Justice Committee

Stage 1 Report on the Inquiries into Fatal Accidents and Sudden Deaths etc. (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. The Scottish Government introduced the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill on 19 March 2015 with the aim of reforming and modernising the law in Scotland in relation to fatal accident inquiries (FAIs). The Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill on 31 March 2015.

2. On 24 March, the Committee issued a call for views on the provisions contained in the Bill, which closed on 28 April. Forty responses were received and an additional two submissions from the Crown Office and Procurator Fiscal Service and the Scottish Government.

3. The Committee held four public meetings in May 2015 to hear evidence on the Bill, beginning with evidence from Lord Cullen to set the scene and explain his views on those areas where the Scottish Government decided not to take forward his recommendations. Details of all of those who gave evidence and the videos of those meetings can be viewed on the Parliament’s website.

4. The Committee would like to thank all those who contributed to this Stage 1 scrutiny of the Bill without whom, the Bill would not have had such rigorous scrutiny. We look forward to receiving the Scottish Government’s response to our recommendations and, should the Bill pass at Stage 1, to discussing amendments to the Bill at Stage 2 in the autumn.

Petitions

5. The Committee has a number of petitions on issues related to fatal accidents and sudden death referred to it and considered PE1280, PE1501 PE1567 as part of its overall Stage 1 scrutiny of the Bill.

Report

6. This report will outline some areas where the Committee believes the Bill could be improved and strengthened particularly in relation to—

- the scope of mandatory FAIs
- deaths abroad
- delays
- the role of the family
- sheriffs’ recommendations
Alongside its scrutiny of this Bill, the Committee took evidence on the Inquiries into Deaths (Scotland) Bill, Patricia Ferguson's Members’ Bill, and heard from Ms Ferguson on her Bill at its meeting on 9 June 2015. In advance of that session, the Scottish Government wrote to the Committee on 4 June, setting out its views on the Bill, and highlighting where her proposals deviated from the provisions in the Scottish Government’s Bill.

The comments from the Scottish Government and of other witnesses on Ms Ferguson’s Bill are discussed in the key themes section of this report. However, the Committee does not comment or make any recommendations on her Bill in this report. Instead, the Committee will publish a separate Stage 1 report containing recommendations on the detail of her Bill in September 2015.

General principles of the Bill

7. Generally speaking, the Committee shares the view of all those who gave evidence that this Bill is a much needed and welcome piece of legislation. An update to the law relating to FAIs, building on the valuable work done by Lord Cullen, is essential given that the existing provisions were enacted almost 30 years ago.

8. The Committee supports the general principles of this Bill.

Background and policy objectives of the Bill

9. An FAI is an inquiry into the circumstances of death in order to determine the time, place and cause of death. Such inquiries are undertaken in the public interest and are not intended to establish any guilt in a criminal sense. The role of an FAI as set out in the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 is to establish, as far as possible—

- where and when the death, and any accident resulting in the death, took place
- the cause(s) of death and any accident resulting in the death
- whether there were reasonable precautions which could have been taken to avoid the death
• whether there were any defects in working practices which contributed to the death

• any other facts which are relevant to the circumstances of death.

**Current legislative framework for Fatal Accident Inquiries in Scotland**

10. The 1976 Act sets out the current legislative framework for FAIs. The procedure for dealing with these inquiries is set out in the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977, which were made under the 1976 Act.

11. An FAI **must** be held when a death occurs in Scotland as a result of a work-related accident or when the deceased was in legal custody at the time of their death.

12. 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.

13. Procurators fiscal investigate all sudden deaths where the circumstances surrounding the death appear suspicious, accidental or unexplained. At present in Scotland, only the procurator fiscal can apply for a fatal accident inquiry, which is a public examination of the circumstances of death.

14. In such cases where an FAI would be mandatory, it is open to the Lord Advocate to decide **not** to hold an FAI if he believes the circumstances of the death have been established sufficiently during criminal proceedings.

15. In addition, an FAI may be held at the **discretion** of the Lord Advocate if it is in the **public interest** to hold an inquiry where the deaths were sudden, suspicious or unexplained. The aim being to establish the time, place and cause of death and whether any **lessons can be learned to prevent similar deaths occurring**.

16. The procurator fiscal is responsible for carrying out an investigation and for presenting evidence about the accident. A sheriff presides over the FAI and makes a determination covering the facts surrounding the death. Determinations which are of public interest are published on the Scottish Courts and Tribunals Service’s (SCTS’s) website. FAIs are not usually held until after any related criminal proceedings have been concluded.

17. It is generally considered that an FAI is an inquisitorial process where the sheriff’s role is to establish the facts rather than to apportion blame or to find fault. **The inquisitorial nature of an FAI differentiates it from criminal proceedings, where the object is to establish whether the accused is guilty of a crime**.

18. It is not possible to appeal a decision made in relation to an FAI, such as the sheriff’s findings or the Lord Advocate’s decision not to hold an FAI, however,
such decisions can be subject to a judicial review. Sheriffs’ FAI determinations are not admissible in evidence in any other court proceedings however the evidence led at an FAI is in the public domain and can be used in other court proceedings.

Other death investigations

19. Death investigations are carried out by the COPFS in roughly half of the deaths reported to the procurator fiscal which, on average is roughly 11,000 deaths a year. Of those death investigations, 50-60 FAsIs carried out in Scotland each year.

20. The Scottish Parliament Information Centre briefing6 outlined the range of organisations who have a role in investigating deaths in Scotland—

- Crown Office and Procurator Fiscal Service

21. Investigations are carried out by a specialist unit within COPFS known as the Scottish Fatalities Investigation Unit. This unit was established as a result of recommendations made in Lord Cullen’s Review of Fatal Accident Inquiry legislation, which is covered in more detail later in this report.

22. In carrying out its investigations, COPFS will usually review evidence, such as post-mortem and other medical reports. Statements may also be taken from witnesses. Once the evidence has been collected, COPFS will make decisions about how to proceed, such as whether criminal charges should be pursued or whether an FAI should be held.

23. Family members are given a point of contact in the procurator fiscal’s office so that they can raise any issues or concerns directly. COPFS indicated that family members have access to the key evidence and input into the decision about whether to hold an FAI. The decision about whether or not to hold an FAI will be explained to the family. In addition, families have access to victim information and advice officers employed by COPFS, who can provide information about the FAI process.

- Health and Safety Executive

24. The Health and Safety Executive (HSE) has a policy of investigating all fatal work-related accidents unless there are specific reasons for not doing so (HSE 2009). However, the HSE will not always be the appropriate agency to carry this out. In particular, local authorities have responsibility for enforcing health and safety obligations in relation to some premises, including offices, shops, hotels and food outlets.

25. HSE Investigations are carried out to decide: what caused the accident; whether action should be taken to prevent a recurrence or to ensure compliance with the law; whether existing law or guidance could be improved; and what response is appropriate to deal with any breach of the law.
26. Prosecutions in Scotland (unlike in England) can only be carried out by the procurator fiscal in the public interest. It will therefore be up to the procurator fiscal, rather than the HSE, whether criminal charges are actually brought. Evidence collected by the HSE – and any conclusions drawn from it by investigators – may also be presented to an FAI.

27. The HSE may, separately, hold an inquiry into particular incidents or matters of health and safety. Where such an inquiry has been held in relation to a work-related death in Scotland, the Lord Advocate can decide not to also hold an FAI.

- Healthcare bodies: NHS boards; local authorities; the Care Inspectorate; Mental Welfare Commission for Scotland

28. NHS boards carry out “adverse event reviews” where there are concerns about the circumstances of a death. Their purpose is to discover if any lessons for future practice can be learned. In many cases, the facts of the death will also be reported to the procurator fiscal, who may carry out a separate investigation. NHS boards set their own policies in relation to adverse event reviews so practice varies from area to area. Healthcare Improvement Scotland has an active role in reviewing deaths from suicide and promoting any lessons learned across the NHS.

29. Local authorities have systems in place to review some deaths, through a critical incident review or multi-agency review type process. However, the approach is also not standardised across local authorities.

30. The Care Inspectorate regulates social care, social work and child protection services. It is a legal requirement that the death of a person using a care service is reported to the Care Inspectorate. In many cases, the death will also be reported to the procurator fiscal, who may carry out a separate investigation.

31. The Mental Welfare Commission for Scotland is an independent organisation which works to support the rights of people with mental illness, learning disability and related conditions. It has statutory powers to carry out investigations or hold inquiries where there are concerns about the care or treatment of somebody with a mental illness, learning disability or related condition. Such investigations can be carried out during the lifetime of the person concerned as well as after a death.

- Deaths of children

32. Depending on where a child died, there may be a review by a healthcare or social care body, but again these procedures are not standardised. The Care Inspectorate has a legal duty to review deaths of children who are “looked after” by their local authority. This covers children who are being cared for by foster parents, kinship carers, prospective adopters or in residential accommodation provided by the local authority.

33. Where the death of a child results from abuse, the local authority will carry out a “significant case review”. There are systems in place to disseminate lessons
learned from such reviews more widely. NHS boards organise reviews into cot deaths, and Healthcare Improvement Scotland co-ordinates all findings from the reviews.

Lord Cullen’s Review of Fatal Accident Inquiries legislation

34. The Bill seeks to reform and modernise the law governing the holding of fatal accident inquiries (FAIs) in Scotland and largely implements the recommendations made in the 2009 Review of Fatal Accident Inquiry Legislation led by Lord Cullen of Whitekirk KT, former Lord President of the Court of Session.

35. The Bill repeals the 1976 Act and enacts new provisions to govern the system of FAIs in Scotland. The Scottish Government has confirmed that recommendations from Lord Cullen addressed to COPFS have all been taken forward by the establishment of the Scottish Fatalities Investigation Unit. The Bill therefore, largely implements a number of recommendations set out by Lord Cullen in his review which require primary legislation. There are some notable exceptions, where the Scottish Government has chosen not to take forward his recommendations on—

- extending mandatory FAIs to cover children who die while in residential care (other than those who die while in secure accommodation) as well as those who die while subject to compulsory detention by a public authority;

- holding an initial early court hearing soon after a death is reported to COPFS;

- enabling relatives who are represented at an FAI to receive legal aid without having to demonstrate that it is reasonable in the circumstances; and

- giving the Scottish Government responsibility for publishing responses to Sheriffs’ recommendations.

Bill overview

Consultation on the Bill

36. In 2011, the Scottish Government published its response to Lord Cullen’s Review and issued a consultation on its proposals in July 2014. Fifty seven responses were received and an independent analysis of responses to the consultation was published in November 2014.
37. The Scottish Government also held a number of meetings with key stakeholders throughout the consultation process.

Policy objectives and provisions

38. This policy objectives of the Bill as outlined in the Policy Memorandum are to—

- build on the recommendations implemented by the COPFS,
- extend the categories of death in which it is mandatory to hold a fatal accident inquiry,
- place a requirement on those to whom sheriffs direct recommendations at the conclusion of the inquiry to respond,
- permit discretionary FAIs into deaths of Scots abroad where the body is repatriated to Scotland
- permit FAIs to be re-opened if new evidence arises or, if the evidence is so substantial, to permit a completely new inquiry to be held; and
- provide flexibility for the locations and accommodation for FAIs.

39. The Bill is in 41 sections and has 2 schedules, summarised as follows—

- **Inquiries into deaths occurring in Scotland**: Sections 1-5 sets out whether an FAI may or must be held into the death of someone in Scotland.

- **Inquiries into deaths occurring abroad**: Sections 6 and 7 make provision for inquiries into deaths occurring abroad in both general terms and for service personnel and stipulate that, for an FAI to be undertaken, the body must be repatriated.

- **Reasons where an inquiry is not held**: Section 8 requires that, if requested, the Lord Advocate must give reasons (in writing) as to why an inquiry into a person’s death is not being held.

- **Procurator fiscal’s investigation – witnesses**: Section 9 allows the procurator fiscal to cite a person to attend for precognition as part of a death investigation.

- **FAI – participants and location**: Section 10 provides details of who may participate in an FAI inquiry. The location of the inquiry and under which sheriff’s jurisdiction it lies is set out in sections 11 and 12. Section 13 makes provision for inquiries into multiple deaths.

- **Pre-inquiry procedure**: Sections 14 to 17 set out the procedure for the pre-inquiry process including initiating the inquiry (section 14), preliminary hearings (section 15), notice of the inquiry (section 16 ) and agreement of the facts before an inquiry (section 17).
• **The FAI – Sheriff powers, evidence and witnesses and publishing restrictions:** Sections 18 to 24 set out the provisions for the inquiry outlining the powers of the sheriff (section 18), evidence and witnesses (section 20) and that the inquiry is to be conducted in public (section 20). Section 21 provides publishing restrictions in relation to children and offences by bodies corporate is covered under section 22. Sections 23 and 24 deal with assessors and expenses respectively.

• **Sheriff’s findings and recommendations:** Sections 25 and 26 provide for the Sheriff’s determination and the dissemination of the determination as soon as possible after the conclusion of evidence and submissions in an inquiry. The Bill requires that the Scottish Courts and Tribunals Service (SCTS) must publish the determination and give a copy to all relevant people including the Lord Advocate, all those who participated in the inquiry and each person to whom any recommendations are directed to. Section 27 details compliance with the sheriff’s determination which makes the person to whom the recommendation applies required to respond in writing and make the response available in the public domain. The response must set out what the person has done or proposes to do in relation to the recommendation.

• **Further inquiry proceedings:** Sections 28 to 33 detail the provisions relating to any further inquiry which is to be held. The Bill sets out the circumstances in which a further inquiry may be held (section 28) and the initiation of a further inquiry (section 30) and section 29 provides for the precognition of witnesses. Re-opened inquiries are dealt with under section 31 and section 32 applies to fresh inquiries. The difference between fresh evidence and new evidence is that fresh evidence was in existence at the time of the original inquiry but, for whatever reason, was not considered whereas new evidence is evidence which has become available since the original inquiry and did not exist at the time of the original inquiry.

• **Inquiry procedure rules** Section 34 gives the Court of Session the power to regulate procedure in relation to inquiry practice and procedure.

• **Specialist sheriffs and summary sheriffs** Sections 35 and 36 allow the sheriff principal to designate one or more sheriff or summary sheriff as a specialist on the inquiry and give that sheriff the powers to conduct an inquiry.

• **General, interpretation, schedules, ancillary provision, commencement and short title.** Section 37 repeals the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and sub-section 2 provides that Schedule 2 modifies other enactments. Section 38 outlines various definitions in the Bill and section 39 gives Scottish Ministers the power to make regulations in respect of giving full effect to any provisions of the Bill. Schedule 1 on procedural rules sets out the role of the Scottish Civil Justice Council and provides for transitional arrangements and Schedule 2 modifies other enactments, as referred to in section 37.
Patricia Ferguson MSP Members’ Bill

40. 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 that Bill at Stage 1 on 2 June 2015.

41. The Bill, like the Scottish Government’s proposals, replaces the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and gives effect to many recommendations of Lord Cullen’s review of FAIs report. In addition, it seeks to address concerns raised by trade unions and campaigners such as Families Against Corporate Killers and Scottish Hazards.

42. The Policy Memorandum outlines the main provisions in this Bill which go beyond the Cullen recommendations and which are different from the Government’s FAI Bill. These recommendations are designed to achieve three overarching policy objectives—

- extending the scope of mandatory FAIs
- placing families of the deceased at the heart of the inquiry process and giving them their proper place in relation to the investigation of the death of their loved one, and
- ensuring that lessons are learned from the death and enforced for the purpose of ensuring the future safety of Scottish citizens.

43. The Government made comments on the broad policy elements of the Bill namely—

- Mandatory FAIs (industrial diseases; deaths of mental health patients; notification of relevant persons,
- Application to hold an inquiry,
- Time limits,
- Specialist sheriff courts,
- Holding of an inquiry, and
- Enforcement of sheriffs’ recommendations and appeals
Clarity around the purpose of FAIs and investigations into deaths

44. Throughout its scrutiny of the Scottish Government’s Bill, the Committee was struck by the lack of clarity surrounding the purpose of a fatal accident inquiry and a lack of understanding as to what is meant by inquiries which are held in the public interest.

Public interest

45. Tom Marshall from the Society of Solicitor Advocates highlighted the fact that inquiries in the public interest can vary\textsuperscript{16}—

\begin{quote}
There is almost a conflict of interest for the procurator fiscal, because the public interest in having a prosecution is not the same as the public interest in having an inquiry that is there so that lessons can be learned for the future. Those two things are entirely distinct, and therefore, if the Crown is to remain in charge of both aspects, separating the responsibilities within the Crown Office and Procurator Fiscal Service would be a good thing”.
\end{quote}

46. He elaborated further on the different aspects of public interest in the enforcement of the criminal law by prosecution and the public interest in lessons learned for the future by the holding of an FAI. His view was that 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.\textsuperscript{17}

47. The Solicitor General for Scotland, Lesley Thomson, did not agree that these differing aspects of what was in the public interest caused a tension\textsuperscript{18}—

\begin{quote}
The public interest encompasses all those things at different times. Ensuring that someone who has been involved in criminality is brought to court is the public interest that takes precedence at that stage. That is why, if there are criminal proceedings, there is not always an immediate decision on whether there should be a further inquiry, because an inquiry relates to different aspects… At the start, it may be thought that a matter will have to be inquired into in public by a fatal accident inquiry. By the time that all the investigations, reviews and remedial actions have been taken, there may be nothing left that requires to go into the public domain for further public scrutiny.
\end{quote}

48. The Solicitor General also confirmed that no decision is made on whether there will be an inquiry without the views of the family having been taken on board and that there are occasions when FAIs can take place where the family does not want one.\textsuperscript{19}
Investigatory work

49. Alistair McNab, representing HSE, explained some of the processes involved in their investigatory work and suggested that improvements could be made—

”We have to control expectations, because we cannot say at an early stage whether or not there may be proceedings, which is not our decision...There could be improvement to that phase... There is no doubt that there could be improvements in the liaison with the families and in explaining how the process works...Our main aim in life is to prevent incidents from happening again by enforcing things by enforcement notice, if necessary, and by issuing safety alerts where that can be done. Safety alerts can be issued in agreement with the Procurator Fiscal Service so as to avoid prejudice.”

50. The work done to advise the general public on safety issues while the inquiry is ongoing was described by Stephen McGowan COPFS—

”During investigations, the HSE accident investigation branches and bodies of that nature regularly put out material on public safety in order that any public safety aspects can be taken into account quickly. We also have an arrangement with Healthcare Improvement Scotland so that similar things can be done in the medical sphere. Although a criminal inquiry may be ongoing, steps can be taken immediately if a particular issue of public safety needs to be addressed. That is fairly routine and happens regularly…”

51. The Committee considers that, in the interests of those who have lost a loved one in often tragic circumstances and who must navigate the system, it is imperative that there be greater clarity and understanding around FAIs, their purpose and how they relate to other death investigations and civil or criminal proceedings.

52. The Committee therefore recommends that the Scottish Government should work closely with the Crown Office and Procurator Fiscal Service to promote a better understanding across Scotland of the purpose of an FAI, how it fits together with other death investigations, and the role of the family in the process.

Key themes

Mandatory Fatal Accident Inquiries

53. The remainder of this report will outline the key themes emerging from the evidence heard by the Committee on the specific provisions contained in the Bill and where the Bill could be strengthened.
54. Under the Bill’s proposals, FAIs remain mandatory where someone dies in an accident relating to their work or in legal custody, however the definitions will be updated. It will extend situations in which it will be mandatory to hold an FAI to include children kept in secure accommodation and will extend discretionary FAIs for deaths abroad.

55. The Scottish Government does not agree that an FAI should be mandatory if the death of a child occurs whilst they are resident at other residential child care settings, an issue that respondents to the consultation on the Bill were divided on.

Children in secure accommodation

56. The Financial Memorandum estimates that extending the definition to include children in secure accommodation would result in no more than one or two extra FAIs every few years.

57. The Committee heard there was confusion as to the definition of secure accommodation. The Scottish Government confirmed its intention was that such children would be covered even if the death occurred while the child had absented themselves from the accommodation. Stephen McGowan of COPFS told the Committee that it would be helpful to have in the Bill clarity about the legislative intent with regard to the situation where the child may be out for the day, whether at school or elsewhere.

58. The Scottish Government therefore agreed to reflect on the drafting of this provision saying “the intention in all those cases, including for secure accommodation, is that the provision does not only apply literally within the building. However, if it is felt that there is a lack of clarity we will certainly take that away and reflect on it.”

Looked-after children

59. 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, died.

60. He explained why he felt mandatory FAIs should be undertaken when a child dies while in residential care saying —

When a child is put into the care of others, away from the family, a responsibility of care and protection is owed to that child. I felt that it would be appropriate for such a situation to be considered by a fatal accident inquiry...the idea is simply that those children are in the protection of others and that, if something happens while they are being protected, it is right and proper that there should be an FAI.

61. Some witnesses also believed that FAIs should be extended to include deaths of children in residential care. James Wolffe told the Committee—
We have expressed the view that the scope of the mandatory inquiry requirement should be expanded to cover the category of children who are not in secure accommodation but who are in residential establishments listed in the Children (Scotland) Act 1995 and the Social Work (Scotland) Act 1968… it strikes me that the issue is one that the Government should think about again.

62. Glasgow City Council\(^{30}\) (GCC) argued that there were already sufficient statutory protections in place to ensure the deaths of children looked after by their local authority are thoroughly investigated. It stated that most deaths in residential establishments are as a result of life-limiting health conditions.

63. The Scottish Government highlighted that the law already provides for the investigation of deaths of looked-after children through the reporting requirements of the Looked After Children (Scotland) Regulations 2009. The Minister stated\(^{31}\) —

> Deaths of children in residential establishments are investigated and reviewed by the Care Inspectorate and many (half) are as a result of health issues. It is difficult to see how the public interest would be served by having a FAI for every such case.

I would suggest that a mandatory FAI into the death of a child in wider circumstances than those specified in the Bill may cause the bereaved family unnecessary distress. As with mental health-related deaths I invite the relevant stakeholders to reflect on whether they might produce flow diagrams or other materials to make clearer the proper working practices in this field and more clearly demonstrate circumstances and decision making process as to when an FAI might be considered."

Compulsory detention by a public authority

64. The Mental Welfare Commission for Scotland\(^{32}\) (MWCS) and the Royal College of Psychiatrists in Scotland\(^{33}\) believed that an FAI in every death where the individual was detained by a public authority was not necessary or welcome. MWCS referred to its research\(^{34}\) in this area, which concluded that—

> patients subject to detention were no more likely to die than other people being treated for mental illness, learning disability or related conditions, and that it was important to maintain a policy focus on the much wider issue of the huge inequality of life expectancy between the general population and people with mental health problems."

65. Dr Morrison, MWCS, explained further the difficulties associated with extending the mandatory FAI categories to include all those subject to a compulsory detention or by a public authority. He referred to those on community based treatment orders saying\(^{35}\) —

> It would be very hard to say that their liberty is being restricted or that they are being deprived of their liberty by the state. However, there will be other people
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on community orders who have to stay in a certain place—possibly supported accommodation—and who cannot go out freely without staff with them. …There are close to 10,000 people under welfare guardianships in Scotland at the moment. About 40 per cent of them are older people with dementia. Their liberty is being restricted—most of them are in care homes where they cannot freely go out. Because of their age and their frailty, they are highly likely to die over any given period."

66. Lord Gill warned\(^{36}\) against imposing unnecessary rigidity in the system by extending mandatory FAIs to all who are in the care of the state and said he believed the Crown currently exercises its prerogative responsibly.

67. The Scottish Government argued\(^{37}\) that it was not appropriate to extend mandatory FAIs to include all those who die while subject to compulsory detention—

The Scottish Government accepts the principle of an independent investigation for all deaths where a person has been detained by a public authority. However, we have concluded that there should continue to be some discretion to determine whether an FAI is appropriate in a particular case. The crucial distinction is between an independent investigation and a fully led hearing in the form of an FAI."

Detention under mental health legislation

68. As outlined in the Policy Memorandum, where there is a death of a person detained under mental health legislation, there is a graduated scale of investigations—

- adverse incidents (internal review)
- critical incident reviews (involving a consultant from another Health Board area)
- significant adverse incident reviews (involving another Health Board)
- independent investigations by the Mental Welfare Commission for Scotland (MWCS)
- independent investigation by the procurator fiscal and possibly a discretionary FAI.

69. The current system was described by confusing and as having gaps. The Mental Welfare Commission for Scotland suggested that there was a need for a streamlined approach to investigating deaths of those held under mental health legislation.

70. The Scottish Government acknowledged that there may be a case for these investigations to be rationalised and formalised but did not believe that this Bill was the vehicle for this\(^{38}\).
71. Article 2 of the European Convention of Human Rights creates a right to life. The courts have interpreted this to include a duty on governments to investigate loss of life in certain circumstances. The courts have developed the law to require certain procedural standards to apply to investigations. Investigations must: be independent; be effective; be reasonably prompt; allow for sufficient public scrutiny; and involve the next of kin.

72. Dr Morrison stated that critical incident reviews and adverse incident reviews where no-one out with the local services is involved could cause a potential breach of the requirement for independence under article 2. He suggested the MWCS oversee these reviews to ensure that they are taken seriously and the conclusions are robust.  

73. Cathy Assante, representing Scottish Human Rights Commission (SHRC), supported this view regarding the lack of independence of the graduated scale of investigations—More needs to be added into the system to ensure that all the article 2 requirements are met. Whether that happens under the bill or under mental health legislation is not something we have a specific view on. 

74. The Scottish Human Rights Commission suggested that one way of meeting the legal requirements would be to require a mandatory FAI for deaths in mental health detention. The Lord Advocate could then have discretion (similar to that provided in relation to criminal proceedings) not to hold an FAI where a MWCS investigation had sufficiently established the circumstances of death.

75. Louise Taggart, representing Families Against Corporate Killers (FACK) agreed with SHRC’s position—FAIs should be mandatory in cases involving people with mental health issues, particularly in cases of suicide… Those people are some of the most vulnerable people in our society and are under the hospital’s care”.

76. However, the Royal College of Psychiatrists in Scotland were pleased that the Bill does not include extending the categories of those who should be subject to a mandatory FAI to all those detained under mental health legislation. Lord Gill was also not convinced that there was a need for an FAI in suicide cases as often the circumstances related to the cause of death are conclusive. He told the Committee “it would be very difficult to legislate in such a way as to make FAIs mandatory only for those particular deaths. To be honest, I cannot see the justification for that.”

77. Dr Gary Morrison representing MWCS also did not support holding mandatory FAIs in all such cases and suggested that there should be changes to the current system to introduce more independent oversight. He questioned whether it was proportionate, effective or reasonable to carry out an FAI in every case and used statistics to make his point—
In one year, there were 78 deaths. We have reviewed the case notes of 73 of those. Of those 73 people, 39 died of expected natural causes, a further 14 deaths were unexpected but natural. We argue that having a mandatory fatal accident inquiry for 53 deaths out of 73 would not be an efficient use of resources. Importantly, it would be distressing for the families of people who died of natural causes while detained.”

A proposal for a two-tier system was mooted by MWCS whereby an initial investigation is carried out to rule out deaths from natural causes or cases where there is no cause for concern, and that all other deaths of those detained under mental health legislation should be included within the mandatory FAI category.

The Minister for Community Safety and Legal Affairs said that he recognised these concerns but still did not believe that FAIs should be mandatory in every case—

I take on board people’s serious concerns about human rights when someone is taken into a setting that is not a normal facility, such as the Carstairs facility. More commonly, facilities that deal with people with mental health issues who are sectioned under the Mental Health (Care and Treatment) (Scotland) Act 2003 are medical environments. We are satisfied that there are triggers to allow the Mental Welfare Commission to flag up any pattern of concern regarding the deaths of individuals in those settings and the Crown can raise criminal investigations if it believes that something of that nature has happened.

He emphasised the need for a flexible and adaptable system. However he acknowledged that there was a lack of clarity about how the current system of investigations works in practice and gave a commitment to look at the current guidance and address any gaps which may raise human rights issues.

In supplementary evidence, the Minister confirmed his belief that the Bill was human rights compliant—

The Scottish Government and the Presiding Officer have both certified the Bill as being compliant with the ECHR. The longstanding authority of the procurator fiscal to investigate deaths in Scotland as well as investigations by other public authorities (such as the Health and Safety Executive, the Mental Welfare Commission Scotland (MWCS) or the Air Accident Investigation Branch) plus the discretionary power of the Lord Advocate to hold an FAI meet the requirements of Article 2. As the Solicitor General told the Committee, the “final safeguard” under the Scottish system is the Lord Advocate’s discretionary power to hold an FAI where article 2 compliance has not been secured by another authority’s investigation.”

In response to the criticism that there were gaps in the system of investigating the deaths of those detained under mental health legislation, the Minister stated—
I repeat my call for the relevant authorities to collaborate to produce any flow diagrams, protocols or Charters that might set out the optimal working practices in this field and secure greater confidence that everything is in order."

Industrial diseases and work-related exposure

83. Patricia Ferguson’s proposed Members’ Bill would require mandatory FAIs to be held for deaths due to industrial diseases or work-related exposure to hazardous substances. Her proposals would also require mandatory FAIs to be held in other circumstances and allow the Lord Advocate to opt out of holding an FAI if it is not in the public interest to do so.

84. The Scottish Government believes that Patricia Ferguson’s proposals would significantly increase the number of FAIs being held when nothing new may be learned about the circumstances of the death. In addition, it argues that there may also be difficulties investigating matters which may have occurred decades ago.50

85. The RMT51 argued that extending mandatory FAIs to industrial disease cases would encourage employers to keep employers’ liability insurance records. Ian Tasker representing the STUC argued that the extensions would allow risks to health to be identified at the earliest possible opportunity and emphasised the importance that mandatory FAIs for industrial diseases should not cover old ground and throughout52—

The STUC’s view is quite clear that it would be impractical to have fatal accident inquiries into every death caused by an industrial disease….Our intention in seeking mandatory inquiries in relation to industrial disease is to future proof against new technologies—such as fracking, and nano-technology and the materials that are used in that process—and the ways in which they may cause problems for individuals. Our intention is not to place a burden on the fatal accident inquiry process by covering old ground; it is to investigate new ground.

86. James Wolffe QC and Tom Marshall both believed that FAIs relating to industrial diseases should be undertaken in certain circumstances in order to promote good working practices. James Wolffe was content with the Bill as drafted saying53—

I would be concerned about putting all deaths through industrial disease into the mandatory inquiry category, partly because of the potential for a death to take place long after exposure to a substance and also because, if one is dealing with a case in which there are multiple exposures, and consequences, a series of deaths may effectively raise the same issue. That may be a good reason for having a discretionary inquiry in those circumstances, but to have to have a mandatory inquiry in each case might be thought not to be necessary.

87. When asked about extending mandatory FAIs to cover industrial diseases, Lord Gill said he was not in favour, believing that it is the Crown’s prerogative to decide when and where an FAI should be applied for. He said54—
In many cases the holding of an FAI is completely unnecessary because the facts are staring us in the face and there is simply no need for it. That is where the Crown exercises judgment… the proposal could be hugely costly to the public. I am not at all convinced that there would be any cost benefit to it.

88. Where new industrial processes or diseases are identified, the Solicitor General explained that this would be exactly the situation where there should be discretion as to whether to hold an FAI depending on levels of public concern and the need to air these concerns. She said “I do not feel that it would be necessary to have such cases in the mandatory category because there are all sorts of difficulties around definition, but those are exactly the types of situation that would lead to discretionary FAIs.”

89. The Minister questioned whether it was in the public interest to extend the mandatory FAI category to include industrial diseases 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. He also highlighted the Lord Advocate’s discretion to hold an FAI saying “when there is public interest in a death as a result of industrial disease or exposure to hazardous substance…The Scottish Government, and 83% of respondents to the Government’s consultation, believe that the current provisions for work-related deaths are sufficient.”

90. Finally, the Minister also advised that in circumstances where deaths arise in any new industry which raise issues of public concern but do not currently fall within the types of death which require a mandatory FAI that these could and would be addressed by the holding of a discretionary FAI.

91. Patricia Ferguson was asked if she was reassured by the evidence heard that there would be a discretionary FAI where new industrial disease deaths were uncovered to which she replied —

The practical difference is that there will be a presumption that there will be an FAI until it is decided that there will not be… We are saying that it should be the other way round—they should have to exercise their discretion not to do so and explain why they came to that conclusion.

Police custody

92. The Scottish Government’s Bill will update the definition of legal custody to ensure that any death while someone is detained by the police – in any location – is covered.

93. Witnesses, including the Equality and Human Rights Commission (EHRC), welcomed this provision.

94. Hamish Goodall, the Bill Team Leader, outlined the policy intention behind this provision —
The amendment was made to the legislation in line with Lord Cullen’s recommendation and at the request of the former Association of Chief Police Officers in Scotland. The association pointed out that there was a slight discrepancy in the law. The existing legislation applied only to police cells and police stations. The bill widens the definition to police custody outwith police stations.

95. The Committee notes the range of witnesses’ views on whether it should be mandatory to hold an FAI following the death of a person detained under mental health legislation or a child who is looked after.

96. The Committee asks the Scottish Government to further consider whether the Bill should be extended to include mandatory FAIs for both these categories of death, with the Lord Advocate having discretion not to hold an FAI in certain circumstances. The Committee also considers that it would be helpful if the Scottish Government could provide further information on the proposal to rationalise and formalise the current investigatory processes.

Service personnel

97. Flt Lft James Jones urged that an FAI should be mandatory in the event of the death of service personnel while on duty in Scotland. He highlighted concerns regarding the legal definition of those who die while acting in the course of ‘employment or occupation’ and why service personnel who die in Scotland are not covered.

98. Speaking to the Committee, Flt Lft Jones said —

As far as the Crown Office is concerned, the 1976 act talks about employees and employers and, for some reason, because service people do not have an
official signed contract— they are Crown appointees—they are not considered to be employed. That came as a big surprise to me and to a lot of my colleagues, who must obviously have been unemployed for many years. The Crown Office’s interpretation is that service people are not employees.

99. In advance of giving evidence, COPFS wrote to the Committee to explain Crown Counsel’s view of the law as it currently stands as to whether an FAI is mandatory in the event of the death of service personnel whilst on duty—

Historically, a member of the Armed Forces is not an employee of the Crown. Members of the Armed Forces are appointed by the Crown under the Royal Prerogative, and hold an appointment at the Crown’s pleasure. It is therefore a matter of law that deaths of Service Personnel in the course of their duties are not mandatory Fatal Accident Inquiries. There is no employer/employee relationship between the parties.

100. The Scottish Government confirmed that this was not an issue which was raised during Lord Cullen’s review or as part of its consultation on the draft Bill. The Minister said “I must confess that I, too, was surprised to learn that service personnel are not considered to be employees, but I appreciate that that represents long-standing legislative practice.”

Section 104 Order

101. The Bill, as introduced, relates to the devolved matter of FAIs in Scotland. The Coroners and Justice Act 2009 contains arrangements for FAIs to be held into deaths of Scottish military service personnel which occur abroad and the Bill re-enacts these provision without any amendment.

102. It would appear that the Bill as it stands, is worded widely enough to encompass service personnel and therefore address concerns in this area. However, it is not clear whether the issue of the deaths of service personnel in Scotland while on duty may raise issues around reserved competency for the Scottish Government. The Minister confirmed that there may be legislative competence issues around the proposals—

Given the defence reservation, any change to the law would have to be achieved by means of a section 104 order, which is already being contemplated for the bill, and agreed by the UK Government. We have had some initial informal discussion with the Ministry of Defence on the matter, and we believe that there might be room for further discussion in an effort to bring deaths of service personnel in Scotland within the scope of the bill.”

103. The Minister provided further evidence which stated—

Having reflected on the evidence at Stage 1, the Government believes that it is inconsistent to have discretionary FAIs into military deaths abroad (but only if the death is notified to the Lord Advocate) and coroners’ inquests into such
deaths in England and Wales, but not when the death occurs in Scotland. Crown Office have confirmed to the Committee that they would not have difficulty with a change to the law which would permit FAIs to be held into deaths of military personnel in Scotland… The latest position is that the Scottish Government is seeking the view of the Ministry of Defence on having mandatory FAIs into service employment deaths in Scotland.

104. He committed to update the Committee on the response from the UK Government.

105. The Committee welcomes the commitment from the Scottish Government to look at amending the Bill to allow the deaths of service personnel in Scotland to fall within its scope and to update the Committee on its discussions with the UK Government.

Deaths abroad

Overview

106. The Bill would enable a discretionary FAI to be held when someone who lives in Scotland dies abroad and their body is repatriated. It sets out the factors the Lord Advocate would consider when deciding whether it would be in the public interest to do so. The Financial Memorandum estimates that creating a power to hold FAIs into deaths abroad would result in no more than one extra FAI per year. COPFS is likely to carry out more death investigations too, at a total cost of approximately £157,350.

107. Almost all witnesses welcomed this new power and Julie Love, representing Deaths Abroad – You’re Not Alone (DAYNA) summed up the general feeling “that the provision, section 6, will definitely make a difference.”

108. However, witnesses highlighted the potential difficulties in obtaining evidence from abroad as there are no formal arrangements for requiring evidence to be provided and, in addition, there are no mechanisms to enable any sheriff’s recommendations to be taken forward. COPFS would therefore be reliant on the goodwill of the country concerned.

109. Police Scotland highlighted the issue of limited resources and the impact of introducing FAIs for those who die abroad and the body is repatriated. Detective Chief Superintendent Robbie Allan was asked if he had concerns regarding resources available to investigate deaths abroad and responded—
We wrestled with what the exercise in relation to deaths abroad would look like, as it would apply to the COPFS and Police Scotland. Would it be very much a paper exercise in which we would take information from abroad and review it, or would we need to be more proactive? What level of intrusion would be required? That is not something that we do at the moment, so additional resources would obviously be required to undertake that role, and it would depend on what level of scrutiny was to be applied.

110. Witnesses felt sections 6 and 7 lacked detail in relation to engagement with other jurisdictions and what the role of Scottish organisations, such as Police Scotland in international death inquiries would be. DSC Allan said—

That needs to be made clear—it was certainly not clear from my initial reading of the bill. Indeed, my first question was whether the bill would require us to deploy Police Scotland officers in foreign countries.

111. However, it was not envisaged that police forces would be deployed abroad according to the Solicitor General—

We do not have power to send investigators abroad in relation to such matters, and the bill does not give us that power. We would do that as a result of cooperation with other countries through the Foreign and Commonwealth Office.

112. More generally, Julie Love highlighted the lack of support currently available to families of those who die abroad—

When a death occurs abroad, the difficulty is that legal aid is not available, because the case is in another country. Most families I know of have definitely not had legal aid or aid for travelling outwith the country to attend court or whatever. They have had no assistance whatsoever.”

Repatriation

113. A number of witnesses expressed concern regarding the requirement that the body must be repatriated and suggested that the Bill should be amended to allow the Lord Advocate discretion, where appropriate, to hold an FAI without the body being repatriated.

114. For example, Jake Molloy of RMT told the Committee that he believed cases where the body could not be repatriated should be included in the Bill and explained the potential benefits, not only to the families of the deceased—

If a fatal accident inquiry were to be held and the recommendations shared, that could have the impetus to improve health and safety understandings and operations. Sharing such learning could prevent recurrence globally.
115. The Solicitor General highlighted that while repatriation of the body is very important to the Crown as it is valuable evidence, she agreed that there should be some flexibility—

“I would have no difficulty with there being exceptional circumstances when a body has not been repatriated, although such circumstances would require to be justified to allow the Lord Advocate to go down that route.”

116. The Scottish Government explained the reasons behind the repatriation requirement in the Bill but conceded that this may not always be possible. The Minister said—

“We are flexible about the bill and will look at what we can do. We want to be realistic with the committee and not raise expectations that an inquiry would automatically lead to an explanation for the death; it will be more difficult without the body, unfortunately.

117. The Committee welcomes the provision in the Bill to allow FAIs to be undertaken when a death has occurred abroad.

118. The Committee understands why the Scottish Government chose to replicate existing legislation and stipulate that, in order for an FAI to be undertaken into a death abroad, the body must be repatriated. However, we consider that there could be exceptional circumstances where it may be appropriate to hold an FAI when it has not been possible to bring the body back to Scotland.

119. The Committee therefore recommends that the Scottish Government considers bringing forward an amendment at Stage 2, to allow for some discretion to hold an FAI where repatriation has not been possible.

Delays

120. A major criticism of the current regime is long delays between the date of death and the start of an FAI, a point acknowledged by the Scottish Government. The Policy Memorandum explains the reasons for these delays as being—

- the need to wait for the outcome of other investigations by bodies like the Health and Safety Executive or the Air Accident Investigation Branch;
- the possible need to obtain expert advice;
- the need to consider whether criminal proceedings are appropriate; and
- the overriding necessity of conducting death investigations thoroughly – this factor is of particular relevance in relation to the complexity of some investigations, especially those involving medical cases and of course helicopter crashes.
121. The Cullen Review contained several recommendations designed to address delays. These included better organisation of COPFS and the introduction of early\(^1\) and preliminary hearings.

122. Eric McQueen, Chief Executive of the SCTS, highlighted that delays in process were not related to the point at which the court is informed that an FAI is proceeding until the time that the hearing takes place\(^2\)—

> About 45 per cent are one-day hearings, and they are largely held within three to four months of the fatal accident inquiry application coming forward. A further 45 per cent are hearings that last between two and 10 days. Most of those take place within three to four months, with some possibly taking place within seven months if they are particularly long or if more evidence is required. Only 10 per cent of cases are of long duration—of about 11 days or more—and most of those will be held within a four to five-month period, with some of the longer ones possibly taking place within nine to 10 months. We are certainly not aware of there being a problem for the parties involved in FAIs or of the issue being raised in the evidence sessions.

123. The Bill would introduce preliminary hearings with the aim of speeding up the FAI process. It is anticipated that the parties would provide information about witnesses, evidence and any areas of agreement at a preliminary hearing, allowing better judicial management of the FAI process.

124. The preliminary hearings would establish the facts and Lord Gill suggested that good case management by the sheriff was the key to conducting the inquiry efficiently and effectively\(^3\)—

> I strongly favour the idea that, in an inquiry procedure, as much of the evidence as possible should be presented in written form. That eliminates unproductive use of time in the inquiry...In practice, we find that a great deal of the evidence—probably two thirds or more of it—is completely uncontroversial and is taken as read.

**Early hearings**

125. Lord Cullen recommended that an early hearing be held in relation to mandatory FAIs and suggested this could be done within three months of a death being reported. The purpose of this hearing would be for COPFS to provide an update on the progress of investigations. Lord Cullen thought it would act as a “spur” to reduce delays. He took care to differentiate between an early hearing and a preliminary hearing as outlined in Section 15 of the Bill, which is concerned with the practicalities of an FAI once it has been agreed that one will take place—

> That is something quite new and the idea is to let relatives and interested parties know what is going on. I thought that it would be useful to have an independent person in the position of a sheriff who was able to say, “Can you give me an explanation of what is going on here?”
I proposed such a procedure simply to let the families and other persons who are directly involved know what is going on so that they can be satisfied that all proper steps are being taken to progress matters.\(^{84}\)

126. Campaigners were broadly in favour of an early hearing. Julie Love said this would be beneficial for families as well, because they could express their thoughts at this stage.\(^{85}\)

127. Jake Molloy representing RMT agreed with the principle of an early hearing to deal with the facts and to “dispel perceptions, fears and concerns, address the family’s issues and share as early as possible the specific facts of the accident to prevent recurrence.”\(^{86}\)

128. Tom Marshall from the Society of Solicitor Advocates also said he was sympathetic to the idea of an early hearing—

> It seems to me that having an early hearing does not leave the matter entirely within the hands of the Crown Office and Procurator Fiscal Service. It brings the court into play at an early stage and, therefore, it gives the court an element of control of the pace at which matters happen in future. That must be important.\(^{87}\)

129. Lord Gill was less enthusiastic about holding early hearings and the Crown having a supervisory role over the Crown’s decision-making process. He suggested improved protocols would work better—

> It is not that I am not conscious of the need for expeditious conduct of the process, but I am just not sure that that would be the best way to go about it… …The real answer would be for the Crown to establish good protocols of conduct whereby the relatives would be kept in touch and would know what was going on. We could achieve the same thing without the need for meetings.

130. Patricia Ferguson stated that until the Lord Advocate has decided there will be an FAI, sheriffs would have no jurisdiction and therefore the proposal seems slightly out of sequence, although she said she had a lot of sympathy with the idea and aim of having an early inquiry.\(^{89}\)

**Criminal proceedings**

131. The Policy Memorandum highlights the fact that FAIs are not usually held until a decision has been taken on whether any criminal proceedings will take place into the death. Following any criminal or civil proceedings, under current legislation, the Lord Advocate may decide that there is no need for an FAI as the circumstances of death have been established in criminal proceedings and it is not in the public interest to undertake another inquiry where the same evidence will be heard.\(^{90}\)

132. The Committee heard from campaigners about the impact of such matters. The result being that there is no public discussion of the evidence or any opportunity
for the families to play an active part in the process. In addition, there is no opportunity to consider what lessons might be learned, a point made by the RMT and the Fire Brigades Union.

133. The STUC, when asked if holding an FAI before criminal proceedings are concluded is not in the public interest as it could prejudice those proceedings replied:

That is very much the case, but more could be done...It is clear that the public interest has to come first, but more could be done to publish reports on fatal accidents at work—we are talking mainly about such accidents—that would help us to improve safety standards at an earlier stage than we do now.

134. However, this was a view not shared by Lord Cullen—

The general answer to that is that it would not be wise for a fatal accident inquiry to start before the conclusion of criminal proceedings.. My problem with that idea concerns how much could usefully be achieved during that initial phase, because even an explanation of how the deceased came to die might be relevant to the criminal prosecution. There is always a danger that whatever is said could create a problem for an on-going criminal prosecution, so it is better to have the criminal proceedings finished.

Milestone charter

135. The Solicitor General acknowledged the need to keep families informed of progress throughout what can be a lengthy death investigation and told of plans to produce a milestone charter:

I have asked the Crown Office team in the Scottish fatalities investigation unit to produce a charter that would be in the public domain and would indicate the various milestones. In relation to early hearings, the equivalent at the investigative stage would be a hearing or a meeting—whatever you want to call it—set by the fiscal at a certain time. What I have in mind at the moment is three months from the date that the death was reported. At that point, the fiscal would be required to provide to the family specific information on the stage at which the investigation is and the timescale for it...We are working on that—we will consult on that milestone charter with the various victims groups and a number of the groups that have given evidence, and we will publish the results of that consultation.

136. The Minister welcomed the plan to introduce a charter—

I think that that is a constructive suggestion, and I understand that she is going to come back to the committee on it. In a sense, it would mean that, in the three-month interval that the Solicitor General referred to, the Crown Office would review where it was at with an inquiry and what needed to be done to ensure that it happened and that any delays were kept to a minimum. As I have said,
that is a very constructive suggestion that will, I hope, largely deal with the intent behind Lord Cullen’s recommendation.

137. Patricia Ferguson expressed an interest in the charter but said95—

"Why wait for a new idea of a charter just to avoid something being laid down in law? That seems to be counterproductive."

138. It is expected that the Committee will receive a draft version of the milestone charter in advance of any Stage 2 consideration.

Statutory timescales

139. 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, the Bill proposes that an FAI should take place within a year. The Lord Advocate would have six months from the death to notify the relatives as to whether he intended to hold an FAI.

140. The STUC supported the idea of mandatory timescales saying “we believe that the timescales proposed by Patricia Ferguson MSP in her Inquiries into Deaths (Scotland) Bill are necessary in order to address one of the most significant failures in the current system.” 96

141. Ian Tasker also expressed his disappointment that the Scottish Government’s Bill did not contain mandatory timescales.97 However, James Wolffe representing the Faculty of Advocates, said he was not in favour of statutory timescales—

"There is such a range and diversity of circumstances and such complexity in the subject matter and nature of an inquiry that it is very difficult to be prescriptive about timescales for starting an inquiry…I suggest that being overly prescriptive is not necessary or helpful." 98

142. Patricia Ferguson, when giving evidence on how statutory timescales proposed in her Bill would address delays in the FAI process, stated99—

"Our view is that we need to specify a time when the Lord Advocate will formally communicate to families and those with an interest the decision that he has made or the likelihood of his decision. We are suggesting six months for that, where there have not been criminal proceedings, and three months where there have been criminal proceedings. We are not being completely rigid about that; rather, we are saying that the Lord Advocate can give an explanation as to why that is not possible."

Resources

143. Alistair McNab from HSE, told the Committee that delays can be caused by the complex nature of some death investigations and police resource available. He said100—
We were working with the police and the Procurator Fiscal Service well before the COPFS health and safety division was set up, but since that came into being, we have all made a concerted effort to try to speed up the investigation process… after five years of tripartite working involving the police, the HSE and the COPFS, we are looking at what we have learned in that time and how we can improve the speed of investigations."

144. The Committee notes the concerns of witnesses regarding delays in holding FAIs, but understands the need for criminal proceedings to be concluded before an FAI can begin. The Committee notes the argument for early hearings, as proposed by Lord Cullen. However, given the commitment by the Solicitor General to produce a milestone charter outlining what families can expect from COPFS in terms of the timings of investigations and decision-making, it is not convinced this is now necessary. The Committee believes that this step will bridge the gap between the Bill as drafted and those who called for an early hearing.

145. The Committee asks the Solicitor General to make available a draft copy of the milestone charter in advance of Stage 2 consideration of the Bill, should it progress past Stage 1.

146. The Committee welcomes the provisions in the Bill requiring preliminary hearings to be held and agrees with witnesses that this should allow better judicial management of the FAI process.

The role of the family

147. The Bill would require the Lord Advocate to give written reasons (on request) for a decision not to hold an FAI. Patricia Ferguson’s Bill would require written reasons to be provided in a range of circumstances.

148. COPFS stated that families have access to key evidence as well as input into the decision about whether to hold an FAI. Families also have access to information about the FAI process through COPFS’s victim information and advice officers.

149. Currently, the family can challenge a decision not to hold an FAI by means of judicial review. However, a judicial review is expensive as it is heard in the Court of Session. The process can only look at the administrative aspects of a decision, rather than its wider merits. Witnesses questioned how effective the existing arrangements were and disputed the fact that they had access to all the relevant information.

Family participation and access to information

150. Witnesses, including the STUC, called for the Bill to give the family a specific right to make representations in relation to the scope of the inquiry. It was also
suggested that family members beyond a spouse/partner or nearest relative should have a right to participate in the process. \(^{102}\)

This, they felt, would better reflect the fact that different family members may have different attitudes to the situation.

151. James Wolffe also mooted that families should be given the opportunity to participate, he said\(^{103}\) —

> I notice, for example, that, under section 12, where the sheriff makes an order transferring the proceedings to a sheriff of another sheriffdom, he has to give “participants in the inquiry an opportunity to make representations”. The family will not always be participants in the inquiry, and one could add in a requirement that the family be given the opportunity to make representations.

152. In order to conduct the FAI efficiently, Lord Gill said that sheriffs must have the discretion to decide who can participate in the inquiry, thus making the most productive use of time. He concluded that\(^{104}\) —

> The sheriff must make a judgment on that based on the circumstances of the case and the representations that are made to him by those who claim to have an interest. That is a perfectly normal facet of effective case management.

153. Stephen McGowan was asked if there was any mechanism for families to challenge the conclusion as to whether a death was self-inflicted or accidental, to which he replied\(^{105}\) —

> We come to certain conclusions but we do not make any determination as to whether a death is self-inflicted. An investigation might reach that point, we might have a discussion with the families about it and a certain statistical return might be put in, but we do not make a formal finding.

**Written reasons from the Lord Advocate**

154. The Bill would require the Lord Advocate to give written reasons (on request) for a decision not to hold an FAI. It was suggested that this information should be provided to families whether or not it was requested.

155. However, the Solicitor General told the Committee that this happens automatically at the moment and she would not have a problem if the Bill were amended to remove the requirement that this information is requested\(^{106}\) —

> In practice, we currently provide the reasons. We have been considering other ways in which we could ensure that families are continually kept advised of progress.

156. The Law Society of Scotland proposed that families should have a right to request an FAI where the Lord Advocate refuses one. A sheriff would consider at a hearing whether such a request was in the public interest.
157. Scotland’s Campaign against Irresponsible Drivers (SCDI) stressed that families need to understand how the death occurred and that lessons have been learned.\(^{107}\)

families need to understand what happened to their loved one, why it happened and, most important of all, to know that lessons have been learned from their loss to ensure that no other family will suffer as they have.

158. DCS Allan acknowledged that improvements could be made in keeping families informed of ongoing police investigations—

The police will deploy to every death, and in cases involving unexplained or suspicious deaths, we also deploy family liaison officers. That initial engagement with the family happens, and we keep them updated during the initial stage of the police inquiry. They will know what we are doing, particularly with regard to how we are managing the initial investigative strategy, the scene and so on. I think that where we need to tighten things up a fair bit is what happens when we complete the initial investigation and report the circumstances to the COPFS.

Legal aid

159. Parties to an FAI can claim legal aid to cover the costs of representation. However, they must demonstrate that it is “reasonable” for them to have separate representation.

160. Whether families of lost loved ones should qualify for legal aid when making representations during an FAI was discussed by the Committee. Lord Cullen said he believed that the reasonableness test should be removed, a point echoed by STUC in their written submission.\(^{108}\)

161. The financial burden placed on families was highlighted by Louise Taggart from Families Against Corporate Killers who said “in a work-related death, it is often the main breadwinner who has been killed, so there are significant financial issues for the families who are left behind. If legal aid were to be more readily available, that would certainly be a positive move”.\(^{109}\)

162. Ian Tasker, STUC, said that individuals should have access to legal aid if they want to be represented at a fatal accident inquiry.\(^{110}\) He went on to highlight the need for families to be supported through the process\(^{111}\)—
Lawyers advise families in fatal accident inquiries at present; families need that support because they have not been part of a legal process before. We have trade unions that support members at fatal accident inquiries."

163. Tom Marshall, when asked if the reasonableness test for legal aid should be removed, replied—

"In my opinion, it is important that families are represented. In some workplace accident cases, there may be support from a trade union, but in other circumstances financial backing may not be available. My own experience of last year's Super Puma helicopter inquiry was that the families wanted to bring forward a number of different issues that did not seem to be on the procurator fiscal's agenda. Without the support of the trade union movement, those issues might not have been aired at all—that is an important point."

164. Scotland’s Campaign Against Irresponsible Drivers (SCID) supports Lord Cullen’s recommendation that relatives of the deceased should not have to justify reasonableness of the granting of legal aid and also that the limit should be increased for legal aid for FAIs.

165. The Scottish Legal Aid Board welcomed the provisions in relation to mandatory inquiries stating that extending the scope of mandatory inquiries to cover death beyond those occurring in the course of a person’s employment could put additional pressure on legal aid expenditure.

166. Following the evidence session with the Minister on 26 May, the Committee requested further information from the Scottish Government in relation to legal aid costs associated with FAIs over the last 3 years. In response, the Minister stated—

"The Committee has suggested that the Scottish Government was not implementing Lord Cullen’s recommendations regarding legal aid on cost grounds. That is not the only reason why the Scottish Government is not proposing that Lord Cullen’s recommendations should be implemented, though it is a significant one."

167. The Minister provided costs to the legal aid fund of supporting families at FAIs in the past three years, which totalled £2,472,600 between 2011 and 2014. He confirmed that the figures provided in the Financial Memorandum were constructed differently in that lifetime costs of cases were calculated based on the year the FAI case started.

168. The Minister highlighted the Scottish Government’s response to Lord Cullen’s review which said that it did not agree with this recommendation. While it regards it important that relatives should be able to participate appropriately in FAIs, it did not accept that this requires automatic legal representation in every case.
Since it is for the procurator fiscal to investigate the circumstances of a sudden death, there must be a clear basis for a relative of the deceased requiring their own publicly funded legal representation. The basis of this approach is rooted in the function of the inquiry itself, namely that it is a fact finding exercise, and not one which seeks to apportion blame or fault. Notwithstanding, the reasonableness test is likely to be met if a relative can demonstrate that they have a discernible interest that is unlikely to be subject to investigation by the procurator fiscal, necessitating that they have their own legal representation.”

Trade union participation

169. Patricia Ferguson’s Bill does not specifically mention trade unions. However, it does contain proposals to allow the participation in FAIs of anyone who has notified the Lord Advocate and appears to him to have an interest in lessons learned from the death. Patricia Ferguson stated that one of the key purposes of her proposed Member’s Bill is to put the families of victims at the heart of the FAI process.

170. Both the RMT and the STUC called for trade unions to have a formal role in FAIs. Currently the spouse or nearest relative and, for work-related deaths an employer are entitled to participate. The Bill will allow a health and safety inspector to participate and the sheriff may allow anyone else with an interest in the inquiry to participate.

171. Tom Marshall highlighted that in some workplace accidents families are supported by a trade union representative who can bring forward issues which are not on the procurator fiscal’s agenda. He said—Without the support of the trade union movement those issues might not have been aired at all.

172. We believe it is imperative that families, trade unions and staff associations are able to participate in a meaningful way in an FAI and that families are represented appropriately and are kept informed throughout the process.

173. The Committee welcomes the requirement that the Lord Advocate provides written reasons for a decision not to hold an FAI but does not believe that this information should only be provided to families on request.

174. The Committee recommends that the Scottish Government brings forward an amendment to remove the requirement that this information must be requested.
Sheriffs’ recommendations

175. Currently under the 1976 Act, at the end of an FAI the sheriff is required to set out the place, time and cause of death [and any accident resulting in the death]. The Sheriff can also set out any precautions whereby the death may have been avoided and any defects in the ways of working which contributed to the death.

176. The Bill would require sheriffs’ determinations to be published and that anyone who was a party to the inquiry and to whom a recommendation is addressed would have to respond. If a recommendation were made to a party that did not participate in the inquiry, then there would be no need for that party to respond.

177. There would be no legal sanctions attached to these requirements. Parties would also be free to respond explaining why they will not be implementing recommendations.

178. Patricia Ferguson’s Bill differs significantly from the Scottish Government’s Bill in relation to Sheriffs’ recommendations and their enforcement.

179. Her Bill would make it a legal requirement to comply with a sheriff’s recommendation after the matter has been investigated further by the sheriff. The Lord Advocate would be responsible for monitoring compliance. Where a party had not complied with the recommendation, the sheriff would have the power to hold a hearing to discover why. It would be an offence not to comply with any order issued by the sheriff after the hearing.

Legally binding sheriff’s recommendations

180. Concern was expressed that the recommendations made by sheriffs to prevent future incidents are not always implemented and lessons are not being learned from these accidents. Indeed, in some cases the party may not be aware that a recommendation has been made.

181. The Scottish Government suggested\textsuperscript{116} that there are practical problems to making sheriffs’ recommendations legally enforceable. These include: that the recommendation may not, in fact, be practicable or affordable; that FAIs may become more adversarial as a result; and that sheriffs would become involved in ongoing enforcement.

182. The HSE was not in favour of making sheriffs’ recommendations legally binding\textsuperscript{117}—

\begin{quote}
We would not support mandatory directions because in our experience, important as they are, inquiries do not always cover all the issues, nor do they always call the right witnesses. The sheriff could be left in a position where they are putting mandatory decisions on regulators, such as the HSE, when there may be more risks that have not emerged or been debated at the FAI.
\end{quote}
183. James Wolffe pointed out that often sheriffs’ recommendations are directed at groups of people who were not represented at the FAI and how their views were represented prior to recommendations being made, hence the danger of making recommendations legally binding. He explained\(^\text{118}\) —

Sheriffs may well frame their recommendation in such a way deliberately, recognising that it may be for a trade body to issue guidance to its members or for the Government to take forward in certain ways and that it would be wrong for the sheriff to be unduly prescriptive about the outcome of that because there are other parties whose interests need to be taken into account.

184. He stated clearly that the Faculty of Advocates did not believe that sheriffs’ recommendations should be legally binding and explained the reasons were twofold: one of principle and the other being a risk that such a change would make FAIs more adversarial.\(^\text{119}\)

185. Lord Gill was not in favour of making sheriffs’ recommendations legally binding, neither was the Solicitor General. Lord Gill stated\(^\text{120}\) —

No. I do not think that that is a good idea at all. The sheriff makes a recommendation within the context of an FAI, which, as I have tried to emphasise, has a very tightly constrained remit. There may well be other evidence that is not before the inquiry, which might emerge later or might simply be of only indirect relevance to the purpose in section 1(3), and the sheriff’s recommendation might well require to be reconsidered in the light of that other evidence. To make a recommendation mandatory introduces a completely unnecessary degree of rigidity and could lead to completely unhelpful recommendations having to be acted upon. I do not think that that is in the public interest at all.

186. Lesley Thomson echoed this view\(^\text{121}\) —

Legally binding recommendations would widen the scope of an FAI; they might end up being unenforceable, given that the sheriff would have been looking at the particular circumstances of the death, or deaths, before him; and there is the danger that the inquiry would turn into an adversarial process.

187. The Scottish Government commented on the inappropriateness of making sheriffs’ recommendations legally binding.\(^\text{122}\) —

The flexibility currently offered by the present system is seen as an advantage, given that the recommendations from a particular inquiry may have wider implications which need to be considered in a broader context.

If recommendations were to become legally binding, the Faculty of Advocates have suggested [in their response to the consultation on the Inquiries into Deaths (Scotland) Bill promoted by Patricia Ferguson MSP] that FAIs would become longer, more expensive and more adversarial, as parties will want to be
represented and will fight harder to ensure that they are not unnecessarily burdened with legally binding recommendations. Furthermore, if sheriffs were aware that any recommendation they make will become legally binding, the Scottish Government is concerned that sheriffs would be disinclined to make recommendations since FAIs as judicial inquiries are not the forum to impose rights or burdens on parties.”

188. The Minister added—

“I understand that Patricia Ferguson has proposed a continuing involvement in the enforcement of recommendations by the sheriff. Presumably a sheriff would be required to call a party back to court if another party complained that the recommendation had not been implemented. This causes us significant concern, in that this would have major implications for shrieval and court resources if such a proposal were to be adopted, since FAI proceedings would effectively continue, possibly indefinitely, while interested parties complained to the sheriff – with justification or not – that recommendations had not been implemented. “

189. Ian Tasker acknowledged the difficulties associated with sheriffs’ recommendations involving devolved and reserved areas—

..road traffic regulations are reserved, but we think that a sheriff should be able to make legally binding recommendations on matters relating to the Scottish Parliament’s devolved powers. ”

190. Patrick McGuire, representing Thompson’s solicitors in support of Patricia Ferguson, acknowledged the difficulties associated with making sheriffs’ recommendations legally binding where they related to reserved issues and explained—

..we have reflected that—as we have had to do—in section 25(5), where 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
Publication of recommendations

191. There was general agreement that sheriffs’ recommendations should be published alongside the responses from those to whom they are directed, for example Jake Molloy, RMT, said this: "would lead to a lot of emphasis being put on those companies responding positively. It would act as a great deterrent to bad practice and would promote good practice, as long as the process was open and transparent."

192. However, several respondents argued that SCTS may not be the most appropriate body to co-ordinate responses. Lord Cullen’s original proposal envisaged the Scottish Government taking a more active role in overseeing the implementation of responses. James Wolfe said: "I expect that, if someone decides not to implement a recommendation, they will wish to explain why, and the requirement in and of itself to consider a response ought to have an impact on those to whom recommendations are directed. There is perhaps a question whether the procedure for publication through the Scottish Courts and Tribunals Service is exactly the right way to go about that, but the broad thrust of the policy in the bill seems to strike the right balance."

193. Tom Marshall indicated that the SCTS website would be appropriate place for the publication of responses: "It does have the advantage that those who are looking for information about fatal accident inquiries will probably go first to the Scottish Courts and Tribunals Service website. If they have to go somewhere else to find out information about recommendations that have been made and responses that have been given, the prospect is that they are not going to find it—or, at least, the Scottish Courts and Tribunals Service website is going to have to include a link, which means that it is going to have to do some work somewhere."

194. Mr McQueen agreed that SCTS should take on the role of publishing sheriffs’ recommendations and responses, subject to adequate resourcing: "As the Lord President suggests, we are being pragmatic rather than being particularly happy about the situation. Nevertheless, we see a logical link; the SCTS website would include the determinations, recommendations and responses to them. For openness and transparency the information would all be there for everyone to see. We do not have a particular skill in assessing responses, so we would need to put in place a function to deal with that aspect."

195. He told the Committee that to take on this function would cost in the region of £60,000 per year.

196. The Minister emphasised the Scottish Government’s position regarding SCTS’ role: "
I firmly believe that it would be advantageous for the SCTS to publish the response to the sheriff’s recommendations. I do not want to overstate the point but it would probably give more credibility to the process if the sheriff gives recommendations and response is made to the sheriff about whether those recommendations will be taken forward and if not, why not. That would help the process.”

Monitoring of the implementation of sheriffs’ recommendations

197. On the issue of monitoring whether a sheriff’s recommendation has been acted upon, James Wolfe noted\textsuperscript{132}—

> The problem would then be who would do that in the Scottish Courts and Tribunals Service. Is it envisaged that it would go back before a sheriff who would have some monitoring role over the way in which a recommendation is implemented or not implemented? If it is to be a sheriff who has that role, what sanction is to be applied other than the sanction of public opinion or the pressure that comes from being forced at least to confront the recommendation and make a response to it?... At the end of the day, however, it has to be for the body concerned to consider the issue at large and to decide for itself what its responsibilities are.”

198. Sheriff Liddle explained that it would be very difficult for a sheriff to maintain control over any determinations they make and manage the case on an ongoing basis but he pointed out that the expectation was that their recommendations would be implemented\textsuperscript{133}—

> I fully accept that if I make a recommendation, I want and expect it to be implemented. There is such a wide variety of recommendations that could come out of an inquiry that it is difficult to be prescriptive.”

199. The Minister was not clear on whose role it was to monitor compliance with sheriffs’ recommendations\textsuperscript{134}—

> ..that would probably be a resource issue that the SCTS would face. So, in some way, shape or form, a relevant organisation or body would monitor progress. As a whole, on the issue that you might be getting at as to whether the SCTS should monitor overall performance and how many recommendations are followed through, I do not think it would be realistic for us to expect the SCTS to do that within its resource.”

200. The Minister added\textsuperscript{135}—

> It would be inappropriate for the Scottish Government, SCTS or the Lord Advocate to actively monitor compliance because this would place them in a quasi-judicial role.”
201. Patricia Ferguson explained her position in relation to sheriffs’ recommendations and their enforcement saying—

> Under natural justice and the ECHR, if we say that a sheriff’s 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. Similarly, it is only right that the sheriff can set a timeframe against which the recommendation must be implemented and can call back the person or organisation to whom the recommendation was made and find out what action has been taken to implement it. At that point, the person or organisation might say that it has not been possible to implement the recommendation in that timeframe but that they can do it in another six months or a year and that, in the meantime, they can give details of the progress that has been made. It is only right for the sheriff to be able to review that, listen to what has been said and take whatever action he or she thinks appropriate at that point. Those two sides of the exercise need to be in place.”

202. The Committee welcomes the proposals in the Bill to require sheriffs’ determinations to be published and to require parties involved in the inquiry to which a recommendation is addressed to respond to the recommendations. The Committee considers that the proposals strike the correct balance between improving compliance with the recommendations. The Committee, on balance, considers that the Scottish Courts and Tribunals Service is the most appropriate body to do this.

203. The Committee notes the view of witnesses that there could be difficulties in placing a duty on a particular body to monitor the implementation of sheriffs’ recommendations and considers the requirement in the Bill that recommendations are published and responded to by those involved to be sufficient. The Committee asks the Scottish Government to look at ways of ensuring that sheriffs’ recommendations are respected.

Other issues

Location of an FAI

204. Proposals in the Bill would break the current link between the location of the accident and the sheriffdom in which an FAI is held. The Scottish Government argued that this would increase flexibility, and thus assist with delays and better meet the needs of families. However, it has traditionally been considered important that FAIs were held as close as possible to the location of the accident. This was thought to preserve local knowledge. It is also likely to be the most convenient location for witnesses.

205. James Wolffe agreed that the provision in the Bill provided flexibility but warned of the potential negative impacts for the families—
We recognise that it is a good thing to put flexibility into the system to allow inquiries to be held at the appropriate place, which may not always be the local sheriffdom. Our particular concern is that the decision-making process should take into account the interests and views of the family in particular. It may be that that could be built in by way of an amendment.”

Sheriff Gordon Liddle said that the Bill should contain a presumption that the FAI will be held locally particularly to enable families to attend—It can be difficult for families to travel long distances...Another equally important aspect is that often cases that lead to an inquiry have a local flavour—the people in the local community are interested in what happens and what the outcome will be. Those people would be excluded from a public inquiry if it were to be held elsewhere.”

However, Lord Gill disagreed that there should be a presumption for an FAI to be held locally—I think that in most cases it will be pretty obvious that the inquiry should take place in the jurisdiction in which the accident happened, but there will be cases in which it is more appropriate that inquiries take place where the families are. That gives us the necessary degree of flexibility. I am all in favour of that.”

The Committee welcomes the proposals in the Bill to allow flexibility to determine the sheriffdom in which an FAI can be held and considers this to be a practical step in addressing some of the delays in the system. However, we urge the Lord Advocate, when choosing the sheriffdom, to put families’ interests at the heart of his decision as well as the practicalities.

Summary and specialist sheriffs

Concerns were expressed regarding the power given to the Lord Advocate to appoint summary sheriffs to an FAI. Some witnesses were not enthusiastic regarding the appointment of specialist sheriffs, which could lead to specialist centres. Sheriff Liddle described these as undesirable. Sheriff Stewart explained the Sheriffs’ Association’s position—We have reservations, in that it may create the feeling in the public mind that there are important and less-important fatal accident inquiries, that the decision is made when the Lord Advocate assigns a fatal accident inquiry to a particular sheriffdom, and that if a part-time summary sheriff takes up an FAI it may not get the attention that it would get if a more experienced sheriff got it.

This was not the view of Lord Gill who put it simply when he said “a summary sheriff will be perfectly capable of conducting a straightforward fatal accident inquiry. If the inquiry is more complex, a sheriff should do it.”
211. The Committee notes the concerns of sheriffs regarding the appointment of summary sheriffs to FAIs but also notes the view of Lord Gill that a summary sheriff will be able to conduct straightforward FAIs while sheriffs would deal with more complex cases.

Financial implications

212. The Financial Memorandum provides an overview of the financial impact of the Bill on the Scottish Government, COPFS and SCTS and states that the existing cost of an FAI will not change as a result of this Bill. From the FM, the current costs to COPFS and SCTS in preparing and conducting a lengthy FAI is £94,701 and £90,000 respectively. The Finance Committee issued a call for evidence on the Financial Memorandum which closed on 24 April 2015 and received seven responses but agreed not to undertake any further work or to report on the FM

213. Additional costs incurred as a result of investigating deaths abroad is estimated at £157,350 each year.

214. The Financial Memorandum for Patricia Ferguson’s Bill estimates that there would be an additional one or two FAIs every five years as a result of her proposals to extend the work related deaths category to include deaths from industrial diseases or from workplace exposure to hazardous substances.

215. The Committee believes that, should the scope of mandatory FAIs be extended to include deaths of those detained under mental health legislation, then the financial impact could be significant.

216. The Committee has made comments in relation to legal aid earlier in this report. The Scottish Legal Aid Board (SLAB) concurred with the view that it was difficult to predict the increased cost of legal aid as it is difficult to predict whether the Bill will result in an increase in the number of FAIs. It did however, point out that any additional costs to the Legal Aid Fund would be met by the Scottish Government under the terms of the Legal Aid (Scotland) Act 1986.

Delegated powers

217. The Bill contains a number of delegated powers provisions, the main one being in relation to places at which inquiries may be held. The Scottish Government stated that this provision [section 11(1)], which will allow Scottish Ministers to make regulations to designate places at which a sheriff court may be held to hold an FAI would be subject to the affirmative procedure.

218. The Delegated Powers and Law Reform Committee considered the delegated powers within the Bill and reported to the Committee on 27 May 2015. The
DPLRC agreed to raise questions on the powers in section 34(1) (power to regulate procedure etc.) and made the following recommendations—

- that the power in section 34(1)(b) is narrowed so as to limit the ancillary power to matters ancillary to inquiry proceedings in line with the policy intention explained in the Scottish Government’s response and (b) draws the lead committee’s attention to the general breadth and scope of section 34(1) of the Bill.

- The justification given for the width of the power is the need for maximum flexibility to implement the recommendations arising from Lord Cullen’s review. A further justification is that the 2014 Act confers powers in the same terms on the Court of Session to make rules about proceedings in that court and in the sheriff court. However in the Committee’s view the Scottish Government has not explained why the 2014 Act powers constitute a relevant precedent. Those powers were conferred in the context of giving the Court of Session far-reaching powers to reform its own procedures and practice as part of a radical overhaul and modernisation of the civil court system.

219. The Committee endorses the recommendations of the Delegated Powers and Law Reform Committee in relation to the delegated powers in the Bill and asks the Scottish Government to respond to the concerns raised.
Justice Committee
Stage 1 Report on Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, 13th Report, 2015 (Session 4)

1 The Bill and associated documents have been published on the Parliament’s website at the following address: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/87332.aspx [Accessed March 2015]
2 http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/88085.aspx
3 More information on these petitions can be found on the Committee’s website
4 The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976
http://www.legislation.gov.uk/ukpga/1976/14/contents
5 Bremner, A. 2015. Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill SB 15/23 Available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-23_Inquiries_into_Fatal_Accidents_and_Sudden_Deaths_etc_Scotland_Bill.pdf [Accessed June 2015]
6 Bremner, A. 2015. Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill SB 15/23
7 The Review report can be viewed on the Scottish Government’s website
8 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Explanatory Notes, page 3
10 As defined in the Children (Scotland) Act 1995.
11 As defined from regulations made under the Public Services Reform (Scotland) Act 2010.
13 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Policy Memorandum, page 2.
15 Inquiries into Deaths (Scotland) Bill SP Bill 71-Policy Memorandum.
17 Society of Solicitor Advocates - written submission FA40
20 The HSE investigates between 25 and 35 work-related deaths and give evidence in approximately 10 to 15 FAIs each year.
24 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Financial Memorandum, page 28
27 Children may be living in a residential establishment (which can be provided by a local authority or a third party) because no one can care for them at home or because they have complex disabilities.
28 Scottish Parliament Justice Committee Official Report. 5 May 2015, Col 2
30 Glasgow City Council FA13 – written submission
31 Letter from the Minister to the Convener – 4 June 2015
32 Mental Welfare Commission for Scotland – written submission FA17
33 Royal College of Psychiatrists in Scotland FA1
38 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Policy Memorandum, page 22
The 1976 Act states that a mandatory FAI must be undertaken when a death has resulted from an accident occurring in Scotland while the person who has died, being an employee, was in the course of his employment or, being an employer or self-employed person, was engaged in his occupation as such.

Section 2(3)(b)

Early hearings would occur in situations where an FAI was mandatory. They would happen soon after the death and provide an opportunity to update families and others on the progress of investigations. Lord Cullen intended that they would act as a “spur” to avoid delays. Preliminary hearings would happen before an FAI was due to start and would deal with issues around the scope of the inquiry and the evidence to be presented.
90. Figures supplied to the Scottish Government estimate that 59% of cases which would otherwise result in a mandatory FAI do not proceed because of this reason. Inquiries Into Fatal Accidents and Sudden Deaths etc (Scotland) Bill SP Bill 63-PM page 7

91. Written submission – Fire Brigades Union FA10

95. Scottish Parliament Justice Committee Official Report. 9 June 2015, Col 44
96. Written submission – STUC FA37

102. STUC – written submission FA37
107. Written submission – Scotland’s Campaign against Irresponsible Drivers FA4
[http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/FA4_.SCID.pdf] [Accessed May 2014]

108. STUC – written submission FA37

113. Written evidence – SCID FA4
114. Written evidence – SLAB FA32
116. Policy Memorandum, paragraphs 37 to 41 and 95
122. Inquiries Into Fatal Accidents and Sudden Deaths etc (Scotland) Bill SP Bill 63-PM page 11
123. Letter from the Minister to the Convener – 4 June 2015
125. Scottish Parliament Justice Committee Official Report. 9 June 2015, Col 52
135. Letter from the Minister to the Convener – 4 June 2015
Justice Committee
Stage 1 Report on Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill, 13th Report, 2015 (Session 4)

144 Written submission – Scottish Legal Aid Board FA32 [http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/FA32__SLAB.pdf] [Accessed May 2015]
145 Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill. Delegated Powers Memorandum, page 3
Annexe A

Extracts from the minutes of the Justice Committee and associated written evidence

10th Meeting, 2015 (Session 4) Tuesday 24 March 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1 and (a) agreed the timetable for the scrutiny of the Bill; (b) agreed to issue a call for written evidence; and (c) considered a list of suggested witnesses.

11th Meeting, 2015 (Session 4) Tuesday 31 March 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (in private): The Committee further considered its approach to the scrutiny of the Bill at Stage 1 and agreed panels of witnesses for its forthcoming evidence sessions.

14th Meeting, 2015 (Session 4) Tuesday 5 May 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Lord Cullen of Whitekirk
Julie Love, Chairperson, Death Abroad - You're Not Alone
Louise Taggart, Founder Member, Families Against Corporate Killers
Flt Lt James Jones RAF (Rtd), Campaigner

Written Evidence
Death Abroad - You're Not Alone
Families Against Corporate Killers
Flt Lt James Jones RAF (Rtd)

Supplementary Written Evidence
Flt Lt James Jones RAF (Rtd)
Flt Lt James Jones RAF (Rtd)
15th Meeting, 2015 (Session 4) Tuesday 12 May 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Jake Molloy, Regional Organiser, National Union of Rail, Maritime and Transport Workers
Ian Tasker, Assistant Secretary, Scottish Trades Union Congress
Alistair McNab, Head of Operations in Scotland, Health and Safety Executive
Dr Gary Morrison, Executive Director (Medical), Mental Welfare Commission for Scotland
Cathy Asante, Legal Officer - Human Rights Based Approach, Scottish Human Rights Commission
Iain Miller, Executive Legal Manager, Glasgow City Council
Detective Chief Superintendent Robbie Allan, Police Scotland

Written Evidence
National Union of Rail, Maritime and Transport Workers
Scottish Trades Union Congress
Health and Safety Executive
Mental Welfare Commission for Scotland
Scottish Human Rights Commission
Glasgow City Council
Police Scotland

16th Meeting, 2015 (Session 4) Tuesday 19 May 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
James Wolfe QC, Dean, Faculty of Advocates
Tom Marshall, President, Society of Solicitor Advocates
Sheriff Gordon Liddle, Vice-President, and Sheriff Nikola Stewart, Sheriffs' Association
The Rt Hon Lord Gill, Lord President and Lord Justice General
Roderick McQueen, Chief Executive, Scottish Courts and Tribunals Service

Roderick Campbell declared an interest as a member of the Faculty of Advocates.

Written Evidence
Faculty of Advocates
Sheriffs’ Association
Lord President of the Court of Session

Supplementary Written Evidence
Society of Solicitor Advocates
### 17th Meeting, 2015 (Session 4) Tuesday 26 May 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Lesley Thomson, Solicitor General for Scotland
Paul Wheelhouse, Minister for Community Safety and Legal Affairs, Hamish Goodall, Policy Officer, Civil Law and Legal System Division, and Greig Walker, Solicitor, Directorate for Legal Services, Scottish Government.

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill (in private): The Committee considered the evidence received and agreed to further consider the evidence received at a future meeting in order to inform the drafting of its Stage 1 report.

### Written Evidence

**Crown Office and Procurator Fiscal Service**

**Supplementary written evidence**

Crown Office and Procurator Fiscal Service
Scottish Government

### 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.

### 22nd Meeting, 2015 (Session 4) Tuesday 23 June 2015

Inquiries into Fatal Accidents and Sudden Deaths etc. (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.
Annexe B

List of other written evidence

- Association of Personal Injury Lawyers
- Autism Rights
- Centre for Excellence for Look After Children in Scotland
- Commander Toby Everitt Royal Navy (Rtd)
- Digby Brown LLP
- Equality and Human Rights Commission
- Fire Brigades Union
- Forum of Scottish Claims Managers
- Healthcare Improvement Scotland
- Institution of Occupational Safety and Health
- Law Society of Scotland
- Pinsent Masons LLP
- Royal College of Nursing Scotland
- Royal College of Psychiatrists in Scotland
- Royal Society for the Prevention of Accidents
- Scotland's Campaign against Irresponsible Drivers
- Scottish Civil Justice Council
- Scottish Legal Action Group
- Scottish Legal Aid Board
- Scottish Police Federation
- Sheriff Principal L Murray WS
- Stuart Graham
- Together (Scottish Alliance for Children's Rights)
- Victim Support Scotland
- Zurich Insurance plc (UK Branch)