



The Scottish Parliament
Pàrlamaid na h-Alba

Official Report

JUSTICE COMMITTEE

Tuesday 5 May 2015

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JUSTICE COMMITTEE
14th Meeting 2015, Session 4

CONVENER

*Christine Grahame (Midlothian South, Tweeddale and Lauderdale) (SNP)

DEPUTY CONVENER

*Elaine Murray (Dumfriesshire) (Lab)

COMMITTEE MEMBERS

*Christian Allard (North East Scotland) (SNP)
*Jayne Baxter (Mid Scotland and Fife) (Lab)
*Roderick Campbell (North East Fife) (SNP)
*John Finnie (Highlands and Islands) (Ind)
Alison McInnes (North East Scotland) (LD)
*Margaret Mitchell (Central Scotland) (Con)
*Gil Paterson (Clydebank and Milngavie) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Lord Cullen of Whitekirk
Flt Lt James Jones
Julie Love (Death Abroad—You're Not Alone)
Louise Taggart (Families Against Corporate Killers)

CLERK TO THE COMMITTEE

Tracey White

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Committee

Tuesday 5 May 2015

[The Convener opened the meeting at 10:00]

Decision on Taking Business in Private

The Convener (Christine Grahame): Good morning and welcome to the Justice Committee's 14th meeting in 2015. I ask everyone to switch off mobile phones and other electronic devices, as they interfere with broadcasting even when switched to silent.

Apologies have been received from Alison McInnes.

The committee is invited to agree to consider our work programme in private under item 5. Is that agreed?

Members *indicated agreement.*

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill: Stage 1

10:00

The Convener: Item 2 is our main item of business today and our first evidence session on the Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Bill. We will hear from two panels of witnesses.

First, I welcome Lord Cullen of Whitekirk, who conducted a review of fatal accident inquiry legislation in 2008-09. The bill will implement many, but not all, of the recommendations from his review. Lord Cullen, do you wish to make an opening statement, or shall we go straight to questions?

Lord Cullen of Whitekirk: I have a few remarks.

My remit was

"to review the operation of the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 ... so as to ensure that Scotland has an effective and practical system of public inquiry into deaths which is fit for the 21st century".

As I started my work, it became clear that I was concerned not merely with legislation in whatever form but with the way in which the legislation is operated by organisations such as the Crown Office and Procurator Fiscal Service. I suppose that the discussion in my report and the recommendations that I made are concerned with three general strands: one is to update the system; the second is to expand the system in certain respects; and the third is to improve the system as far as one could through my report.

As you said, convener, my report was published in October 2009, and since then, the Scottish Government has made a number of responses. I am here to answer your questions and to help you in any way I can.

The Convener: Thank you. I move to questions from members, starting with John Finnie.

John Finnie (Highlands and Islands) (Ind): Your review recommended that the death of any child who is being looked after in a residential establishment should trigger a mandatory fatal accident inquiry. What is the rationale behind that recommendation?

Lord Cullen: 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. I appreciate that we are not talking about compulsory measures, because those are accepted by the

Government and now form part of the bill, but 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. I appreciate that, as has been said by the Government, it would open up a wide range of possible situations, but I have said what I can say in my report and I cannot really add to that.

John Finnie: Terminology is clearly terribly important, and your recommendation would include boarding schools. Given your original definition relating to children being in the care of others, there is no reason why that would not still apply to boarding schools. Is that correct?

Lord Cullen: It certainly would apply. It is perhaps a matter of drafting. If the principle is accepted, appropriate drafting could confine that provision to what are thought to be the areas of concern.

John Finnie: My point is that the provision would not necessarily exclude boarding schools.

Lord Cullen: Yes, I accept that.

John Finnie: To what extent should public interest determine whether the Lord Advocate should hold a fatal accident inquiry?

Lord Cullen: From the beginning, the conception has been that a fatal accident inquiry should be held in the public interest, for the information of the public, and for action if necessary. However, that also involves the need to provide for the participation of those who have been directly affected by what happened. The initiative lies with the public authority, namely the Lord Advocate, except in cases in which Parliament decides that there must be a mandatory inquiry—obviously, subject to the proviso about criminal prosecution or an inquiry under the Inquiries Act 2005, which might make that unnecessary. The essential idea, however, is that a fatal accident inquiry is held in the public interest and everything must be responsive to that.

John Finnie: Are you relaxed about there being a measure of discretion afforded to the Lord Advocate with that decision making?

Lord Cullen: Yes, I am. I think that that discretion has always been exercised responsibly. It is important for the public and the individuals concerned to know why it has been exercised against an inquiry, and that is why I recommended that reasons should be given.

John Finnie: Should that power of discretion be open to challenge?

Lord Cullen: I suppose that, technically, it could be challenged through judicial review. That is technically possible, but there would have to be an

underlying legal flaw and, if reasons are given, those reasons might of themselves open up the way to judicial review.

John Finnie: That tends to suggest that the system is one of complete disclosure, and that is not always the case with deaths that give rise to public concern.

Lord Cullen: I am not sure whether I can agree with your general statement that there is a lack of disclosure. All that I am saying is that, if reasons are given, they might open up the need for judicial review. Of course, it would not lead to a situation in which the court could say that there must be an inquiry. It would simply mean that, if a challenge was successful, the Lord Advocate would have to think again.

John Finnie: Thank you very much, Lord Cullen.

Elaine Murray (Dumfriesshire) (Lab): There has been some debate around whether there should be a time limit for initiating a fatal accident inquiry. Some of the arguments against have included the idea that any criminal proceedings should take place first. Would it be permissible or acceptable for an FAI to take place before criminal proceedings had taken place or while a criminal investigation or criminal proceedings were under way?

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. I appreciate that Ms Ferguson has made proposals for time limits, and that they include the possibility of an FAI opening only to be adjourned. 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.

Elaine Murray: Could I also ask about sheriffs' recommendations?

The Convener: Before Elaine Murray proceeds, I would like to intervene. Lord Cullen, one of your proposals is to hold an initial court hearing soon after death is reported. What would that be if it were simply to happen and then be adjourned?

Lord Cullen: Thank you for raising that point. What I put forward there was a proposal not to embark on the FAI itself, but merely to have a meeting to inform the relatives and interested parties about the progress of the investigation and proceedings, if criminal proceedings are necessary. 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?"

No evidence would be heard and it would not technically be the beginning of the FAI. Perhaps I could describe it as an application for a potential FAI that might not go ahead if there were criminal proceedings and it was found after that that there was no point in having an FAI, so the matter would simply be discontinued. 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.

The Convener: So, it would be procedural, rather than substantive, and would not therefore prejudice any subsequent criminal proceedings.

Lord Cullen: Yes, but you will appreciate that that particular idea of mine has not found favour with the Scottish Government.

The Convener: That does not always matter to the committee. It is an interesting proposal and I thought that it might help to raise it.

Elaine Murray: There seems to be a difference of opinion between you, the Scottish Government and Ms Ferguson on the issue of sheriffs' recommendations. You recommend that there be an obligation to respond to such recommendations, whereas Patricia Ferguson suggests that complying with them should be a requirement, although there would be an opportunity to explain why they had not been complied with. However, the Government has not taken forward your suggestion that information on recommendations and responses be published in a report to Parliament. What is your view on that?

Lord Cullen: You have covered a number of topics in that question, the first of which is about publication. I was anxious to ensure that everything would be done to bring home sheriffs' recommendations by making them known to the public and those in positions of authority so that they could take whatever action was required—hence my recommendations on the dissemination and publication of the sheriff's determinations and the response. I wondered how I could make sure that those determinations and the responses—or, indeed, the lack of response—to them got as high a profile as possible, and that is why I recommended that they be tendered to the Government. That would ensure that the Scottish and United Kingdom Parliaments would be aware of what was happening and what the responses were so that they could take any appropriate action. However, my proposal about publication and the information being the subject of an annual report did not find favour with the Scottish

Government, which has left the matter in the hands of the Scottish Courts and Tribunals Service.

That said, I would still like as high a profile as possible to be given to the recommendations. I do not want it ever to be thought that determinations and recommendations are being overlooked.

Elaine Murray: In their written evidence, some witnesses said that they did not think that the Scottish Courts and Tribunals Service was the appropriate organisation to make such a report.

Lord Cullen: I think that I am correct in saying that when I wrote my report, the website of what is now the Scottish Courts and Tribunals Service set out sheriffs' determinations and recommendations. At that stage, the responses themselves were not set out anywhere; that was yet to come. The question, then, is: where should the responses go? I thought it better for them to go to the Scottish Government rather than the Scottish Courts and Tribunals Service. Of course, they could go to both, with links between the two of them. However, the issue is all about profile, which is why I thought it best for the recommendations to go to the Scottish Government. I also mentioned the UK Parliament, because some of a sheriff's recommendations could apply to reserved matters, such as health and safety.

You also touched on the question of how the recommendations are dealt with. I have read Ms Ferguson's proposals on what you might call the enforcement of sheriffs' recommendations, and have some thoughts on the matter. At first, I thought that if a party to an FAI thought that it was likely to be the subject of a legal duty to comply with a sheriff's recommendation, it would want, during the inquiry, to have the clearest specification in that respect and an opportunity, if necessary, to contest that with evidence. The position with regard to a non-participant in an inquiry would be even more significant, because they would not hear what the sheriff's order was until after the FAI and, in fairness, they would need to be given the opportunity to contest it, presumably through some form of hearing of evidence after the FAI was over.

10:15

What concerns me about all that is that it runs counter to the idea that an FAI is there for the purpose of inquisition, not for the purpose of establishing rights, duties and obligations. That is actually quite foreign to the FAI process and would, I think, be inappropriate. Apart from anything else, it would involve a considerable increase in the amount of time spent in the sheriff court dealing with matters that really should be followed up by organisations such as the Health

and Safety Executive or one or other of the Parliaments that have an interest in them.

Making the sheriff's recommendations mandatory places the sheriff in the position of being able to—if you like—enact a legal duty. Apart from the fact that such a move is foreign to the FAI, it places the sheriff in a rather strange position, because the enacting of legal duties is really a matter for the Parliament. If the sheriff were to enact a duty that must be complied with and, if necessary, enforced by some punishment such as a fine, what would you do with that duty if the recommendation itself turned out not to be wise, was superseded or was for some other reason found to be not good? How would you get rid of it? I suppose that you would have to enact some piece of legislation in order to do so, because until that time, the party concerned would have to comply with that legal duty. That point shades into a constitutional question about who is actually in charge, and it seems to me that that is really a matter for Parliament.

My final and purely practical point is that some sheriffs' recommendations—for example, a recommendation that something be considered or discussed or that there be collaboration—are simply not the sort of thing that you would make the subject of a legal duty. Other recommendations might be misguided, superseded or conflict with what was being done or had been recommended elsewhere in Scotland. It would be far better to leave sorting all that out to potential legislation or the actions of some authority that was actually charged with responsibility for looking after safety.

I am sorry that my answer was so long, but those are three points that came to me when I thought about the matter.

Elaine Murray: Thank you very much.

The Convener: Would European convention on human rights issues not arise if there were such a duty and if, after a recommendation was made, it became binding on a party who had not been party to the proceedings and had not had the right to a fair hearing?

Lord Cullen: Indeed. Of course, that comes back to my earlier point that, if a sheriff were to impose a duty on a person who had not participated in the inquiry, you would have to start all over again by examining the case for and against it.

Margaret Mitchell (Central Scotland) (Con): Good morning. It seems to me that if the bill is to be effective, certain resource implications will have to be taken account of. For example, in your recommendations, you suggest that the reasonableness test for legal representation for relatives be withdrawn. I think that the idea behind

that suggestion was that, although the Crown Office and Procurator Fiscal Service could ask some questions on the relatives' behalf, it represents the public interest. However, the Scottish Government has rejected that suggestion, saying that, given the financial climate, the time is not right. Do access to justice questions not arise in that respect?

Lord Cullen: That is part of the Government's answer, and I quite appreciate its view. As you will have seen from the report, what led me in this direction was the reflection that the families have a distinct point of view, which means that they have not only the standing to ask questions but reasonable grounds for asking what should or could have been done. I appreciate the comment that the procurator fiscal can take account of what the relatives say, but he is not bound to do so. After all, he is not conducting his part of the inquiry on their behalf. That led me to wonder why the relatives should not be able to access legal aid—subject, of course, to the limits of what is financially available to them. The reasonableness of their participation should not be in question.

Margaret Mitchell: It seems to me that, if we are talking about updating and improving the process, this is a key access to justice question.

Lord Cullen: It could be seen as such, but of course we are not talking about access to justice in the normal sense, which is all about access in a court of law. An inquiry is not a court of law. However, the question is whether there is a public interest, so to speak, in families having that degree of support.

Margaret Mitchell: I also want to ask about the resourcing of the Crown Office and Procurator Fiscal Service. We have seen delays of up to four years before a fatal accident inquiry has even been considered, and you have made very specific recommendations about resourcing and creating a "central team" in the Crown Office and Procurator Fiscal Service to co-ordinate and monitor things.

Lord Cullen: Yes. The delays have been very dismaying and very unfortunate. As you say, I made a number of recommendations to try to reinforce the need for the COPFS to put resources into and give adequate priority to FAIs. No doubt you will hear from it about what it has succeeded in doing.

There is one respect in which what has happened is not in accordance with what I suggested. I suggested a team that would be devoted specifically to FAIs, whereas it has turned out to be part of a larger deaths unit. That might be perfectly all right—I do not know. I have heard a lot of reassuring statements by the COPFS, and I trust that it has been working well. When you

hear from it, you will no doubt be able to judge whether that approach has been successful so far.

Margaret Mitchell: There seems to be a bit of a precedent, certainly in criminal matters, as we have the domestic abuse task force within the COPFS to make sure that issues are dealt with as efficiently as possible. It seems to me that there is a relationship between the two.

Lord Cullen: As I said in my opening remarks, the working of the system is dependent on the working together of the legislation on the one hand and the COPFS on the other. The two have to work together well enough to ensure that there are no avoidable delays.

Margaret Mitchell: Returning to Elaine Murray's question about the early hearing, which would give some information and communication, would the extra resourcing—

Lord Cullen: That is an important connection, because that is the context in which I talked about the delay. If the COPFS has made improvements such that fears about the family not being kept fully in the picture are groundless, that makes an early hearing of the type that I described earlier unnecessary. The two work together.

My idea was to have an early hearing as a spur to effort and disclosure. However, if the COPFS system is working well, it makes the case for that early hearing less good.

Margaret Mitchell: At present, we do not have a commitment in the bill to an early hearing, and it is not clear whether the Crown Office and Procurator Fiscal Service has received the additional funding that would help to improve the system.

Lord Cullen: I appreciate that there is a problem about the early hearing, because when would it be? The Government has said various things at different stages about when it should be. It has tended to say that it should be held only when we know enough to know that the FAI will go ahead. What I had in mind was something rather earlier than that, but getting a time for the early hearing is difficult. What do we relate it to? Given the range of FAIs, which cover a diversity of accidents, it is difficult.

Margaret Mitchell: Would it involve just the Crown Office and Procurator Fiscal Service or would it involve Police Scotland as well?

Lord Cullen: I presume that Police Scotland would feature as part of the work that is done for the COPFS. It would not have a separate position but would simply be part of what is done to investigate.

Margaret Mitchell: Thank you.

Roderick Campbell (North East Fife) (SNP):

Good morning, Lord Cullen. I want to move on to the question of compulsory detention due to mental health issues. You recommended that a person's death during such detention would be suitable for a mandatory FAI, but that recommendation has not been taken forward. Indeed, the Government has consulted on alternatives. Despite those alternatives, however, the Equality and Human Rights Commission and the Scottish Human Rights Commission seem to have reservations.

I do not know whether you have had an opportunity to look at what the Government says in its policy memorandum about the position relating to those who are detained for mental health reasons, but it refers to its understanding from the Royal College of Psychiatrists that there is a graduated scale of investigations. In the light of what has happened since you reported, how do you feel about the Government's proposals?

Lord Cullen: Are you asking how I feel about the fact that it has not incorporated the proposal in the bill?

Roderick Campbell: Yes.

Lord Cullen: At the time, I felt—and, I think, I still feel—that there is a clear read-across between persons who are in a custodial situation through criminal behaviour and those who are in mental health hospitals by way of compulsion. Each of those groups of people is there by compulsion and they are protected, as it were, by the authority into whose care they have been committed. The Human Rights Act 1998 does not draw a distinction between the two. Cases have cropped up in which deaths have occurred in mental hospitals of people who have been held there compulsorily. Such people have been held to be covered by the 1998 act—article 2, I think—in the same way as those who are in prison or another form of custody. That is why I thought that they should be treated in the same way.

I appreciate that it can be said that a person who dies in a mental hospital may die of natural causes, but the same may be said of those who die in prison, so most of the things that apply to one also apply to the other. I feel that there is still something to be said for my recommendation. Nothing that has happened since then has changed my mind. I have read the policy memorandum, of course, and it shows a number of possible avenues, but no mandatory avenue. That is what I had in mind.

Roderick Campbell: So you remain of the view that a mandatory approach is required.

Lord Cullen: I still consider that there is a lot to be said for it.

Roderick Campbell: Notwithstanding the reservations of the Royal College of Psychiatrists and the Mental Welfare Commission for Scotland.

Lord Cullen: Of course, the committee has to balance everything up. Those organisations have a point of view. It is a question of balancing one thing against another.

Roderick Campbell: Okay. You pointed out in your report that, in 1998-99, there were 141 fatal accident inquiries whereas, in 2008-09, at the time of your report, there were 57. I think that in the last financial year there were 59, and in the previous year there were 33. In general terms, do you think that, as a society, we have got it right? Fatal accident inquiries have been quite an expensive procedure. What is your general view on the number of fatal accident inquiries?

Lord Cullen: I have heard nothing at any stage to suggest that we have too few or too many.

Roderick Campbell: Okay. Perhaps I will leave that there.

The Convener: That put your gas at a peep. [*Laughter.*]

Roderick Campbell: What would you draw from comparing the system that we have in Scotland with the system south of the border?

Lord Cullen: I would hesitate to draw comparisons. I have looked at the system south of the border for certain limited purposes, but not for an overall view.

Roderick Campbell: Thank you, Lord Cullen.

The Convener: I am looking at the distinction that you make between an early hearing before an FAI and a preliminary hearing. Why is the preliminary hearing not good enough? Why do you wish for something else in advance of it?

Lord Cullen: A preliminary hearing takes place in order to organise the management of the FAI. In other words, we have embarked and we want to ensure that the time is properly spent and that we have proper arrangements for what is to come. We are on the way. An early hearing, which I discussed earlier, would be simply and solely for the purpose of information being given—before the sheriff—for the benefit of the families and other interested persons. That is all.

The Convener: Why would it have to be done before the sheriff? Should the Crown Office not be doing that anyway in a more informal fashion? Should it not keep the interested parties—

Lord Cullen: That is the question. I thought that it would be better to have an independent person who could say, “I want to make sure that you tell me in front of everybody what the position is and what is happening.” That is all.

The Convener: Yes. I am quite persuaded by that, because it seems that it would be in the public interest. Quite often, grieving relatives and friends are unaware of or have mixed messages about their role, if any, in an FAI, and it is difficult for them to appreciate their position in that regard. You think that an earlier hearing would be helpful.

10:30

Lord Cullen: I do not want to downplay what the COPFS has been doing and will do, but it would be useful to have the addition of an appearance before the sheriff. If necessary, the hearing could be held in chambers; it would not have to be held in public.

The Convener: I see—so it might not be held in open court.

Lord Cullen: It could be in chambers—I do not see why not.

The Convener: That is interesting.

Christian Allard (North East Scotland) (SNP): Good morning, Lord Cullen. I will press you on one point. A proposed member’s bill wants the categories of death for which a mandatory FAI would be held to include all work-related deaths. Should it be a human right for such deaths to be included?

Lord Cullen: Are you talking about the suggestion in Patricia Ferguson’s proposed member’s bill to cover work-related deaths other than those that are currently covered?

Christian Allard: Yes.

Lord Cullen: There are problems with the proposal. If we take a typical example of industrial disease, long before the death occurs it will perhaps be known what the person concerned is suffering from and what kind of exposure caused that disease. What public interest would be served by holding a public inquiry to establish either the cause of death or the kind of exposure that caused it? If it is a question of where the person acquired the exposure, there will be an employment history. How much can the public interest be served by inquiring into the way in which the particular industry conducted itself? Exposure could have happened years ago—perhaps at a time when there were old-fashioned practices that are no longer being followed.

Would there be a public interest in having a mandatory FAI in all cases into such deaths? I am not suggesting that there should not be an FAI in particular cases, for example if there was a novel form of exposure or if a cluster of things was causing concern. However, would it be in the public interest to have an FAI as a matter of

course when that requires—as was said earlier—the use of public resources?

Christian Allard: Would it be a matter of public resources, or of repetition?

Lord Cullen: Indeed, that could arise. A number of workers could have suffered from exposure to something some years back and, if an FAI were mandatory, an inquiry would have to be held into the death of each worker. I ask myself what each of those inquiries would establish.

Christian Allard: So an FAI would have to be mandatory for one particular type of death, or a new type.

Lord Cullen: An FAI would be required if there was something novel. I am not suggesting for a moment that it would not be useful for the Lord Advocate to be able to do that at his or her discretion, but that is a different matter.

Elaine Murray: The Scottish Trades Union Congress indicated that the ambit of the mandatory FAI should be extended when deaths arise because of new industries such as fracking or nanotechnologies. Would you be sympathetic to that being mandatory or could it be covered by the discretion of the Lord Advocate?

Lord Cullen: I think that there is a difficulty of terminology, so the best course is to leave it to the discretion of the Lord Advocate. 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.

Jayne Baxter (Mid Scotland and Fife) (Lab): I return to the convener's comments about the value of a preliminary hearing and who might convene such a hearing. Should the timescales be monitored? It has already been said that it can take a long time for FAIs to begin or to conclude. Should someone monitor the delays and report back to interested parties on them?

Lord Cullen: Let us not call it a preliminary hearing, because that causes confusion; let us call it an early hearing. The answer to your question on monitoring is that, if an early hearing has taken place and it is inconclusive because things are still in progress, it is up to the sheriff to adjourn it to another date. That is the way in which matters can be kept before the sheriff.

Jayne Baxter: Should that be communicated?

Lord Cullen: The sheriff will communicate it to the parties. He will say, "I appreciate all that has been said today. I hope that it has been useful for the families to hear all this. It is plain that we have to wait for at least a month, so I adjourn this hearing for another six weeks." That is how it would be done.

The Convener: It is a light-touch way of ensuring that there is not unnecessary delay.

Lord Cullen: Yes. It is a reassurance, if you like.

The Convener: As there are no further questions, does Lord Cullen have anything to add? Is there anything that we have not asked that we ought to have asked? We do not mind being insulted.

Lord Cullen: I do not think so. You have covered all the things that I thought you would ask about, and any of the things that were not taken up from my report have come up anyway. Thank you very much.

The Convener: Thank you very much. I suspend the meeting for a couple of minutes to allow a changeover of witnesses.

10:35

Meeting suspended.

10:37

On resuming—

The Convener: We move to our second panel of witnesses. I note that you were all present to hear the evidence in the previous session, which I hope you found useful.

I welcome Julie Love, chairperson of the group Death Abroad—You're Not Alone. Members will be aware that she lodged petition PE1280, on fatal accidents abroad, which the committee is considering alongside the bill. I also welcome Louise Taggart, founder member of families against corporate killers, and Flt Lt James Jones, a retired member of the Royal Air Force who has advised on several inquiries into fatal accidents involving military aircraft.

Before we start, I have some brief information for the witnesses. When questions are addressed to you directly, your microphone light will come on. Otherwise, you may indicate if you want to comment, then I will call you and your light will come on. The microphones come on automatically.

You may wish to make brief opening statements. I emphasise that they should be brief, as we have your submissions, but I am sure that the committee would be happy to hear from you. Does any of you wish to do that? As no one does, we move straight to questions from members.

Margaret Mitchell: I think that most of the witnesses were in the room when Lord Cullen gave evidence in response to questions on legal representation and his proposal to drop the reasonableness test. Do you have any experience

of relatives finding it difficult to get legal aid for legal representation?

Julie Love (Death Abroad—You're Not Alone): 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.

Margaret Mitchell: What is the position more generally?

Louise Taggart (Families Against Corporate Killers): I have no specific examples but, 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.

Flt Lt James Jones: My only experience has been in dealing with the families who were affected by the Nimrod accident in Afghanistan, when the bodies were repatriated to the coroner's court in Oxford in England. There were no real problems with that.

Margaret Mitchell: Have you experienced delays in the holding of fatal accident inquiries? Will the proposals in the bill help to speed up the process? Do you have any suggestions for measures that are not included in the bill?

Louise Taggart: I know that Lord Cullen said that it is not necessarily helpful to draw comparisons with what happens in England and Wales but, from our perspective, it is useful to look at what used to be done there. An inquest used to be held before the criminal prosecution took place. That was the case when the Crown Prosecution Service had decided that there was not to be a gross negligence manslaughter case or a corporate manslaughter case but that the Health and Safety Executive would take forward charges under the Health and Safety at Work etc Act 1974. If a manslaughter case was to proceed, an inquest would be held off and the manslaughter case would go ahead in the Crown court. An inquest might be held subsequently.

If only offences under the 1974 act were being considered, the inquest would be held first. The HSE would often say that it saw the inquest as forming part of its investigative process and that things could come out of the inquest that it found helpful for its prosecution. That meant that families got answers earlier, because the inquest took place first. That was not considered to have a negative impact on the subsequent criminal prosecution. Therefore, I think that consideration should be given to holding the FAI before the criminal prosecution.

Margaret Mitchell: Lord Cullen suggested that an initial or early hearing, if not a full FAI, would give the families more information. It would do what you just described without jeopardising anything else, which is the reason that is given for delaying the holding of an FAI. It would involve informing relatives of what had been discovered up to that point. That initial or early hearing would be held in chambers, a maximum of three months after the death.

Louise Taggart: An early hearing would probably not give families as much information as they would need at that stage. I am not sure how much progress it would be possible to report on at that stage but, if that served as a bit of a kick up the backside for the Crown Office and Procurator Fiscal Service—as a way of saying, “This hasn't been progressed and it needs to be progressed, so what are you doing about it?”—it would be a positive step.

However, that in itself would not be enough for a family. As someone said earlier, we can wait for up to four years for an FAI to kick off. As I said in our submission, some families have had to wait seven years to find out that an FAI is not to take place. Delays of six or seven years are wholly unacceptable. Families need more answers, and they need them more quickly. They need more than just an update on progress—they need answers on how and why their relative died.

Margaret Mitchell: I think that the idea of the initial or early hearing was purely to focus the mind—

Louise Taggart: That is a better way of putting it.

Margaret Mitchell: —and to try to prevent such long delays. As I understand it, it would not be a hearing to establish the facts, but it would put the case on the radar and would allow progress to be kept track of.

Flt Lt Jones: I do not want to keep talking about what happened south of the border but, if we go back to the Nimrod inquiry, the families certainly had meetings with the potential coroner long before the inquest. They talked issues through, which I think they found beneficial. They got things off their chests and they knew that they could raise questions with him that they felt would be brought up at the inquest. Talk of criminal proceedings came up during the inquest, and there was talk of corporate manslaughter as a verdict that could be returned. That went ahead before there was any talk of criminal proceedings.

10:45

The Convener: Do you accept that there could be an issue? Ms Taggart mentioned questions as

to how and why people's loved ones died. If we proceeded with an FAI and family members and relatives wished—rightly—to know those things, might that prejudice a trial, because the party who might thereafter be accused would not have had the protection of the presumption of innocence or even representation? Heaven forbid that I should interpret Lord Cullen, but that is the kernel of what he was saying—a trial might be prejudiced, and we would get into a grey area.

Louise Taggart: It is a grey area, but there are some protections. A witness could not be compelled to answer a question that they thought might incriminate them, and the sheriff's determination could not be referred to in future criminal proceedings. Those protections are built in.

The Convener: Does anybody else wish to comment on that? Are there sufficient protections? I have grave concerns, as you can hear from my questions. It is not that I am not sympathetic to your proposal, but I think that the proposal that my colleague Margaret Mitchell mentioned—an early hearing in procedural terms—is as close as we could get without prejudicing a trial in circumstances when criminal proceedings might be in the air. If somebody was taken to trial afterwards, we would not want the trial to be unable to proceed because issues had been in the public domain in advance.

Louise Taggart: My only point is that the inquest procedure in England and Wales has operated for a number of years and it has not prejudiced criminal proceedings. In some instances, the coroner has stopped the inquest at a point when he has thought, "Hold on a minute—we need to refer this back to the CPS."

The Convener: I think that that has happened in Scotland, too, if something has not been foreseen.

Louise Taggart: That is another protection. If the sheriff thought that something had gone too far, they could stop proceedings and refer the case back for further consideration.

John Finnie: Good morning, panel. My question is for Ms Taggart. You did not make an opening statement, but the opening paragraph of your submission talks about the background of your organisation and states that it is

"a national campaigning network which aims to stop workers and others being killed in preventable incidents".

There is clearly a role for the Health and Safety Executive in that. Further on, you say:

"Often, where a 'mandatory' FAI does not take place, it is because it is said that the full facts and circumstances have been explored in criminal proceedings."

You express frustration about that. Will you share your views with the committee?

Louise Taggart: It is fairly rare for a case to go to a full trial when there is a work-related death. My brother was killed at work, which is why I am involved with families against corporate killers. He was killed in 2005 and a criminal prosecution went ahead in 2008. It was a full trial that was three and a half weeks long, but such trials tend not to happen. Four or five years down the line, the Crown Office and Procurator Fiscal Service tends to come to a plea arrangement with the employer.

In court, people go in and hear the plea arrangement that has been made. They do not get to hear from witnesses or to see all the documentation, such as photographic evidence or whatever else there may be. In that sense, it bursts people's bubble. They have waited that long and they think that the case is going ahead and that they will find out all the facts and circumstances, but they do not. They are told, "We're not going to hold an FAI because we think all the facts and circumstances have come out." How can they possibly have come out if people have not heard from anybody?

John Finnie: Of course, the purpose of putting out the full facts and circumstances is for others to learn from them or for the HSE, for instance, to initiate further proceedings.

Louise Taggart: In my brother's case, when we got to the end of the three-and-a-half-week trial, we were asked whether we wanted an FAI. You would have thought that, with my campaigning background, I would have said, "Yes—of course we do," but by the end of the trial we were so exhausted that we could not—[*Interruption.*]

The Convener: I suspend the meeting.

10:50

Meeting suspended.

10:51

On resuming—

The Convener: We are back in business with a question from John Finnie.

John Finnie: I will follow up my previous question with a question for the whole panel—Ms Taggart, too, can pick it up if she wants—about the proposal to make sheriffs' recommendations more effective.

Louise Taggart: I will pick that up—

The Convener: I think that the committee is fairly sympathetic to giving more power to sheriffs' recommendations in order to ensure that organisations, businesses or companies cannot

simply walk away. We would be happy to hear from anyone on the panel on that point.

Julie Love: When my son died, there was no fatal accident inquiry. There was no inquiry whatever. However, what pushed me to submit my petition to Parliament was that there was no one to speak on my behalf or on behalf of any family, when a death occurs abroad. I had to write to President Chavez, who was the Venezuelan President at the time, and I was just a wee Glasgow mum. I felt that if there had been a recommendation from my elected MSP, the Scottish Government or the UK Government, something else might have been done. My question was why there were no lifeguards or warning signs on that particular beach. Colin had researched his holiday thoroughly and knew about everywhere he was going. He would say, "This is great. This is where I'm going, and this is what I'll be doing." The same thing could happen to anyone who goes to the same area; in fact, it has happened again and is still happening today.

The most important thing when someone dies abroad is that our Government can make specific recommendations. I know that the recommendations will not always be carried out, but at least the process would be in place.

The Convener: Will the provision in section 6, on "Inquiries into deaths occurring abroad", be helpful? It says:

"An inquiry is to be held into a death to which this subsection applies if the Lord Advocate ... considers that the death ... was sudden, suspicious or unexplained, or ... occurred in circumstances giving rise to serious public concern".

Julie Love: I think that the provision will be helpful. There has to be a broader discussion about the issue, but that provision will definitely make a difference.

Flt Lt Jones: With regard to repatriation of Scottish military personnel who die overseas, I think that having FAIs here in Scotland rather than coroner's inquests in England would be a commendable move. Having spent three weeks with the families on the Nimrod inquest, I know how gruelling and demanding it is to go south of the border for that.

I would say—I hope that I get the chance to explain this later—that it is also important that we in Scotland know how we should deal with the deaths of servicepeople, because the issue is not just about repatriating people who have died abroad. If we bring them back, we have to bring them back to a system that is the same for all.

The Convener: I do not know whether Mr Finnie is ready to develop that line.

John Finnie: My question was about how robust sheriffs' recommendations can be. Does the panel have any suggestions on how to enhance the standing of those recommendations?

Flt Lt Jones: I would just say—

The Convener: We will come back to military personnel, Flt Lt Jones. We have a specific question for you on that.

Louise Taggart: We decided not to go ahead with an FAI at the end of the trial partly because we wondered what use would come of it at the end. If a recommendation was made but nothing could be done if it was not followed, what valuable outcome was likely, given what we would have needed to put ourselves through again? If recommendations were binding, and if FAIs took place earlier, families would be more likely to go ahead with FAIs. Families absolutely want lessons to be learned from the deaths of their loved ones.

Towards the end of my submission is an example about Barry Martin and Michael Adamson, who was my brother. We had to listen to evidence at the trial that seven electricians had died across the UK between 2004 and 2006 because of the exact same failure to ensure that safe isolation equipment was provided to electricians. If an FAI had been held early and recommendations had come out of it, six of those lives could have been saved.

The Convener: Your submission makes a point about what happens when there is a criminal process first and there is a guilty plea and plea bargaining, so the family do not hear anything. Is it your proposal that, when a guilty plea is made pre-trial and when the family has not been privy to any evidence, we should have an FAI of some kind—perhaps it could be restricted—to establish the facts and circumstances?

Louise Taggart: Yes. Such an inquiry should consider the facts and circumstances and go on to determine lessons to be learned. There would be even more impetus to make recommendations binding if there were a move to take FAIs out of sheriff courts. Although that would be a good move for families, who would feel a bit more relaxed, it would perhaps take away from the gravitas of what sheriffs recommend at the end.

The Convener: I have always found sheriffs to be scary.

Louise Taggart: Me too.

The Convener: I have appeared in front of them in a professional capacity, and they usually have gravitas.

Louise Taggart: I mean that somebody who has not been a party to an inquiry might see the

recommendations and ask whether they must really do what is recommended.

They are termed “recommendations”, but I would go further. There has been a move in England for coroners’ reports to be termed “reports to prevent future deaths”. Something similar would be helpful; a report would have more impact than recommendations. People might wonder whether they have to follow a recommendation.

Elaine Murray: I return to military deaths. I was surprised—to say the least—to read in Flt Lt Jones’s written submission that

“The interpretation of the current Act, by the Crown Office, discriminates against members of the Armed Forces in that ... They are not regarded as ‘employees’”.

Will you expand on that and its effect on military personnel?

Flt Lt Jones: I am not sure that I am the person who should expand on that: the Crown Office needs to do that.

Elaine Murray: What is the effect of that on military personnel?

Flt Lt Jones: As far as the Crown Office is concerned, the 1976 act talks about employees and employers and, for some reason, because servicepeople 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 servicepeople are not employees. Therefore, when we have what I would term “a work-related death” and a call for a mandated FAI, servicepeople are not being fitted into the category of employees, which is wrong. That interpretation seems to go against what I believe is the intention of the 1976 act.

11:00

When the 1976 act was written I am sure that people did not sit down and say, “Let’s put in the words ‘employee’ and ‘employer’ so that we can exclude military personnel.” It was just a way of saying that the death was work related. I think that Lord Cullen said that we should have mandated FAIs for work-related deaths.

To take just one example—there are others—for me, the deaths of the three crew members who died in the Tornado collision were work-related deaths. I cannot get my head round any other explanation. The Lord Advocate has the power to decide not to go ahead with an FAI for a work-related death as long as there has been a public inquiry or a criminal investigation, but those have not taken place, either. The military aviation

authority has carried out an investigation and produced a report. The authority would say that it is independent, but it is part of the Ministry of Defence. In carrying out that investigation, no independent judge was present and there was no cross-examination. It was, by the authority’s own definition, an in-house internal investigation. Families were not involved and no one was allowed to put any questions. That is what has been presented to the Crown Office and Procurator Fiscal Service, which said that that would do instead of an FAI. I do not think that it will. I cite that example in my submission.

To go back to the accident on the Mull of Kintyre about 20 years ago, Lord Philip carried out a review in 2011. He said that the inquiry

“was an internal process ... The Board of Inquiry was not a substitute for a legal inquiry into the cause and circumstances of a death”.

That point was in his report. Interestingly, he went on to say that

“the Lord Advocate concluded that a Fatal Accident Inquiry was necessary because some of those on board at the time of the crash were engaged in the course of their employment”.

That point comes up in the email that I got from the procurator fiscal. The report continues:

“while not mandatory in respect of all of the deaths, the inquiry should relate to all onboard.”

That shows that even 20 years ago, the line was being drawn between civilian deaths and service deaths. The Mull of Kintyre FAI took place only because there were civilians on board.

Elaine Murray: Did you make those recommendations to the Government at the time of the consultation? Do you feel that your concerns were taken in properly?

Flt Lt Jones: I am sorry. Do you mean the consultation document from last year?

Elaine Murray: Yes.

Flt Lt Jones: No—I did not make those recommendations. I was, however, involved in the case that I am describing.

I must say that no one pointed out that a consultation document was coming forward. It is just fortuitous that a few weeks ago, when we were all bitterly disappointed about the Crown Office’s decision not to hold an FAI for the Tornado crash, I stumbled through the website, found out about the bill and thought that perhaps there was a chance to come forward. Unless we acknowledge what has gone wrong in the past, it will be wrong in the future.

Elaine Murray: It is a pity that we did not get the opportunity to ask Lord Cullen about this. I

presume that it was not within the remit of his review.

The Convener: What is bewildering me is that the explanatory notes say that section 2(3)

“replicates the effect of”

a

“section of the 1976 Act”,

and section 2(3)(b) says that an FAI is mandatory

“while the person was acting in the course of the person’s employment or occupation.”

It is not just “employment”; it is “employment or occupation”. Therefore, even if there is an argument—which I do not necessarily agree with—that a person is not employed by the services because of the system under which people join the armed forces, it is still their “occupation”. I thought that that provision was new, and therefore would cure the problem, but it seems to be in the 1976 act anyway, so I am not quite sure why the Crown Office considered that people in the armed forces are not engaged in their “occupation”. I am just putting that in the air, because I do not understand.

Flt Lt Jones: This is the first time that it has been challenged. I refer you to the statement about the Mull of Kintyre helicopter crash. At some time, someone decided to play around with the words “employee” and “employer” and to take service personnel out. That was wrong.

The Convener: I am keeping away from the words “employee” and “employer”. The bill says “or occupation”, so even if you fail on the employment criterion—which I do not think you necessarily do—“occupation” seems to me to cover the situation. That is not even new; it is under the 1976 act.

Flt Lt Jones: That is absolutely correct.

The Convener: Perhaps servicepeople are covered anyway. We can ask the Crown Office.

Flt Lt Jones: As I said, the Crown Office’s interpretation is not in line with the intention of the 1976 act. After the Mull of Kintyre accident, what was even crazier was that a Tornado took off from RAF Marham in England, flew over the border and crashed in Glen Ogle in Scotland, but there was no fatal accident inquiry because those guys were not in their “employment or occupation”, and because they had left English air space there was no coroner’s inquest.

The Convener: They were in the course of their “occupation”.

Flt Lt Jones: Yes, I know, madam—which is why I am asking the Crown Office why it is coming up with such decisions. It does not make sense to

me, to Angus Robertson, to the families’ lawyer or to the families.

Roderick Campbell: We obviously need to look back at the background, for what it is worth, to the passage of the 1976 act. What I have to say is not really a question; it is more of a comment. The royal prerogative and the comments in the “Stair Memorial Encyclopaedia” are not new.

The Convener: You had better tell us what they are.

Roderick Campbell: Flt Lt Jones refers to them in his written submission.

Flt Lt Jones: What I quoted is the answer that I got from the Crown Office and Procurator Fiscal Service. I also said that, in 2012, when he was dealing with the Snatch Land Rover accident, Lord Neuberger made it clear that the people who died were employees and that the MOD was their employer. For me, that makes the situation even clearer.

The Convener: There are two lines of argument—about employment and occupation.

Christian Allard: On what you said earlier about the MOD investigating itself, are you recommending that such inquiries should be civil inquiries?

Flt Lt Jones: I am saying that it is okay for the MOD or the Military Aviation Authority to do their own inquiries, and that it is important for them to do that because any immediate problems can be put right, but such inquiries do not replace proper inquiries in the public domain. There is no input to a military inquiry. It is like asking a person who runs a factory in which someone has died because a machine was operated unsafely to carry out their own investigation and to make recommendations, and then taking the factory owner’s report and saying, “Thank you very much—that’s fine.” You would not do that. As Lord Cullen said, FAIs are carried out in the public interest, which has not been satisfied in this case.

Christian Allard: As a representative of North East Scotland, I am used to public inquiries into such accidents, but will you elaborate a little on the difference between what the MOD has done and what happens with accidents in the North Sea, such as the one involving the Super Puma? Is there a huge difference between the two kinds of inquiries?

Flt Lt Jones: The air accidents investigation branch carried out a detailed investigation into the Super Puma accident, which took about 30 months. It was then decided that, as an inquiry would be in the public interest and the incident needed to be discussed, there should be an FAI.

The Ministry of Defence now has the Military Aviation Authority, which carries out investigations. It has strict terms of reference. The procurator fiscal can take such a report and say, "Okay—that is a piece of evidence. Let us now have a fatal accident inquiry."

You will see from my submission that the president of the service inquiry into the Tornado crash, with whom I have been in touch, said that he was prevented from going down certain lines of interrogation and that he thought that his report was incomplete. Since the FAI was rejected, he has written to me and said that that makes a nonsense of one of his conclusions, which was that the panel did not have enough skills to go the full way and that he expected another inquiry to take place.

Christian Allard: I have a question for not only Mr Jones but Ms Love, on the recovery of bodies. Can a full air accident inquiry be held when fatalities happen abroad and the bodies cannot be recovered? Do you have views on that?

Flt Lt Jones: Do I have any personal views on that?

Christian Allard: Yes.

The Convener: I think that the question was for Ms Love.

Christian Allard: It is for Ms Love as well.

Flt Lt Jones: I was around when we brought the bodies back from Afghanistan. They came back by Brize Norton and went to a coroner's inquest there. Until we know how servicepeople will be dealt with or what the interpretation is when servicepeople come to Scotland, I would bring back through Brize Norton people who had died abroad, because that would guarantee them an inquest. Here in Scotland, a dead person is not guaranteed an FAI.

Christian Allard: My point is that, if the body cannot be recovered, there cannot be an inquiry in England or Scotland.

Flt Lt Jones: In the Nimrod case, recovering the bodies was difficult. It was a token recovery—let us put it that way. The families should have input and should be asked whether they want the body to be repatriated to England or Scotland. Right now, I would go for England. I would like to go for Scotland, having lived here for so long, but I know that my interests would be best served if I was repatriated to England.

Julie Love: I know of few incidents involving Scots in which their bodies have not been recovered. There was a Scot in Thailand during the tsunami who has still not been registered as dead; they are still a missing person. We have dealt only with cases in which the body has been

repatriated to Scotland and there has been no inquiry whatsoever.

Christian Allard: So the members of your organisation are not concerned about what I described.

Julie Love: There are no major concerns about that issue. We deal with missing persons organisations throughout the world, but there have been no major cases in which the body has not been recovered.

The Convener: Are you content with the section in the bill that says that the decision to hold an inquiry into a death abroad is discretionary when it is considered that the death

"was sudden, suspicious or unexplained, or ... occurred in circumstances giving rise to serious public concern"?

We know what happened in the tsunami, so surely you would not want an inquiry to be mandatory in all circumstances.

Julie Love: Definitely not. Investigations will be carried out in other countries and we do not want to mimic them in this country. However, there definitely are circumstances in which families believe that the investigation has not been thorough enough.

The Convener: The Lord Advocate gave Mr Jones an explanation of why there was no FAI in one case. When an FAI is not carried out, should there always be at least a fairly full written explanation from the Lord Advocate of why there has not been one?

Julie Love: I think so. Even the talk about the preliminary hearing or inquiry—

The Convener: It is an early hearing—we must not get our words muddled up.

Julie Love: Yes. An early hearing would be beneficial for families as well, because they could express their thoughts at that stage.

11:15

The Convener: My colleague Christian Allard asked about the recovery of bodies, which might be an issue in some circumstances. He might want to pick up on the point, given the North Sea experience.

Christian Allard: Yes—I want to speak about that with Mr Jones. After some air accidents, it could be impossible to recover any bodies, which would be a barrier to having a fatal accident inquiry.

Flt Lt Jones: Yes. The air accidents investigation branch's inquiry into the Super Puma accident focused on what went wrong with the

helicopter. That is a piece of useful evidence that a sheriff could consult or refer to during an inquiry.

The Convener: With regard to someone dying abroad, my colleagues are concerned about the criterion in section 6(1)(c) of the bill that

“the person’s body has been brought to Scotland.”

Notwithstanding what Ms Love said about bodies generally being recovered, we are concerned that there might be a circumstance in which it is not possible to recover a body, but an FAI might be the appropriate way forward. I think—I am looking round my colleagues—that we might look fairly sympathetically at it not necessarily having to be the case that a body was returned to Scotland if there was sufficient evidence to go for an FAI. Do you have concerns about the criterion that a body must be returned to Scotland?

Flt Lt Jones: If it is clear from what happened—for example, someone falling overboard—that there is no question of finding a body, that should not rule out having an FAI. Sometimes there are aircraft accidents when there is nothing left, to put it bluntly. That should not stop an FAI taking place.

The Convener: That is our point.

Julie Love: In some instances, but more so in the past, the Foreign and Commonwealth Office has recommended to UK and Scottish citizens that, for financial reasons and so on, a body should be cremated in the country where the person died. We have come across families who had a cremation in that situation but then found out suspicious things. They did not have a body at that point, so they could not have a post mortem to investigate the death further.

The Convener: That perhaps supports the point that it should not be necessary to have a body for an FAI, although that is mandatory in the bill at the moment.

Julie Love: Yes.

Christian Allard: I have a question for Ms Love on the submission that we had from Police Scotland. If the bill was implemented, do you think that Police Scotland might not have the resources or expertise to respond to families’ need for investigations abroad?

Julie Love: I read the submission, but I have not had much time to speak to our trustees about it. However, I believe that the resources are there for Police Scotland to support families now. We do not have a process in Scotland whereby Police Scotland delivers the death message when someone dies abroad, but a system is in place that could be used for that. We do not have a process whereby the family of someone who dies abroad is allocated a—

Louise Taggart: Police liaison officer.

Julie Love: A police liaison officer—thanks very much—or a family liaison officer. We do not have a process for that, but a system is in place that could be used for that. There are systems in place, which means that there would be no financial impact from using them for families of people who die abroad.

I suppose that there would be a financial impact if an investigation had to take place in another country. We do not have the statistics—or they are scarce—on how many Scots have died abroad and had their bodies repatriated to the UK. We would need to consider how many investigations we were looking at. I would say that it would be a maximum of three a year. In the past three years, there has maybe been one a year, if we go by the statistics that we have gathered.

Flt Lt Jones: Earlier, the convener talked about the Lord Advocate giving the answers about why we did not hold an FAI—

The Convener: We cannot go into a specific case, but we can deal with the generality.

Flt Lt Jones: Okay. Someone said that the Lord Advocate had given an answer, but he did not. The final answer that was given was that the report that the MOD prepared was sufficient. I am saying that that does not meet the criteria that are laid out in the bill.

The Convener: We can talk about the generality of whether—

Flt Lt Jones: I am saying that that report did not satisfy those criteria so, in my humble opinion, the view that was expressed by the Lord Advocate or his department was wrong.

Louise Taggart: Could I make a couple of final points?

The Convener: Of course.

Louise Taggart: As the bill is drafted, a family have to request the written reasons why a decision has been taken not to hold an inquiry. A family should automatically get written reasons why an FAI—

The Convener: I think that that is a requirement in the bill—I will check.

Louise Taggart: I think that there is a requirement to give reasons, but only if the family ask for them. A family should not have to ask for the written reasons.

The Convener: I appreciate your point; I am just checking for the provision in the bill. Has anyone found it? [*Interruption.*] It is in section 8. You are right—it says that the Lord Advocate must give reasons in writing

“if requested to do so”.

Louise Taggart: The reasons should be given to a family automatically. Further, as Julie Love said, the reasons should not turn up out of the blue. Families should have some sort of warning that they are on their way. However, families should get a full explanation of why an FAI is not going ahead, if that is what has been decided.

The Convener: Should we retain the categories of people who can receive the information—the people in paragraphs (a) to (c) of section 8?

Louise Taggart: Yes—that would be sensible.

There was discussion earlier about whether FAIs should be mandatory in cases involving people with mental health issues. The sister of a school friend of mine committed suicide in a mental health hospital. Two months later, I read about two suicides in a Glasgow mental health hospital and noted that the circumstances were similar. 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.

The Convener: We will certainly put those points to the Crown, and to the cabinet secretary when he comes to the committee.

Thank you for giving us your evidence. It is hard to do, but you did it well.

11:23

Meeting suspended.

11:24

On resuming—

Subordinate Legislation

The Convener: Item 3 is consideration of six negative instruments, all relating to pension schemes.

Firemen's Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/140)

The Convener: This first negative instrument amends the Firemen's Pension Scheme Order 1992, consequential to the introduction of same-sex marriage. The order also sets out the revised pensionable pay bands under the 1992 scheme.

The Delegated Powers and Law Reform Committee drew the attention of the Parliament to the order as it breaches the 28-day rule. Members have no comments to make on the order. Are members content to make no recommendation?

Members *indicated agreement.*

Firefighters' Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141)

The Convener: The second negative instrument provides transitional arrangements for members who transfer to the firefighters' pension scheme (Scotland) 2015. It sets out more detail on scheme governance and membership contributions from 1 April 2015. The DPLR Committee agreed to draw the attention of the Parliament to the instrument, as several regulations are—wait for it—defectively drafted. Where have we heard that before?

Do members have any comments in relation to the regulations?

Elaine Murray: This is not in relation to this particular instrument, but it is a bit concerning that so many of these instruments are defectively drafted.

The Convener: Indeed. I think that the DPLR Committee is making quite a bit of noise about the issue, quite rightly, as it is not appropriate for a professional Parliament to have so much in the way of defective drafting.

Are members content to make no recommendation in relation to this Parliament? *[Laughter.]* I meant “in relation to this instrument”—do not take me up on that one.

Police Pension Scheme (Scotland) Regulations 2015 (SSI 2015/142)

The Convener: The third negative instrument provides for a reformed pension scheme for Police Scotland. The DPLR Committee agreed to draw the attention of the Parliament to the regulations as the drafting appears to be defective in a number of areas. Do members have any comments? It is the same story.

Are members content to make no recommendation in relation to the regulations?

Members *indicated agreement.*

Firefighters' Compensation Scheme and Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/143)

The Convener: The fourth negative instrument updates provisions as a consequence of the coming into force of the firefighters' pension scheme 2015 to ensure that compensation awards are made in the event of a qualifying injury or death in service, in accordance with the compensation scheme. The DPLR Committee agreed to draw the attention of the Parliament to the order as it breaches the 28-day rule and is—do members want to join in with me?—defectively drafted. I do not say that flipantly.

Do any members have comments in relation to the order? Silence says not, I take it. Is the committee content to make no recommendation in relation to the order?

Members *indicated agreement.*

The Convener: If I see the words “defectively drafted” again—and they will come up again—we may want to write about it ourselves. It is all very well, but familiarity does in fact breed some contempt here—and of the kind that is not wanted. Would members agree with that?

Members *indicated agreement.*

Firemen's Pension Scheme (Amendment No 2) (Scotland) Order 2015 (SSI 2015/173)

The Convener: On the fifth negative instrument, why does it say “Firemen's” and not “Firefighters”? I am a bit taken aback by that, but there we are. The order clarifies commutation factors for firefighters retiring under the Firemen's Pension Scheme Order 1992. I see—it relates to the previous amendment order. The DPLR Committee agreed not to draw the order to the attention of the Parliament.

Members have no comments to make. Are members content to make no recommendation in relation to the order?

Members *indicated agreement.*

Police Pensions (Amendment) (Scotland) Regulations 2015 (SSI 2015/174)

The Convener: We move on to the final negative instrument that we are considering today. The regulations clarify commutation factors for police officers retiring under the Police Pensions Regulations 1987. The DPLR Committee agreed not to draw the regulations to the attention of the Parliament.

Members have no comments to make on the regulations. Are members content to make no recommendation in relation to the regulations?

Members *indicated agreement.*

Act of Adjournal (Criminal Procedure Rules Amendment No 2) (European Protection Orders) 2015 (SSI 2015/121)

The Convener: Item 4 is further subordinate legislation. The act of adjournal before us is not subject to any parliamentary procedure. It inserts a new chapter 61 into the criminal procedure rules 1996 to make provision in consequence of a European Union directive on the European protection order.

We previously agreed to consider any no-procedure instrument where the DPLR Committee raises concerns. The DPLR Committee agreed to draw the act of adjournal to the attention of the Parliament as it appears to be defectively drafted. Are members content to endorse the DPLR Committee's comments?

Members *indicated agreement.*

The Convener: We will do more than just endorse those comments. As we have already said, we want to write separately regarding the increasing number of instruments coming before this committee that appear to be defectively drafted.

Members *indicated agreement.*

11:29

Meeting continued in private until 11:34.

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