be subject to a judicial review. The sheriff in charge of the FAI makes a determination at the end of the inquiry. Those determinations in which there is public interest are published on the website of the Scottish Courts and Tribunals Service (SCTS).

**Scrutiny**

13. The Committee took evidence on the issues raised by Ms Ferguson’s then draft Bill during its scrutiny of the Government Bill. This involved a call for written views in April 2015, which elicited forty responses, and oral evidence sessions throughout May 2015 with practitioners, experts and individual campaigners who were directly affected by the law in relation to fatal accidents. We sought written views from the Scottish Government on Ms Ferguson’s Bill which were received on 4 June 2015. On 9 June, shortly after the Bill’s introduction, we took evidence from Patricia Ferguson MSP and Patrick McGuire, representing Thompson’s Solicitors (who had assisted Mr Ferguson in preparing her Bill) on her Bill and on the issues raised during evidence on her proposals. We published our Stage 1 report\(^5\) on the Government’s Bill on 1 July 2015.
14. We were assisted in our consideration by a Scottish Parliament Information Centre (SPICe) briefing paper outlining the similarities and differences between this Bill and the Government’s Bill.

**Background to the Bill**

**Lord Cullen’s review of fatal accident inquiries legislation**

15. In 2009, Lord Cullen published his recommendations to modernise the law relating to fatal accident inquiries following a request by the Scottish Government to review this area. Many of these recommendations required primary legislation, most, but not all, of which would be implemented in the Government’s Bill.

**The Scottish Government’s Bill**

16. The Scottish Government introduced its Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill, which sought to reform and modernise the law in relation to FAIs, on 19 March 2015. We took evidence on this Bill throughout May and, as noted earlier, published our Stage 1 report on 1 July 2015, setting out our support for the general principles of the Bill.

17. The Government’s Bill did not take forward Lord Cullen’s recommendations that it should be mandatory to hold an FAI into the death of—

- a child looked after in a ‘residential establishment’ (other than those who die while in secure accommodation)
- someone subject to compulsory detention by a public authority at the time of their death.

18. It also did not take forward the recommendations that an initial early hearing should be held, that families should receive legal aid without having to demonstrate it was reasonable in the circumstances to do so, and that the Scottish Government should take responsibility for publicising responses to sheriff’s recommendations.

19. Our report called for greater understanding of the purpose of FAIs and how they relate to other death investigations and civil or criminal proceedings. We recommended that the Scottish Government should work closely with the COPFS to address this issue. We concluded that the Bill could be strengthened in the following areas:

20. **The scope of mandatory FAIs:** the Committee asked the Scottish Government to consider whether the Bill should be amended to make it mandatory to hold an FAI following the death of a person detained under mental health legislation or who is a looked after child. This amendment could include provision to give the Lord Advocate the discretion not to hold an FAI in certain circumstances. In addition,
the Committee concluded that deaths of service personnel in Scotland should fall within the Bill’s scope.

21. **Deaths abroad:** the Committee was persuaded by views that there could be exceptional circumstances where it might not be possible to repatriate the body of a person who had died abroad yet it would be appropriate to hold an FAI. The Committee therefore recommended that the Bill be amended to allow for some discretion to hold an FAI where repatriation of a body would not be possible.

22. **Delays:** the Committee welcomed the announcement that the COPFS would introduce a milestone charter, which would set out timescales for investigations and decisions in relation to a death being investigated by the COPFS to help keep families informed of progress. We recommended that the Solicitor General make available a draft charter in advance of Stage 2 of the Government’s Bill and we understand that a draft charter was being consulted on over the summer.

23. **The role of the family:** we highlighted the need for families to be represented appropriately and kept informed throughout an FAI. In addition, where the Lord Advocate decides not to hold an FAI into a death being investigated by the COPFS, we recommended that the reasons behind this decision be shared with the family as a matter of course and not just when families requested this information.

24. **Sheriffs’ recommendations:** the Committee welcomed the provisions in the Bill requiring those to whom sheriffs’ recommendations are directed to respond to them and for these determinations and subsequent responses to be published on the SCTS website. We asked the Scottish Government to look at ways of ensuring that sheriffs’ recommendations are acted upon.

**Patricia Ferguson’s consultation on her proposal for legislation**

25. Patricia Ferguson MSP lodged her draft proposal for a Member’s Bill on 1 August 2013 accompanied by a consultation document, which ran for the period 2 August 2013 to 31 January 2014. The proposal was for a Bill—

- to re-enact with amendments the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976:
  - (a) to extend the scope of inquiries to cover work-related deaths not resulting from accidents, such as deaths from industrial diseases and deaths resulting from exposure at work to certain substances
  - (b) to make the process of investigating deaths quicker and more transparent, to refer appropriate cases to specialist sheriff courts, and to give the families of the deceased person a more central role in the process.

26. The consultation received 30 responses, the majority of which (83%) supported the proposal. In November 2014, Ms Ferguson lodged the final proposal taking
into account the views of respondents. The final proposal gained cross-party support from 31 MSPs\textsuperscript{12}, and Ms Ferguson gained the right to introduce the Bill. The final proposal had the same aims as the original proposal with the following additions —

- to extend the scope of inquiries to cover deaths of persons receiving compulsory mental health treatment and deaths of children subject to a child protection order
- to refer appropriate cases to specialist sheriff courts, to give the families of the deceased person a more central role in the process, and to provide that recommendations made by the sheriff are enforceable in certain circumstances and subject to appeal.

27. The summary of consultation responses\textsuperscript{13} highlighted that people considered the main potential benefits of changing the law as being—

- broadening the scope of mandatory FAIs for work related deaths
- ensuring that lessons are learned and that recommendations are enforced
- improving communication with the family to make the processes more efficient and transparent.

28. A number of responses argued that the aims of the proposal were already achieved under existing legislation particularly regarding the principle of placing equal emphasis on determining the cause of death and learning lessons from the death. Many respondents expressed concern about broadening the scope of the proposed Bill to include extending mandatory death inquiries into historical cases of industrial diseases and strengthening the sheriff’s enforcement powers. In addition, some respondents questioned the practicalities of enforcing time limits and sheriffs’ recommendations in addition to the manner in which specialist sheriffs and courts would operate.

29. In her commentary on the results of the consultation, Ms Ferguson stated that she intended to amend the draft bill prior to introduction to provide for the right of appeal against sheriffs’ recommendations.

30. In addition, the draft bill would be amended to provide the Lord Advocate with the discretion not to hold an FAI in cases where the death was as a result of an industrial disease or exposure to hazardous substances and where the circumstances surrounding the death had been previously well established and lessons learned.

31. Ms Ferguson argued that this additional flexibility would address concerns expressed during the consultation about whether there would be any benefit in holding an FAI following a death as a result of an industrial disease where the facts had already been well established, lessons have been learned and, in some cases, the companies involved no longer existed.
The Bill: main provisions

32. The Bill contains six parts and 2 schedules—

- Part 1 - Investigations of deaths etc: Sections 1-4 set out the cases in which the Lord Advocate must carry out an investigation into the circumstances of the death of a person occurring in Scotland. They include a provision for work-related deaths (Section 2), deaths while in legal custody (Section 3) and for sudden deaths (Section 4). Section 5 provides that certain deaths which occur outwith Scotland are to be treated as occurring in Scotland. Sections 6 and 7 empower the Lord Advocate to cite witnesses for precognition and require certain people to be notified of the Lord Advocate’s intentions. Section 7 requires that the Lord Advocate must notify all persons within six months whether it is intended that an FAI will be undertaken.

- Part 2 – Application to hold an inquiry: Sections 8 and 9 require the Lord Advocate to apply to hold an inquiry and provide various exceptions to this duty including, in Section 9(5), discretionary powers for the Lord Advocate to decide not to hold an FAI into a work related death where the method and circumstances of exposure to the disease or hazardous substance is well known and no further lessons can be learned. Section 11 sets a three month time limit by which the Lord Advocate must apply to hold an inquiry after notifying the relevant people. Where this is not possible, the Lord Advocate must determine a later date and notify the relevant people by giving reasons why it was not possible to apply to hold the inquiry earlier.

- Part 3 – Holding of an inquiry: Section 14 sets out who is entitled to participate in the inquiry and section 15 provides that the Sheriff must appoint a time, date and place for a preliminary hearing no later than three months after an application to hold an inquiry has been made. Section 16 sets out the Sheriff’s powers in relation to the FAI, which are akin to those of a judge in civil proceedings, and section 17 provides that the Lord Advocate must – and participants may – bring forward evidence relating to the circumstances of the death. The inquiry should be held in public (Section 18) and, under Section 19, the Sheriff may appoint an assessor to help with the inquiry. Section 20 provides for criminal proceedings and the adjournment of the inquiry i.e. the fact that criminal proceedings may be taken does not mean that the inquiry cannot be commenced.

- Part 4 – Sheriff’s determination and recommendation: Sections 21- 25 provide for the Sheriff’s determination and recommendation and their enforcement. The determination sets out the circumstances of the death such as where and when the death occurred and what caused it. It may also contain recommendations covering lessons which could be learned, as set out in section 22. The Explanatory Notes accompanying the Bill make clear that “an FAI determination is inadmissible in evidence and cannot be founded on in other
judicial proceedings”. The Sheriff must send any relevant person a copy of the determination and proposed recommendation and give them the opportunity of being heard or make a written submission prior to the Sheriff making a final recommendation (Section 22(4)). Section 23 provides for warning notices to be issued to any person who may be criticised prior to any determination or recommendation being made. Section 24 makes provision for what happens at the end of an FAI and section 25 provides for the enforcement of the Sheriff’s recommendations. This section provides that where the person to whom the recommendation (on devolved matters) is addressed, they must comply with the recommendation and notify the Sheriff that it has been complied with or give reasons why not.

- Part 5 – Appeals: Sections 26-28 provide for appeals to the Sheriff Appeal Court and sections 29 and 30 for appeals to the Court of Session. This part of the Bill sets out the framework for people to whom recommendations are addressed to appeal against the recommendation.

- Part 6 – General and Schedules 1 and 2: Sections 32-40 make general provision including provision on re-opening the inquiry, offences by bodies corporate, inquiry procedure rules, and commencement. Schedule 1 includes procedure rules and schedule 2 repeals certain provisions in Acts of Parliament.

33. In summary, the main provisions in this Bill which go beyond Lord Cullen’s recommendations and which differ from the Scottish Government’s Bill are—

- to extend the scope of the investigations and inquiries into deaths to cover work-related deaths resulting from industrial disease or exposure to certain substances due to the nature of person’s employment

- to extend the categories of mandatory death inquiry to include those who at the time of their death are—
  - subject to compulsory detention by a public authority
  - subject to a compulsory treatment order under mental health legislation
  - undergoing voluntary hospital treatment for a mental disorder
  - a child being kept in secure accommodation.

- to provide a statutory timetable for the Lord Advocate to notify the family of the deceased whether and when an application for an FAI will be made and a preliminary hearing held

- to make it clear that the investigation and inquiry is not only into the causes of the death but the lessons to be drawn from the death in order to prevent further deaths arising from similar circumstances in the future, and
• to provide that a sheriff’s recommendations as to what action requires to be taken, or not taken, to prevent those future deaths may be addressed to persons who may or may not be participants in the FAI and to be enforceable ultimately by criminal sanctions.

Key policy objectives and themes

Extending the scope of mandatory death inquiries

Work-related deaths

34. Currently it is mandatory for an FAI to be held into someone’s death resulting from an accident occurring in Scotland that was in the course of their employment. The Government’s Bill would require a mandatory FAI to be held where the death occurs as a result of an accident at work. This Bill would extend the categories of work-related deaths for which a death inquiry must be held to cover deaths from industrial diseases and exposure to hazardous substances. The Policy Memorandum\textsuperscript{15} argues that there is no justification for a different approach to these types of work-related deaths.

35. The Financial Memorandum to the Bill, prepared by Ms Ferguson with advice from Thompson’s Solicitors, estimates that there will be no more than one or two additional FAIs every five years compared with 2014/15 figures as a result of this proposed extension.\textsuperscript{16}

36. The Scottish Government stated in its written submission on the Bill that it was not clear how the public interest would be served by an FAI 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. The Scottish Government considered 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 Government’s Bill, would include such factors.\textsuperscript{17}

37. Trade union representatives were however in favour of this proposed extension, arguing that disease or exposure from substances hazardous to health should be treated in the same way as other work-related deaths. The STUC stated\textsuperscript{18}—

"to continue to ignore the potential effects of emerging technologies and the chemicals involved in new manufacturing processes is wrong. Inclusion of occupational disease within the mandatory inquiry could allow essential lessons to be learned and, as a result of proper examination as part of an
improved inquiry process, potentially identify risks to health and life at the earliest possible stage.”

38. Mr McGuire, representing Thompson’s Solicitors, told us\(^{19}\) “It is a truism that the victims and the families who are left do not see any distinction between losing a loved one to an industrial disease and losing them to an industrial accident.”

39. The Solicitor General highlighted\(^{20}\) that, where new industrial processes or diseases are identified, the Lord Advocate would already have the discretion to hold an FAI where a death had occurred. This did not provide reassurance for the Member in charge who told us that the practical difference is there will be a presumption that there will be an FAI until it is decided that there will not be.\(^{21}\)

40. We note that, following concerns raised during the consultation process on her draft proposal, Ms Ferguson amended her proposal to provide the Lord Advocate with the discretion not to hold an inquiry into a death caused by industrial disease or exposure to hazardous substances if the Lord Advocate was satisfied that the circumstances surrounding the disease or exposure were well known, and there were no further lessons which could be learned from the death.

41. The Committee differs in its views on whether to extend the categories of work-related deaths for which it is mandatory for an inquiry to be held to include deaths from industrial disease and exposure to hazardous substances.

Other mandatory categories

42. Currently the law makes it mandatory for an FAI to be held where a death has occurred when the person was in legal custody. Lord Cullen recommended that mandatory FAIs should also be triggered where a child living in a residential establishment or someone subject to compulsory detention by a public authority dies. The Government’s Bill would not extend mandatory FAIs to cover children who die in residential establishments or people who, at the time of their death, are subject to compulsory detention by a public authority.

43. The Bill would make it mandatory for a death inquiry to be held when someone dies when they are\(^{22}\) —

- in legal custody
- subject to compulsory detention by a public authority
- subject to a compulsory treatment order (under mental health legislation) regardless of whether they are detained in a hospital
- a voluntary patient in a hospital for treatment of mental disorder
- a child required to be kept or detained in secure accommodation.
Deaths when in the custody of the state

44. The Financial Memorandum\(^{23}\) estimates that the impact of the extension proposed in Ms Ferguson’s Bill would result in no more than one or two additional FAIs per year.

45. The Mental Welfare Commission for Scotland (MWCS) highlighted research\(^ {24} \) into deaths under compulsory treatment orders. According to this research, there were 78 such deaths in 2012/13 and 53 were from natural causes. The Committee also heard evidence (from the MWCS and others) that it might be undesirable to subject family members to an FAI where the circumstances of death are not controversial (eg. expected death from a known condition).

46. The Scottish Government does not agree with extending mandatory FAIs to those subject to compulsory detention orders and told us that it may cause unnecessary distress for the family—\(^ {25} \)

\[ \text{MWCS and the Royal College of Psychiatrists (RPsych) do not support mandatory FAIs for patients who are subject to compulsory detention or treatment orders and have commented that deaths of this category of patient give rise to no more concern than deaths of other mental health patients. Ms Ferguson’s proposal would affect every natural cause and expected death and it is difficult to see how the public interest is served by holding an FAI in such circumstances.}\]

47. Ms Ferguson, in response, explained that the Lord Advocate would have discretion not to hold a death inquiry where “it was obvious that the death had been the result of natural causes or where a post mortem had confirmed that”.\(^ {26} \)

Deaths when subject to compulsory detention by a public authority

48. Witnesses questioned \(^ {27} \) whether the procedural requirements under the current system for investigating the death of someone subject to a compulsory detention order ensured human rights compliance.

49. There was particular concern about how the deaths of those detained under mental health legislation were investigated in practice with the current system being described as confusing and having gaps.

50. The Scottish Government told us the relevant authorities should collaborate and produce protocols or charters to address the shortcomings in current practices.\(^ {28} \)

51. The Committee acknowledges the complexities involved in investigating the deaths of those subject to compulsory detention by a public authority or subject to a compulsory treatment order (under mental health legislation). We are concerned that the current regime has been described as confusing and could lead to additional upset and distress to families of the deceased.
52. The Committee concluded in its report on the Government’s Bill that further consideration be given to extending that Bill to make it mandatory that a fatal accident inquiry be held following the death of a person detained under mental health legislation and that consideration also be given to rationalising and formalising the current investigatory processes.

53. The Committee also asked the Scottish Government to consider whether its Bill should be amended to include mandatory FAIs following the death of a child who is looked after.

Involving the family of the deceased

54. The Policy Memorandum sets out Ms Ferguson’s intention to place the family of the deceased at the heart of the inquiry process through addressing delays, improving transparency and allowing the family to have a role in shaping the scope of the inquiry. It states:29 —

“There have been many examples over the years of families waiting two, three, four, and, on occasion, more years for an FAI to be held. This is a glaring omission in current procedures.”

55. The need for families to have answers as quickly as possible in order for them to move on was highlighted as one of the key objectives of the Bill and, in order to address this, the Bill introduces statutory timescales for processes as far as possible.

56. The Bill also contains an enabling power which would allow the Court of Session to make rules to provide families with financial assistance during an FAI. Any financial assistance regime created under the Bill would be separate from the legal aid system.

57. The Bill would require the Lord Advocate to give written reasons to participants for certain decisions made, including the decision not to hold an inquiry.

Impact of delays on families and the introduction of statutory timescales

58. Patricia Ferguson’s Bill would create specific time limits in which an FAI has to be held. In situations where there is no intention to bring criminal proceedings (or other forms of inquiry), the Bill proposes that an FAI should take place within a year of the death. The Lord Advocate would have six months from the death to notify the relatives as to whether the Lord Advocate intends to hold an FAI. The Lord Advocate would then have an additional three months to apply to the sheriff and the sheriff would have a further three months to hold a preliminary hearing.

59. The Bill provides that, where criminal proceedings (or other forms of inquiry) are taking place, the Lord Advocate would have three months from the date of
conclusion of proceedings to notify the family if the Lord Advocate intends to apply for an FAI.

60. The Lord Advocate would retain the discretion not to hold an otherwise mandatory FAI if the circumstances of death had been adequately established in other proceedings and there were no further lessons to learn. In such situations, the Lord Advocate would still have to notify the family within six months of the death where it is not possible at that stage to determine whether an FAI would be held.

61. The Committee heard\(^{31}\) that delays are often caused by the need to conduct thorough and often complex investigations and to deal with related criminal proceedings.

62. Some witnesses, including the STUC, supported the idea of mandatory timescales. However others highlighted the difficulties associated with being too prescriptive given the complexities involved in FAIs.\(^ {32}\)

63. In Ms Ferguson’s view, the introduction of statutory timeframes was a key element in ensuring that families are central to the entire process. She said\(^ {33}\) “The issue that seems to generate the most concern and discussion with regard to fatal accident inquiries is the length of time it takes for a decision to be made about whether an FAI can be held.”

64. Many of those who gave evidence to the Committee suggested that mandatory timescales for FAIs would be unrealistic. Ms Ferguson told the Committee that these timescales were suggestions rather than rigid requirements, stating “we are saying that the Lord Advocate can give an explanation as to why that is not possible”.\(^ {34}\)

Notification

65. The Bill places various requirements on the Lord Advocate to notify “relevant persons” (including the deceased’s family) of decisions. The main requirement for notification is in relation to whether an FAI is to be held. The Lord Advocate would also have to notify relevant persons where it was not possible to apply for an FAI within three months of a decision to hold the inquiry.

66. The Policy Memorandum\(^ {35}\) emphasises the importance of keeping the family informed of important developments. It also states that the remedy of judicial review would potentially be available to families to challenge reasons given in writing.

67. Sections 7 and 11 would require the Lord Advocate to notify ‘relevant persons’ of the decision on whether to hold an inquiry within prescribed timescales. The Scottish Government argued that the circumstances set out are narrowly drawn and do not take account of other reasons why a time limit might not be met\(^ {36}\)—
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”.

68. The Minister stated “it is of course my expectation that the Crown Office’s forthcoming milestone charter will cover all of these points”. 

69. Ms Ferguson was asked her views on the Crown Office’s intention to publish a milestone charter. She said it might help but said it should “be underpinned by legislation to give it the credibility and importance that family members expect it to have.” This point was echoed by Mr McGuire from Thompson’s Solicitors—

If it [the COPFS] is already doing something and striving to achieve the best for victims, it should have no fear about, and should embrace, putting that on a statutory footing.”

Other provisions

70. The Bill also contains other requirements that, it could be argued, support the role of the family in the FAI process. Where a death is work-related, family members would be able to require that an FAI is held before the specialist personal injury court if they wish. The Policy Memorandum also suggests that families will be able to make submissions on the appropriate scope of the inquiry at the preliminary hearing. Provision is also made to permit financial assistance (separate from the Legal Aid scheme) to be made available to those attending inquiries.

71. The Committee strongly supports the Member’s proposal to involve the family more in the inquiry process and, overall to make the process more understandable. We agree that families should be notified each step of the way in any decisions relating to whether an inquiry will be held, the reasons behind decisions and the scope of any inquiry as it progresses.

72. The principle that FAIs should proceed without unnecessary delay, in order to help provide families with the answers they are seeking is inarguable. Evidence at Stage 1 of the Government’s Bill indicated room for improvement in this area. However, the balance of evidence suggests that the setting of mandatory timescales in statute in order to try to deliver this objective may not be the best way to realise improvements, and may in some cases be counterproductive.

73. However, we suggest that the Member in charge and the Scottish Government maintain a dialogue on how best to address shortcomings in this area, should the Government’s Bill proceed further. As the Member’s Bill
has highlighted, there is also room for improvement in the manner in which the authorities communicate with families as the preliminary work to an FAI, or potential FAI, proceeds.

74. We are reassured by the development of a milestone charter which will outline what families can expect from the Crown Office and Procurator Fiscal Service in terms of timings of investigations and decision-making. We consider that this will help address the impact of delays on families of the bereaved more effectively than imposing statutory deadlines. We recommend that the Member works with the Scottish Government and the COPFS to incorporate her policy intentions in relation to reducing delays within the Government Bill or help in the development of the milestone charter.

Learning lessons

75. The Policy Memorandum states that one of the overarching policy objectives of the Bill is to ensure that lessons are learned following a death. The Bill would require that the Lord Advocate should only exercise discretion not to hold an FAI where there had been criminal proceedings (or other forms of inquiry) if—

- the circumstances of death have been adequately established and
- no further lessons can be learned from the death.

76. In addition, the Bill would enable the Lord Advocate to hold a partial inquiry where some aspects had been thoroughly investigated and others had not.

Sheriff’s determinations and recommendations

77. The Government’s Bill would require sheriff’s determinations to be published and require parties involved in the inquiry and to whom a recommendation is addressed to respond to that recommendation.

78. Part 4 of the Bill makes provisions for sheriffs’ determinations and recommendations. It would enable sheriffs to make some or all of their recommendations legally binding and would make this a multi-stage process:

- Before making a recommendation, the sheriff would be required to send the party to whom a recommendation is addressed a copy of the proposed recommendation and give them an opportunity to be heard by the FAI.
- Parties would be required to notify, within the time specified by the sheriff, the sheriff and other participants to the inquiry that the recommendation had been complied with – or the reasons why it had not been implemented.
The Lord Advocate would be responsible for monitoring compliance and would be responsible for alerting the sheriff where a party had failed to respond to a recommendation.

Where a recommendation had not been fully implemented, the sheriff would be able to hold a further hearing (with representations from all interested parties). The sheriff could then make an order requiring implementation within a specific time frame. It would be a criminal offence not to comply with such an order.

The sheriff's determination would set out the circumstances of death which the sheriff has found to have been established on the evidence, such as when and where the death occurred and what caused the death. It would also include findings as to what lessons or precautions could be drawn from that death and what action would require to be taken, or not taken, in order to prevent further deaths in similar circumstances in the future.

The Bill provides that an FAI determination would be inadmissible in evidence and could not be founded on in other judicial proceedings. Ms Ferguson argues that this is an essential element of the distinction between, on the one hand, the fact-finding inquisitorial nature of the FAI with the sheriff empowered to make recommendations and, on the other, the fault-finding, adversarial nature of other legal proceedings. It is not the purpose of the FAI to establish liability for negligent actions. If liability arises from the death, then a civil case is the forum where these matters are examined.

Warning notices

The Bill would require the sheriff to send “warning notices” before issuing a determination. Warning notices would be issued to a person or body where—

- the person or body had been criticised during FAI proceedings
- criticism of a person or body could be inferred from evidence given at the FAI or
- the sheriff’s determination or any recommendations will contain criticism of a person or body (or such criticism could be inferred).

Concerns were expressed regarding making recommendations legally binding. Some witnesses believed this risked making the process more adversarial and therefore less likely to discover the truth. Witnesses suggested that sheriffs may choose to make less strong recommendations if they are to be legally binding, potentially undermining the process.

In addition, some witnesses raised questions regarding health and safety which is a reserved issue. This was acknowledged by Mr McGuire—

> We recognise that the sheriff’s recommendations as they relate to reserved matters, including health and safety regulations, cannot be enforceable.
However, many other recommendations will be enforceable and they could make a difference.”

84. Some respondents supported some legal strengthening of sheriffs’ recommendations. The submission from Digby Brown LLP (solicitors) said that Consideration should be given to whether failing to respond to a Sheriff recommendation should be dealt with by way of contempt of Court. This would ensure that recommendations are actively considered and full and detailed responses are received. To do otherwise would rob the objective of receiving and publishing responses of much of their practical effectiveness.”

85. The Scottish Government did not agree that sheriffs’ recommendations should be legally enforceable, arguing that the effect of the relevant provisions in the Bill— … would be to lengthen FAIs and to introduce a more adversarial element. 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.”

86. On the proposal that the Lord Advocate monitors compliance with sheriffs’ recommendations, the Scottish Government argued that it was for the sheriff to decide whether to make recommendations rather than the Lord Advocate, and …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.”

87. When asked about the difficulties involved in making sheriffs’ recommendations legally binding, Ms Ferguson replied My view is that we need to be in a position where we prevent loss of life and injury as well as find out reasons for it. Knowing the reason is worth less - not worthless – if you cannot do anything about it. That is the situation we are in at the moment and I would like to see that change.”

88. Ms Ferguson explained that the sheriff’s power to make legally enforceable recommendations is discretionary i.e. there is flexibility in the Bill to allow the sheriff to make a statement about the circumstances of death without making legally enforceable recommendations.

89. Mr McGuire said that the only way in which learning lessons could properly be achieved would be by making recommendations enforceable.
90. We share the view of the member in charge of the Bill that the FAI system stands or falls on whether it ensures that lessons are learned. Determinations and recommendations made by sheriffs at the conclusion of the inquiry are key to ensuring those individuals and organisations learn lessons to prevent a similar death occurring, provided they are acted upon.

91. However, we have not been persuaded that the FAI system would be improved by giving sheriffs the power to make their recommendations legally binding. This risks undermining the inquisitorial (rather than adversarial) nature of the current system, which we see as key to helping ascertain the truth behind a fatal accident in an objective manner. It also appears that there may be a legal difficulty associated with the reserved nature of health and safety legislation.

92. In our Stage 1 report on the Scottish Government’s Bill, we have asked the Scottish Government to look at ways of ensuring that sheriffs’ recommendations are respected, and recommend that Ms Ferguson discuss its response to the Committee in advance of Stage 2 of the Government’s Bill should it proceed to that Stage.

Appeals

93. Unlike the Government’s Bill, the Bill would provide for an appeals process by which a sheriff’s recommendation could be challenged.

94. Ms Ferguson explained to us that the existence of this provision was in part a necessary consequence of the provisions in the Bill enabling a Sheriff’s recommendations to be legally enforceable:

> Under natural justice and ECHR, if we say that sheriffs’ findings are enforceable, we have to offer a right of appeal to those against whom a finding might be made, and we do that in the bill.’

95. The Scottish Government stated:

> 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 Government’s Bill, the routine practice of those receiving recommendations would be to immediately appeal leading to delay, cost and uncertainty.

96. The Committee understands the Member’s wish to give more of a role in the FAI process to the families of those who have lost loved ones. Providing them with the options for legally challenging recommendations is one way to do so. However, we are concerned that this could prolong the process, as
well as further compromising its non-adversarial nature, potentially leading to increased stress and suffering for families. We also note the comments of the Member in charge that the existence of a provision for appeals is in large part a consequence of provision made elsewhere for sheriff’s recommendations to be legally enforceable. As stated above, we do not support that provision.

97. The Committee notes that there currently exists a judicial review process where individuals can question the inquiry process and how it was conducted and consider this to be the appropriate mechanism rather than an appeals process.

Financial implications

98. The estimates of the costs and impacts of the Bill contained in the Financial Memorandum are based on the Financial Memorandum accompanying the Scottish Government’s Bill. That FM highlights the unpredictable nature of the average number of fatal accident inquiries held each year and the associated inherent difficulty with estimating the additional costs associated with the Government’s Bill, a point echoed in the FM accompanying this Bill.

99. Notwithstanding this uncertainty, the FM accompanying Ms Ferguson’s Bill estimates an additional one or two FAIs per year related to the combined total of the death of persons subject to a compulsory hospital detention order, a compulsory treatment order and of a voluntary patient in a hospital for treatment of a mental disorder. It estimates that there will be no more than one or two additional FAIs every five years as a consequence of extending the mandatory FAIs to include deaths resulting from industrial disease or exposure to substances hazardous to health due to the person’s employment or occupation.

Financial assistance for those attending an FAI

100. The Bill would empower the Court of Session to make rules providing for financial assistance for the representation of those attending an FAI. It would also enable the sheriff, at a preliminary hearing, to award such funding. (As discussed in the next section, the Delegated Powers and Law Reform Committee has criticised this provision on technical grounds.)

101. The funding mechanism envisaged in the Bill would be separate from the legal aid scheme. The Financial Memorandum states—

> No estimate has been made for any provision which may be made in the FAI rules providing for funding to be made available to families to enable them to obtain legal representation at FAIs. This is because it depends upon what provision is made in those rules for that funding.’
102. We presume that this provision exists in the Bill to enable families of the deceased to have access to justice. Given the provisions in the Bill giving potential legal force to sheriff's recommendations, those individuals at risk of being criticised following an inquiry may also wish to avail themselves of these provisions. It is disappointing that the Member in charge has not done more work to clarify whom these provisions are intended to benefit and how the envisaged scheme would work, in turn enabling a best estimate of costs arising from this provision to be made.

Financial resolution

103. Under Rule 9.12 of the Parliament’s standing orders, the Presiding Officer ruled that the Bill would require a financial resolution; otherwise it could not proceed to Stage 2.

104. Only a member of the Scottish Government or a junior Scottish Minister may lodge and move a motion for a financial resolution and, in July 2015, Patricia Ferguson wrote to the Cabinet Secretary for Finance, Constitution and Economy requesting that he introduce one. If such a motion is not moved and agreed to by Parliament, the Bill cannot proceed past Stage 1.

Finance Committee

105. The Finance Committee issued a call for evidence on the Financial Memorandum which closed on 21 August and received eight responses but agreed not to undertake any further work or to report on the FM.

Delegated powers

106. The Bill contains a number of delegated powers provisions in relation to ancillary provision (section 36(1)), commencement (section 39 (2)), transitional arrangements (schedule 1, paragraph 2(1) and the power to regulate procedure (section 34(1)).

107. The Delegated Powers and Law Reform Committee (DPLRC) considered the delegated powers within the Bill and reported to the Committee on 18 June 2015. The DPLRC agreed to raise questions on the power to regulate procedure.

108. Section 34(1) confers powers on the Court of Session to make rules to regulate the practice and procedure to be followed at deaths inquiry proceedings. In addition, subsection 2(j) allows provision to be made regarding financial assistance to participants in the inquiry, a provision not included in the Scottish Government’s Bill.
109. The Delegated Powers and Law Reform Committee recommended that the powers conferred on the Court of Session should be narrowed so as to limit the ancillary power to matters ancillary to inquiry proceedings. It concluded that the provision of financial assistance is a substantive matter normally dealt with by the executive or legislature and recommended that section 34(2)(j) be removed at Stage 2.

110. We endorse these recommendations and ask the Member to respond to the concerns raised. We note that the objection of the DPLRC is not as to the policy behind this provision which, as noted in the immediately preceding section, is opaque.

Conclusions

111. The Committee commends Patricia Ferguson on her Bill and for prompting discussion on updating the law in relation to fatal accident inquires. This Bill and the Government’s Bill both restate the 1976 Act and the Committee considers that the Scottish Government and the member work together.
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum, paragraph 31
Letter from the Minister to the Convener, 4 June 2015
STUC; written evidence
Scottish Parliament Justice Committee Official Report. 9 June, Col 45
Scottish Parliament Justice Committee Official Report. 26 May, Col 21
Scottish Parliament Justice Committee Official Report. 9 June, Col 46
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum, paragraph 51
Letter from the Minister to the Convener, 4 June 2015
STUC; written evidence
Scottish Parliament Justice Committee Official Report. 9 June, Col 49
Justice Committee 13th Report 2015 (session 4): Stage 1 Report on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill page 17 (SP Paper 774)
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Policy Memorandum paragraph 31
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Policy Memorandum paragraph 31
Inquiries Into Fatal Accidents and Sudden Deaths etc (Scotland) Bill SP Bill 63 Policy Memorandum page 7
Scottish Parliament Justice Committee Official Report. 9 June, Col 42
Scottish Parliament Justice Committee Official Report. 9 June, Col 42
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Policy Memorandum paragraphs 36 and 39
Letter from the Minister to the Convener, 4 June 2015
Letter from the Minister to the Convener, 4 June 2015
Scottish Parliament Justice Committee Official Report. 9 June, Col 43
Scottish Parliament Justice Committee Official Report. 9 June, Col 43
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Policy Memorandum paragraph 49
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Policy Memorandum paragraph 5
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Explanatory Notes page 16
Evidence taken on this issue is discussed in paragraphs 180-190 of the Committee’s Stage 1 report on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill.
Scottish Parliament Justice Committee Official Report. 9 June, Col 52
Digby Brown LLP; written submission
Letter from the Minister to the Convener, 4 June 2015
Letter from the Minister to the Convener, 4 June 2015
Scottish Parliament Justice Committee Official Report. 9 June, Col 47
Scottish Parliament Justice Committee Official Report. 9 June, Col 57
Scottish Parliament Justice Committee Official Report. 9 June, Col 48
Scottish Parliament Justice Committee Official Report. 9 June, Col 54
Letter from the Minister to the Convener – 4 June 2015
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum, Page 25, paragraph 6
Inquiries into Fatal Accidents and sudden Deaths etc (Scotland) Bill. SP Bill 63. Financial Memorandum.
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum, paragraph 29
Inquiries Into Deaths (Scotland) Bill SP Bill 71. Financial Memorandum, paragraph 70
Published on the Finance Committee’s website at the following link
Annexe A

20th Meeting, 2015 (Session 4) Tuesday 9 June 2015

Inquiries into Deaths (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Patricia Ferguson MSP;
Patrick McGuire, Thompson's Solicitors.

Written evidence
Τ Scottish Government

23rd Meeting, 2015 (Session 4) Tuesday 1 September 2015

Inquiries into Deaths (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.