The Scottish Parliament
Pàrlamaid na h-Alba

JUSTICE COMMITTEE

AGENDA

20th Meeting, 2015 (Session 4)

Tuesday 9 June 2015

The Committee will meet at 9.30 am in the Robert Burns Room (CR1).

1. **Decision on taking business in private:** The Committee will decide whether to take item 4 in private.

2. **Apologies (Scotland) Bill:** The Committee will take evidence, in round-table format, on the Bill at Stage 1 from—

   Ronnie Conway, Co-ordinator in Scotland, Association of Personal Injury Lawyers;

   David Stephenson QC, Faculty of Advocates;

   Graeme Watson, Scottish representative, Clinical Negligence Sector Focus Team, Forum of Insurance Lawyers;

   Laura Ceresa, Solicitor and member of the Society Health and Medical Law Committee, Law Society of Scotland;

   Paul McFadden, Head of Complaints Standards, Scottish Public Services Ombudsman;

   Charlie Irvine, Senior Teaching Fellow, University of Strathclyde;

   and then from—

   Dr Sally Winning, Deputy Chair, British Medical Association Scotland;

   Dr Anthea Martin, Joint Head of Medical Division, Medical and Dental Defence Union of Scotland;

   Dr Gordon McDavid, Medicolegal Adviser, Medical Protection Society;

   Bruce Adamson, Legal Officer, Scottish Human Rights Commission;

   Geraldine McCann, Head of Administration and Legal Services, South Lanarkshire Council.

3. **Inquiries into Deaths (Scotland) Bill:** The Committee will take evidence on the Bill at Stage 1 from—

   Patricia Ferguson MSP;

   Patrick McGuire, Thompson's Solicitors.

4. **Work programme:** The Committee will consider its work programme.

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The papers for this meeting are as follows—

Agenda item 2

Paper by the clerk	J/S4/15/20/1
Private paper	J/S4/15/20/2 (P)

Apologies (Scotland) Bill and accompanying documents

Apologies (Scotland) Bill: SPICe Briefing

Written submissions received on the Bill

Agenda item 3

Paper by the clerk	J/S4/15/20/3
Private paper	J/S4/15/20/4 (P)

Inquiries into Deaths (Scotland) Bill and accompanying documents

Agenda item 4

Private paper	J/S4/15/20/5 (P)

Justice Committee

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

Apologies (Scotland) Bill

Note by the clerk

Purpose

1. This paper provides some background information in advance of the Committee's first evidence session on the Apologies (Scotland) Bill, which was introduced in the Parliament by Margaret Mitchell MSP on 3 March 2015.

The Bill

2. The Bill provides that "an apology (as defined in terms of the Bill) is inadmissible in certain civil proceedings as evidence of anything relevant to the determination of liability, and cannot otherwise be used to the prejudice of the person making the apology (or on whose behalf it is made)".[1] The Bill also has the broader purpose of encouraging a cultural and social change in attitudes towards apologising.[2] The provisions in the Bill would apply to all forms of apology and to all civil proceedings with the exception of fatal accident inquiries and defamation proceedings. The Policy Memorandum explains that the reason or an exception for fatal accident inquiries is "to take account of the public interest in ensuring that all relevant evidence may be led" and that the exception for defamation proceedings is for similar reasons.[3]

3. The Policy Memorandum confirms that the legislation should not impede any further course of action being taken where an apology has been given.[4] It also anticipates that the Scottish Ministers will wish to issue guidance both internally and externally and that the six-month period between Royal Assent and the time the Act comes into force provided in the Bill would allow sufficient time for them to prepare this.

4. More information can be found in the Bill and accompanying documents at: http://www.scottish.parliament.uk/parliamentarybusiness/Bills/86984.aspx and in the SPICe briefing on the Bill, which is available at: http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_15-29_Apologies_Scotland_Bill.pdf

Committee consideration

Justice Committee

5. The Justice Committee was designated as lead committee for Stage 1 consideration of the Bill on 17 March and issued a call for written evidence on 31 March. Written submissions[5] received are available at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/89281.aspx

[1] Policy Memorandum, paragraph 2.
[2] Policy Memorandum, paragraph 3.
[3] Policy Memorandum, paragraphs 10 and 11.
[4] Policy Memorandum, paragraph 7.
[5] A pack of written submissions was circulated to each member with their meeting papers of 19 May.

6. The Scottish Government has provided a memorandum to the Committee setting out its position on the Bill, which can be accessed at: http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/20150501_SG_Memorandum.pdf

Finance Committee

7. The Finance Committee's call for evidence on the Financial Memorandum (FM) on the Bill received seven responses. That Committee agreed not to take any further evidence or to report formally on the FM. Responses it received are at: http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/87890.aspx

Delegated Powers and Law Reform Committee

8. The Delegated Powers and Law Reform Committee's report on the Delegated Powers Memorandum on the Bill was published on 28 April and is available at: http://www.scottish.parliament.uk/S4_SubordinateLegislationCommittee/Reports/sur-15-26w.pdf

Next steps

9. The Committee is due to hold two round-table sessions on 9 June,[6] before hearing from the Minister for Community Safety and Legal Affairs on 16 June and from the member in charge of the Bill, Margaret Mitchell MSP, on 23 June.

[6] On 9 June, the Committee is due to hear from the Law Society of Scotland; Faculty of Advocates; Scottish Public Services Ombudsman; Association of Personal Injury Lawyers; Professor Charlie Irvine, Strathclyde Law School; British Medical Association Scotland; Medical Protection Society; Medical and Dental Defence Union of Scotland; South Lanarkshire Council, and the Scottish Human Rights Commission.

Justice Committee

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

Inquiries into Deaths (Scotland) Bill

Note by the clerk

Introduction

1. This cover note provides some background information in relation to the Committee's scrutiny of Patricia Fergusons MSP's Inquiries into Deaths (Scotland) Bill[1] and outlines the next steps in the Committee's scrutiny.

2. This is the first evidence session on the Bill, although the Committee considered the issues contained in the member's consultation on this Bill during its scrutiny of the Scottish Government's Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill[2] and how it compares to the Scottish Government's proposals.

Background

The Bill

3. The Bill was introduced on 1 June 2015 and the Parliamentary Bureau designated the Justice Committee as lead committee in consideration of the Bill at Stage 1 on 2 June 2015.

4. The Bill, like the Scottish Government's proposals, restates the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 and gives effect to many recommendations of Lord Cullen's review of FAIs report[3]. In addition, it and seeks to address concerns raised by trade unions and campaigners such as Families Against Corporate Killers and Scottish Hazards.

5. From the Policy Memorandum, the main amendments made in this Bill which go beyond the Cullen recommendations and which are different from the Government's FAI Bill are designed to achieve three overarching policy objectives—

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

[1] The Bill and accompanying documents can be viewed on the Parliament's website http://www.scottish.parliament.uk/parliamentarybusiness/Bills/89907.aspx [accessed June 2015]
[2] The Bill and accompanying documents can be viewed on the Parliament's website http://www.scottish.parliament.uk/parliamentarybusiness/Bills/87332.aspx [accessed April 2015]
[3] 2009. Review of Fatal Accident Inquiry Legislation – The Report. http://www.gov.scot/Publications/2009/11/02113726/11 [Accessed June 2015]

Scottish Government written evidence

6. The Scottish Government wrote to the on 4 June, setting out its views on the Bill, this has been reproduced in full at **Annexe A** to this note. In addition, the Scottish Government undertook to provide supplementary written evidence following the evidence session on 26 May 2015 on the Scottish Government's FAI Bill. This evidence includes information on a number of relevant issues including mandatory FAIs, representation of families and sheriff's recommendations. This has been reproduced at **Annexe B** to this note.

Next steps

7. At its meeting on 9 June, the Committee will take evidence hear from Patricia Ferguson MSP, and Patrick McGuire, Thompson's Solicitors and is expected to consider its report on the Bill in September 2015.

Annexe A

Correspondence from the Scottish Government Bill - 4 June 2015

INQUIRIES INTO DEATHS (SCOTLAND) BILL

The Justice Committee has asked for the comments of the Scottish Government on Patricia Ferguson MSP's Inquiries into Deaths (Scotland) Bill which was introduced on 1 June.

The following comments relate to the broad policy elements of Ms Ferguson's Bill only. In the timescale available to the Scottish Government, it has not been possible for full consideration to have been given to potential legal or operational issues.

Mandatory FAIs

Section 4 of the Bill makes provision for inquiries at the discretion of the Lord Advocate. Her Bill differs from the Government's Bill in relation to categories of mandatory inquiries.

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

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

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

According to Ms Ferguson's Policy Memorandum, the Bill "recognises that some deaths caused by industrial disease and such exposures will be in circumstances where the exposure was many years earlier and where the circumstances of such disease and exposure are well known." Section 9(5) provides that a mandatory FAI need not be held in such a case if the Lord Advocate is satisfied that the method and circumstances of exposure to the disease or substance hazardous to health is well known within the industry within which the exposure took place and that no further lessons can be drawn from the death. The Scottish Government considers that the additional references to lessons learned in sections 1(2)(b) and 9(5) and elsewhere within Ms Ferguson's Bill are unnecessary given that the Lord Advocate's consideration of whether the circumstances of a death had been fully aired, in the context of the Government's Bill, would include such factors.

The apparent aim of these provisions together is to have an opt-out decision-making process for the Lord Advocate instead of the current discretionary process, with a

presumption that there will be an FAI in these circumstances unless the Lord Advocate is satisfied of the criteria set out in section 9(5). Ms Ferguson's Financial Memorandum notes that "It is not known how many deaths within this category are anticipated to take place in a year but, in view of the exception made in section 9(5), it is thought that there will not be more than one or two additional FAIs held every five years as a consequence of this amendment."

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

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

Deaths of persons receiving compulsory mental health treatment

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

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

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

Such deaths are already the subject of investigation by the procurator fiscal or MWCS and the Lord Advocate has discretionary power to hold an FAI into such deaths when it is considered to be in the public interest.

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

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

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

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

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

Certain deaths and accidents to be treated as occurring in Scotland

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

Citation of witnesses for precognition

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

Notification to relevant persons

Section 7 of the Member's Bill broadly replicates the list of persons who may participate at an inquiry as set out in section 10 of the Government's Bill (with the addition of a definition of relatives that was not considered necessary in the context of the Government's Bill).

The provision also places a duty on the Lord Advocate to notify the persons set out in subsection (4), within six months of becoming aware of the death, that the Lord Advocate intends to investigate the death and to apply for the holding of an FAI. Alternatively the Lord Advocate may notify those persons that it is not possible to decide on an FAI because of the need for other proceedings to take precedence.

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

Application to hold an inquiry

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

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

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

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

Time limits

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

This proposal does not seem to acknowledge that in December 2013 the Lord Advocate instructed the Scottish Fatalities Investigation Unit that a request for an FAI

to take place should be made to the relevant court within two months of the procurator fiscal receiving Crown Counsel's instructions to hold an FAI. This may be after a decision has been taken not to prosecute or after criminal or other proceedings have been concluded.

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

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

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

Specialist sheriff courts

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

This proposal seems to go against the purpose of an FAI, which is a fact-finding forum held in the public interest and which does not attempt to apportion blame or guilt in the civil or criminal sense. Personal injury actions are adversarial civil actions whereas FAIs are inquisitorial judicial inquiries held in the public interest. These are two completely different legal specialisms and it would be inappropriate for these to be conjoined. The Sheriff Personal Injury Court is proposed to be established for the purposes mentioned in the 2015 Order referred to and not for any other purpose.

Placing FAIs in the Sheriff Personal Injury Court would effectively turn FAIs into the preliminary proceedings of personal injury actions and would run contrary to the Government's policy to reverse the recent trend for FAIs to become more adversarial. The Scottish Government has, however, proposed that it will be possible for both sheriffs and summary sheriffs to specialise in FAIs, which may better meet Ms Ferguson's policy aims. Sheriffs Principal will also continue to be able to preside over FAIs.

Holding of an inquiry

Preliminary hearing

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

Powers of the sheriff

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

Evidence and witnesses

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

Inquiry to be conducted in public

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

Criminal proceedings and the adjournment of the inquiry

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

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

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

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

Sheriffs' recommendations to be legally enforceable and subject to appeal

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

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

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

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

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

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

Sheriffs' recommendations do not bestow legal rights and obligations on participants at an FAI and a sheriff will only make recommendations by which the death might have been avoided. The purpose of an FAI is not, however, to apportion blame or guilt in a civil or criminal way. By contrast, persons and bodies who are involved in a

major incident which is the subject of a full public inquiry should be entitled to receive prior warning of possible criticism in the inquiry's final report.

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

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

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

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

Section 25(3) envisages a role for the Lord Advocate in reporting a failure to comply with the requirement to notify action taken, or not taken, in pursuance of the recommendation. It would then permit the sheriff to call back any party to whom recommendations have been made to ascertain if those recommendations have been implemented. If the recommendation has not be implemented then under section 25(4) the sheriff will be permitted to make an order requiring the person to implement the recommendation. This would mean a continuing involvement in the enforcement of recommendations by the sheriff.

Under section 25(6) and (7) a person who is subject to an order from a sheriff to implement a recommendation would commit an offence if they do not do so without reasonable excuse.

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

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

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

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

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

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

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

Appeals

Sections 26 to 31 of Ms Ferguson's Bill replicate sections 110 to113 and sections 115 and 116 of the Courts Reform (Scotland) Act 2014 which apply to civil proceedings. FAIs are not, however, civil proceedings. They are inquisitorial judicial inquiries held in the public interest.

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

General

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

I hope these comments are helpful to the Committee.

Paul Wheelhouse
Minister for Community Safety and Legal Affairs

Supplementary written evidence the Scottish Government Bill - 4 June 2015

When I gave evidence on the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill on 26 May, I undertook to provide some further information to the Committee and also some further clarification on issues which were raised during the session about fatal accident inquiries (FAIs).

Mandatory Fatal Accident Inquiries

I understand that a number of respondents to the Committee's call for evidence have proposed expanding the circumstances in which a mandatory FAI should be held. This was specifically suggested in the areas of industrial disease deaths, those of mental health patients and of children who are compulsorily detained by the State. The Committee has also heard views on the proposals consulted on by the Scottish Government for dealing with deaths of those detained by a public authority and the application of the European Convention on Human Rights (ECHR). I undertook to provide clarity on these matters.

European Convention on Human Rights

Let me deal with ECHR first. As stated in paragraph 255 of the Policy Memorandum, the Bill makes a significant positive contribution to realising in Scotland the procedural element of Article 2 of the ECHR (right to life), by continuing to provide for mandatory FAIs in certain cases and discretionary FAIs in others. 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. The Solicitor General emphasised in this regard the independence of investigations by the Crown Office and Procurator Fiscal Service (COPFS) from those that may be carried out by other public authorities. There is also the additional safeguard that the Scottish Ministers may establish an inquiry under the Inquries Act 2005, and that possibility is explicitly recognised in section 3(2)(d) of the Bill.

Industrial diseases

The Scottish Trades Union Congress have proposed that the mandatory category of deaths as a result of an accident in the course of employment should be extended to cover deaths caused by industrial disease.

It is not clear what purpose would be served in the public interest by an FAI when the exposure causing the fatality from industrial disease 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. Further, the exposure may have occurred wholly or partly outside Scotland.

Deaths caused by industrial diseases are unlikely to be sudden or unexplained and it is likely that in most cases the victim will be pursuing civil redress against the employer (before death occurs) or the family will do so after the death.

Any deaths arising in any new industry, which do not fall within the current types of death which require a mandatory FAI, could, however, rightly raise issues of public concern and would be addressed by the holding of a discretionary FAI. This was confirmed by the Solicitor General who said:

"[New industrial processes or diseases are] exactly the type of situation where discretion would be exercised on whether to have an inquiry because, irrespective of whether it was a new type of industrial process or a new disease, there would be public concern about the issues surrounding its not having been aired before. Our holding an inquiry would fall into the category of erring on the side of caution because there had not been previous public scrutiny, especially if there were serious concerns about a new industrial process. 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."

Neither Lord Cullen nor the Health and Safety Executive supported mandatory FAIs into deaths caused by industrial diseases. Lord Cullen said that "it is quite difficult to find a form of words that would bring in what we want to bring in without bringing in things that we do not want to bring in".

Tom Marshall, of Thompsons, Solicitors, and President of the Society of Solicitor Advocates, said: "It is unrealistic to have a mandatory inquiry in every case of industrial disease".

Detained mental health patients

The Scottish Government specifically consulted on Lord Cullen's recommendation that provision be made for the investigation into the death of any person who is subject at the time of death to compulsory detention by a public authority within the meaning of the Human Rights Act 1998.

As I have explained above, a full FAI is not required in all cases to meet the requirements of Article 2 of ECHR and it is not the only means to have a death investigated. Sudden, suspicious or unexplained deaths are the subject of investigation by the procurator fiscal (and/or by other public authorities) and the Lord Advocate has discretionary power to hold an FAI into mental health-related deaths when it is considered to be in the public interest.

In relation to the Government's question on Lord Cullen's proposal, some 74% of respondents to consultation favoured the retention of the investigation by the procurator fiscal and the exercise of discretion by the Lord Advocate on completion of the investigation to instruct an FAI.

Investigations are already carried out by the independent MWCS (in the case of mental health patients) who liaise with COPFS in cases which they feel may merit an FAI. Neither the MWCS or the Royal College of Psychiatrists support having mandatory FAIs for detained mental health patients for the reasons set out in their submissions and consultation responses.

Many families of detained mental health patients may not want an FAI in the event that their loved one dies in compulsory detention. Many deaths of mental health patients will be from natural causes, which are nothing to do with their mental health condition, and it is difficult to see what would be achieved by an FAI in such cases.

Some witnesses drew attention to the fact that mandatory FAIs are held into all deaths in legal custody in prison or police custody and compared this with other forms of compulsory detention by the State. But prisoners are detained securely by the State for reasons of punishment and rehabilitation. Mental health patients are detained by the State – for the safety of the patient and of society – in a caring, healthcare environment. The Scottish Government Government would submit that this is fundamentally different from legal custody in prison or police custody. As the Solicitor General said:

"*The balance in the legislation is appropriate. The purpose of mental health detentions is care of individuals. There would therefore not be the same public concern about, for example, people who are in police custody or prison, for whom there is an element of punishment as well as care*.".

Further, the Lord President said in his evidence: "*I think that we can rely on the good judgement of the Crown to identify exactly the cases in which such issues arise and cases in which they plainly do not".* He went on*: "I think that we are in danger of imposing unnecessary rigidity on the system. The system by which the Crown makes investigations and forms judgements is, I think, the best model*".

To the extent there is any perception of "gaps" or lack of clarity in terms of practical working arrangements, 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.

Looked after children

I note that Glasgow City Council recommended against widening the circumstances for mandatory FAIs for all deaths of looked after children and was content with the provision in the Bill which provides for mandatory FAIs for deaths of children in secure accommodation.

I would add to their view, however, that FAIs can be held in wider circumstances if it considered to be in the public interest by the Lord Advocate.

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, (which require local authorities to notify the Scottish Ministers and the Care Inspectorate of a death within 1 working day).

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.

The Care Inspectorate identifies any lessons to be learned and makes recommendations for review of legislation, policy or guidance.

The Centre for Excellence for Looked After Children in Scotland did not recommend making this a mandatory category because it said there was no certainty it would lead to improvements in services for looked after children and those leaving care.

COPFS liaise with and refer to Care Inspectorate reports to inform its decisions on whether to hold an FAI.

The legal definition of "looked after" children includes some who remain living at home with parents, or live with relatives, foster or adoptive parents. Lord Cullen specifically advised against bringing all looked after children within the mandatory grounds.

Finally, 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.

Military deaths in Scotland

The Committee has received concerns that currently the deaths of service personnel in Scotland are not investigated through mandatory FAIs because they are not considered to be employees, though the Lord Advocate may exercise his discretion to hold an FAI. I undertook to provide further information on this.

The Coroners and Justice Act 2009 introduced arrangements for FAIs to be held into deaths of Scottish military service personnel abroad. The 2009 Act amended the terms of the previous Coroners legislation and the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 to allow an FAI to be carried out in Scotland where appropriate into deaths of service personnel abroad. The spirit of the legislative change was to give a choice to affected nearest relatives as to whether a coroner's inquest or an FAI be held if the deceased had links to Scotland. The provisions of the 1976 Act are proposed to be re-enacted without policy modification.

As the Committee will be aware, there was no FAI into the deaths of three RAF airmen following the collision between Tornado jets over the Moray Firth in 2012. I am aware that COPFS has provided a detailed letter of legal reasoning

to the Committee on why service personnel are not in the same legal position as civilian employees, in terms of mandatory FAIs under the 1976 Act.

No discretionary FAI was held in relation to the 2012 Tornado collision because "*all the relevant issues have been comprehensively examined in the course of the Military Aviation Authority report and could not have been better considered in any FAI.*" COPFS also said an FAI "*would only duplicate the months of thorough work undertaken by the Military Air Accident Investigation Branch and the Military Aviation Authority in preparing the service inquiry*".

The Bill has been introduced on the basis that FAIs will be mandatory in cases of death as a result of an accident in the course of employment – a restatement of the 1976 Act.

The position of deaths of service personnel in Scotland was not raised in Lord Cullen's review or by any respondents to the Government's consultation on its legislative proposals. This issue only came to light during evidence given to the Committee by former Flight Lieutenant James Jones.

Mr Jones seeks to have mandatory FAIs into military deaths in Scotland. He and other campaigners have criticised the apparent inconsistency between how FAI legislation is applied and the system in England and Wales under the 2009 Act. For example, an FAI was held into the RAF Chinook helicopter crash in the Mull of Kintyre because civilian staff were also on board, which triggered a mandatory employment FAI. A coroner's inquest would be held for any death resulting from a military accident that occurred in England and Wales.

Having reflected on the evidence at Stage 1, the Government believe 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. This issue clearly involves the reservation of the naval, military or air forces of the Crown to Westminster. Any legislative action would have to be in the Westminster order which is proposed under section 104 of the Scotland Act 1998.

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. I will update the Committee on the response from the UK Government, when a response is received.

FAIs into deaths abroad

I am aware that COPFS has indicated that it is prepared to accept that death investigations may in exceptional circumstances have to be carried out without the body being repatriated to Scotland. The Government will consider a Stage 2 amendment to remove the need for the repatriation of the body. Death investigations and FAIs into deaths abroad would remain at the discretion of the Lord Advocate.

Representation of the family and legal aid

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.

In his Review, Lord Cullen recommended that (i) relatives of the deceased should not have to justify the reasonableness of the granting of legal aid for their representation at an FAI; (ii) the Scottish Ministers should consider increasing the limit for legal aid in FAIs and the extent to which legal aid is available within that limit; and (iii) legal aid should, as a matter of course, be granted in any case where the participation of the relatives is necessary in order to comply with Article 2 of ECHR.

In its response to Lord Cullen's Review, the Scottish Government responded as follows:

"*The Scottish Government does not agree with this recommendation, and believes that existing statutory tests should continue to apply. While we regard it as important that relatives should be able to participate appropriately in FAIs, we do not accept that this requires automatic legal representation in every case*."

This view is reinforced by the fact that, in the current financial climate, it has been necessary to manage legal aid expenditure more effectively. Ministers are determined to do this in a way which maintains access to justice as far as possible, and do not believe that removing a test of reasonableness specifically for FAIs would contribute to this aim. All civil legal aid applications need to meet the statutory tests of probable cause and reasonableness.

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.

When an inquiry is investigating a potentially unlawful killing by agents of the State, or as outlined above, a death in legal custody, then we accept that it will be generally appropriate for relatives of the deceased to secure independent legal representation. Accordingly, the tests of probable cause and reasonableness should be easy for an applicant to satisfy."[4]

[4] http://www.gov.scot/Publications/2011/03/18150120/3

The Scottish Legal Aid Board (SLAB) has published guidance explaining the current approach taken when assessing reasonableness in these applications. Where a death occurs in legal custody, SLAB accept that it would be generally reasonable for relatives of the deceased to have independent representation, given that the investigation is being conducted by an agent of the State. This is the practice for legal aid applications. The Scottish Human Rights Commission indicated that there was no ECHR issue with the current provision of legal aid.

The Scottish Government does not believe that there have been any changes in circumstances which would cause it to revisit its attitude to the provision of legal aid for FAIs. In particular, the severe restraints on public expenditure imposed by the UK Government largely remain in place, and could indeed get worse in the forthcoming July 8th Budget Statement and in these circumstances it would be inappropriate to extend legal aid availability for FAIs as this would reduce the amount available for other proceedings.

Notwithstanding that the function of an FAI is not to seek to apportion blame or guilt in civil or criminal sense, it is clear that some firms of solicitors continue to try to use FAIs as a method of trying to establish grounds for subsequent civil action. My officials have previously drawn the attention of the Committee to the website below which clearly sets out how some solicitors view FAIs as an opportunity to glean information which may support a civil claim.

http://www.lemac.co.uk/resources/guides/The_Fatal_Accidents_and_Sudden_Deaths_Inquiry.htm

In particular this site suggests that “any gaps or inadequacy in your civil claim should become clear or be capable of being dealt with”.

This is not the purpose of FAIs, which are inquisitorial judicial inquiries held in the public interest and not preliminary hearings for adversarial actions for civil reparation. Section 1(4) of the Bill makes it clear that the purpose of an inquiry is not to establish civil or criminal liability. I must emphasise this point robustly.

When I gave evidence to the Committee, I undertook to provide to the Committee the costs to the legal aid fund of supporting families at FAIs in the past three years, which totals £2,472,600 between 2011 and 2014.

FAI - Total Legal Assistance Paid inc VAT

	2011-12	**2012-13**	**2013-14**	**2014-15****
A&A	£10,700	£7,300	£3,900	£8,900
Legal Aid	£1,801,100	£539,600	£146,000	£259,000
Contributions*	£12,000	£12,000	£12,000	£12,000
Net Legal Aid Fund	**£1,799,800**	**£534,900**	**£137,900**	**£255,900**

* estimated figures for 11-12 & 14-15

** provisional figures

These are the annual report figures for FAI costs, including Advice & Assistance (A&A), which was not included in the breakdown for the Financial Memorandum. The annual report figures are the summed effect of accounts from many FAI cases from the past few years. They represent what FAI cost as a subject area in any particular year. The figure for 2011-12 is higher as that includes representation for the Rosepark Care Home FAI that concluded in 2010.

The figures provided in the Financial Memorandum[5] were constructed differently in that lifetime costs of cases were summed back on to the year the FAI case started. This allowed more detailed analysis of FAI case cost to demonstrate what the potential impact could be of a small increase in case numbers.

Please note that the figures for the last financial year are provisional. Legal aid costs for FAI cases may be payable over a number of financial years. SLAB emphasise that case numbers for FAIs are typically few, but case costs are potentially high and also very variable. Therefore any change to the provision of legal aid or the number of FAIs could have a disproportional affect on the Legal Aid Fund.

Location of Fatal Accident Inquiry

I understand that the Committee heard concerns that the best location for an FAI was usually the sheriffdom in which the accident occurred. The Committee has asked whether the Scottish Government would consider including in the Bill an assumption that an FAI should be held in the local sheriffdom in which the accident occurred unless there was a good reason not to.

The Scottish Government agrees that FAIs should normally be held in the sheriffdom in which the death or deaths occurred (or the accident which caused the death(s)) and it is expected that this will continue to be the case in the vast majority of cases. Particularly in remote and rural parts of the country, it is right that an FAI should be held in the local sheriff court so that the bereaved family and/or witnesses do not have to travel significant distances. Section 12(3) of the Bill does, however, permit a sheriff to transfer proceedings to another sheriff of another sheriffdom, as recommended by Lord Cullen.

The Bill removes the link between the location of a death and the local sheriff court district. This will provide more flexibility in the system and should mean that court capacity will not delay FAIs being held since it will be possible to hold the inquiry where there is capacity. This may mean that the FAI is held in another sheriff court district within the sheriffdom or in another sheriffdom.

Lord Cullen recommended that FAIs should, where possible, not be held in a sheriff courtroom but elsewhere in other appropriate premises. The greater use of ad hoc premises as well as sheriff courts will provide maximum flexibility for accommodating FAIs as well as providing alternative accommodation as envisaged by Lord Cullen. The FAI into the 2009 North Sea Super Puma crash was held in the Council Chambers in Aberdeen City Chambers. Other FAIs have been held in Maryhill

[5] Pages 25 and 26 of the Financial Memorandum
http://www.scottish.parliament.uk/S4_Bills/Fatal%20Accidents%20(Scotland)%20Bill/b63s4-introd-en.pdf

Community Centre, which was originally adapted for inquiry use for the ICL Stockline Inquiry headed by Lord Gill, and in a gospel hall in Motherwell.

The use of such premises may well permit FAIs to be held quicker than might be the case if capacity had to be found in a local sheriff court.

The Lord President gave evidence to the Committee in the following terms: "*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*". He specifically disagreed that there should be a presumption on the face of the Bill that the inquiry be held locally. The Scottish Government agrees that the appropriate authorities can be entrusted to exercise their discretion sensibly on a case-by-case basis.

The ability to chose to hold an FAI in a different sheriffdom would permit, for example, an FAI in relation to a death in Glasgow to be held in, say Paisley or Dumbarton Sheriff Courts, rather than the very busy Glasgow Sheriff Court within the geographically small sheriffdom of Glasgow and Strathkelvin.

There is, however, no intention or expectation that an FAI into a death most closely connected to the sheriffdom of South Strathclyde, Dumfries and Galloway would be held in the sheriffdom of Grampian, Highlands and Islands, for example.

Centralisation of FAIs

The Committee asked what assurances could be given that the proposals in the Bill to enable FAIs to be held outside courts and away from the local sheriffdom would not be used by the Scottish Courts and Tribunals Service (SCTS) to centralise FAI hearings at some point in the future.

The Government consulted on the proposal that <u>all</u> FAIs would be held <u>only</u> in bespoke, dedicated centres, with specialist sheriffs, with one in the North of Scotland, one in the East and one in the West. This option was, however, rejected by 72% of consultees who responded to the questions on FAI accommodation who mostly cited the expense of providing such centres, the likelihood that they would be under-employed (since there are only around 50-60 FAIs per annum) and the cost and inconvenience to bereaved families who would have to travel to such centres.

The Lord President, to whom SCTS are responsible and who is statutorily responsible for the efficient disposal of business in the Scottish courts, specifically disagreed with a suggestion that the creation of specialist sheriffs for FAIs could lead to a possible centralisation of the FAI process. Lord Gill said in evidence to the Committee: "*I do not think that that will happen. There is no immediate prospect of there being a centralised FAI system with a national FAI venue. It is not being contemplated at the moment and it is not even on the far horizon. I do not see any need for it, either*".

He went on: "*The Courts Reform (Scotland) Act 2014….broke down the rigid barriers in sheriffdoms; sheriffs now have the flexibility to sit wherever they are sent. If a small group of specialist FAI sheriffs were to emerge, they could be deployed*

anywhere in Scotland as need arose. That would be a much better solution than a centralised venue".

The Government does not therefore envisage any possibility of the centralisation of FAIs in the foreseeable future.

Expenses

Section 24 of the Bill expressly removes any power of the court to award legal expenses at an FAI. The Committee asked if I believed these should be retained as a tool to prevent abuse of process by parties to an FAI.

The Scottish Government does not believe that the award of legal expenses in FAIs is appropriate or necessary to prevent abuse of process by participants at an FAI. This is unconnected with the payment of the expenses of any witnesses etc.

FAIs are inquisitorial judicial inquiries held in the public interest. They are not civil proceedings which typically end with an award of expenses for or against one party. The policy of the Bill is that no expenses should be capable of being awarded against either the Crown or another participant at a judicial inquiry

In relation to awarding expenses against the Crown, the issue of allowing such expenses to be awarded was considered in the case of ***Global Santa Fe*** *Drilling (North Sea) Ltd v. Lord Advocate* (2009 CSIH 43) where, in proceedings for judicial review, an award of expenses made by the sheriff at Aberdeen Sheriff Court was upheld in the absence of statutory direction on the point. If permitted, awards of expenses against the Crown would undermine the principle of the Bill that the decision to hold an FAI is for the Lord Advocate alone acting in the public interest. Section 14(1) of the Bill provides that an FAI is initiated by the procurator fiscal simply notifying the sheriff that an inquiry is to be held.

In relation to other participants at an inquiry, if a participant behaves vexatiously, then the sheriff has case management powers to deal with that. The rule making power in the Bill will permit rules to be made to give sheriffs sufficient case management powers to be able to deal with vexatious behaviour as it arises without the need to award expenses. For example, FAI rules will greatly empower the sheriff to control proceedings through the use of minutes of agreed evidence, powers to regulate the conduct and management of proceedings and the regulation of witnesses and evidence. This approach is in line with the reforms introduced by the Courts Reform (Scotland) Act 2014 to permit greater judicial control of the pace and direction of court proceedings.

Sheriffs' recommendations

Having read the official report for the 26 May session, I would like to take this opportunity to clarify one point.

The Committee asked if I would expect SCTS to monitor compliance with sheriffs' recommendations. When responding I said it would probably give more credibility to the process if responses are made to the sheriff. As you are aware, the provision in the Bill is for the response to be made to SCTS and not the sheriff, but I was keen to

emphasise that this would strengthen the authority of the inquiry process and the sheriff's recommendations in that responses would be sent to SCTS rather than Scottish Government or another body The Government's consultation sought views on responses going directly to the sheriff, however the Lord President, SCTS, the Sheriffs Principal and the Sheriffs' Association raised serious concerns as the sheriff's role in the FAI is ended (*functus officio)* once the determination has been issued.

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.

Section 26 of the Bill provides for the dissemination of the sheriff's determination to (a) each person to whom a recommendation is addressed and (b) any other person whom the sheriff considers has an interest in the recommendation. This was a point discussed during my evidence to the committee and dissemination could clearly include any regulatory body with power to implement change, possibly on a UK basis. This is how lessons from FAIs will be disseminated and learned. The Health and Safety Executive's evidence was that the relevant authorities review determinations carefully and take recommendations very seriously indeed.

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. Recommendations, made for a specific set of circumstances, often refer to working practices which require interpretation on the ground and it is hard to see how the Scottish Government could assess compliance in such circumstances. Many recommendations, particularly in for example medical and aviation FAIs, are technically complex and it might be a matter of opinion as to whether the recommendation had been implemented. There may also be very legitimate reasons not to implement a sheriff's recommendation such as unintended consequences. There may be better ways to achieve the desired result. Moreover, it would be highly undesirable to expect devolved authorities to action changes to reserved areas of regulation – health and safety at work being the most obvious one – where under current devolved responsibilities they would have no power to do so.

The Bill therefore proposes that SCTS would be the most appropriate body to receive and publish responses to sheriffs' recommendations, particularly as the sheriff's determination is published on the SCTS website. This was agreed by as being logical by the Chief Executive of SCTS. In this way, as stated earlier, the Bill will foster accountability on the part of those to whom sheriffs' recommendations are addressed and responses to them will become more transparent by providing a public record.

What is proposed in the Bill broadly replicates what happens under the system of coroners' inquests and the Ministry of Justice believe that this is a proportionate response which fosters compliance by those to whom coroners' reports are sent.

The Committee also asked about consideration of legal sanctions against those who fail to respond, such as contempt of court. The Scottish Government does not believe that this is necessary as COPFS have indicated that parties to whom recommendations are addressed usually take them very seriously and there will be an incentive to respond in that the fact that a party has not responded will be noted next to the determination on the SCTS website. The Chief Coroner's Office has indicated that there was a 100% response rate in the first six months of 2014 under regulation 29 of the Coroners (Investigations) Regulations 2013 (which mirrors what is proposed in the Bill) with no threat of legal sanction. I would expect that the media and public interest groups would seek to expose respondents who fail to produce a response, or an adequate response. Thus, in the words of the Health and Safety Executive, there will be a "strong steer" towards compliance in the Bill as it stands.

I hope the Committee finds this further clarification helpful. I will be replying separately about Patricia Ferguson's Inquiries into Deaths (Scotland) Bill which was introduced on 1 June.

Paul Wheelhouse
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